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Transport & Environment
Director Aviation and Shipping
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DECISION OF THE SECRETARY-GENERAL IN ACCORDANCE WITH ARTICLE 4 OF THE IMPLEMENTING PROVISIONS OF REGULATION (EC) No 1049/2001¹

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2016/1013**

Dear Mr Hemmings,

I refer to your letter dated 29 July 2016, registered on the same day, by 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 (hereafter 'Regulation 1049/2001').

1. SCOPE OF YOUR APPLICATION

By your initial application of 2 March 2016, you requested access to *correspondence to and from aircraft manufactures and DG Move and the Cabinet of Commissioner Bulc relating to the development by ICAO of a CO2 standard for new aircraft, covering the period November 1st 2015 and February 12 2016*.

In its initial reply dated 13 July 2016, the Directorate-General for Mobility and Transport (hereafter 'DG MOVE') stated that it had identified 38 documents falling under the scope of your application and, after consultation of third parties in accordance with Article 4(4) of Regulation 1049/2001:

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

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

- gave access to three of these documents, subject to the redaction of personal data based on the exception of Article 4(1)(b) of Regulation 1049/2001 (protection of the privacy and the integrity of the individual);
- with regard to the remaining 35 documents, refused access based on the exceptions of Article 4(1)(a), third indent (protection of international relations) and Article 4(2), first indent (protection of commercial interests of a natural or legal person) of Regulation 1049/2001.

Subsequent to verification, at confirmatory level, of the documents falling under the scope of your application, the Commission identified 35 such documents³. You will find attached a list of the documents in question.

Through your confirmatory application, you request a review of DG MOVE's position. You put forward a number of arguments to support your request. These have been taken into account in our assessment, of which the results are described under section 3.

2. CONSULTATION OF THIRD PARTIES AND MEMBER STATES IN ACCORDANCE WITH ARTICLES 4(4) AND 4(5) OF REGULATION 1049/2001

On 11 May 2016, DG MOVE consulted aircraft manufacturers Airbus, Boeing and Dassault at the initial stage on the possible disclosure of documents falling under the scope of your request and originating respectively from each of them. Boeing and Dassault did not oppose the disclosure of the documents in question⁴, whilst Airbus opposed such disclosure based on the exceptions of Article 4(1)(a), third indent (protection of international relations) and Article 4(1)(b) (protection of the privacy and the integrity of the individual) of Regulation 1049/2001.

On 6 December 2016, my services re-consulted Airbus at the confirmatory stage, as well as the UK authorities, GE Aviation and the International Civil Aviation Organization (hereafter 'ICAO'), as the documents falling under the scope of your application also contain documents originating from the latter. Whilst the UK authorities and GE Aviation did not oppose the disclosure of the relevant documents⁵, ICAO and Airbus, in whose regard follow-up consultations were conducted on respectively 20 July 2017 and 6 April as well as 13 July 2017, opposed such disclosure based *inter alia* on the exception of Article 4(1)(a), third indent of Regulation 1049/2001 (protection of international relations).

3. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant

³ Please note that three out of the 38 documents indicated by DG MOVE at the initial level are not correspondence to and from aircraft manufactures and DG MOVE and the Cabinet of Commissioner Bulc, and consequently they do not fall under the scope of your application.

⁴ Subject to the redaction of personal based on the exception of Article 4(1)(b) of Regulation 1049/2001 (protection of the privacy and the integrity of the individual).

⁵ Idem.

to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the service concerned at the initial stage in light of the provisions of Regulation 1049/2001.

Having examined your confirmatory application, the requested documents and the reasons invoked in the initial reply of DG MOVE, and following the assessment of the replies of third parties and a Member State under Article 4(4) and 4(5) of Regulation 1049/2001:

- a) partial access is granted to 30 documents⁶ (see details below in section 3.1):
 - 18 of these (documents 1, 3, 6 to 9, 11, 12, 16, 17, 19, 23, 24, and 31 to 35) are subject only to the redaction of personal data based on the exception of Article 4(1)(b) of Regulation 1049/2001 (protection of the privacy and the integrity of the individual); and
 - 12 of these (documents 4, 10, 13, 15, 18, 20 to 22, 25, and 27 to 29) contain redactions based on the exceptions of Article 4(1)(a), third indent (protection of international relations) and Article 4(1)(b) (protection of the privacy and the integrity of the individual) of Regulation 1049/2001;
- b) access is refused to two documents (documents 26 and 30) based on the exceptions of Article 4(1)(a), third indent (protection of international relations) and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001 (see details below in section 3.2); and
- c) wider access is granted to the three documents⁷ partially disclosed at the initial stage (documents 2, 5 and 14, see details below in section 3.3).

Insofar as the document(s) or parts thereof fall(s) under the scope of application of the Aarhus Regulation⁸, please note that the grounds for refusal set out below have been interpreted in a restrictive way in accordance with Article 6(1) of that Regulation.

3.1. Partial access granted to 30 documents (all but those mentioned under sections 3.2 and 3.3 below)

a) Article 4(1)(b) of Regulation 1049/2001 (protection of the privacy and the integrity of the individual) (all documents)

Article 4(1)(b) of Regulation 1049/2001 provides that *the 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.*

⁶ You will find attached the documents in question. Please note that, with the exception of documents 22 and 34, the annexes are not attached as they would be entirely redacted.

⁷ You will find attached the documents in question.

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, Official Journal L 264, p. 13.

The documents in question contain names of natural persons or information from which their identity can be deduced.

In this respect, Article 4(1)(b) of Regulation 1049/2001 provides that access to documents is refused where disclosure would undermine *the protection of privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data*.

In its judgment in the *Bavarian Lager* case, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No. 45/2001⁹ (hereafter 'Data Protection Regulation') becomes fully applicable¹⁰.

Article 2(a) of the Data Protection Regulation provides that '*personal data*' shall mean *any information relating to an identified or identifiable 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*. According to the Court of Justice, *there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of "private life"*¹¹.

The names¹² of the persons concerned, as well as information from which their identity can be deduced, undoubtedly constitute personal data in the meaning of Article 2(a) of the Data Protection Regulation.

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. 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 cumulative.¹³

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

In its judgment in the *ClientEarth* case, 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*

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, Official Journal L 8 of 12 January 2001, page 1.

¹⁰ Judgment of 29 June 2010, *Commission v Bavarian Lager*, C-28/08P, EU:C:2010:378, paragraph 63.

¹¹ Judgment of 20 May 2003, *Rechnungshof v Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

¹² Judgment in *Commission v Bavarian Lager*, cited above, EU:C:2010:378, paragraph 68.

¹³ *Idem*, paragraphs 77-78.

to decide on the request for access¹⁴.

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 data¹⁵.

In your confirmatory application, you do not contest the applicability of Article 4(1)(b) of Regulation 1049/2001 and do not establish the necessity of having the data in question transferred to you.

Therefore, I have to conclude that the transfer of personal data through its disclosure cannot be considered as fulfilling the requirements of Regulation 45/2001, as there is no need to publicly disclose the personal data in question, and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

The fact that, contrary to the exceptions of Article 4(2) and (3), Article 4(1)(b) of Regulation 1049/2001 is an absolute exception which does not require the institution to balance the exception defined therein against a possible public interest in disclosure, only reinforces this conclusion.

b) Article 4(1)(a), third indent (the protection of the public interest as regards international relations) (13 documents)

Article 4(1)(a), third indent of Regulation 1049/2001 provides that *the institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards (...) international relations*.

On the one hand, the documents in question contain information related to the development by ICAO, through its Committee on Aviation Environmental Protection (hereafter 'CAEP'), of a CO2 standard for new aircraft.

Contrary to what you seem to suggest in your confirmatory application, the Union is fully involved in the negotiations on international instruments concerning the protection of the environment in civil aviation in general, and on CO2 emissions in particular. This is evident from the fact that the Council adopted Decision (EU) 2016/915 of 30 May 2016 on the position to be taken on behalf of the European Union with regard to the international instrument to be drawn up within the ICAO bodies and intended to lead to the implementation from 2020 of a single global market-based measure for international aviation emissions¹⁶. Even if it is correct that the EU is only an observer in the Committee on Aviation Environmental Protection (CAEP), several of its Member States are members of it, and the Commission ensures that a European position is developed and presented within this committee¹⁷.

The requested correspondence between the Commission and European industry concerns the determination of the EU's negotiation position and contains exchanges of assessments between various negotiating parties, possible green and red lines, possible

¹⁴ Judgment of 16 July 2015, *ClientEarth v EFSA*, C-615/13P, EU:C:2015:489, paragraph 47.

¹⁵ Judgment of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 106.

¹⁶ Official Journal L 153 of 10.6.2016, p.32.

¹⁷ Contrary to what you state in your confirmatory application, even if individual Member States of the European Union and not the European Union itself are members of ICAO, there is a coordinated EU position, as demonstrated by the reference, in the disclosed documents, to the European paper.

compromise options, negotiation tactics etc. They also illustrate direct negotiation exchanges between the European Commission and other international partners.

The disclosure of the redacted parts of these exchanges would severely undermine the Commission's and the Member States' ability to negotiate with non-European parties in future international negotiations: indeed, not only will the CO2 standards continue to be discussed and negotiated on a rolling basis within ICAO and thus the CAEP, but similar international negotiations regarding aircraft standards are ongoing¹⁸. The Commission's negotiating position would consequently be put at risk by the disclosure of these parts of document. This would indeed create a bias against European stakeholders, allowing non-European parties insight into the information underpinning the EU's negotiating position, including the latter's margin of manoeuvre.

The Court recognised this negative effect¹⁹ and emphasised in this regard that *in the context of international negotiation, the positions taken by the European 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 of the negotiators, including the European Union itself. [...] It is possible that the disclosure by the European Union, to the public, of its own negotiating positions, even though the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating position of the European Union.*

Moreover, the CAEP is composed of international experts who develop technical standards, such as the CO2 emissions standard for aircraft. For this purpose, ICAO gives them limited access to confidential information such as product-related data from industry. ICAO has repeatedly insisted on the confidentiality of the documents and information related to the work of the CAEP, within the framework of exchanges that are open to a specific group of persons and for specific reasons. It highlighted that the disrespect of the applicable rules can lead to the adoption of measures that include the suspension of observer- or membership status of an organisation or state participating in the CAEP.

The disclosure of such information would therefore have a detrimental effect on the atmosphere of mutual trust, not only between the Commission and ICAO, but between the Commission and all negotiating parties. Indeed, if the European Union's negotiating partners had a reason to believe that their positions expressed during confidential negotiations could be made public unilaterally by the Commission²⁰, this would have an adverse effect on the future international negotiations mentioned above. The Commission's negotiating position would consequently be put at risk if the data confidentiality arrangements of the ICAO-system were unilaterally disregarded by the Commission.

¹⁸ E.g. regarding a new standard for particulate matters or a new noise standard for supersonic aircraft.

¹⁹ Judgment of 19 March 2013, *In't Veld v Commission*, T-301/10, EU:T:2013:135, paragraphs 122-124.

²⁰ This is even truer for information exchanged in e-mails about bilateral discussions with other negotiating partners.

In this respect, the Court underlined that *in the context of international negotiations, unilateral disclosure by one negotiating party of the negotiating position of one or more other parties, even if this appears anonymous at first sight, may be likely to seriously undermine, for the negotiating party whose position is made public and, moreover, for the other negotiating parties who are witnesses to that disclosure, the mutual trust essential to the effectiveness of those negotiations. As the Commission emphasises, establishing and protecting a sphere of mutual trust in the context of international relations is a very delicate exercise. The negotiation of international agreements can justify, in order to ensure the effectiveness of the negotiation, a certain level of discretion to allow mutual trust between negotiators and the development of a free and effective discussion. As the Commission points out, any form of negotiation necessarily entails a number of tactical considerations of the negotiators, and the necessary cooperation between the parties depends to a large extent on the existence of a climate of mutual trust.*²¹

On the other hand, the documents in question contain sensitive information submitted directly by the European industry in order to be able to establish and develop EU negotiating positions. The European Union's position in the negotiations regarding the ICAO CO₂ standard takes indeed not only into account its environmental objectives, but also the impact the technical requirements would have on the competitiveness of European industries, which has a direct impact on European employment and growth. This kind of information is passed to the Commission under the assumption that it is protected.

To be able to adequately conduct negotiations of this kind, the Commission therefore requires access to the information held by the European industry, even if it is sensitive. If sensitive information submitted in this context by the European industry to the Commission would be released, there would be a clear and non-hypothetical risk that the European industry would not provide similar information to the Commission in the future. This means that the Commission would be deprived of the possibility to obtain precise and relevant information allowing it to objectively assess the negotiating options from the perspective of technical feasibility, and with regard to potential competitive impacts. Given that this information is crucial to its negotiations, the Commission would be prevented from conducting effective negotiations on an equal footing with third countries, including in the framework of the EU's international relations under the scope of ICAO. The negotiation power of the Commission would consequently be affected and its position in future negotiations weakened, which in turn would damage the protection of the public interest as regards international relations.

Regarding specifically Airbus, it must, moreover, be noted that Airbus is, via ICCAIA (International Coordinating Council of Aerospace Industries Associations), also an observer in the CAEP. Airbus is thus not only part of the European industry, but also one of the negotiating parties represented in the CAEP.

²¹ Judgment in *In't Veld v Commission*, cited above, T-301/10, EU:T:2013:135, paragraphs 119, 125 and 126.

Having regard to the above, I consider that the use of the exception under Article 4(1)(a), third indent of Regulation 1049/2001 on the grounds of protecting international relations is justified, and that access to the withheld parts of the documents in question must be refused on that basis.

3.2. Access to two documents refused (documents 26 and 30)

Article 4(1)(a), third indent of Regulation 1049/2001 provides that *the institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards (...) international relations*.

The documents in question are an e-mail which ICAO addressed to the CAEP members and observers, and which Airbus, an aircraft manufacturer, subsequently forwarded to the Commission for information (document 26); and an e-mail Airbus sent to the Commission in order to give feedback on a meeting it had had with the Federal Aviation Administration (hereafter 'FAA') (document 30).

It must first be underlined that the considerations under section 3.1.(b) equally apply to these documents. More specifically, in response to the consultation in accordance with Article 4(4) of Regulation 1049/2001, ICAO opposed the disclosure of document 26 given its confidentiality within the framework of exchanges that are open to a specific group of persons and for specific reasons. The e-mail was sent by the Secretary of the CAEP to its members and observers with an expectation that its content would be kept confidential and not be disclosed to unintended recipients. ICAO underlined *the paramount importance of trust, discipline and respect for the written and unwritten rules of engagement of the working group, key among them confidentiality of its internal communications*. ICAO stressed that such disclosure would require a re-examination of ICAO's communications with the EU across all the multiple forums and groups existing within ICAO. The disclosure would also affect discussions within the CAEP, because the quality of such discussions depends heavily on the full, frank and thorough exchanges among its participants, including on matters concerning procedural affairs. This is only possible with the assurance of confidentiality of its internal communications.

It results clearly from this response that a unilateral disclosure of this document against the opinion of ICAO would seriously harm the public interest as regards the international relations between ICAO and the European Union. Such disclosure would indeed have a detrimental effect on the atmosphere of mutual trust between ICAO and the European Union, and thus limit the prospects for future cooperation with or within ICAO.

With regard to document 30, Airbus equally relied strongly on the exception of Article 4(1)(a), third indent of Regulation 1049/2001 (protection of international relations) when opposing its disclosure. This document contains internal notes taken by Airbus during a meeting it had with the FAA. These notes were provided to the European Commission in confidence in order to give it an optimal understanding of the negotiating position of the USA and enable it to assess accurately the negotiation situation and perform its coordination role within the CAEP.

Its disclosure would not only severely impact the trust and relationship between the Commission and Airbus, but also between the Commission and the FAA. The Commission would indeed not receive similar information from industry in the future. It is indeed clear that, without any comparable insights into the position of the FAA, the negotiating position of the European Commission would be negatively impacted, not only with a view to the recurring negotiations on the CO2 standard for aircraft, but for all international and/or bilateral negotiations involving the FAA.

Having regard to the above, I consider that the use of the exception under Article 4(1)(a), third indent of Regulation 1049/2001 on the grounds of protecting international relations is justified, and that access to the documents in question must be refused on that basis.

Please note that the documents in question also contain personal data that fall under the exception of Article 4(1)(b) of Regulation 1049/2001, for the same reasons as described under section 3.1.(a).

3.3. Wider access to the three documents partially disclosed at the initial stage (documents 2, 5 and 14)

As you correctly point out in your confirmatory request, the three documents disclosed at the initial stage contain unjustified redactions such as the names of companies. You will find attached new versions of these documents, correctly redacted in accordance with Article 4(1)(b) of Regulation 1049/2001 (please see section 3.1.(a) above).

4. PARTIAL ACCESS

I have also examined the possibility of granting partial access to the documents refused under section 3.2 in accordance with Article 4(6) of Regulation 1049/2001. However, it follows from the assessment made under the above-mentioned section that these documents are manifestly and entirely covered by the exception laid down in Article 4(1)(a), third indent of Regulation 1049/2001 (the protection of the public interest as regards international relations). In any event, no meaningful partial access is possible once all protected parts are redacted.

5. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Articles 4(1)(a) and 4(1)(b) of Regulation 1049/2001 are absolute exceptions which do not require the institution to balance the exceptions defined therein against a possible public interest in disclosure.

Please note that, as indicated under section 3, the grounds for refusal have, however, been interpreted in a restrictive way in accordance with Article 6(1) of the Aarhus Regulation insofar the document or parts thereof fall(s) under the scope of application of that Regulation.

6. 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*

Annexes:

- List of documents
- 33 partially redacted documents (two of them with an annex)