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Mr Bas EICKHOUT
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DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2017/1185

Dear Mr Eickhout,

I refer to your letter of 3 April 2017, registered on 4 April 2017, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² ('Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 27 January 2017, dealt with by the Commission's Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW), you requested access to *the minutes and summary records of the meetings of the technical committee on Motor Vehicles from September 2016 to the present*.

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, p. 43.

DG GROW has identified the following documents relating to the Technical Committee on Motor Vehicles (TCMV), as falling under the scope of your request:

1. Summary record of 60th meeting on 15 September 2016,
2. Summary record of 61st meeting on 3 October 2016,
3. Summary record of 62nd meeting on 16 November 2016,
4. Summary record of 63rd meeting on 20 December 2016,
5. Summary record of 64th meeting on 24 January 2017,
6. Full minutes of 60th meeting on 15 September 2016,
7. Full minutes of 61st meeting on 3 October 2016,
8. Full minutes of 62nd meeting on 16 November 2016,
9. Full minutes of 63rd meeting on 20 December 2016,
10. Full minutes of 64th meeting on 24 January 2017.

In its reply of 13 March 2017, DG GROW informed you that documents (1) – (5) are publically available in the Comitology Register and additionally, in a public CIRCABC³ group⁴.

With regard to remaining documents (6) – (10), i.e. the full minutes of the TCMV meetings concerned, DG GROW noted that they were released to the European Parliament's EMIS⁵ Committee⁶ under the modalities agreed between the European Commission and the European Parliament on secured access to non-classified documents, in accordance with point 2.3 of Annex II of the Framework Agreement on relations between the European Parliament and the European Commission⁷. You therefore benefit of privileged access to the documents concerned, in your capacity of the Member of the EMIS Committee.

With regard to your request for public access under Regulation 1049/2001 to documents (6) – (10), DG GROW refused such access on the basis of the exception provided for in Article 4(3), second subparagraph (protection of the decision-making process) of Regulation 1049/2001, in conjunction with the confidentiality rules guaranteed by the respective provisions of the Standard Rules of Procedure for Committees.

Through your confirmatory application you request a review of this position and present a series of arguments supporting your request. These will be addressed in the respective parts of this decision.

³ Communication and Information Resource Centre for Administrations, Businesses and Citizens.

⁴ <https://circabc.europa.eu/w/browse/419045db-b7c5-4935-a7ab-91332f168b0a>.

⁵ Committee of Inquiry into Emission Measurements in the Automotive Sector (EMIS).

⁶ The minutes of the TCMV meetings of 15 September 2016 and 3 October 2017 were delivered to the secretariat of the EMIS Committee on 8 February 2017, the minutes of the TCMV meetings of 16 November 2016 and 20 December 2016 were delivered on 20 February 2017, and the minutes of the TCMV meeting on 24 January 2017 were delivered on 14 March 2017.

⁷ Framework Agreement on relations between the European Parliament and the European Commission of 20 October 2010, (OJ L 304 of 20.11.2010).

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I am pleased to inform you that partial access is granted to documents (6) – (10).

The undisclosed parts of these documents have been redacted on the basis of the exceptions provided for in Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(3), first and second subparagraphs of Regulation 1049/2001 (protection of the decision-making process).

The assessment is based on a restrictive interpretation of the exceptions of Regulation 1049/2001, in accordance with Article 6 of Regulation 1367/2006⁸.

The detailed reasons are set out below.

2.1. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation 1049/2001 provides that [T]he *institutions shall refuse access to a document where disclosure would undermine the protection of (...) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.*

The relevant undisclosed parts of documents (6) – (10) contain the names, surnames and contact details of Commission staff members not holding any senior management position. They also contain the names and surnames of the third parties, such as of representatives of national administrations.

These are personal data in the meaning of Article 2(a) of Regulation 45/2001⁹, which defines it as *any information relating to an identified or identifiable natural person (...); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity.*

It follows that public disclosure of the above-mentioned information would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

⁸ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, p. 13.

⁹ 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.

In accordance with the *Bavarian Lager* ruling¹⁰, when a request is made for access to documents containing personal data, the Regulation 45/2001 becomes fully applicable. According to Article 8(b) of that Regulation, personal data shall only be transferred to recipients if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. Those two conditions are cumulative¹¹.

Only if both conditions are fulfilled and constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

In that context, whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the Institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject¹².

Indeed, in the recent judgment in the *ClientEarth* case, where the Court of Justice ruled that “*whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject. If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request for access*”¹³. I refer also to the *Strack* case, where the Court of Justice ruled that the Institution does not have to examine by itself the existence of a need for transferring personal data¹⁴.

Neither in your initial, nor in your confirmatory application, have you established the necessity of disclosing any of the above-mentioned personal data.

Therefore, I have to conclude that the transfer of personal data through the disclosure of the redacted relevant parts of documents (6) – (10) cannot be considered as fulfilling the requirements of Regulation 45/2001. In consequence, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as there is no need to publicly disclose the personal data included therein, and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

¹⁰ Judgment of the Court (Grand Chamber) of 29 June 2010 in case C-28/08 P, *European Commission v the Bavarian Lager Co. Ltd.* (ECLI:EU:C:2010:378), paragraph 63.

¹¹ *Ibid*, paragraphs 77-78.

¹² Judgment of the Court of Justice of 16 July 2015 in case C-615/13P, *ClientEarth v EFSA*, (ECLI:EU:C:2015:489), paragraph 47.

¹² *Ibid*, paragraph 47.

¹⁴ Judgment of the Court of Justice of 2 October 2014 in case C-127/13 P, *Strack v Commission*, (ECLI:EU:C:2014:2250), paragraph 106.

2.1 Protection of commercial interests of a natural or legal person

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.*

The relevant parts of documents (8), (9) and (10) include the discussions concerning a request from one of the Member States to grant an EU type-approval, in accordance with Article 20 of Directive 2007/46/EC¹⁵, regarding the steering system developed by one of cars manufactures. The discussions include the detailed information regarding functioning of the system, as well as the concerns raised by certain members of the Committee. The above-mentioned information relating to the system developed by the cars manufacturer concerned, has to be considered as part of specific know-how pertaining to the latter and as such constitutes commercially sensitive business information.

Its disclosure, through the public release of documents (8), (9) and (10) under Regulation 1049/2001, would clearly undermine commercial interests of the car manufacturer concerned.

Furthermore, document (9) contains information regarding state of play in investigations carried out by the Commission in the context of another cars manufacturer. Public disclosure of this information, would have clearly negative effect on manufacturer's public image and reputation, thus affecting its commercial interests.

In consequence, there is a real and non-hypothetical risk that public access to the above-mentioned information would undermine the commercial interests of the manufacturers concerned. I conclude, therefore, that access to the requested documents listed under points 1.1 and 1.4, must be denied on the basis of the exception laid down in the first indent of Article 4(2) of Regulation 1049/2001.

2.2. Protection of the decision-making process

Article 4(3) of Regulation 1049/2001 provides that:

[a]ccess to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process [...].

¹⁵ Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles.

[a]ccess to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process [...].

In your confirmatory application you argue that DG GROW did not provide any proper statement of reasons as regards the applicability of the exception invoked in the initial reply. You allege, in particular, that [DG GROW] *fail to provide specific reasoning as to how and why a specific harm to the decision-making process would be foreseeable and more than purely hypothetical*. To support the position quoted above, you refer to the relevant passages of the General Court's judgment in case T-233/09¹⁶.

The relevant undisclosed parts of documents (6) – (10) relate to the discussions within the TCMV Committee regarding the Commission's proposals for the several pending legislative acts. These include the draft proposals for Commission Implementing Regulations on the CO₂ and fuel consumption certification for heavy-duty vehicles and on the monitoring and reporting approach for CO₂ and fuel consumption of heavy-duty vehicles, as well as the draft Commission Second Regulation on Worldwide harmonized Light vehicles Test Procedure (WLTP2) and the draft Commission Fourth Regulation on Real-Drive Emissions (RDE4). As regards all above-mentioned draft acts, the Commission's proposals were submitted for the TCMV Committee's opinion, which has not yet been yet issued. Therefore, the above-mentioned proposals may not be considered as finalised, and the discussions involving the Commission and the Member States representatives are fully ongoing.

The relevant undisclosed parts of the documents (6) – (9) relate to the discussions within the TCMV Committee regarding the Commission's proposals for several pending Commission acts, such as the draft Commission Implementing Regulation on, respectively, Real-Drive Emissions (RDE3) and the draft Commission Implementing Regulation on Worldwide Harmonized Light Vehicles Test Procedure (WLTP1), as well as the draft Commission Implementing Decision authorising Germany to grant EC-type approval in respect of a vehicle steering system. In all of the above-mentioned files, the Committee has provided its opinion. However, the scrutiny by the European Parliament and the Council is still ongoing. Consequently, the decision-making process cannot be considered as finalised, as none of the above-mentioned legislative acts have been adopted by the Commission.

Consequently, the relevant undisclosed parts of the above-mentioned documents, containing various comments provided by the Member States' representatives within the Committee, have to be considered as containing information relating to a matter where the decision has not yet been taken by the Commission. Disclosure of the respective parts would seriously undermine the decision-making process, for the reasons set out below. They therefore fall under the scope of application of the exception provided for in the first subparagraph of Article 4(3) of Regulation 1049/2001.

¹⁶ Judgment of the General Court of 22 March 2001 in case T-233/09, *Access Info Europe v Council*, (ECLI:EU:T:2011:105).

The relevant undisclosed parts of documents (7) and (8) relate to the discussions within the TCMV Committee regarding the draft Commission Implementing Regulation laying down the administrative requirements relating to emissions limits for non-road mobile machinery.

The relevant undisclosed parts of document (9) contain the information exchanged in the context of the discussions concerning the Notice on Guidelines on evaluating auxiliary emission strategies and the presence of defeat devices.

The relevant undisclosed parts of document (10) relate to the exchanges within the Committee regarding the position to be taken by the European Union in the relevant Committees of the United Nations Economic Commission for Europe as regards new proposals and proposals for amendments to UN Regulations and UN Global Technical Regulations.

With regard to all above-mentioned files, the decision-making processes concerned were finalised with the adoption of the Regulation¹⁷ and the publication of the Notice¹⁸ and adoption of Council Decision on the position to be taken by the European Union in the Committees of the United Nations Economic Committee for Europe¹⁹.

Nonetheless, the undisclosed parts of these documents, containing various comments provided by the Member States within the Committee, still have to be considered as opinions for internal use expressed as part of deliberations and preliminary consultations, and falling under the exception defined in the second subparagraph of Article 4(3) of Regulation 1049/2001.

Indeed, notwithstanding the stage of the decision-making process, the relevant undisclosed parts of the documents requested reflect the positions expressed by the Members of the Committee, expressed as part of preliminary internal deliberations and consultations on the (then) draft legislative acts, as well as their voting behaviour concerning the final examination and delivery of opinion on the legislative acts concerned.

Public disclosure of such positions would seriously undermine the Commission's leverage to consult Member States' representatives, in the framework of ongoing and future consultation and decision-making processes, free from external pressure. Indeed, Member States' participation in Committees is of crucial importance for the decision-

¹⁷ Commission Implementing Regulation (EU) 2017/656 of 19 December 2016 laying down the administrative requirements relating to emission limits and type-approval of internal combustion engines for non-road mobile machinery in accordance with Regulation (EU) 2016/1628 of the European Parliament and of the Council, OJ L 102, 13.4.2017, p. 364.

¹⁸ <http://ec.europa.eu/DocsRoom/documents/21151>.

¹⁹ Council Decision (EU) 2017/443 of 6 March 2017 establishing the position to be adopted on behalf of the European Union in the relevant Committees of the United Nations Economic Commission for Europe as regards the proposals for amendments to UN Regulations Nos 3, 4, 6, 7, 13, 19, 23, 27, 28, 38, 39, 43, 45, 50, 69, 70, 73, 75, 77, 79, 83, 87, 91, 98, 99, 101, 104, 107, 109, 110, 112, 118, 119, 123 and 138, and one proposal for amending the Consolidated Resolution on the Construction of Vehicles (R.E.3) by guidelines on cyber security and data protection.

making process, as it allows the Commission to take into consideration the - uncensored - opinion of the Member States at an early stage of the decision-making process. If the Member States' representatives would learn that their positions are disclosed, this would jeopardise the entire process for any other instrument adopted through (at the later stage of the process) the Comitology procedures.

Indeed, public release of the undisclosed (parts of) documents concerned would significantly increase the risk of targeted external pressure by various external actors, including industry and non-governmental organisations on the representatives of the Member States' in the Committee. Furthermore, the internal opinions expressed at a preliminary stage could be instrumentally exploited in relation to the decision that the Commission has to take in relation to the draft implementing decision.

According to the case law, the existence of such a risk may be considered as a reason for refusal of access to the documents under the exception protecting the decision-making process²⁰.

Furthermore, it should also be noted that it follows from Article 10(2) and 13(2) of the Standard Rules of Procedure for Committees (2011/C 206/06) that summary records of the meetings shall not mention the position of individual Member States in the Committee's discussions and that the Committee's discussions shall be confidential.

The Standard Rules were adopted on the basis of Article 9 of Regulation 182/2011. Article 10 of Regulation 182/2011 provides for the information on committee proceedings that can be made public and information such as the one included in the requested documents is not part of it. Therefore, the provisions of Regulation 1049/2001 need to be applied in conformity with Regulation 182/2011, so that the above-mentioned confidentiality requirement is not deprived of its meaningful effect.

Indeed, in its judgment in case T-93/11²¹, the General Court confirmed that minutes circulated to participants in the framework of an advisory committee meeting which was not open to the public, are to be considered as internal documents within the meaning of Article 4(3) of Regulation (EC) No 1049/2001 and require protection on that basis. The same reasoning applies, a fortiori, to the positions of Member States expressed in the framework of committee meetings. The Member States and the Commission must be free to explore all possible options in preparation of a decision within a committee free from external pressure. Consequently, public disclosure of the positions of the individual Member States would prevent Member States from frankly expressing their views in the framework of committee meetings and thus seriously undermining the possibility of the Commission to explore all possible options in preparation of a decision and impairing the quality of the decision-making process. Therefore, public access to the views of individual Member States would seriously undermine the Commission's decision-making process. That risk is reasonably foreseeable and not purely hypothetical.

²⁰ Judgment of the General Court of 13 November 2015 in joined cases T-424/14 and T-425/14, *ClientEarth v Commission*, (ECLI:EU:T:2015:848), paragraph 95.

²¹ Judgment of the General Court (Eight chamber) of 7 June 2013 in case T-93/11, *Stichting Corporate Europe Observatory v European Commission*, paragraph 32 .

The General Court thereby acknowledged the existence of a need to protect internal preliminary discussions within the Commission on sensitive issues, at least for the time where the decision-making process is still ongoing.

Therefore, I conclude that access to the undisclosed parts of documents (6) - (10) has to be refused, based on Article 4(3), first subparagraph (protection of the decision-making process) of Regulation 1049/2001.

With regard to the redacted parts of documents (7), (8) and (9), I consider that, as they reflect opinions for internal use as part of preliminary deliberations, the disclosure of which would, for the reasons described above, seriously undermine the decision-making process, access thereto still has to be refused pursuant to Article 4(3), second subparagraph of Regulation 1049/2001.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) and Article 4(3) of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application, you refer to the provisions of Regulation 1367/2006, according to which *there should be an automatic overriding public interest, where the information requested relates to emissions into the environment. It goes without saying that there is an obvious and direct link between car emissions and emissions into environment.* You add that *[t]here is therefore clearly an overriding public interest in ensuring the probity of the decision-making process on issues that have a far-reaching impact on the public and on the environment.* Taking into account the above, in your view *[t]he right of access to environmental information [included in the documents requested] should (...) clearly outweigh any short-term "embarrassment" that Member States might suffer from as a result of their position being made public in the minutes.*

You therefore seem to argue that the existence of an overriding public interest warranting public disclosure of the (undisclosed parts of) the documents requested, is linked to the presence therein of information relating to emissions into environment.

With regard to the information withheld on the basis of the exception protecting commercial interests, provided for in the first indent of Article 4(2) of Regulation 1049/2001 (i.e. in the case at hand, documents (8), (9) and (10)), Article 6 of Regulation 1367/2006 envisages the existence of the default overriding public interest in so far as the information relating to emissions are concerned.

No overriding public interest in disclosure can automatically be derived from the provisions of Article 6 of Regulation 1367/2006 as regards the exception set out in Article 4(3) of Regulation 1049/2001. In case of the latter exception, Article 6 merely requires interpreting the grounds for refusal restrictively whenever the information requested relates to emissions into the environment, taking into account the public interest served by disclosure and whether the information requested relates to emissions to the environment.

Nonetheless, please note that, in its recent ruling in case C-673/13P, the Court of Justice considered that the concept of *information which relates to emissions into the environment* means information which concerns or relates to *actual emissions*, and not information with merely a (direct or indirect) link to such emissions²². This includes data that will allow the public to know what is actually released or will be released into the environment, as well as *information enabling the public to check whether the assessment of actual or foreseeable emissions is correct*²³. According to the Court's assessment, it *may not, however, in any event, include information containing any kind of link, even direct, to emissions into the environment*²⁴, such as general measures aimed at regulating emissions. It follows that the undisclosed information included in the documents requested may not be considered as information relating to emissions to the environment in the sense of Article 6 of Regulation 1367/2006.

As regards your general reference to the alleged existence of a general need for public transparency in this case, I would like to refer to the judgment in the *Strack* case²⁵, where the Court of Justice ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient to merely rely on that principle and its importance, but that an applicant has to show why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure²⁶.

In my view, such a pressing need has not been substantiated in this case. Whilst I understand that there can be a public interest in obtaining access to the undisclosed information included in the documents in question, I consider in this case that any possible public interest in transparency cannot outweigh the public interest in protecting the commercial interests of the car manufacturers concerned and the decision-making process falling under the exceptions provided for in the first indent of Article 4(2) and the first subparagraph of Article 4(3) of Regulation 1049/2001.

In consequence, I consider that in this case there is no overriding public interest that would outweigh the interest in safeguarding the commercial interests of the car manufacturers concerned and the decision-making process falling under the exceptions provided for in the first indent of Article 4(2) and the first subparagraph of Article 4(3) of Regulation 1049/2001.

²² Judgment of the Court (Fifth Chamber) of 23 November 2016 in case C-673/13P, *Commission v Stichting Greenpeace Nederland and PAN Europe*, (ECLI:EU:C:2016:889), paragraph 78.

²³ *Idem*, paragraph 79-80.

²⁴ *Idem*, paragraph 81.

²⁵ Judgment of the Court of Justice of 2 October 2014 in case C-127/13 P, *Strack v Commission*, (ECLI:EU:C:2014:2250), paragraph 128.

²⁶ *Idem*, paragraph 129.

4. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

*For the Commission
Alexander ITALIANER
Secretary-General*



Enclosures: (5)