EUROPEAN COMMISSION

Brussels, 7.3.2024
C(2024) 1660 final

Mr Alexander Fanta

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

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 – EASE 2023/4175

Dear Mr Fanta,

I refer to your e-mail of 29 September 2023, registered on the same day, in which you submitted 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 (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 18 July 2023, you requested access to, I quote:

‘documents which contain the following information:

‘-All replies from providers of online platforms and trade associations, industry groups as part of the public consultation on the Digital Services Act (DSA) Transparency Database’

The initial request was assigned to the Directorate-General for Communication Networks, Content and Technology.

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In its proposal of fair solution of 2 August 2023, the Directorate-General for Communication Networks, Content and Technology invited you to restrict the scope and informed you that the following two categories of documents were identified:

- Replies from providers of online platforms: approximately 18 documents.
- Replies from trade associations and industry groups: approximately 21 documents.

In your reply to the fair solution proposal of 3 August 2023, you requested to be provided with a detailed list of identified documents or; alternatively, to access the 18 documents in the category ‘replies from providers of online platforms’.

In its initial reply of 29 September 2023, the Directorate-General for Communication Networks, Content and Technology identified the following 18 documents:

- Submission, Google, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 1’)
- Contribution, Snap, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 2’)
- Contribution, Wikimedia, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 3’)
- Contribution, Dailymotion, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 4’)
- Contribution, MG Freesites, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 5’)
- Contribution, Apple, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 6’)
- Contribution, Google, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 7’)
- Contribution, Zalando, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 8’)
- Contribution, CDiscount, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 9’)
- Contribution, Allegro, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 10’)
- Contribution, BOL, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 11’)
- Contribution, Booking, Consultation on the DSA transparency database, Ares(2023)5903603 (‘Document 12’)
- Contribution, MAFRA, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 13’)
- Contribution, Mozilla, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 14’)
- Contribution, Polish News Agency, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 15’)

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- Contribution, Roblox, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 16’)
- Contribution, Vinted, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 17’)
- Submission, Vinted, Consultation on the DSA transparency database, Ares(2023)5903603, (‘Document 18’).

The Directorate-General for Communication Networks, Content and Technology

- granted full access to document 1;
- granted partial access to documents 2 to 9 based on the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001;
- refused access to documents 10 to 18 based on the exception of the first indent of Article 4(2) (protection of commercial interests) Regulation (EC) No 1049/2001 as the Directorate-General for Communication Networks, Content and Technology ‘did not manage to obtain the opinion of the third parties on the public disclosure of these documents’.

In your confirmatory application, you request a review of this position with respect to the refusal to disclose documents 10-18 as you argue ‘that DG Connect applied the exception regarding commercial interests in an overly broad manner’.

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 the review performed at the confirmatory stage and taking into account the replies of the third parties concerned, the Secretariat-General is pleased to inform you that wide partial access is given to documents 10 to 18 with the exception of some parts that are redacted based on the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

The detailed reasons underpinning the assessment are set out below.

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’.

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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 Community institutions and bodies and on the free movement of such data\(^4\) (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/EC\(^5\) (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 requested contain personal data, such as the names, surnames and contact details pertaining to natural persons who are neither public figures acting in a public capacity, nor members of the senior management of the European Commission.

The names\(^8\) 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.

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\(^6\) 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.
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.

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. 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 personal data contained in documents 10 to 18, 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.

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3. **OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

Please note that point (b) of Article 4(1) 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, the widest partial access has been granted to the documents 10-18.

5. **REUSE**

Documents 10-18 originate from third parties. Please note that they are disclosed to you based on Regulation 1049/2001. However, this disclosure is without prejudice to the rules on intellectual property, which may limit your right to reproduce or exploit the released documents without the agreement of the originators, who may hold an intellectual property right on them. The European Commission does not assume any responsibility from their reuse.

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

**CERTIFIED COPY**
For the Secretary-General

Martine DEPREZ
Director
Decision-making & Collegiality
EUROPEAN COMMISSION

Enclosures: [9]