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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 2016/4392**

Dear Mr Dohle,

I refer to your email of 19 November 2016, registered on 21 November 2016, 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 28 July 2016, addressed to the Directorate-General for Neighbourhood and Enlargement Negotiations (DG NEAR), you requested access to [a]// *minutes of EU-Montenegro Sub Committee Meetings on Justice, Freedom and Security*.

The Commission has identified the following five documents as falling under the scope of your request:

- (1) Minutes of the Sub Committee Meeting of 2010 ('Document 1');
- (2) Minutes of the Sub Committee Meeting of 2011 ('Document 2');
- (3) Minutes of the Sub Committee Meeting of 2012 ('Document 3');

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

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

- (4) Minutes of the Sub Committee Meeting of 2014 ('Document 4'); and
- (5) Minutes of the Sub Committee Meeting of 2015 ('Document 5').

These documents were drafted in the framework of the meetings of the Subcommittee on Justice, Freedom and Security which took place following the entry into force of the Stabilisation and Association Agreement between the European Union and Montenegro on 1 May 2010.

In its initial reply of 28 October 2016, DG NEAR refused access to these documents on the basis of the exceptions of Article 4(1)(a), third indent, Article 4(3) and Article 4(1)(b) of Regulation 1049/2001. These exceptions provide for the protection of respectively: international relations, the decision-making process, and privacy and the integrity of the individual.

Through your confirmatory application you request a review of this position. You underpin your request with detailed arguments, which I will address in the corresponding sections below.

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 1 to 5.

As regards the redacted parts of these documents, I regret to inform you that I have to confirm the initial decision of DG NEAR to refuse access, on the basis of the exceptions provided in Article 4(1)(a), third indent (protection of international relations), Article 4(3) (protection of the decision-making process) and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001, for the reasons set out below.

2.1. Protection of international relations

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 [...]*.

In this instance, the requested documents were drafted in the framework of the accession process and negotiations pertaining to Montenegro's application for EU membership. This process involves a continuous monitoring by the Commission of the candidate country's implementation of policies and reforms in sensitive areas such as fundamental rights, rule of law, judiciary reform, judiciary cooperation in civil and criminal matters, police cooperation and fight against organised crime and terrorism, visa and asylum policy, and also border management.

The said monitoring requires enhanced dialogue, cooperation and exchange of information with the Montenegrin authorities in order to allow for an in-depth view of their country's implementation of the *acquis*. This is permitted through an understanding that some parts of the information received not be made public, in particular those related to specific extradition cases, intelligence operations, secret surveillance of criminal activities, and witness and other protection programmes.

Were the Commission to provide *erga omnes* access to such particularly sensitive information, communicated by the Montenegrin authorities under the understanding that it would remain protected, the environment of mutual trust essential to the process of dialogue and cooperation required in the framework of the present and future negotiations would be severely affected. As a result, the willingness of the Montenegrin authorities to communicate such sensitive but required information for the institutions' assessment would be seriously undermined.

In view of the above, there is indeed a real and non-hypothetical risk that public disclosure of the above-mentioned information would jeopardise the atmosphere of mutual trust in the framework of Montenegro's negotiations for EU membership and would undermine as a result the external relations of the EU with the said candidate country.

Against this background, the above-mentioned sensitive information regarding extradition cases, intelligence operations, secret surveillance of criminal activities, and witness and other protection programmes have been redacted from the requested documents in accordance with Article 4(1)(a), third indent of Regulation 1049/2001.

Please note that the Commission cannot provide more detailed information on the withheld parts and on the reasons for their redaction without disclosing their substance.

2.2. Protection of the decision-making process

Article 4(3), first subparagraph 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, unless there is an overriding public interest in disclosure.*

In the *Muñiz*³ case, the Court of First Instance (now 'General Court') held that access to documents can be refused on the grounds of Article 4(3), first subparagraph of Regulation 1049/2001, where disclosure of the documents requested would have a substantial negative impact on the decision-making process in question, in particular, where disclosure of the documents would lead to a real and reasonably foreseeable risk of external pressure⁴ and/or an objectively justified risk of self-censorship⁵.

³Judgment of 18 December 2008, *Pablo Muñiz v Commission*, T-144/05, EU:T:2008:596.

⁴*Ibid.*, Paragraph 86.

⁵*Ibid.*, Paragraph 89, 90.

In this instance, the documents requested relate to the on-going negotiations on the accession process of Montenegro to the EU. Until these negotiations are concluded, the Commission will regularly be making decisions on how to conduct them.

As stated above, confidentiality between the parties is essential during the negotiation of international agreements, in order to foster an atmosphere of mutual trust and confidence, where the parties may express themselves freely.

Should the requested documents be fully disclosed, this required climate of trust and confidence would be eroded, and there would be a real and non-hypothetical risk of self-censorship on the part of the Montenegrin representatives in order to maintain the confidentiality, integrity and efficiency of its intelligence operations, secret surveillance on criminal activities, witness and other protection programmes and specific complex extradition cases.

The information pertaining to these areas which is contained in the requested reports was intended strictly for internal use by the Commission and was transmitted by the Montenegrin authorities with the understanding that it would not be disclosed.

Without this degree of confidentiality, the Montenegrin authorities would not have provided the information in question within the framework of meetings of the EU-Montenegro Sub Committee on Justice, Freedom and Security and the monitoring of Montenegro's progress by the Commission would be seriously undermined.

Under these circumstances, public disclosure of the withheld sensitive information would not only undermine the climate of trust with Montenegro, as explained above, but would also seriously jeopardise the success of the accession process as such, as it could deprive the Commission of the needed data and cooperation from this and other negotiating countries in the future.

For the above-mentioned reasons, I consider that disclosure of the respective withheld parts of the requested documents pertaining to the above-mentioned sensitive information would seriously undermine the Commission's ongoing decision-making process, and therefore must be precluded on the grounds of the exception set out in Article 4(3), first subparagraph of Regulation 1049/2001.

2.3. Protection of the privacy and integrity of the individual

Article 4(1)(b) 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.*

Article 2(a) of Data Protection Regulation 45/2001⁶ ('Regulation 45/2001') provides that '*personal data*' shall mean any information relating to an identified or identifiable person [...].

According to Article 8(b) of Regulation 45/2001, 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.⁷ Only fulfilment of both conditions enables one to consider the processing (transfer) of personal data as compliant with the requirement of lawfulness provided for in Article 5 of Regulation 45/2001.

In that context, whoever requests such a transfer must first establish that it is necessary. According to the Court of Justice, the necessity requirement must be demonstrated *by express and legitimate justifications or convincing arguments*.⁸

Once the necessity requirement is fulfilled, 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.⁹

In this instance, some of the withheld parts of the requested reports contain the names and handwritten signatures of individuals, including of Commission staff members not holding any senior management positions. These constitute undoubtedly personal data within the meaning of Regulation 45/2001. It follows that public disclosure of the above-mentioned information would constitute processing (transfer) of personal data within the meaning of Regulation 45/2001.

Neither in your initial request, nor in in your confirmatory application, have you stated any grounds to substantiate the necessity of the transfer of personal data contained in the requested documents.

In light of the above, I must conclude that the transfer of the personal data contained in the requested documents cannot be considered as fulfilling the requirement of lawfulness provided for in Article 5 of Regulation 45/2001.

Consequently, the exception provided by Article 4(1)(b) of Regulation 1049/2001 applies in this instance, as there is no need to publicly disclose the personal data contained in the withheld parts of the requested reports and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

⁶Regulation (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 12.1.2001, p. 1.

⁷Judgment of 29 June 2010, *Commission v Bavarian Lager*, C-28/08, EU:C:2010:378, paragraphs 77-78.

⁸Judgment in *Bavarian Lager*, EU:C:2010:378, paragraph 78.

⁹Judgments in *Bavarian Lager*, EU:C:2010:378, paragraphs 77 and 78, Judgment of 2 October 2014, *Guido Strack v. Commission*, C-127/13 P, EU:C:2014:2250, paragraphs 107 and 108. See also judgment of 9 November 2010, *Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, paragraph 85.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Article 4(1)(a) and 4(1)(b) of Regulation 1049/2001 do not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

The exception laid down in Article 4(3), first subparagraph 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 argue that *[t]hese meetings are the basis for the annual reports and as such the Minutes of the meetings should be public in order to provide transparency and enable citizens to understand and verify the assessment of DG NEAR.*

Yet, such general considerations cannot provide, pursuant to settled case-law, an appropriate basis for substantiating the existence of an overriding public interest in disclosure prevailing over the reasons justifying the refusal to disclose the documents in question¹⁰

Moreover, I consider that disclosure of the withheld parts of the requested documents, insofar as they pertain only to sensitive information concerning specific extradition cases, intelligence operations, secret surveillance of criminal activities, or witness and other protection programmes, would not enable citizens to achieve the objective of understanding and verifying the assessment of the Commission.

Therefore, I conclude that you have not established, in this instance, the existence of an overriding public interest within the meaning of Article 4(3), first subparagraph of Regulation 1049/2001. Nor have I been able to identify any public interest capable of overriding the interest protected by the said provision of Regulation 1049/2001.

This conclusion is supported by the fact that thorough information regarding the Commission's detailed assessment of the state of play of Montenegro's progress is being provided regularly to the public, *inter alia*, via the annual Progress Reports to which you are referring and which are publicly available on the Commission's website.¹¹ Consequently, citizens have access to the latest analysis of most areas referred to in the requested documents, in respect of Montenegro's accession process and transparency in in this regard is already appropriately ensured, without sensitive information provided by the Montenegrin authorities requiring to be disclosed.

¹⁰Judgment of 14 November 2013, *LPN and Finland v Commission*, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93.

¹¹See https://ec.europa.eu/neighbourhood-enlargement/countries/package_en

The fact that the requested documents relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness,¹² provides further support to this conclusion.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, partial access is granted to the documents requested. However, for the reasons explained above, full access to the requested documents is not possible without undermining the interests described above.

5. 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 complaint 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*

¹²Judgment of 29 June 2010, *Commission v Technische Glaswerke Ilmenau GmbH*, C-139/07 P, EU:C:2010:376, paragraphs 53-55 and 60; Judgment of 29 June 2010, *Commission v Bavarian Lager*, C-28/08, EU:C:2010:378, paragraphs 56-57 and 63.