



EUROPEAN COMMISSION

Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs

Director General

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Mrs Julia Reda
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Subject: Your application for access to documents – Notification 2017/127/D - GestDem No 2017/4478

Dear Mrs Reda,

We refer to your e-mail dated 28 July 2017 in which you made a request for access to documents, registered under the above-mentioned reference number, and to our reply dated 14 September 2017, in which we announced that we intended to provide you with a complementary reply as soon as the consultation with other Commission services and third parties would be finished.

Following this consultation, 14 additional documents have been identified as relevant for your request and are listed in the attached table.

I consider your request to cover documents held up to the date of your application.

Following the assessment of the documents identified, please note that we have organised them into the following categories:

1. Third-party documents

- 1.1. Comments issued by Italy and Sweden and the reply provided by Germany concerning notification 2017/127/D. These documents are listed respectively at Nos 1, 2 and 3 in table II. Please note that they are fully disclosed, for the reasons described below.
- 1.2. Letter of 30 June 2017 to Commissioner Bieńkowska, listed at No 4 in table II. Please note that it is partially disclosed, for the reasons described below
- 1.3. Letter of 22 May 2017 from several external stakeholders to different members of the Commission, listed at No 5 in table II. Please note that it is partially disclosed, for the reasons described below.

2. Internal Commission's documents

- 2.1. E-mail of 31 March 2017 including the preliminary consultation of DG GROW to the Commission's services on the notification 2017/127/D, listed at No 6 in table II. Please note that it is partially disclosed, for the reasons described below.
- 2.2. E-mail of 03 April 2017 from DG GROW informing the Commission's hierarchy on notification 2017/127/D, listed at No 7 in table II. Please note that it is partially disclosed, for the reasons described below.
- 2.3. Briefing for and minutes of the meeting of 12 June 2017 between Cabinet Bieńkowska and Facebook, listed respectively at Nos 8 and 9 in table II. Please note that they are partially disclosed, for the reasons described below.
- 2.4. Replies of the Commission's services to the preliminary consultation by DG GROW concerning notification 2017/127/D, listed at Nos 10, 11, 12 and 13 in table II. Please note that they are not disclosed, for the reasons described below.
- 2.5. Letter of Commissioner Bieńkowska of 19 July 2017 listed at No 14 in table II. Please note that it is partially disclosed, for the reasons described below.

Having examined documents Nos 1, 2, 3, 4, 5, 6, 7, 8, 9 and 14 pursuant to Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents¹, I am pleased to inform you that those documents are disclosed under the modalities described below.

Documents Nos 1, 2, 3, 4 and 5 originate from third parties. Please note that documents received from third parties are disclosed for information only and cannot be re-used without the agreement of the originator, who holds copyright on them. They do not reflect the position of the Commission and cannot be quoted as such.

Documents Nos 6, 7, 8, 9 and 14 originate from the European Commission. You may reuse these requested documents free of charge for non-commercial and commercial purposes provided that the source is acknowledged and that you do not distort the original meaning or message of the documents. Please note that the Commission does not assume liability stemming from the reuse².

Regarding documents Nos 8 and 9, access is granted to the parts which fall under the scope of your request. Please note that the parts of the documents which fall outside the scope of your request have been blanked out.

Documents Nos 4, 5, 6, 7, 8, 9 and 14 contain personal data. Personal data of non-senior management Commission staff appearing therein has been redacted from the documents disclosed to you, as well as personal data of the third parties with whom the Commission was in correspondence. Pursuant to Article 4(1)(b) of Regulation (EC) 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with European Union legislation regarding the protection of personal data.

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43.

² See the Decision of the Commission of 12 December 2011 (2011/833/EU), OJ L 330/39 of 14 December 2011 for details; this Decision does not apply to documents for which third parties hold the copyrights, Article 2(2)(b).

The applicable legislation in this field is Regulation (EC) 45/2001³ on the protection of individuals with regard to the processing of personal data by the Union institutions and bodies and on the free movement of such data. When access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable⁴. According to Article 8(b) of this Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced.

We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned.

In case you would disagree with the assessment that the expunged data are personal data which can only be disclosed if such disclosure is legitimate under the rules of personal data protection, you are entitled, in accordance with Article 7(2) of Regulation (EC) 1049/2001, to make a confirmatory application requesting the Commission to review this position. Such confirmatory request has to be submitted to the Secretary-General of the Commission within fifteen working days of receiving this letter.

All correspondence should be sent either electronically to sg-acc-doc@ec.europa.eu or by regular mail to the following address:

European Commission
Secretary-General
Transparency unit SG-B-4
BERL 5/327
B-1049 Brussels

Documents Nos 6, 7, 8 and 9 have been expunged of certain information the disclosure of which is prevented by the exception to the right of access laid down in Article 4(3) second paragraph of Regulation (EC) 1049/2001.

Moreover, having examined documents Nos 10, 11, 12 and 13 pursuant to Regulation (EC) 1049/2001, I hereby inform you that access to them cannot be granted because they contain information the disclosure of which is also prevented by the exception to the right of access laid down in Article 4(3) second paragraph of Regulation (EC) 1049/2001.

Article 4(3) second paragraph of Regulation 1049/2001 provides that "*[a]ccess 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*".

Documents Nos 10, 11, 12 and 13, as well as the expunged parts of documents Nos 6, 7, 8 and 9, contain opinions for internal use that form part of deliberations and preliminary consultations between the Commission's services concerning their position regarding notification 2017/127/D. The Commission did not finally react to the notification.

³ 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, OJ L 8, 12.1.2001, p. 1.

⁴ Judgment of the Court of Justice of the EU in case C-28/08 P, Commission/The Bavarian Lager Co. Ltd.

Given the sensitive topic raised under notification 2017/127/D⁵ and the important number of external reactions⁶ in the context of the notified draft, there is a real and serious risk that the interim, partial, internal and personal opinions contained in documents Nos 10, 11, 12 and 13, as well as in the expunged parts of documents Nos 6, 7, 8 and 9, are used to undermine the institution's decision making process. Disclosure of these opinions for internal use, exchanged between Commission services' staff as part of preliminary consultations, would seriously affect the decision-making process within the Commission, as the latter's staff would no longer be able to freely exchange views and advice in order to allow the Commission to take a position on a sensitive draft notified under Directive (EU) 2015/1535⁷. In addition, these particular documents and internal opinions need to be protected to preserve the essence of the power of initiative conferred on the Commission by Directive (EU) 2015/1535, and thus, its capacity to assess, wholly independently, the appropriateness of a notified draft⁸.

The possibility of granting partial access to documents Nos 10, 11, 12 and 13, in accordance with Article 4(6) of Regulation (EC) No 1049/2001, has also been examined. However, taking into consideration the information available, this has not been considered to be possible since the documents in question are entirely covered by the exception under Article 4(3) second paragraph of Regulation (EC) No 1049/2001.

The exceptions laid down in Article 4(3) of Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the document. However, in this case, the information provided by you does not show that the public interest in making the content of the requested documents public would outweigh the harm that disclosure would cause to the interests protected by the invoked exception.

Moreover, concerning the application of the exception to the right of access laid down in Article 4(3) second paragraph of Regulation (EC) 1049/2001, I would like to inform you that in accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to submit a confirmatory request to the Secretary-General of the Commission within fifteen working days of receiving this letter.

⁵ The notified draft tried to strike a complex balance between individual rights, effective law enforcement and the need to guarantee the free provision of services when defining measures to avoid the proliferation of criminal offences committed via social networks.

⁶ 18 external reactions were submitted to the Commission concerning notification 2017/127/D, including from a German governmental representative, as showed in the table joined to our reply of 14 September 2017 and in table II joined to the present letter.

⁷ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241, 17.9.2015, p. 1.

⁸ In this regard, see Judgment of the General Court of 13 November 2015 in joined cases T-424/14 and T-425/14, *ClientEarth v Commission*, point 95: "*This is all the more important in order to preserve the essence of the power of initiative conferred on the Commission by the Treaties and its capacity to assess, wholly independently, the appropriateness of a policy proposal. More specifically, it is important to protect that power of initiative from any influences exerted by public or private interests which would attempt, outside of organised consultations, to compel the Commission to adopt, amend or abandon a policy initiative and which would thus prolong or complicate the discussion taking place within that institution*".

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Yours sincerely,



Lowri Evans

Enclosures: - Table II
- 10 documents