



EUROPEAN COMMISSION

Brussels, 6.9.2019
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[REDACTED]
07747 Jena
Germany

**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 2019/2321**

Dear [REDACTED]

I refer to your letter of 20 May 2019, registered on 28 May 2019, 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 (hereafter 'Regulation (EC) No 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 15 April 2019³, assigned to the Legal Service of the European Commission, you requested access to the 'internal evaluation of the European Commission on i.a the extension options regarding Brexit'.

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

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

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

³ Your initial application of 20 March 2019, registered under reference GestDem 2019/1697, was assigned to the Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 of the Treaty of the European Union. Upon the request of this service, a new request was registered on 15 April 2019 with the reference number GestDem 2019/2321 and assigned to the Legal Service of the European Commission.

- Note of 17 January 2019 of the Legal Service to the attention of the Cabinet of the President of the European Commission, “Brexit - Legal considerations on a possible extension of the two-year period” [document reference Ares(2019)3014500].

In its initial reply of 20 May 2019, the Legal Service of the European Commission refused access to this document based on the exceptions provided for in the second indent of Article 4(2) (protection of legal advice), first subparagraph of Article 4(3) (protection of the ongoing decision-making process) and the third indent of Article 4(1)(a) (protection of the public interest as regards international relations) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position.

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 regret to inform you that I have to confirm the initial decision of the Legal Service of the European Commission based on the exceptions provided for in the second indent of Article 4(2) (protection of legal advice), first subparagraph of Article 4(3) (protection of the ongoing decision-making process) and the third indent of Article 4(1)(a) (protection of the public interest as regards international relations) of Regulation (EC) No 1049/2001.

2.1. The context of the document requested

On 29 March 2017, the United Kingdom notified the European Council of its intention to withdraw from the European Union, in accordance with Article 50 of the Treaty on European Union (TEU). Following the extensive negotiations between the United Kingdom and the EU, the Council of the European Union adopted a decision on the signing of the withdrawal agreement on 11 January 2019, approving also a draft decision on the conclusion of the withdrawal agreement.

The House of Commons in the United Kingdom voted against the Government's withdrawal agreement with the European Union on 15 January, 12 March and 29 March 2019. On 11 April 2019, at the request of the Prime Minister of the United Kingdom, the European Council, in agreement with the United Kingdom, decided on a further extension of Article 50 until the end of October 2019. At this stage, the agreement on the withdrawal of the United Kingdom has not yet been concluded. The document requested assesses the legal consideration on a possible extension of the two-year period launched on 29 March 2017.

2.2. Protection of legal advice

Article 4(2) second indent of Regulation (EC) No 1049/2001 provides that the institutions shall refuse access to a document where disclosure would undermine the protection of legal advice.

In its judgment *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, the Court of Justice ruled that the protection of legal advice must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice.⁴

The Legal Service of the European Commission is regularly invited to provide its legal advice and to examine possible scenarios for Brexit. The document requested contains a legal opinion on a complex and highly sensitive matter. It discusses possible scenarios for Brexit and the options for the EU institutions in case of the extension of the two-year period. At this stage, the disclosure of this document would have a serious impact on the Commission's interest in seeking and receiving legal advice and on the Legal Service's capacity to assist the Commission in the assessment of this complex and sensitive matter. The frankness, objectivity and comprehensiveness, as well as the expeditiousness of the legal advice would be seriously affected if this note would be disclosed, depriving thus the Commission of an essential element in the framework of its work. The disclosure of this document would put in the public domain the internal opinions intended for the Cabinet of the President of the European Commission, who, as a member of the European Council, participates in the discussions on the possible extension of the two-year period for the withdrawal of the United Kingdom from the EU. As mentioned above, since the agreement on the withdrawal of the United Kingdom from the EU has not yet been concluded, the views and recommendations expressed in this document remain relevant and sensitive.

Consequently, I conclude that, pursuant to the second indent of Article 4(2) of Regulation (EC) No 1049/2001, access cannot be granted to the document requested as this would undermine the protection of legal advice.

2.3. Protection of the ongoing decision-making process

Article 4(3) first subparagraph of Regulation (EC) No 1049/2001 provides that the institutions shall refuse access to a document where disclosure would seriously undermine the institution's decision-making process.

As previously mentioned, the Council of the European Union adopted a decision on the signing of the withdrawal agreement on 11 January 2019. Although the EU considers the negotiations on the withdrawal agreement to be finalised, the decision-making process regarding the withdrawal of the United Kingdom, including the possibility of the extension of the two-year period, is still ongoing.

⁴ Judgement of the Court of Justice of 1 July 2008, *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, Joined Cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 42.

The withdrawal must be concluded before the expiry of the time-limit set in Article 50(3) of TEU, which may be extended by the European Council. There is a close link between the conditions for such extension and the ongoing process concerning the withdrawal agreement.

The legal analysis contained in the document requested is still relevant for possible future decisions of the European Council regarding the withdrawal of the UK from the Union. Putting in the public domain the internal legal considerations of the Commission's Legal Service would reduce the Commission's capacity to take decisions after frank and unbiased internal discussions free from external interferences. It would also severely undermine the capacity of the President of the Commission, as a Member of the European Council, to participate in the discussions in the European Council.

Therefore, I have concluded that access to the requested documents must be refused based on the exception provided for in the first subparagraph of Article 4(3) (protection of the ongoing decision-making process) of Regulation (EC) No 1049/2001.

2.4. Protection of the public interest as regards international relations

The third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001 provides that the institutions shall refuse access to a document where disclosure would undermine the public interest as regards the protection of international relations.

Concluding an agreement with a withdrawing Member State and building a new relationship with it is an unprecedented and extremely sensitive process. As the United Kingdom will be, from the entry into force of the withdrawal agreement, a third country, the discussions on the withdrawal agreement concern the future international relations of the EU. Moreover, as follows from Article 50(2) TEU, one or more international agreements with the UK will have to take place, forming the framework for the future relationship of the UK with the European Union. In these circumstances, the disclosure of requested document would risk affecting seriously the agreement(s) on the framework of the future relations with the UK.

Consequently, I conclude that, pursuant to the third indent of Article (4)(1)(a) of Regulation (EC) No 1049/2001, access cannot be granted to the document requested as this would undermine the protection of international relations.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in the first subparagraph of Article 4(3) (protection of the decision-making process) and the second indent of Article 4(2) (protection of the legal advice) 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 indicate the fact that numerous news agencies from different countries reported on this document as an overriding public interest in disclosure. First, the European Commission has not released this document in an authorized way. Secondly, the fact that news agencies reported on parts of the document does not in itself qualify as an overriding public interest that would justify the disclosure of the document requested. General considerations cannot provide an appropriate basis for establishing that the principle of transparency was in this case especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question.⁵

Nor have I been able to identify any public interest capable of overriding the public and private interests protected by Article 4(3) first subparagraph (protection of the decision-making process) and Article 4(2), second indent (protection of the legal advice) of Regulation (EC) No 1049/2001.

Please note also that Article 4(1)(a) of Regulation (EC) No 1049/2001 does not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

4. PARTIAL ACCESS

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

However, for the reasons explained above, no meaningful partial access is possible without undermining the interests described 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 specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

For the Commission



⁵ 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.