EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR TRADE

The Director-General

Brussels
TRADE/SW/F.1(2024)4913127

Ms Cassandre Bigaignon
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13 Rue d'Uzès
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By email only – with request for explicit acknowledgment of receipt by email reply:
ask+request-14501-1539319f@asktheeu.org

Subject: Your application for public access to documents – EASE 2024/2247

Dear Ms Bigaignon,

I refer to your email dated 24 April 2024, registered on 29 April 2024 under the above mentioned EASE reference number, in which you make a request for public access to documents under Regulation (EC) No 1049/2001 ([1]) ('Regulation 1049/2001'). Please accept our apologies for the delay in preparing the reply to your request due to the heavy current workload and the very high number of documents identified in relation to your request.

1. SCOPE OF YOUR REQUEST

In your request, you asked for access as follows:

'All correspondence, preparatory documents, minutes of meetings and any other report of such meetings, notes, logs of phone calls having occurred in 2023 between officials/representatives/Commissioner/cabinet member of DG TRADE and the following private companies and stakeholders:

– Philippe Morris International;

– British American Tobacco;

([1]) Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 20 May 2001 regarding public access to European Parliament, Council and Commission documents (Official Journal OJ L 145, 31.5.2001, p. 43).

– *Japan American Tobacco;*

– *Any lobby group or individual when these exchanges are related to tobacco or nicotine products.*'

On the basis of this scope, we have **identified 35 documents** that are listed and numbered in the attached Annex 'List of identified documents' and assessed in the present reply letter. As a result of this assessment we are releasing fully or partially all but six of these 35 documents.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law, when an institution is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents set out in Article 4 of Regulation 1049/2001. ([2])

Having examined the requested documents under the applicable legal framework, **full public access** is granted **to 13 documents (documents 6, 7, 13, 14, 16, 22-27, 33 and 34)** and **partial access to 16 documents (documents 1, 3-5, 8-12, 15, 17, 18, 21, 28, 29 and 35)**. No access may be granted to 6 documents (documents 2, 19, 20, 30-32). For your convenience, all documents are listed in the Annex 'List of identified documents' attached to the present reply.

In **documents 1, 9, 12, 15, 17, 18, 28, 29 and 35** only names and other personal data have been redacted pursuant to Article 4(1)(b) of Regulation 1049/2001, and in accordance with Regulation (EU) 2018/1725 ([3]) ('Regulation 2018/1725'). Hence, the main content of these documents relevant to your request is accessible.

In **documents 2-5, 8, 10, 11, 19-21 and 30-32**, additional or other information is withheld, as this additional information is covered by the exceptions under Article 4(2), first indent (protection of commercial interests of a natural or legal person, including intellectual property) and/or Article 4(2), third indent (protection of the purpose of inspections, investigations and audits).

The reasons justifying the application of the exceptions referred to above are set out here below under points 2.1, 2.2 and 2.3.

Furthermore, **documents 1, 12 and 35** contain parts that are outside of the scope of your request. These parts are accordingly redacted and marked as 'out-of-scope' in the respective documents.

([2]) Judgment in *Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, point 35.

([3]) Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 205, 21.11.2018, p. 39.

2.1. PROTECTION OF THE PRIVACY AND INTEGRITY OF THE INDIVIDUAL – ARTICLE 4(1)(B) OF REGULATION 1049/2001

With regard to **documents 1-5, 8-10, 12, 15, 17-21, 28-32 and 35** disclosure of certain parts is prevented by the exception concerning the protection of privacy and the integrity of the individual outlined in Article 4(1)(b) of Regulation 1049/2001, because they contain the following personal data:

- the names/initials and contact information of Commission staff members not pertaining to the senior management;
- the names/initials and contact details of other natural persons;
- handwritten signatures/abbreviated signatures and/or other handwritings of natural persons.

Under Article 4(1)(b) of Regulation 1049/2001, access to a document has to be refused, if its disclosure would undermine the protection of *'privacy and the integrity of the individual, in particular in accordance with European Union legislation regarding the protection of personal data'*.

The currently applicable legislation regarding the protection of personal data is Regulation (EC) No 2018/1725.

Article 3(1) of Regulation 2018/1725 states that personal data *'means any information relating to an identified or identifiable natural person [...]'*. The Court of Justice has indicated that any information, which by reason of its content, purpose, or effect, is linked to a particular person is to be considered as personal data. ([4]) Names, signatures, functions, telephone numbers and/or initials pertaining to staff members of an institution are thus to be considered personal data. ([5])

Article 9(1)(b) of Regulation 2018/1725 does not allow the transmission of these personal data, except if you prove that it is necessary to have the data transmitted to you for a specific purpose in the public interest and where there is no reason to assume that the legitimate interests of the data subject might be prejudiced. In your request, you do not express any particular interest to have access to these personal data, nor do you put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation 1049/2001, access cannot be granted to the personal data contained in the documents, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and as there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

([4]) See judgment in *Nowak*, C-434/16, EU:T:2018:560, points 33 to 35.

([5]) Judgment in *Chambre de commerce et d'industrie métropolitaine Bretagne-Ouest (port de Brest) v Commission*, T-39/17, EU:T:2018:560, points 43 and 44.

2.2. PROTECTION OF COMMERCIAL INTERESTS – ARTICLE 4(2), FIRST INDENT OF REGULATION 1049/2001

2.2.1. Relevance of Article 4(2), first indent of Regulation 1049/2001

Article 4(2), first indent of Regulation 1049/2001 provides that *'[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] commercial interests of a natural or legal person, including intellectual property [...] unless there is an overriding public interest in disclosure'*.

While not all information concerning a company and its business relations can be regarded as falling under the exception of Article 4(2), first indent of Regulation 1049/2001 ([6]), it appears that the type of information covered by the notion of commercial interests would generally be of the kind protected under the obligation of professional secrecy ([7]). Accordingly, it must be information that is *'known only to a limited number of persons'*, *'whose disclosure is liable to cause serious harm to the person who has provided it or to third parties'* and for which *'the interests liable to be harmed by disclosure must, objectively, be worthy of protection'* ([8]).

Certain parts in **documents 2, 4, 5, 10, 11, 19-21, and 30-32** have been withheld, because they reveal specific views, concerns, and interests of the economic operator Philip Morris regarding trade within countries outside the EU. They contain commercial priorities, strategies, including as regards approaches to perceived market access barriers, and concerns this company has. There is a reasonably foreseeable risk that the public disclosure of this information would harm the commercial interests of the company concerned, as it could be exploited by competitors to undermine its competitive position in third countries and its relationship with the regulators in such markets or could make it subject to action in response by the authorities or government concerned.

Moreover, where this concerns information shared with the Commission in order to provide useful input and support for the EU's work to address market access barriers faced by European stakeholders outside the EU, placing such information in the public domain may prevent the Commission from obtaining such information in the future regarding this or other cases, due to concerns regarding the confidentiality of contacts with the Commission in the context of a formal complaint. Economic operators typically share information with the Commission so that the latter can determine how to best position itself in the relations with third-country governments in order to protect the EU's strategic interests and those of its industry, workers and citizens. Ensuring that the Commission continues receiving access to this information and that the industry engages in open exchanges with the Commission, are key elements for the success of the internal and external policies of the EU. Nevertheless, commercially sensitive information provided by the economic operator requires protection under Article 4(2), first indent of Regulation 1049/2001.

([6]) Judgment in *Terezakis v Commission*, T-380/04, EU:T:2008:19, point 93.
([7]) See Article 339 of the Treaty on the Functioning of the European Union.
([8]) Judgment in *Bank Austria v Commission,* T-198/03, EU:T:2006:136, point 29.

2.2.2. No overriding public interest

The exception of Article 4(2), first indent (protection of commercial interests of a natural or legal person, including intellectual property) of Regulation 1049/2001 applies, unless there is an overriding public interest in disclosure of the document. Such an interest must, first, be public and, secondly, outweigh the harm caused by disclosure.

Accordingly, we have considered whether the risks attached to the release of the withheld parts of **documents 2, 4, 5, 10, 11, 19-21, and 30-32** are outweighed by the public interest in accessing the requested document. We have not been able to identify any such public interest capable of overriding the commercial interests of the company concerned. In the present case, there is no such evidence.

2.3. PROTECTION OF THE PURPOSE OF INSPECTIONS, INVESTIGATIONS AND AUDITS – ARTICLE 4(2), THIRD INDENT OF REGULATION 1049/2001

2.3.1. Relevance of Article 4(2), third indent of Regulation 1049/2001

Article 4(2), third indent of Regulation 1049/2001 provides that *'[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] the purpose of inspections, investigations and audits'.*

Documents 2-4, 8, 10, 19, 20, 30-32 concern exchange of emails, attachments or information transmitted during meetings in the context of problems encountered by the economic operator Philip Morris, and subsequently shared with Single Entry Point on market access issues in third countries and their follow-up investigations of the Directorate-General for Trade ('DG Trade'). Some of these exchanges may have taken place in the context of formal complaints to the Commission's Single Entry Point related to the behaviour of certain states and its compliance with international trade commitments.

Certain parts in those documents have been withheld because they reveal information shared with the Commission for the purpose of the investigations of DG Trade's Single Entry Point. As explained in its operating guidelines ([9]), *'[t]he Single Entry Point will treat all information received as confidential and will not make public the fact of having received a complaint, its content and the identity of the complainant [...]'.*

This information was shared with the Commission in order to provide input and support for the EU's work to address market access barriers faced by European stakeholders outside the EU. Placing in the public domain the withheld information would seriously undermine the trust that European stakeholders have in the Commission and deter them from submitting complaints to the Single Entry Point by raising doubts about the extent of confidentiality within the complaint system.

2.3.2. No overriding public interest

The exception of Article 4(2), third indent (protection of [...] the purpose of inspections, investigations, and audits) of Regulation 1049/2001 applies, unless there is an overriding

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([9]) https://trade.ec.europa.eu/access-to-markets/en/form-assets/operational_guidelines.pdf

public interest in disclosure of the document. Such an interest must, first, be public and, secondly, outweigh the harm caused by disclosure.

Accordingly, we have considered whether the risks attached to the release of the withheld part of **documents 2-4, 8, 10, 19, 20, 30-32** are outweighed by the public interest in accessing the requested document. We have not been able to identify any such public interest capable of overriding the protection of the investigations. In the present case, there is no such evidence.

3. PARTIAL ACCESS

Pursuant to Article 4(6) of Regulation 1049/2001 *'[i]f only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released'*. Accordingly, we have also considered whether partial access can be granted to **documents 2, 19, 20, 30-32**.

After a careful review, we have concluded that these documents are widely covered under the exceptions set out in Article 4(1)(b) and/or Article 4(2), first and/or third indent of Regulation 1049/2001, as explained above, and that any remaining releasable content of those documents would be meaningless. According to the General Court, the Commission is entitled *'to refuse partial access in cases where examination of the documents in question shows that partial access would be meaningless because the parts of the documents that could be disclosed would be of no use to the applicant'* ([10]).

Therefore, partial access to the before-mentioned documents cannot be granted.

4. DISCLAIMER(S)

Please kindly pay attention to the following: you may reuse public documents, which have been produced by the European Commission or by public and private entities on its behalf, based on Commission Decision 2011/833/EU of 12 December 2011 on the re-use of Commission documents ([11]). You may reuse the documents disclosed free of charge for non-commercial and commercial purposes, provided that the source is acknowledged, and that you do not distort the original meaning or message of the documents. Please note that the Commission does not assume any liability stemming from the reuse.

Furthermore, please note that documents containing content of third-party origin, i.e. either documents originating from third parties or documents containing parts of third party origin (in the present case: **documents 3, 5- 7, 9, 11--18, 21-29 and 33-35**), are disclosed to you based on Regulation 1049/2001. However, disclosure of such third-party content is without prejudice to the rules on intellectual property, which may limit your right to reproduce or exploit the released documents without the agreement of the originator, who may hold an intellectual property right on them. The European

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([10]) Judgement in *Mattila v Council and Commission*, T-204/99, EU:T:2001:190, point 69.
([11]) OJ L 330, 14.12.2011, p. 39.

Commission does not assume any responsibility from the reuse of those documents or parts of documents.

Finally, **documents 4, 8 and 10** were drawn up under the responsibility of the relevant Commission official. Such type of document solely reflects the author's interpretation of the interventions made and does not set out any official position of any third party/parties to which the document may refer, which was/were not consulted on its content. Such type of document does also not necessarily reflect the position of the Commission, and, therefore, cannot be quoted as such.

5. POSSIBILITY OF A CONFIRMATORY APPLICATION

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretariat-General of the Commission, either by

- **asking for a review via your portal ([12]) account** (available only for initial requests submitted via the portal account), *or*
- **email** to sg-acc-doc@ec.europa.eu, *or*
- **letter post** to the following address:
  European Commission
  Secretariat-General
  'Transparency, Document Management & Access to Documents' (unit SG C.1)
  BERL 7/76
  Rue de la Loi 200/Wetstraat 200
  1049 Brussels
  BELGIUM.

Yours sincerely,

Sabine WEYAND
p.o Leopoldo RUBINACCI

Enclosures (30): Annex 'List of documents',
29 partially or fully disclosed documents.

([12]) https://www.ec.europa.eu/transparency/documents-request