EUROPEAN COMMISSION
Secretariat-General

The Secretary-General

Brussels, 16.3.2017
C(2017) 1901 final

Mr Diego NARANJO
European Digital Rights
Rue Belliard 20
1040 Bruxelles

DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001[1]

Subject: **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2016/5921**

Dear Mr Naranjo,

I refer to your e-mail of 2 February 2017, by 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 ("Regulation 1049/2001").

1. SCOPE OF YOUR REQUEST

In your initial application of 19 October 2016 you requested access to:

- *'all correspondence between the Commissioners and their Cabinets with regard to the Commission's legal service opinion(s) on the drafts of the Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market COM/2016/0593 final - 2016/0280 (COD)'* ;
- *'all correspondence between the Commissioners and their cabinets and the responsible Commission services regarding the Commission's legal service opinion(s) on the drafts of the*

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

Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market COM/2016/0593 final - 2016/0280 (COD)'.

In its initial reply of 1 February 2017, the Directorate-General for Communications Networks, Content and Technology (DG CNECT, hereinafter) identified correspondence relating to the Legal Service's opinions from the Cabinets falling under their remits of competence, namely of Vice-President Ansip and Commissioner Oettinger. This is an email dated 20 July 2016 addressed to the Legal Service concerning the Value Gap in Digital Single Market Commissioner Project Team meeting and its attachment, namely the Note on Digital Single Market Commissioner Project Team meeting (ref. ARES (2016)6764539). Full refusal was based on Article 4(3) (protection of the decision-making process) of Regulation 1049/2001.

Through your confirmatory application you argue that 'the Commission has failed to properly assess the overriding public interest as well as options for a partial release'.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General or service concerned at the initial stage.

Having carried out a detailed assessment of your request in light of the provisions of Regulation 1049/2001, I am pleased to inform you that partial access can be granted to the email and its attachment – Digital Single Market Commissioner Project Team meeting - 20 July 2016. Please find a copy of the documents to which partial access has been granted annexed.

The redacted parts of the email and the attachment to the email, the Option Paper on value gap, fall under the exceptions of Article 4(3), first and second subparagraphs (protection of the decision-making process), of Regulation 1049/2001, for the reasons set out below.

2.1. Protection of the decision-making process

Article 4(3) of Regulation 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.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

The email and its attachment include lines-to-take and preliminary assessments discussed with regard to copyright reform, and in particular the issue of the value gap, between the Cabinets of the Vice-President Ansip and the Legal Service as well as with other Commissioners' Cabinets. Parts of these documents cannot be disclosed as their disclosure would seriously undermine the ongoing decision-making process regarding the adoption of the Commission's proposed Directive for the modernisation of EU copyright rules, and more precisely, what were the different preliminary assessments considered before tabling the legislative proposal.

The Digital Single Market Strategy[2], adopted by the Commission on 6 May 2015, sets out the main elements of the modernisation of EU copyright rules. The Communication on copyright adopted on 9 December 2015 details the next steps in this regard, including on possible legislative proposals and timelines. Further to the proposed Regulation on cross-border portability of online content services adopted the same day as the Communication, the Commission adopted on 14 September 2016, a set of legislative measures, called the 'copyright second legislative package'.

As the Council and the European Parliament still have to take a position on the Commission's proposals, the decision-making process on these proposals is not finished. In particular, concerning the value-gap aspects of the copyright reform, the e-mail and its attachment refer to preliminary assessments for which the decision-making process is fully ongoing. Depending on the negotiations on this particular issue, the Commission may indeed have to adapt its position taking into account the elements contained in the above-mentioned documents. The finalisation of the above-mentioned negotiations is not foreseen before the end of 2017.

The Court of Justice, in the *ClientEarth* and *AccessEuropeInfo*[3] judgments, acknowledged that there may be a need for the Commission to protect internal reflections on the possible policy options available to the institutions in the phase preceding the (inter-institutional) legislative procedure. There is a concrete risk that disclosing the information at this stage will affect the Commission's ability to defend its proposals during the ongoing negotiations with the Council and the Parliament. Furthermore, as established in the *Turco* judgment[4], the Court of Justice distinguished this preliminary assessment of the institution from the presumption of wider openness for the institutions acting in their legislative capacity.

---

2 http://ec.europa.eu/priorities/digital-single-market/

3 Judgment of Court of Justice, 17 October 2013 in case C-280/11 P, *Council v Access Info Europe*.

4 Judgment of Court of Justice, 1 July 2008 in case C-39/05 P and C-52/05 P, *Sweden & Turco v Council*.

In the alternative, even if one were to consider that Article 4(3), first subparagraph of Regulation 1049/2001 no longer applies as the Commission put forward its proposals *(quod non)*, I take the view that for the reasons explained below, the opinions which are reflected in the documents requested are covered by the exception of Article 4(3), second subparagraph of Regulation 1049/2001, as their disclosure would seriously harm the decision-making process of the Commission even after its proposals have been adopted.

Given the sensitivity of the subject matter and the various interests involved (e.g. those of right holders and information society service providers), if these documents were to be released, the Commission would be deprived of its ability to defend its proposal throughout the legislative procedure. The Commission might indeed be called upon to adapt certain aspect of its proposals in the current *legislative* negotiations and take into account options which were considered but not retained in its proposals. Premature disclosure, at this stage, of the documents forming part of the ongoing decision-making process would prejudice the institution's margin of manoeuvre and severely reduce its capacity to foster compromises, which is essential in an area by which several important Commission policies and competences are affected (e.g. information and communication policies, internal market, competition policy, etc.).

Furthermore, the dissemination of preliminary and obsolete positions of the Commission preceding the inter-institutional decision-making process would risk confusing the public and stakeholders rather than providing clarity on the options available. Such preliminary options which were not retained in the Commission's proposals might indeed be subject to further inter-institutional negotiations.

The Commission would also be exposed to undue external pressure in case of premature disclosure. A complete release of the documents at this stage would indeed disseminate preliminary, internal conclusions into the public domain. The risk of such an external pressure is real and non-hypothetical, given the specific and fundamental interest of right holders associations of the different content sectors as well as information society service providers involved in the issue to obtain an outcome which is favourable to them. This could create unjustified and disproportionate reactions which would render the negotiations more difficult.

The sensitive nature of the matters at stake, such as the introduction measures for the use of protected content by information society service providers, provides further support to the conclusion that certain preliminary assessments and positions must be protected in order to shield the institutions' internal assessment against any outside pressure and premature conclusions, by the public, until the final decisions are taken, including the adoption of the Directive[5].

[5] Judgments of Court of Justice, 1 July 2008 in case C-39/05 P and C-52/05 P, *Sweden & Turco v Council*, paragraph 69 and of General Court, 15 September 2016 in cases T-796/14 and T-800/14, *Philip Morris v Commission*.

In light of the foregoing, access to the redacted (parts of the) requested documents is refused based on the exception of Article 4(3), first and second subparagraphs (protection of the decision-making process), of Regulation 1049/2001.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(3), first and second subparagraph, of Regulation 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 put forward any reasoning pointing to an overriding public interest in disclosing the requested documents. Nor have I been able to identify any elements capable of demonstrating the existence of any possible overriding public interest in disclosing the refused elements that would outweigh the interests protected by the first and second subparagraphs of Article 4(3) (protection of the decision-making process) of Regulation 1049/2001.

To the contrary, as explained above the inter-institutional decision-making process is ongoing. Full disclosure of the briefing documents would affect the Commission's ability to act freely from external pressure in effectively defending the Commission's proposal for Directive on a Digital Single Market. I therefore consider that such disclosure would be contrary to the public interest in protecting the Commission decision-making process. Furthermore, I assure you that the Commission interpreted and applied the exceptions of Article 4 of Regulation 1049/2001 strictly, which results in partial access to the requested documents.

In consequence, I consider that in this case there is no overriding public interest that would outweigh the interests in safeguarding the protection of decision-making process, based on Article 4(3), first and second subparagraphs of Regulation 1049/2001.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting wider access to the documents requested. However, for the reasons explained above, no meaningful (wider) partial access is possible without undermining the interests described above.

Consequently, I have come to the conclusion that parts of the documents requested are covered by the invoked exceptions to the right of public access.

5. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the 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
Alexander ITALIANER
Secretary-General

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

Enclosures: redacted documents