



EUROPEAN COMMISSION
DIRECTORATE-GENERAL JUSTICE AND CONSUMERS

The acting Director-General

Brussels
JUST.D3/JS/ess(2020)6904545

Mr Nikolaj Nielsen
EUobserver
Avenue d'Auderghem /
Oudergemlaan 150
1040 Brussels
Belgium

E-mail: ask+request-8646-71e43ec5@asktheeu.org

Subject: Your application for access to documents – Ref GestDem No 2020/6269

Dear Mr Nielsen,

I refer to your e-mail of 13 October 2020 in which you make a request for access to documents, registered under the above mentioned reference number.

You request access to “*Exchange of letters sent by the European Commission over the past year to Bulgaria, Cyprus and Malta regarding their investor citizenship and residency schemes as well as their replies to those letters*”.

Your application concerns the following documents:

1. Letter sent by Mr Danail Kirilov, Minister of Justice of Bulgaria to then-Commissioner Jourová on 14 October 2019 (*Ares(2019)6555042*);
2. Letter sent by then-Commissioner Jourová to Mr Danail Kirilov, Minister of Justice of Bulgaria, on 21 November 2019 (*Ares(2019)7195681*);
3. Letter sent by Director-General Astola to Ambassador Nicholas Emiliou, Permanent Representative of Cyprus to the EU, on 29 November 2019 (*Ares(2019)7363453*);
4. Letter sent by Director-General Astola to Ambassador Daniel Azzopardi, Permanent Representative of Malta to the EU, on 29 November 2019 (*Ares(2019)7363489*);
5. Letter sent by Ambassador Nicholas Emiliou, Permanent Representative of Cyprus to the EU, to Director-General Astola on 10 January 2020 (*Ares(2020)242352*);

6. Letter sent by Ambassador Dimiter Tzantchev, Permanent Representative of Bulgaria to the EU, to Ms Geneviève Tuts, Head of Cabinet of Commissioner Reynders, on 28 January 2020 (*Ares(2020)623616*);
7. Letter from Ambassador Daniel Azzopardi, Permanent Representative of Malta to the EU, to Director-General Astola of 4 February 2020 (*Ares(2020)740416*);
8. Letter from Mr Nicos Nouris, Minister of Interior of Cyprus, to Commissioner Reynders on 19 February 2020 (*Ares(2020)6431503*);
9. Letter sent by Commissioner Reynders to Mr Danail Kirilov, Minister of Justice of Bulgaria, on 1 April 2020 (*Ares(2020)1880467*);
10. Letter sent by Commissioner Reynders to Mr Nicos Nouris, Minister of Interior of Cyprus, on 1 April 2020 (*Ares(2020)1880815*);
11. Letter sent by Commissioner Reynders to Mr Byron Camilleri, Minister for Home Affairs, National Security & Law Enforcement of Malta, on 1 April 2020 (*Ares(2020)1880310*);
12. Letter from Mr Nicos Nouris, Minister of Interior of Cyprus, to Commissioner Reynders on 6 April 2020 (*Ares(2020)6430613*);
13. Letter sent by Mr Danail Kirilov, Minister of Justice of Bulgaria, to Commissioner Reynders on 24 April 2020 (*Ares(2020)2218879*);
14. Letter sent by Mr Byron Camilleri, Minister for Home Affairs, National Security & Law Enforcement of Malta, to Commissioner Reynders on 27 April 2020 (*Ares(2020)2283522*);
15. Letter sent by Mr Byron Camilleri, Minister for Home Affairs, National Security & Law Enforcement of Malta, to Commissioner Reynders on 23 June 2020 (*Ares(2020)6430083*);
16. Letter sent by Mr Byron Camilleri, Minister for Home Affairs, National Security & Law Enforcement of Malta, to Commissioner Reynders on 1 July 2020 (*Ares(2020)3566507*);
17. Letter sent by Commissioner Reynders to Mr Byron Camilleri, Minister for Home Affairs, National Security & Law Enforcement of Malta, on 24 August 2020 (*Ares(2020)4386001*);
18. Letter from Mr Nicos Nouris, Minister of Interior of Cyprus, to Commissioner Reynders on 10 September 2020 (*Ares(2020)4789831*);
19. Letter sent by Mr Byron Camilleri, Minister for Home Affairs, National Security & Law Enforcement of Malta, to Commissioner Reynders on 1 October 2020 (*Ares(2020)5280548*);
20. Letter from Ms Nicos Anastasiades, President of the Republic of Cyprus, to President von der Leyen on 13 October 2020 (*Ares(2020)5452635*);
21. Letter of formal notice sent to Cyprus on 20 October 2020 (*C(2020)7167 final*);
22. Letter of formal notice sent to Malta on 20 October 2020 (*C(2020)7168 final*);
23. Letter from Commissioner Reynders to Ms Desislava Ahladova, Minister of Justice of Bulgaria, of 20 October 2020 (*Ares(2020)5677453*);
24. Letter from Mr Nicos Nouris, Minister of Interior of Cyprus, to Commissioner Reynders on 20 October 2020 (*Ares(2020)5774943*).

Having examined the documents requested under the provisions of Regulation (EC) 1049/2001 regarding public access to documents, I regret to inform you that your application cannot be granted, as disclosure is prevented by an exception to the right of access laid down in Article 4 of this Regulation.

The documents listed above contain letters sent to and replies received from the Cypriot, Maltese and Bulgarian authorities as part of the Commission's commitment to "monitor

wider issues of compliance with EU law raised by the schemes and [to] take necessary action, as appropriate”¹.

Documents 3, 4, 5, 7, 8, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 24 relate to investigations regarding a possible infringement of EU law (case numbers 2020/2300 and 2020/2301).

Documents 1, 2, 6, 9, 13 and 23 relate to investigations that may lead to a procedure regarding a possible infringement of EU law.

Disclosure of the documents requested would undermine the protection of the purpose of the ongoing investigations; indeed, disclosure of the document at this point in time would affect the climate of mutual trust between the authorities of the Member States concerned and the Commission, which is required to enable them to resolve the case without having to refer it to the Court of Justice. Therefore, the exception laid down in Article 4(2) third indent of Regulation (EC) 1049/2001 applies to these documents.

Documents 3, 4, 5, 7, 8, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 24 form part of the procedure laid down in Article 258 of the Treaty on the Functioning of the European Union, which consists of two consecutive stages, the administrative pre-litigation stage and the judicial stage before the Court of Justice. The purpose of the pre-litigation procedure is to allow the Member State concerned to put an end to any alleged infringement, to enable it to exercise its rights of defence and to define the subject-matter of the dispute with a view to bringing an action before the Court².

The Court has interpreted Article 4(2), third indent of Regulation 1049/2001 *inter alia* in its *Liga para a Protecção da Natureza* judgment, in which it underlined that in ongoing infringement cases, the institution may base itself on a general presumption of nondisclosure³. This confirmed the Court’s earlier *Petrie* judgment, in which it ruled that “*the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure. This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter’s voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgment of the Court of Justice*”⁴.

Consequently, all documents in the files are covered by a general presumption of non-accessibility based on the exception of Article 4(2), third indent of Regulation 1049/2001. Public disclosure of these documents would not only negatively influence the dialogue between the Commission and the Member States concerned, for which a climate of trust is essential, but would also alter the strictly bilateral nature of the infringement procedure as provided for in Article 258 of the Treaty on the Functioning of the European Union.

¹ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Investor Citizenship and Residence Schemes in the European Union (COM(2019)12 final).

² Judgment of 10 December 2002, *Commission v Ireland*, C-362/01, EU:C:2002:739, paragraphs 15 and 16.

³ Judgment of 14 November 2013, *Liga para a Protecção da Natureza and Finland v Commission*, Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraphs 55, 65-68.

⁴ Judgment of 11 December 2001, *Petrie and Others v Commission*, T-191/99, EU:T:2001:284, paragraph 68.

Documents 1, 2, 6, 9, 13 and 23 relate to ongoing investigations that may lead to a procedure regarding a possible infringement of EU law. The exchanges with Bulgaria are of a strictly bilateral nature as they involve only the Commission and the Member State concerned. Consequently, disclosure of the requested document entails a risk of altering the nature of this ongoing investigation and ultimately undermining its objectives. It would have a negative effect on the extent to which the Commission can conduct negotiations with the Member States concerned with the objective that the Member States comply voluntarily with European Union law.

Having regard to the above, I consider that the use of the exception under Article 4(2), third indent of Regulation 1049/2001 on the grounds of protecting the purpose of inspections, investigations and audits is justified, and that access to the documents in question must be refused on that basis.

The exceptions laid down in Article 4(2) 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 application, you do not put forward any reasoning pointing to an overriding public interest in disclosing the documents requested.

Nor have I been able, based on the elements at my disposal, to establish the existence of any overriding public interest in disclosure of the documents in question. In any case, I consider that the public interest is better served in this case by ensuring the conclusion, in all serenity, of the procedures and the related exchanges with the Member States concerned, without jeopardising the dialogue between the Commission and the Member States for which, as pointed out above, a climate of trust is essential.

In consequence, I consider that in this case there is no overriding public interest that would outweigh the public interest in safeguarding the protection of the purpose of investigations protected by Article 4(2), third indent of Regulation 1049/2001.

The fact that the documents relate to administrative procedures and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness⁵, provides further support to this conclusion.

I have also examined the possibility of granting partial access to the documents concerned, in accordance with Article 4(6) of Regulation 1049/2001. However, it follows from the assessment made above that the documents which fall within the scope of your request are manifestly and entirely covered by the exception laid down in Article 4(2), third indent of Regulation 1049/2001.

It must also be underlined that the Court of Justice confirmed that a presumption of non-disclosure excludes the possibility to grant partial access to the file⁶.

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

⁵ Judgment of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07, EU:C:2010:376, paragraph 60.

⁶ Judgment of 25 March 2015, *Sea Handling v Commission*, T-456/13, EU:T:2015:185, paragraph 93.

European Commission
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu

According to standard operational procedures, the reply is usually also sent by registered mail. Please note, however, that due to the extraordinary health and security measures currently in force during the COVID-19 epidemic, which include the requirement for all Commission non-critical staff to telework, we are unfortunately not in a position to follow this procedure until further notice.

We would therefore appreciate if you could confirm receipt of the present e-mail by replying to just-citizenship@ec.europa.eu

Yours sincerely,

(e-signed)

Salla SAASTAMOINEN