

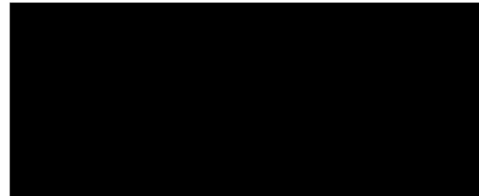


EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR TRADE

The Director-General

Brussels
TRADE/SW/D1 (2021) 6138698

***By registered letter with acknowledgment
of receipt***



Advance copy by email:



Subject: Your application for access to documents – Ref GestDem 2021/4191

Dear 

I refer to your request received on 24 June 2021, in which you ask to receive access to the following documents:

“alle vorbereitenden Dokumente - inklusive briefing notes, emails und weiterer internen Korrespondenz so wie Korrespondenz mit Stakeholdern - Treffen des CETA bilateral Dialogues on Raw Materials, in den Jahren 2018, 2019, 2020 und 2021. Ebenso bitten wir um Übersendung von Protokollen (Minutes) und Teilnehmerinnenlisten der Treffen, sowie Präsentationen, die bei den Treffen gehalten oder ausgetauscht wurden.”

Your request was registered on the same date with reference GestDem 2021/4191.

1. SCOPE OF YOUR REQUEST

On the basis of this scope, 35 documents have been identified and listed in the Annex to this letter. These documents are assessed in this reply letter. In addition, you will be able to consult the agendas and reports (including the participants lists) of the CETA raw materials dialogues that took place in 2018, 2019, 2020 and 2021 on the Commission's public website: <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1811>. The latter documents were also shared with EU Member States in the Council's Trade Policy Committee and with the European Parliament's INTA committee prior to their publication.

2. ASSESSMENT AND CONCLUSION

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 1049/2001.¹

Such assessment is carried out in a multi-step approach. First, the institution must satisfy itself that the document relates to one of the exceptions, and if so, decide which parts of it are covered by that exception. Second, it must examine whether disclosure of the parts of the document in question would undermine the protection of the interest covered by the exception. Third, the risk of that interest being undermined must be "*reasonably foreseeable and not purely hypothetical*".² If the institution takes the view that disclosure would undermine the protection of any of the interests defined under Article 4(2) of Regulation 1049/2001, the institution is required "*to ascertain whether there is any overriding public interest justifying disclosure*".³

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents⁴, "*the exceptions to that right [...] must be interpreted and applied strictly*".⁵

Having carefully examined each of the documents falling in the scope of your request, we are pleased to provide full access to **documents 1-8, 10-14, 16 and 18-35**, with the exception of personal data in some of these documents that is protected pursuant to Article 4(1)(b) of Regulation 1049/2001. In addition to protecting personal data, certain elements in **documents 9, 15 and 17** are not disclosed, as their disclosure would undermine the protection of the EU's international relations. Thus they are covered by the exception set out in Article 4.1(a) third indent of Regulation 1049/2001. You will be able to identify the respective exceptions in each of the partially released documents that are attached to this reply letter, as well as in the Annex. The reasons justifying the application of the respective exceptions are set out below in sections 2.1 and 2.2.

2.1 Protection of the public interest as regards international relations (documents 9, 15 and 17)

Article 4(1)(a), 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 public interest as regards: [...] international relations*'.

According to settled case-law, '*the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) of Regulation 1049/2001, combined with the fact*

¹ Judgment in *Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 35.

² *Id.*, paragraphs 37-43. See also judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraphs 52 and 64.

³ *Id.*, paragraphs 37-43. See also judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraphs 52 and 64.

⁴ Regulation (EC) No 1049/2001, recital (4).

⁵ Judgment in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66.

*that access must be refused by the institution, under that provision, if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care. Such a decision therefore requires a margin of appreciation*⁶. In this context, the Court of Justice has acknowledged that the institutions enjoy ‘*a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by [the] exceptions [under Article 4(1)(a)] could undermine the public interest*’⁷.

The General Court found that ‘*it is possible that the disclosure of European Union positions in international negotiations could damage the protection of the public interest as regards international relations*’ and ‘*have a negative effect on the negotiating position of the European Union*’ as well as ‘*reveal, indirectly, those of other parties to the negotiations*’⁸. Moreover, ‘*the positions taken by the Union are, by definition, subject to change depending on the course of those negotiations and on concessions and compromises made in that context by the various stakeholders. The formulation of negotiating positions may involve a number of tactical considerations on the part of the negotiators, including the Union itself. In that context, it cannot be precluded that disclosure by the Union, to the public, of its own negotiating positions, when the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating capacity of the Union*’⁹.

Since documents 8-23 originate from third parties, the originators of the documents have been consulted. The author of **documents 9, 15 and 17** has objected to the disclosure of the parts of the documents that it sent to the Commission. In particular, the disclosure of certain elements in documents 9, 15 and 17 would put in the public domain detailed and sensitive information related to Canada’s raw materials policy considerations that has been shared with the Commission in confidence in the context of the CETA Raw Materials Dialogue. Disclosure of those elements would therefore undermine the protection of the public interest as regards international relations, because it would risk harming the European Union’s relations with Canada. Consequently, this information could also be used by third countries to bring undue pressure on the Commission’s trading partner, and jeopardise the European Union’s international position.

In sum, we consider that the confidentiality of parts of the requested documents is fully protected by a coherent application of the third indent of Article 4(1)(a) and that therefore access to these parts of the requested documents has to be refused.

⁶ Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 35.

⁷ Judgment in *Council v Sophie in ‘t Veld*, C-350/12P, EU:C:2014:2039, paragraph 63.

⁸ Judgment in *Sophie in ‘t Veld v Commission*, T-301/10, EU:T:2013:135, paragraphs 123-125.

⁹ *Id.*, paragraph 125.

2.2 Article 4(1)(b) of Regulation 1049/2001 (Documents 1-8, 12, 14, 19, 20, 24-29, 31, 32, 34, 35)

Pursuant to 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 applicable legislation in this field is Regulation (EC) No 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/EC10 ('Regulation 2018/1725').

Indeed, Article 3(1) of Regulation 2018/1725 provides that personal data '*means any information relating to an identified or identifiable natural person [...]'*. The Court of Justice has specified 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.¹¹ Please note in this respect that the names, signatures, functions, telephone numbers and/or initials pertaining to staff members of an institution are to be considered personal data.¹²

In its judgment in Case C-28/08 P (*Bavarian Lager*)¹³, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable¹⁴. The requested documents contain personal information such as names, initials, e-mail addresses or telephone numbers that allow the identification of natural persons.

Pursuant to Article 9(1)(b) of Regulation 2018/1725, personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if "[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests". Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 2018/1725, can the transmission of personal data occur.

¹⁰ Official Journal L 205 of 21.11.2018, p. 39.

¹¹ Judgment of the Court of Justice of the European Union of 20 December 2017 in Case C-434/16, *Peter Novak v Data Protection Commissioner*, request for a preliminary ruling, paragraphs 33-35, ECLI:EU:T:2018:560.

¹² Judgment of the General Court of 19 September 2018 in case T-39/17, *Port de Brest v Commission*, paragraphs 43-44, ECLI:EU:T:2018:560.

¹³ Judgment of 29 June 2010 in Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd*, EU:C:2010:378, paragraph 59.

¹⁴ Whereas this judgment specifically related to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, the principles set out therein are also applicable under the new data protection regime established by Regulation 2018/1725.

According to Article 9(1)(b) of Regulation 2018/1725, the European Commission has to examine the further conditions for a lawful processing of personal data only if the first condition is fulfilled, namely if the recipient has established that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.


3. MEANS OF REDRESS

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 Secretary-General of the Commission at the following address:

European Commission
Secretary-General
Transparency, Document Management and Access to Documents unit SG-C.1
BERL 7/076
B-1049 Brussels

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

Yours sincerely,



Sabine WEYAND

Enclosures: (1) Annex - List of identified documents
(2) Partially released documents 1 to 35