



EUROPEAN COMMISSION

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Mr Alexander Fanta
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**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2019/5664**

Dear Mr Fanta,

I refer to your letter of 25 October 2019, registered on 28 October 2019, in which you submitted 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 (EC) No 1049/2001’).

I apologise for the delay in the handling of your application.

1. SCOPE OF YOUR REQUEST

In your initial application of 7 October 2019, addressed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, you requested access to:

- ‘Documents relating to the Impact Assessment of the Commission for the common charger for phones, including but not limited to the study contracted to Economisti Associati and others on the subject;
- Correspondence and minutes of meetings with lobbyists and interest groups on the subject.’

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

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

- Briefing note for the Deputy Head of Cabinet of Commissioner Bieńkowska for the meeting with Alex Rogers, president of Qualcomm Technology Licensing, on 23 May 2019 (document 1, registered under reference Ares(2019)6408491);
- Minutes of the interim meeting held on 9 July 2019 between representatives of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs and Economisti Associati (document 2, registered under reference Ares(2019)6406242);
- Minutes of the kick-off meeting held on 7 January 2019 2019 between representatives of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs and Economisti Associati (document 3, registered under reference Ares(2019)6406874);
- Draft Final Report of Impact Assessment Study on Common Chargers of Portable Devices dated October 2019 (document 4, registered under reference Ares(2019)6407177);
- Inception Report of Impact Assessment Study on Common Chargers of Portable Devices dated March 2019 (document 5, registered under reference Ares(2019)6407424);
- Interim Report of Impact Assessment Study on Common Chargers of Portable Devices dated June 2019 (document 6, registered under reference Ares(2019)6407701);
- Presentation of Impact Assessment Study on Common Chargers of Portable Devices during the meeting of the Expert Group on Radio Equipment held in Brussels on 25 June 2019 (document 7, registered under reference Ares(2019)6407831);
- Minutes of the 2nd meeting of the Commission Expert Group on Radio Equipment held on 25 June 2019 (document 8, registered under reference Ares(2019)6408374).

In its initial reply of 25 October 2019, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs:

- Granted access to documents 7 and 8;
- Granted wide partial access to documents 2 and 3, subject only to the redaction of personal data on the basis of exception of Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of the individual);
- Granted partial access to document 1. The withheld parts of this document are redacted based on the exceptions provided for under Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001;
- Granted partial access to documents 4, 5 and 6. The withheld parts of those documents are redacted based on the exceptions provided for under Article 4(2), first indent (protection of commercial interests of a natural or legal person) and Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. In particular, you argue, I quote, ‘there was no clear reason given for the redaction and I ask for the draft report to be released in full’.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) No 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 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 can inform you that further partial access is granted to document 1. The limited withheld parts of this document are covered by the exceptions laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) and the first subparagraph of Article 4(3), (protection of the decision-making process) of Regulation (EC) No 1049/2001.

As regards documents 4 to 6, I am pleased to inform you that full access is granted to the latter, since the disclosure of their contents does not seriously undermine any of the interests protected by the exceptions to the right of access for in Article 4 of Regulation (EC) No 1049/2001. You may reuse the requested documents free of charge for non-commercial and commercial purposes provided that the source is acknowledged, that you do not distort the original meaning or message of the documents. Please note that the European Commission does not assume liability stemming from the reuse.

Please find attached copies of these documents.

Furthermore, please note that on 31 January 2020, the European Commission published the adopted Impact Assessment Study on Common Chargers of Portable Devices at the following address:

<https://op.europa.eu/en/web/eu-law-and-publications/publication-detail/-/publication/c6fadfea-4641-11ea-b81b-01aa75ed71a1>

Finally, I have to confirm the initial decision of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs to partially refuse access to documents 2 and 3 on the bases of the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

The detailed reasons underlying my assessment are set out below.

2.1. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 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’.

In its judgment in Case C-28/08 P (*Bavarian Lager*)³, the Court of Justice ruled that when a request is made for access to documents containing personal data, 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 data⁴ (hereafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.

Please note that, as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by Regulation (EU) 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/EC⁵ (hereafter ‘Regulation (EU) 2018/1725’).

However, the case law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 2018/1725.

In the above-mentioned judgment, the Court stated that Article 4(1)(b) of Regulation (EC) No 1049/2001 ‘requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with [...] [the Data Protection] Regulation’.⁶

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’.

As the Court of Justice confirmed in Case C-465/00 (*Rechnungshof*), ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life’.⁷

The requested documents contain personal data such as the names, surnames, contact details (such as e-mails, office addresses and phone numbers) and a CV of persons who do not form part of the senior management of the European Commission and that of the contractor’s staff.

The names⁸ of the persons concerned as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725.

³ Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd* (hereafter referred to as ‘*European Commission v The Bavarian Lager* judgment’), C-28/08 P, EU:C:2010:378, paragraph 59.

⁴ OJ L 8, 12.1.2001, p. 1.

⁵ OJ L 205, 21.11.2018, p. 39.

⁶ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

⁷ Judgment of the Court of Justice of 20 May 2003, *Rechnungshof and Others v Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

⁸ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

Pursuant to Article 9(1)(b) of Regulation (EU) 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 (EU) 2018/1725, can the transmission of personal data occur.

In Case C-615/13 P (*ClientEarth*), the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data.⁹ This is also clear from Article 9(1)(b) of Regulation (EU) 2018/1725, which requires that the necessity to have the personal data transmitted must be established by the recipient.

According to Article 9(1)(b) of Regulation (EU) 2018/1725, the European Commission has to examine the further conditions for the lawful processing of personal data only if the first condition is fulfilled, namely if the recipient establishes 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.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by the disclosure of the personal data concerned.

2.2. Protection of the decision-making process

Article 4(3), first subparagraph of Regulation (EC) No 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’.

⁹ Judgment of the Court of Justice of 16 July 2015, *ClientEarth v European Food Safety Agency*, C-615/13 P, EU:C:2015:489, paragraph 47.

Pursuant to settled case-law, the above-mentioned exception may be applied where disclosure of preparatory documents would result in a serious, non-hypothetical and objectively justified risk of self-censorship¹⁰.

It is to be noted that the decision-making exception in Article 4(3) of Regulation (EC) No 1049/2001 does not refer only to decisions having legal effect. The wording in Article 4(3) of Regulation (EC) No 1049/2001 includes neither a definition of the decision-making process, nor any indication that would enable to establish the legislator's intention to limit the scope of the decision-making process protected by that exception only to the legislative process. Indeed, the decision-making process has to be interpreted in a broad sense, encompassing also processes relating to administrative and other functions of the Institutions. The European Ombudsman has agreed that the exception can also apply to non-legislative documents¹¹ and established case law of the EU courts confirms the possibility to apply Article 4(3) both to legislative and to administrative procedures¹².

Document 1 is the briefing prepared by the staff members of the European Commission services and contains information and internal opinions that could reveal the course of any future formal procedural steps the European Commission can undergo in area of common charger of portable devices. It is undeniable that the internal discussions on the topic of common chargers for mobile telephones and compatible devices have been characterised by a significant degree of difficulty and complexity in the framework of the ongoing decision-making process.

At the same time, the European Commission has been, and still is, the target of external pressure from conflicting interests of various stakeholders. These include the producers of mobile phones and chargers both in Europe and abroad, civil society and the NGO community, consumer groups and the industry. This external pressure is not hypothetical but is genuine and tangible.

As an indication of the external interest for this action, it is important to indicate that the public consultation survey on standard chargers for mobile phones received more than 2800 contributions from citizens and other stakeholders. This information is publically available in the Better Regulation website¹³.

Consequently, parts of Document 1 contain opinions for internal use, as part of deliberations and preliminary consultations within the institution in the sense of the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

¹⁰ Judgment of the General Court of 18 December 2008, *Muñiz v European Commission*, T-144/05, EU:T:2008:596, paragraphs 89 and 90. See also Order of the General Court of 10 January 2013, *My Travel v European Commission*, T-403/05, EU:T:2008:316, paragraph 52.

¹¹ Please see the Decision in case 70/2008/TS, paragraph 18 available at <https://europa.eu/FV64Hj>.

¹² Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07, EU:C:2010:376, paragraph 60.

¹³ https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-6427186_en

The General Court acknowledged that ‘the Commission must [...] be placed in a position to decide [...] wholly independently, in the general interest and free from any external pressure or third-party influence [...] on the policy initiatives to be proposed. [...] This is all the more important in order to preserve the essence of the power of initiative conferred on the Commission by the Treaties and its capacity to assess, wholly independently, the appropriateness of a policy proposal. More specifically, it is important to protect that power of initiative from any influences exerted by public or private interests which would attempt, outside of organised consultations, to compel the Commission to adopt, amend or abandon a policy initiative and which would thus prolong or complicate the discussion taking place within that institution’¹⁴.

In fact, the General Court acknowledged that ‘the protection of the decision-making process from targeted external pressure may constitute a legitimate ground for restricting access to documents relating to the decision-making process’¹⁵.

In the present case, I do consider that the above explanations are sufficiently precise as to justify the application of the exception of the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001, in respect to document 1.

Therefore, given the need to protect the ongoing decision-making process of the European Commission and its margin of manoeuvre for exploring all possible policy options free from external pressure ongoing decision-making process would be undermined by the disclosure of the redacted parts of document 1.

In light of the above, the relevant undisclosed parts of document 1 should be protected in accordance with the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(3) of Regulation (EC) No 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 ‘I would like to strongly object to the redaction on the grounds of public interest for my work as a journalist’.

These are general considerations that do not have a direct link with the particular circumstances of the case and cannot provide an appropriate basis for establishing that a public interest prevails over the reasons justifying the refusal to disclose the limited redacted parts of documents concerned¹⁶. You do not provide sufficient arguments showing why, having regard to the specific facts of the case, a public interest is so

¹⁴ Judgment of the General Court of 13 November 2015, *ClientEarth v. Commission*, T-424/14 and T-425/14, EU:T:2015:848, paragraphs 94 and 95.

¹⁵ Judgment of the General Court of 20 September 2016, *PAN Europe v Commission*, T-51/15, PAN, EU:T:2016:519, paragraph 30.

¹⁶ Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission*, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93.

pressing that it overrides the need to protect the redacted parts of the documents in question.

The European Commission welcomes very much indeed the fact that EU citizens are interested in policy development. For this very reason, open public online consultations are systematically part of the consultation strategy for initiatives subject to an impact assessment. In line with that approach, a public consultation¹⁷ on standard chargers for mobile phones took place from 14 May 2019 until 6 August 2019. The final Impact Assessment study was adopted and published on the EUROPA¹⁸ and the European Commission's Radio Equipment Directive sectoral webpages¹⁹.

I conclude that nor have I been able to identify any public interest capable of overriding the public and private interests protected by Article 4(3) of Regulation (EC) No 1049/2001.

As regards Article 4(1)(b) of Regulation 1049/2001, it is an absolute exception that does not require the institution to balance the exceptions defined therein against a possible public interest in disclosure.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting (further) partial access to the documents requested.

As stated above, further partial access is herewith granted to document 1. I consider that a wider access to the undisclosed parts of the briefing would undermine the protection of the decision-making process and protection of personal data for the reasons described in Sections 2.1 and 2.2 above.

With regards to documents 2 and 3, the withheld parts of these documents are protected by Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

¹⁷ https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-6427186/public-consultation_en

¹⁸ <https://op.europa.eu/en/web/eu-law-and-publications/publication-detail/-/publication/c6fadfea-4641-11ea-b81b-01aa75ed71a1>

¹⁹ https://ec.europa.eu/growth/sectors/electrical-engineering/red-directive/common-charger_en

5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European 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
Ilze JUHANSONE
Secretary-General

Enclosures: (4)