



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

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Mr Peter Teffer
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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 2021/3432**

Dear Mr Teffer,

I refer to your letter of 30 July 2021, registered on 31 July 2021, 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').

Please accept our apologies for the delay in replying to your request

1. SCOPE OF YOUR REQUEST

In your initial application of 25 May 2021, addressed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, you requested access to, I quote:

- '[a]ll documents discussing the implications of ECJ ruling C-693/18 (on the interpretation of regulation 715/2007), including but not limited to: - All e-mails between the European Commission and national type approval authorities / market surveillance authorities about the implications on previously given (partial) type approvals
- All presentations by the Commission or member states (including national authorities)
- All minutes of meetings on this subject

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

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

- All internal Commission notes on the ruling.’

The Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs identified in total 26 documents, and replied to you in several batches due to ongoing consultations of third parties.

In the framework of the first batch of 16 July 2021, it granted wide partial access, subject to the redaction of personal data under Article 4(1)(b) of Regulation (EC) No 1049/2001, to six documents. In the framework of the second batch of 22 July 2021, it further granted wide partial access, subject to the protection of personal data under Article 4(1)(b), to 18 more documents.

Finally, in the framework of the third batch of 28 July 2021, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs refused access to the remaining documents on the basis of Article 4(3) second subparagraph of Regulation (EC) No 1049/2001. The documents concerned are the following:

- Email of 4 March 2021 from Ireland to the European Commission, reference Ares(2021)4264687 (hereafter document 1)
 - Letter co-signed by 8 Member States in response to the judgement of the Court of Justice in case C-693/18, reference Ares(2021)4264687 (hereafter document 1.1)
- Email of 10 March from Ireland to the European Commission, reference Ares(2021)4264687 (hereafter document 2)
 - Letter co-signed by 9 Member States in response to the judgement of the Court of Justice in case C-693/18, reference Ares(2021)4264687 (hereafter document 2.1)

In accordance with Article 4(4) and 4(5) of Regulation (EC) No 1049/2001, as regards Member States’ documents, the institution shall consult the third party with a view to assessing whether an exception defined in Article 4 of Regulation (EC) No 1049/2001 is applicable, unless it is clear that the document shall or shall not be disclosed.

In accordance with this provision, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, at initial stage, consulted the Member States’ authorities, co-signatories of the letters, on their possible disclosure. The German authorities objected to the disclosure of documents 1.1 and 2.2. Taking into account their position, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs refused access to the documents on the basis of Article 4(3) second subparagraph of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position as far as the refusal to grant access to the documents from Member States is concerned.

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.

Under the provisions of Article 4(4) and (5) of Regulation 1049/2001 and with a view to taking into account the arguments put forward in your confirmatory application, a renewed third-party consultation of the German authorities regarding documents 1.1 and 2.2 was initiated by the Secretariat-General at confirmatory stage.

The German authorities reiterated their opposition based on Article 4(3) of Regulation (EC) No 1049/2001.

Indeed, both at the initial and confirmatory stage, the German authorities objected to the disclosure of the letters, on the grounds that it would undermine the protection of the decision-making process. In essence, the German authorities argued that the Regulation explicitly provides that the institutions shall be allowed to protect their internal consultations and deliberations where necessary to safeguard their ability to perform their duties. They stressed that the internal unbiased exchange of views between the Commission and the type-approval authorities of individual Member States is the basis for an effective, coordinated and consistent administrative action within the European Union that should not be affected by external influences.

However, following the assessment of the Secretariat-General, I conclude that the arguments put forward are not, at first sight, capable of justifying use of the exception of Article 4(3) of Regulation (EC) No 1049/2001. Therefore, partial access, subject to the redaction of personal data under Article 4(1)(b) of Regulation (EC) No 1049/2001 is granted to these documents.

Please note, however, that the actual transmission of documents 1.1 and 2.2 is subject to the absence of a request, by the German authorities, for interim measures, as referred to in paragraph 5 of this decision.

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

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.

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 documents contain personal data such as the names and initials of persons who do not form part of the senior management of the European Commission and representatives of the national type-approval authorities.

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.

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’.

⁴ Official Journal L 8 of 12.1.2001, page 1.

⁵ Official Journal L 295 of 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.

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 data⁹. 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.

In your confirmatory 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 subjects' legitimate interests might be prejudiced.

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.

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.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Please note also that Article 4(1)(a) and 4(1)(b) of Regulation (EC) No 1049/2001 do 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 and granted wide partial access to the documents requested.

5. DISCLOSURE AGAINST THE EXPLICIT OPINION OF THE AUTHOR

According to Article 5(5) and (6) of Commission Decision of 5 December 2001 amending its rules of procedure¹⁰, '[t]he third-party author consulted shall have a deadline for reply which shall be no shorter than five working days but must enable the Commission to abide by its own deadlines for reply.

In the absence of an answer within the prescribed period, or if the third party is untraceable or not identifiable, the Commission shall decide in accordance with the rules on exceptions in Article 4 of Regulation (EC) No 1049/2001, taking into account the legitimate interests of the third party on the basis of the information at its disposal. If the Commission intends to give access to a document against the explicit opinion of the author, it shall inform the author of its intention to disclose the document after a ten-working day period and shall draw his attention to the remedies available to him to oppose disclosure'.

Since the decision to grant partial access to documents 1.1 and 2.2 is taken against the objection of the German authorities expressed at the initial and confirmatory stage, the European Commission will inform the authorities of its decision to give partial access to the documents requested. It will not grant such partial access until a period of ten working days has elapsed from the formal notification of this decision to the third-party, in accordance with the provisions mentioned above.

This time-period will allow the German authorities to inform the European Commission whether they will object to the partial disclosure using the remedies available, i.e. an application for annulment and an application for interim measures before the General Court. Once this period has elapsed, and in the absence of a declaration of the third party of resorting to the remedies at its disposal, the European Commission will forward the redacted documents to you.

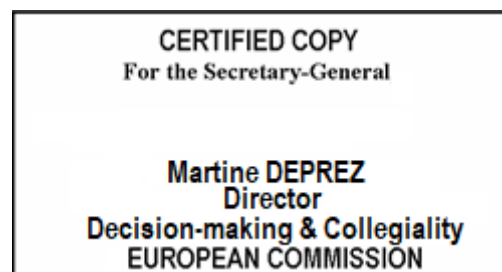
¹⁰ Commission Decision of 5 December 2001 amending its rules of procedure (notified under document number C(2001) 3714), OJ, L 345, 29.12.2001, p. 94.

6. 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)