EUROPEAN COMMISSION

Brussels,23.3.2022
C(2022) 1943 final

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

**Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 – GESTDEM 2022/79**

Dear Mr Fanta,

I refer to your email of 22 February 2022, registered on the same day, 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').

## 1. SCOPE OF YOUR REQUEST

In your initial application of 6 January 2022, addressed to the Directorate-General for Communications Networks, Content and Technology, you requested access to the following documents, I quote:

> 'All documents explicitly mentioning or otherwise relating to the practice of crypto-currency mining, as well as relating to the energy consumption of crypto-currencies such as Bitcoin or Ethereum. My request includes all communication with stakeholders on the subject, including e-mails and minutes of meetings and briefing notes.'

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

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

- Energy Efficiency of Blockchain Technology – Report - Ares(2022)250022 (hereafter 'document 1');
- Email of 30 August 2021 - EUBOF2.0 - Energy Efficiency Report - Ares(2022)249882 (hereafter 'document 2');
    - Attachment:EUBOF_Energy_Efficiency_BC_3v0_20210830.docx (hereafter 'document 3');
- Email of 24 September 2021 - "Energy Efficiency of Blockchain Technology" - FINAL VERSION - Ares(2022)249882 (hereafter 'document 4');
    - Attachment:EUBOF_Energy_Efficiency_BC_6v0_20210921.docx (hereafter 'document 5');
- Email of 29 July 2021 - EUBOF2.0: Status Update on "Energy Efficiency of Blockchain Technologies" Thematic Report - Ares(2022)249882 (hereafter 'document 6');
- Email of 10 September 2021 - Blockchain Energy Efficiency Report - Ares(2022)249882 (hereafter 'document 7');
- Email correspondence November 2021 – Sweden bitcoin mining - Ares(2022)250190 (hereafter 'document 8');
- Back to Office Report - Meeting with Sweden's financial supervisor and environmental agency – 26/11/2021 - Ares(2022)250190 (hereafter 'document 9').

In its initial reply dated 21 February 2022, the Directorate-General for Communications Networks, Content and Technology:

- Provided full access to documents 1, 3 and 5;
- Granted partial access to documents 2, 4, 6, 7 and 8 based on the exception laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001;
- Granted partial access to document 9 based on 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.

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 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 Directorate-General for Communications Networks, Content and Technology to grant partial access to document 9, based on the exceptions of 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.

Moreover, in relation to your request, you claim that, I quote: 'By redacting the information on the left of the page, it is difficult to tell which actor in the conversation said what. Nonewithstanding the right to privacy of individuals present, I was hoping you could clarify which institution said what part of the dialogue. Given that the Commission has already disclosed the statements themselves, it seems reasonable to avoid a misunderstanding of who made them. I believe this could help to guard against any kind of false understanding of the substance of the document once it becomes available to the public at large,' the Secretariat-General would like to emphasise that the Commission cannot create a new document containing information that is not present in the requested document.

In this respect, please note that, as specified in Article 2(3) of Regulation (EC) No 1049/2001, the right of access as defined in that regulation applies only to existing documents in the possession of the institution. The Court of Justice confirmed in Case C-491/15 P (*Typke v European Commission*), that 'Regulation No 1049/2001 may not be relied upon to oblige an institution to create a document which does not exist. It follows that, […], an application for access that would require the Commission to create a new document, even if that document were based on information already appearing in existing documents held by it, falls outside the framework of Regulation No 1049/2001'[3].

### 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*)[4], 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 data[5] (hereafter 'Regulation (EC) No 45/2001') becomes fully applicable.

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3 Judgment of the Court of Justice of 11 January 2017, *Typke v European Commission*, C-491/15 P, EU:C:2017:5, paragraph 31.

4 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.

5 Official Journal L 8, 12.1.2001, p. 1.

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/EC[6] (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'[7].

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'[8].

Document 9 contains personal data such as the names and surnames of staff members of the European Commission not holding any senior management positions as well as names and surnames of the natural persons external to the European Commission who are not public figures in a public capacity.

The names 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[9].

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.

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6 Official Journal L 295, 21.11.2018, p. 39.

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

8 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.

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

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[10]. 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, the Secretariat-General concludes that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the withheld 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 'access 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.'

The part of document 9 in question contains information and views shared between the representative of Swedish Environmental Protection Agency and a staff member of the European Commission on the work in the area of crypto currencies, and their views on particular issues relevant for the legislative approaches under consideration in this area. These exchanges of information and views took place in the context of activities aimed at ensuring that the Commission has all the information necessary to conduct a wide-

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

ranging assessment of impacts of all available policy options. The opinions contained in this document do not represent, in light of the specific context of a technical meeting at stake, the final views of the institutions represented. Moreover, they are closely linked with wider Commission policies on blockchain technology and crypto-assets regulation, including their environmental impact, for which a final decision has not yet been taken.

Furthermore, document 9 was drawn up for internal use under the responsibility of the relevant services of the Directorate-General for Communications Networks, Content and Technology and solely reflects the author's interpretation of the interventions made.

Thus, public disclosure of preliminary views on sensitive issues that do not necessarily represent the final position of the stakeholder would have a negative effect on their participation in such informal exchanges and would undermine the Commission's ability to take well-informed decisions. In addition, if preliminary opinions of the relevant services were disclosed, it would make them more hesitant to express their opinions freely from fear of external pressure. This would have a negative effect on officials, who would not ask questions as freely on sensitive questions, and as a result, the institutions involved would be deprived of relevant information concerning possible policy options.

The premature public disclosure of the above-mentioned parts of document 9 would also harm the European Commission's ability to receive frank information on EU regulatory framework for crypto-assets as it could affect the exploration of different policy options for the future. Premature sharing of isolated pieces of information, with little context, would also serve to distort the picture, rather than giving them a full overview with all relevant information.

Therefore, disclosure of the redacted information at this stage would jeopardise the decision-making process in the meaning of the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

The risk of such external pressure is real and not hypothetical given the specific and sensitive nature of the redacted parts.

Indeed, as the General Court has held, 'the possibility of expressing views independently within an institution helps to encourage internal discussions with a view to improving the functioning of that institution and contributing to the smooth running of the decision-making process'[11].

Given the limited volume of the redactions, it is not possible to give more detailed reasons justifying the need for confidentiality without disclosing the opinions of the persons concerned and, thereby, depriving the exception of its very purpose[12].

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[11] Judgment of the General Court of 15 September 2016, *Phillip Morris* v *Commission*, T-18/15, EU:T:2016:487, paragraph 87.

[12] Please see in this respect: Judgment of the General Court of 24 May 2011, *NLG* v *Commision*, T-109/05 and T-444/05, EU:T:2011:235, paragraph 82. See also Judgment of the General Court of 8 February 2018, *Pagkyprios organismos ageladotrofon* v *Commission*, T-74/16, EU:T:2018:75, paragraph 71.

Consequently, the Secretariat-General concludes that the relevant parts of document 9 are protected under the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

Nevertheless, the Secretariat-General would like to underline that the European Commission has put significant efforts to increase the transparency of its work on EU regulatory framework for crypto-assets[13].

## 3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(3), first subparagraph, 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 do not mention any overriding public interest.

Nor has the Secretariat-General been able to identify any public interest capable of overriding the interests protected by the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

## 4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, the Secretariat-General has considered the possibility of granting further partial access to the document requested.

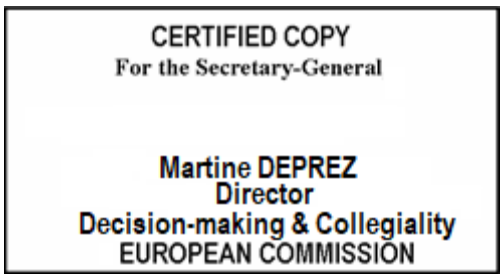
However, for the reasons explained above, no further partial access is possible without undermining the interests described above. The protected parts are covered in their entirety by the invoked exceptions to the right of public access.

[13] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12089-Financial-services-EU-regulatory-framework-for-crypto-assets_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*