



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR MOBILITY AND TRANSPORT

The Director-General

Brussels,
MOVE.A.4

Mr Olivier Hoedeman
Corporate Europe Observatory
(CEO)
Rue d'Edimbourg 26
1050 Bruxelles

[ask+request-13924-
61e895cb@asktheeu.org](mailto:ask+request-13924-61e895cb@asktheeu.org)

Subject: Your application for access to documents – EASE 2023/7203

Dear Sir,

We refer to your request for European Commission documents registered on 5 December 2023 under the above-mentioned reference number.

You request access to the following documents:

- *all complaints received by the European Commission from railway operators regarding their rights to operate in The Netherlands (since January 1st 2021);*
- *all reports (and other notes) from European Commission meetings with representatives of the above-mentioned railway operators (since January 1st 2021);*
- *all correspondence (including emails and WhatsApp messages) between the European Commission and representatives of the above-mentioned railway operators (since January 1st 2021).*

The Commission has received two complaints on the subject matter mentioned above. Please note that we consider your request for reports (and other notes) and correspondence as referring to those which relate to the subject-matter of the complaints, i.e., the award of the future main rail network concession in the Netherlands.

We have therefore identified the following documents as falling within the scope of your application:

- **Document 1:** Email submitted on behalf of the first complainant, dated 24 August 2023, on the submission of a formal complaint, containing 1 attachment.

- **Document 2:** Standard complaint form submitted on behalf of second complainant, dated 29 October 2020.
- **Document 3:** Internal flash report on the meeting between the European Commission and the first complainant, dated 30 September 2021.
- **Document 4:** Letter from the first complainant to the European Commission on the relevant progress and questions regarding the Dutch main rail network concession contract, dated 12 November 2021, containing 13 attachments.
- **Document 5:** Email from the first complainant to the European Commission, dated 28 June 2022, containing 1 attachment.
- **Document 6:** Email from the first complainant to the European Commission, dated 01 July 2022, containing 1 attachment.
- **Document 7:** Email from the first complainant to the European Commission, dated 08 September 2022, containing 1 attachment.
- **Document 8:** Email from the first complainant to the European Commission regarding a draft program of requirements for the Dutch rail concession, dated 22 August 2022, containing 2 attachments.
- **Document 9:** Email from the first complainant to the European Commission, dated 29 September 2022, containing 4 attachments.
- **Document 10:** Email from the second complainant to the European Commission, dated 18 October 2022, containing 1 attachment.
- **Document 11:** Internal email on a summary of meetings that the European Commission had with both complainants, dated 10 November 2022, containing 1 attachment.
- **Document 12:** Email from the first complainant to the European Commission, dated 25 November 2022, containing 1 attachment.
- **Document 13:** Email from the first complainant to the European Commission, dated 06 February 2023, containing 2 attachments.
- **Document 14:** Email from the first complainant to the European Commission, dated 20 February 2023, containing 14 attachments.
- Apart from the documents described above in detail, we have also identified a number of additional e-mails, received by the staff of DG MOVE during the period between 1 January 2021 and 30 November 2023 from the two plaintiffs, essentially containing market information and information about decisions of Dutch authorities and courts, as well as parliamentary procedures related to the award of the next main rail network concession.

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission

documents ⁽¹⁾ (hereinafter ‘Regulation (EC) No 1049/2001’), I regret to inform you that your application cannot be granted, as their disclosure is prevented by the exception to the right of access laid down in the third indent of Article 4(2) of this Regulation.

Article 4(2), third indent of Regulation (EC) 1049/2001 establishes that “*The institutions shall refuse access to a document where disclosure would undermine the protection of (...) the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure*”.

The documents which you seek to obtain all relate to an ongoing investigation regarding a possible infringement of Union law, which cannot be disclosed at the moment. As the law stands, the Court of Justice of the European Union has recognised that the documents concerning an infringement procedure during its pre-litigation stage enjoy a general presumption of confidentiality as long as the procedure is ongoing ⁽²⁾. The Court has held in *Sweden and Spirlea v Commission* that “(...) *all the documents, irrespective of whether they had been drawn up during the informal stage of that procedure, that is to say before the Commission sent the letter of formal notice to the Member State concerned, or during the formal stage that is to say after the letter was sent, [a]re regarded as being covered by that presumption*” ⁽³⁾. It follows that “*it can be presumed that the disclosure of the documents concerning an infringement procedure during its pre-litigation stage risks altering the nature of that procedure and changing the way it proceeds and, accordingly, that disclosure would in principle undermine the protection of the purpose of the investigation, within the meaning of the Article 4(2) of Regulation No 1049/2001*” ⁽⁴⁾.

Indeed, the disclosure of the documents requested at this moment in time would undermine the protection of the purpose of the ongoing investigation concerning the Netherlands. Moreover, their disclosure would affect the climate of mutual trust between the authorities of the Member State in question and the Commission, which is required to enable them to resolve the case without having to refer it to the Court of Justice. It has to be noted that access granted in response to an application is to be considered as disclosure to the public at large (*erga omnes*) ⁽⁵⁾.

Therefore, the exception laid down in Article 4(2), third indent of Regulation (EC) No 1049/2001 applies to these documents.

We have considered whether partial access could be granted to the documents requested, pursuant to Article 4(6) of Regulation (EC) 1049/2001. However, given the nature and structure of the documents, no meaningful partial access would be possible without undermining the protection of the interests described above. We have therefore concluded that it is not possible to grant partial access to the requested documents.

⁽¹⁾ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

⁽²⁾ Judgments of the Court in *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 65, and in *ClientEarth v Commission*, C-612/13 P, ECLI:EU:C:2015:486, paragraph 77.

⁽³⁾ Judgment of the Court of Justice of 11 May 2017 in case C-562/14 P, *Sweden and Spirlea v Commission*, ECLI:EU:C:2017:356, paragraph 41.

⁽⁴⁾ *ibid*, paragraph 40.

⁽⁵⁾ Judgment of the General Court of 21 October 2010 in case T-439/08, ECLI:EU:T:2010:442, *Agapiou Joséphidès v Commission and EACEA*, para 116.

The exception laid down in Article 4(2), third indent of Regulation (EC) No 1049/2001 applies unless there is an overriding public interest in the disclosure of the documents. We have examined whether there could be an overriding public interest in disclosure, but have not been able to identify any such interest.

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed to the Secretariat-General of the Commission within 15 working days upon receipt of this letter. You can submit it **by mail, to:**

European Commission
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

Magda KOPCZYŃSKA