EUROPEAN COMMISSION

Brussels, 30.1.2019
C(2019) 810 final

OUT OF SCOPE

DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001[1]

Subject: **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2018/4638**

Dear ,

I refer to your letter of 7 September 2018 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 documents[2] (hereafter 'Regulation (EC) No 1049/2001').

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

1. SCOPE OF YOUR REQUEST

In your initial application of 31 May 2018, addressed to the Service for Foreign Policy Instruments (FPI) of the European Commission, you requested access to the following documents:

'any official or internal document including inter alia notes, opinions, legal opinions, [PowerPoint presentations], be them at the preparatory or final stage, reports and cases related to application of the Blocking Regulation (EC) No 2271/96 of 22 November 1996.'

Moreover, you stressed that your request 'extend[ed] to any document prepared by the [European] Commission or held by [the latter] originating from Member States of the [European Union], third countries or private parties.'

1 Official Journal L 345 of 29.12.2001, p. 94.
2 Official Journal L 145 of 31.5.2001, p. 43.

This request was registered under the reference number GESTDEM 2018-2996. On 19 June 2018, the Director of the Service for Foreign Policy Instruments, Ms Hilde Hardemann, submitted a proposal for a fair solution to you pursuant to Article 6(3) of Regulation (EC) No 1049/2001.

This provision lays down that '[i]n the event of an application relating to a very mong document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.'

In this instance, the Service for Foreign Policy Instruments assessed that the handling of your request would have involved a disproportionate amount of work for the sanctions team, in light of its tasks consisting, *inter alia*, of:

- implementing and where appropriate, making proposals for amendment of more than 42 sanctions regimes;
- reviewing the application and implementation of each of these regimes throughout the 28 Member States; and
- consulting with the authorities of the United States concerning their sanctions against Russia and Iran;
- assessing the repercussions of these sanctions on EU operators; and
- negotiating and adopting the recent amendment to Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom[3].

Consequently, in order to be able to abide by the deadline provided for under Regulation (EC) No 1049/2001, the Service for Foreign Policy Instruments invited you, in accordance with its standard practice, to reply to the above-mentioned proposal within five working days by email to the functional mailbox of the Service for Foreign Policy Instruments.

On 22 June 2018, you sent an email intended as an acceptance of the proposal for a fair solution, not to the functional mailbox specified in that proposal, but to the professional mailbox of the Head of the Service for Foreign Policy Instruments.

Therefore, the Unit responsible for the handling of your application did not become aware of your acceptance of the principle of the use of a fair solution within the prescribed five working days.

Against this background, this Unit assumed that you had tacitly refused the fair solution proposed by the Service for Foreign Policy Instruments.

[3] Official Journal L 309 of 29.11.1996, p. 1–6. Hereafter 'Regulation (EC) No 2271/96'. The amendment consists of Commission Regulations (EU)2018/1100 and 2018/1101, Official Journal L 199 of 7.08.2018, p. 1-6 and 7-10, respectively.

With a view to safeguarding the interests of good administration, the Service for Foreign Policy Instruments was therefore compelled to balance your possible interest in access against the workload resulting from the processing of your application, in accordance with the case law of the European Court of Justice.[4]

Having regard to the volume of the documents requested, the third parties to be consulted and/or the number of parts of documents possibly to be redacted; the Service for Foreign Policy Instruments determined that the processing of your request would have impeded its Staff to exercise their core tasks, in particular those related to the adoption of an implementing and a delegated act concerning Regulation (EC) No 2271/96, at a strategic time for the EU policy response to the U.S. actions in the area of sanctions.

Therefore, the Service for Foreign Policy Instruments concluded that the processing of your request would involve an unreasonable and disproportionate administrative burden.

Consequently, the latter proceeded to inform you in an email of 16 July 2018, of the proposed restriction of the scope of your request, as per the above-mentioned email of 19 June 2018 of the Director of the Service for Foreign Policy Instruments.

In light of the above, we would like to reassure you, that contrary to your impression, the Service for Foreign Policy Instruments never intended to 'disregard' your acceptance to negotiate a fair solution.

This is further evidenced by the fact that when the latter became aware of your agreement to the principle of finding a fair solution to both parties, it immediately apologised, and started simultaneously to proceed with the implementation of negotiations so as to reach a fair solution, both by phone and in writing.

In the framework of those negotiations, you finally accepted, in an email of 27 July 2018, to narrow down (i) the temporal scope of your request to 'data from 2011' and (ii) its material scope to the following documents:

- 'Any general reports, statistics or studies regarding the implementation of Regulation (EC) No 2271/96, particularly those submitted to the EP and the Council under Article 7(a) and 7(b) of Regulation (EC) No 2271/96';
- 'Any notices in the [O]fficial [J]ournal of the EU on the judgments and decisions to which Articles 4 and 6 of Regulation (EC) No 2271/96 apply';
- 'Any presentations of materials and other information as distributed between the Commission and national experts or working party meetings';
- 'Any examples of cases as of 2011 that are of public knowledge and had been notified to the commission or otherwise a part of public record (such as the pre-2011 ones as: Bawag case in 2007 in Austria; LogicaCMG, Inc in the UK in 2002)';

[4] Judgment of 2 October 2014, C-127/13, *Strack v Commission*, EU:C:2014:2250, paragraphs 27-28.

- ‘Any statistics or other information on notifications of adversely affected interests of companies under Article 2 of Regulation (EC) No 2271/96’;
- ‘Any information regarding drafts of appropriate measures submitted to the committee (Committee on Extraterritorial legislation and it subsequent successors) under Article 8 of Regulation (EC) No 2271/96, including potential presentations’;
- ‘Any studies/reports or information of the measures taken by the EU MS under Article 9 of Regulation (EC) No 2271/96[5]’;
- ‘Any delegated acts adopted under Article 11(a) of Regulation (EC) No 2271/96’; and
- ‘Any other information that [the Service for Foreign Policy Instruments] would determine useful taking into account most-recent practices and cases related to Regulation (EC) No 2271/96’.

Moreover, you agreed to exclude from the scope of your request, in principle, any email correspondence.

On 2 August 2018, the Service for Foreign Policy Instruments informed you that, for administrative procedural purposes, your request, as amended following the agreement reached in the framework of the proposal for a fair solution, would be registered under a new reference number. You did not oppose such re-numbering.

The new reference number, namely GESTDEM 2018-4638, was subsequently communicated to you on 31 August 2018, in the framework of the initial reply of the Service for Foreign Policy Instruments to your request as amended under the agreed fair solution.

In this initial reply, which was sent within the time limit set by Regulation (EC) No 1049/2001, the Service for Foreign Policy Instruments identified 13 documents as falling within the scope of your request, including 12 which were already public.

As the Service for Foreign Policy Instruments did not refuse to grant access to any documents falling under the scope of your request amended as per the fair solution, its reply qualified as a ‘positive’ one. For this reason, the reply of the Service for Foreign Policy Instruments did not include any ‘list of files [in relation to which] access had been denied or restricted’, or ‘any information regarding [the] option [for the submission of a] confirmatory application’, in accordance with the European Commission’s standard practice.

Upon receipt of this reply, you kindly thanked ‘greatly’ the Service for Foreign Policy Instruments, and commended the latter ‘efforts invested into finding relevant documents.’

[5] In respect of this part of your request, you acknowledged that you would need to submit separate requests to the Member States authorities.

In your confirmatory application, you request however a review of the reply of the Service for Foreign Policy Instruments. You also take issue with the reply you have received to your request for access to documents, and in particular you argue in the framework of the confirmatory procedure concerning the request registered under the reference number GESTDEM 2018/4638 that the 'initial scope of the request GESTDEM 2018/2996 has to be answered'. You underpin your request with detailed arguments, which I will address in the corresponding sections below.

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 full review of the reply given by the Service concerned at the initial stage.

It is important to clarify that, through a confirmatory application, applicants for access to documents cannot modify the scope of the initial request which is subject to a confirmatory review. Therefore, I regret to inform you that the European Commission cannot, at this stage, adopt a confirmatory decision on the request registered under GESTDEM 2018/2996. This review was undertaken on the basis of the scope of your request as per the fair solution explicitly agreed between you and the Service for Foreign Policy Instruments and registered under GESTDEM 2018/4638. This is without prejudice to your right under Regulation (EC) No 1049/2001 to submit new applications for access to documents.

In this instance, the fact that the Service for Foreign Policy Instruments mainly provided public documents in the framework of its reply - due to the only very recent intensification of developments in that field - does not invalidate your agreement to the solution in question.

Moreover, I note that in the framework of the fair solution in question, you had expressly asked to be provided with, i*nter alia,* already public documents by requesting information published in the Official Journal such as: '[a]ny notices in the official journal of the EU on the judgments and decisions to which Articles 4 and 6 of the Council Regulation (EC) No 2271/96 apply', or '[a]ny delegated acts adopted under Article 11(a) of Regulation (EC) No 2271/96', and '[a]ny examples of cases as of 2011 *that are of public knowledge* and had been notified to the commission or otherwise a part of public record […][6].'

Therefore, the fact that the Service for Foreign Policy Instruments granted access to documents, most of which were already in the public domain, was justified not only by the circumstance that the types of exchanges concerning Regulation (EC) No 2271/96 in which you were interested only intensified as of 2018, but also by the express terms of your request.

[6] Emphasis added.

Furthermore, I would like to clarify that, contrary to your assumption[7], the Service for Foreign Policy Instruments is not part of the European External Action Service. In fact, both work alongside with each other but are distinct services. The Service for Foreign Policy Instruments is a part of the European Commission and managing foreign policy issues within the latter's mandate. The European External Action Service is the EU's diplomatic service. It aims to make EU foreign policy more coherent and effective, thus increasing the European Union's global influence. However, it is not part of the European Commission. As a result, the Service for Foreign Policy Instruments does not necessarily hold the same documents as the European External Action Service.

Consequently, I would like to reassure you that, contrary to your impressions, the Service for Foreign Policy Instruments handled your request as per the agreed fair solution in good faith.

Following the review of the reply of the Service for Foreign Policy Instruments at the confirmatory stage, I would like nevertheless to inform you that the following six additional documents were identified as falling within the scope of your request:

(1). Minutes of the meeting of the Committee on extra-territorial legislation under Article 8 of Regulation (EC) No 2271/96 held on 27 July 2018[8];
(2). Minutes of the meeting of Member States' Experts on the draft Delegated Act amending the annex to Regulation (EC) No 2271/96 held on 28 May 2018[9];
(3). Notification under Article 2 of Regulation (EC) No 2271/96, registered under Ares(2015)5392268[10];
(4). Letter of acknowledgment of receipt of notification under Article 2 of Regulation (EC) No 2271/96, registered under Ares(2016)78178[11];
(5). Proposal COM(2015)48 of 6 February 2015[12]; and
(6). Judgment of the Landgericht Dortmund of 15 January 2016, notified by Germany (under the reference 3 O 610/15)[13].

After careful assessment of the six above-mentioned documents, I can inform you that:

- full access is granted to documents 5 and 6[14];
- partial access is granted to documents 1, 2 and 4[15]; and
- access must be refused to document 3.

The reasons for withholding document 3 and parts of documents 1, 2 and 4 are set out in the sections below.

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7 See page 2 of your confirmatory application.
8 Registered under reference Ares(2018)6499266. Hereafter 'document 1'.
9 Registered under reference Ares(2018)4336577. Hereafter 'document 2'.
10 Hereafter 'document 3'.
11 Hereafter 'document 4'.
12 Hereafter 'document 5'.
13 Hereafter 'document 6'.
14 Including to the annex of document 5. Respectively annexes 4, 4bis and 5.
15 Respectively annexes 1, 2 and 3.

Moreover, in accordance with the Code of Good Administrative Behaviour, I would like draw your attention to the fact that there are several Parliamentary questions in relation to 'the extraterritorial application of sanctions', in particular the following written questions/replies which are already public, should they be of interest to you:

- E-007804/14[16];
- E-007682/17[17]; and
- E-3514/18[18].

2.1. Protection of the decision making-process

Article 4(3), second subparagraph of Regulation (EC) No 1049/2001 provides that '[a]ccess to a document containing opinions for internal use as part of deliberations and preliminary consultation 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, unless there is an overriding public interest in disclosure.'

In the *Stichting Corporate Europe Observatory* judgment[19], the General Court confirmed that minutes circulated to participants in the framework of a meeting which was not open to the public, qualify as internal documents within the meaning of this provision and warrant protection on that basis.

In this instance, the documents to which you request access pertain to the application of Regulation (EC) No 2271/96 as amended, providing for protection against and counteracting the effects of the extra-territorial application of the laws specified in its Annex.

In particular, Regulation (EC) No 2271/96 imposes measures in order to protect the interests of natural and legal persons who may be affected by extraterritorial foreign legislation enacted in violation of international law, by removing, neutralising, blocking or otherwise countering the effects such legislation.

Document 1 consists of minutes pertaining to a meeting of the Committee on extra-territorial legislation held on 27 July 2018. This committee was set up, in order to assist the European Commission in the implementation Regulation (EC) No 2271/96. [20]

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16 Question available at: http://www.europarl.europa.eu/doceo/document/E-8-2014-007804_EN.html; Reply available at: http://www.europarl.europa.eu/doceo/document/E-8-2014-007804-ASW_EN.html

17 Question available at: http://www.europarl.europa.eu/doceo/document/E-8-2017-007682_EN.html Reply available at: http://www.europarl.europa.eu/doceo/document/E-8-2017-007682-ASW_EN html

18 Question available at: http://www.europarl.europa.eu/doceo/document/E-8-2018-003514_EN.html; Reply available at http://www.europarl.europa.eu/doceo/document/E-8-2018-003514-ASW_EN html

19 Judgment of 7 June 2013, T-93/11, *Stichting Corporate Europe Observatory v European Commission*, EU:T:2013:308, paragraphs 32-33.

20 See Article 8 of the regulation.

Document 2 consists of minutes related to a meeting of Member States' Experts on the draft Delegated Act amending the annex to Regulation (EC) No 2271/96, held on 28 May 2018. This amendment was required in order to include, in addition to the restrictive measures already listed, the measures of the United States of America against Iran, following the announcement by the US government on 8 May 2018, that it will no longer waive them.

Whereas parts of the contents of the discussions reflected in both documents are already publicly known, the specifics as to the expressed individual positions of the Member States remain confidential due to their purely internal nature. The latter qualify as opinions for internal use expressed as part of deliberations and preliminary consultations within the meaning of Article 4(3), second subparagraph, the release of which would seriously undermine the decision-making process, as construed by the above-mentioned case law.

Accordingly, I consider that full access to documents 1 and 2 cannot be granted on the basis of the exception provided under Article 4(3) of Regulation (EC) No 1049/2001, in light of the extremely sensitive international economic relations matter addressed in the discussions reflected in both minutes in question.

Moreover, as document 1 originates from the Committee on extra-territorial legislation, this exception must be construed, in this instance, in light of the rules of procedure of the latter.[21]

The rules of procedure for the Committee on extra-territorial legislation were established having regard to Regulation (EU) No. 182/2011 of the European Parliament and the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers[22].

Notwithstanding Regulation (EC) No 1049/2001, Regulation (EU) No 182/2011 does not provide for public access to the individual positions of the Member States, or to detailed minutes of committee meetings.

Pursuant to settled case law, in the absence of any provision expressly giving one regulation primacy over the other, it is appropriate to ensure that each of those regulations is applied in a manner which is compatible with the other and which enables the consistent application of each of them to their fullest possible extent[23].

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21 You received access to those rules in the framework of the initial reply of the the Service for Foreign Policy Instruments.

22 Official Journal L 55 of 28.02.2011, p.13. (Hereafter 'Regulation (EU) No 182/2011').

23 By analogy, see *inter alia*, judgment of 29 June 2010, *Commission v Bavarian* Lager, C-28/08 P, EU:C:2010:378, paragraph 56; judgment of 13 September 2013, T-380/08, *Netherlands v European Commission*, EU:T:2013:480, paragraphs 32-42.

Moreover, whereas the rules of procedure of the Committee on extra-territorial legislation provide for the publication of summary records briefly describing each item on the agendas into the Comitology Register and the results of votes on any draft implementing act submitted to the latter[24], they further provide that summary records 'shall not mention the individual position of the members in the committee's discussions'[25] and that 'the committee's discussions shall be confidential'.[26] In addition, the rules stress that [t]he members of the committee, as well as experts and representatives of third parties, shall be required to respect the confidentiality obligations set out [therein] and that '[t]he chair shall ensure that [the latter] are made aware of the confidentiality requirements imposed upon them'.

Against this background, and in light of the fact that some transparency as regards the committee's work is already ensured, to some extent, via the disclosure, in the Comitology Register[27], of the internal deliberations within the committee, including Member States' positions, with the understanding they would remain confidential, would seriously hamper the future deliberations of the committee, free from external pressure. As a result, the Commission's decision-making process in the extremely delicate and sensitive field of extra-territorial legislation would be seriously undermined.

Indeed, in light of the field of action of the committee, such public disclosure would expose the Member States, whose positions would be released, to possible retaliation on the international scene from third countries, thereby seriously restraining their margin of manoeuvre and freedom of expression within the Committee.

The same reasoning applies by analogy to the positions of the experts expressed within the framework of document 2. Disclosure of the detailed discussions amongst Member States' experts would seriously undermine the European Commission's margin of manoeuvre in exploring, in the framework of these internal deliberations and preliminary consultations, opinions and options free from external pressure.

Consequently, I conclude to the disclosure of documents 1 and 2, subject to the partial redaction of the positions of the Member States' representatives and experts, in accordance with Article 4(3), second subparagraph of Regulation (EC) No 1049/2001.

2.2. Protection of commercial interests

Article 4(2), first indent of Regulation (EC) No 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.'

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24 Article 10(2).
25 *Ibid.*
26 Article 13(2).
27 See: http://ec.europa.eu/transparency/regcomitology/index.cfm

In this instance, documents 3 and 4 consist respectively in a letter of notification pursuant to Article 2 of Regulation (EC) No 2271/96 and its related acknowledgment of receipt from the Service for Foreign Policy Instruments of the European Commission.

Pursuant to Article 2 of Regulation (EC) No 2271/96, any legal person incorporated within the European Union whose 'economic and/or financial interests […] are affected, directly or indirectly, by the laws specified in the Annex or by actions based thereon or resulting therefrom, […] shall inform the [European] Commission accordingly within 30 days from the date on which it obtained such information […]'

In the framework of this procedure of notification, the person shall provide all information relevant for the purposes of Regulation (EC) No 2271/96[28].

Moreover, Article 3 of the above-mentioned regulation provides that all information supplied in accordance with the above-mentioned provision 'shall only be used for the purposes for which it was provided' and 'information which is by nature confidential or which is provided on a confidential basis shall be covered by the obligation of professional secrecy'. This provision states furthermore that this information 'shall not be disclosed by the Commission without the express permission of the person providing it.'

Clearly, it results from the above-mentioned provisions of Regulation (EC) No 2271/96 read in conjunction with Article 4(2), first indent of Regulation (EC) No 1049/2001, that the information submitted in the framework of a notification is 'by nature confidential' and cannot be disclosed.

Similarly, the name of the notifying entity and the date of the notification qualify *per se* as sensitive commercial information that warrant protection against public disclosure, as their release would subject the latter to identification and possible reprisals and sanctions, thereby seriously undermining its commercial interests within the meaning of Article 4(2), first indent of Regulation (EC) No 1049/2001.

In conclusion, given the purpose of Regulation (EC) No 2271/96 and the risk of retaliation from third countries, it is important to ensure that the names or details enabling the identification of legal persons, whose interests are affected by the said extraterritorial application of the sanctions and the information they supply are not made public.

Consequently, access to document 3 must be refused and partial access is granted to document 4 subject to the redaction of the name of the notifying entity, and the date of notification on the basis of Article 4(2), first indent of Regulation (EC) No 1049/2001.

[28] *Ibid.*

2.3. 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'.

The applicable legislation in this field is 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/EC.[29]

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person […]'. The Court of Justice ruled that any information, which due to its content, purpose or effect, is linked to a particular person, qualifies as personal data[30].

In the *Rechnungshof* case law, the Court of Justice further confirmed that 'there is no reason of principle to justify excluding activities of a professional […] nature from the notion of private life'[31].

Accordingly, the names, signatures, functions, and/or initials pertaining to members of the staff of an institution constitute personal data[32]. Moreover, the names and contact details of third party individuals qualify also as personal data within the meaning of Regulation (EU) 2018/1725, irrespective of whether they act in a professional capacity.

In this instance, documents 1 to 4 to which you request access contain personal data, in particular, the names of European Commission officials who are not part of the senior management and of other third party individuals, as well as their address, and handwritten signature.

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 […] the 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'.

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29 Official Journal L 205 of 21.11.2018, p 39. Hereafter 'Regulation (EU) 2018/1725'.

30 Judgment of 20 December 2017, C-434/16, *Peter Novak v Data Protection Commissioner*, EU:T:2018:560, paragraphs 33-35

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

32 Judgment of 19 September 2018, T-39/17, *Port de Brest v Commission*, EU:T:2018:560, paragraphs 43-44.

Only if these conditions are both 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 your application, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced.

Notwithstanding the above, please note that there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by 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 contacts.

As to the handwritten signature contained in document 4, which is of a biometric nature, there is a risk that its disclosure would prejudice the legitimate interests of the person concerned.

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

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Whereas the exception provided under Article 4(1)(b) of Regulation (EC) No 1049/2001, does not include the possibility to be set aside by an overriding public interest; the exceptions laid down in the second and third paragraphs of the said Article 4 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 do not put forward any reasoning pointing to an overriding public interest in disclosing the documents requested.

Nor have I been able to identify any public interest capable of overriding the public and private interests protected by Article 4, second and third paragraphs of Regulation (EC) No 1049/2001.

The fact that other documents regarding the European Union protection against the extraterritorial application of legislation of a third country have already been made publicly available only reinforces this conclusion.

4. PARTIAL ACCESS

Whilst I conclude that access to document 3 must be withheld, as this document is covered in its entirety by the combined application of the invoked exceptions to the right of public access, partial access is granted to documents 1, 2 and 4, in accordance with Article 4(6) of Regulation (EC) No 1049/2001, for the reasons detailed above.

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 provided respectively in Article 263 and Article 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

For the Commission
Martin SELMAYR
Secretary-General

Enclosures: (6)