



EUROPEAN COMMISSION

LEGAL SERVICE
The Director General

Brussels,

By e-mail

Mr Charilaos Drosos
ask+request-633-5bbb5267@asktheeu.org

Subject: Request for access to documents

Ref.: Your e-mail of 7 July 2013, registered on 8 July 2013 as GESTDEM 2013/3949

Dear Mr Drosos,

I refer to your e-mail mentioned above requesting access to documents under Regulation (EC) N° 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents¹.

Points 2, 3, 7, 8, 12, 13, 17 and 18 of your application refer to documents under the responsibility of the Legal Service. Therefore, as you were informed, this part of your request has been transferred to the Legal Service on 29 July 2013 and registered under reference number GESTDEM 2013/3949.

After examination of the Legal Service's file, the following documents have been identified as matching your request:

- Point 2 of your request - The cover note (or equivalent) by which the Legal Service dispatched to DG COMP its opinion on the first draft of Commission Decision C(2009) 3726 in Case COMP/C3/37.990 – Intel

1. Note to Mr Lowe dated 8 April 2009 by which the Legal Service gives its opinion on the draft decision case COMP/C-3/37.990 – Intel (document having as reference JUR(2009)20499);

- Point 3 of your request - The final opinion of the Legal Service on the abovementioned draft Commission decision.

2. Note to Mr Lowe dated 11 May 2009 by which the Legal Service gives its final opinion on the abovementioned draft decision (document having as reference JUR(2009)20595).

¹ Official Journal L 145, 31.05.2001, page 43.

- Point 7 of your request - The cover note (or equivalent) by which the Legal Service dispatched to DG COMP its opinion about the first draft of Commission Decision C(2006) 5700 in Case COMP/F/38.638 BR/ESBR

3. Note of the Legal Service to Mr Lowe dated 26 October 2006 by which the Legal Service gives its opinion on the draft decision case COMP/F/38.638 – BR/ESBR (document having as reference JUR(2006)21166);

- Point 8 of your request - The final opinion of the Legal Service on the abovementioned draft Decision.

4. Note of the Legal Service to Mr Lowe dated 23 November 2006 by which the Legal Service gives its final opinion on the abovementioned draft decision (document having as reference JUR(2006)21272).

- Point 12 of your request - The cover note (or equivalent) by which the Legal Service dispatched to DG COMP its opinion on the first draft of Commission Decision C(2004) 900 in Case COMP/C-3/37.792 – Microsoft.

5. Note of the Legal Service to Mr Lowe dated 11 February 2004 by which the Legal Service gives its opinion on the draft decision case COMP/C-3/37.792 – Microsoft (document having as reference JUR(2004)20142);

- Point 13 of your request - The final opinion of the Legal Service on the abovementioned draft Decision.

6. Note of the Legal Service to Mr Lowe dated 18 March 2004 by which the Legal Service gives its final opinion on the abovementioned draft decision (document having as reference JUR(2004)20279).

- Point 17 of your request - The cover note (or equivalent) by which the Legal Service dispatched to DG COMP its opinion on the first draft of Commission Decision C(2003) 4570 in COMP/E-2/37.857-Organic Peroxides.

No document has been found matching your request.

- Point 18 of your request - The final opinion of the Legal Service on the abovementioned draft Decision.

7. Notes of the Legal Service to Mr Lowe dated 22 December 2003 and 27 December 2003 by which the Legal Service gives, respectively, its final opinion on the corrigendum of the draft decision and on the draft decision (documents having as references JUR(2003)21548 and JUR(2003)21422).

Having carefully examined the identified documents, I am pleased to inform you that full access can be granted to documents above referred under numbers 3, 5, 6 and 7, a copy of which you will find enclosed. I must however remind you that these documents cannot be reproduced or disseminated for commercial purposes without prior consent given by the Commission.

As regards documents above referred under numbers 1 and 2, having carefully examined them, I regret to inform you that they cannot be disclosed since they are covered by the exception provided for in Article 4(2) second indent (*"the protection of court proceedings and legal advice"*)².

The documents under numbers 1 and 2 are legal opinions which were delivered by the Commission's Legal Service in response to the inter-service consultation (ISC) launched by Directorate-General for Competition (DG COMP) on a draft decision in a competition case which, following its adoption by the College, has been challenged before the General Court. The related jurisdictional proceeding is still on-going before the General Court (case T-286/09).

Disclosure of these legal opinions would, firstly, undermine the protection of legal advice provided for under Article 4(2) second indent of Regulation 1049/2001 since it would make known to the public an internal opinion intended for the Commission's services responsible for preparing the draft decisions.

Secondly, disclosure would also be highly detrimental to the Commission's right of defence in the current court case. Since the Court proceedings concerning the legality of this decision are still pending, this risk is not hypothetical but a real and concrete one.

In addition, the purpose of the exception *"protection of court proceedings"* is to maintain the independence of the EU institutions in their dealings with the Court and to ensure the proper course of justice.

Since case T-286/09 is still pending before the Court, I consider that the abovementioned Commission's legal opinions are clearly covered by the exception provided for in Article 4(2) second indent of the above mentioned Regulation and, consequently, cannot be disclosed at this stage.

As regards the document referred under number 4, your request is devoid of purpose since this document has been already disclosed to you by email sent on 26 July 2013 which already partially dealt with your request of access to documents. Nevertheless, I draw your attention to the fact that, for the reasons described above, the document has been disclosed by mistake since the related Court proceedings were still pending at that time (case C-499-11 P, judgement delivered on the 18th of July 2013).

Pursuant to Article 4(2) of Regulation 1049/2001, the exception to the right of access must be waived if there is an overriding public interest in disclosing the requested documents. I understand the interest of transparency in that it enables citizens to participate more closely in the decision-making process and guarantees that the

² *"The institutions shall refuse access to a document where disclosure would undermine the protection of: court proceedings and legal advice [...] unless there is an overriding public interest in disclosure".*

administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.

However, in the present case, for the reasons explained above, I consider that the interest in transparency does not outweigh the general interest that the Commission and its services receive frank, objective and comprehensive legal advice including the Commission's right of defence and that the institution's decision making process is protected.

In accordance with Article 4(6) of Regulation 1049/2001, I have also considered the possibility of granting partial access to the legal opinions under numbers 1 and 2. However, these documents are entirely covered by the invoked exception, so that a partial disclosure is not possible.

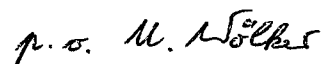
Should you wish this position to be reconsidered, you should present in writing, within fifteen working days from receipt of this letter, a confirmatory application to the Commission's Secretary-General at the address below.

The Secretary-General will inform you of the result of such review within 15 working days from the date of registration of your request. You will either be given access to the document or your request will be rejected, in which case you will be informed of what further action is open to you.

All correspondence should be sent to the following address:

The Secretary-General
European Commission
B-1049 BRUSSELS
e-mail: Sg-Acc-Doc@ec.europa.eu

Yours sincerely,



Luis ROMERO REQUENA

Enclosures: JUR(2006)21166
JUR(2004)20142
JUR(2004)20279
JUR(2003)21548
JUR(2003)21422