Subject: Request for access to documents

Ref.: Your e-mail of 26 June 2013, registered as GESTDEM 2013/3548

Dear Mr. Ntetsikas,

I refer to your e-mail mentioned above requesting access to documents, under 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, relating to the following matters:

I. Documents drawn up by the Legal Service for internal use reflecting the judgment of the Court of Justice in the joined Cases C-92/09 and C-93/09 (hereafter "the Schecke judgment") as well as notes of the Legal Service to the various Directorates-General reflecting the Schecke judgment and advising them on legislative matters, on administrative procedures and on FP6 and FP7 contractual procedures (points 1 to 4 of your request).

II. Documents drawn up by the Legal Service on specific requirements set out in FP6 and FP7 i.e. the requirement in the Guide for Applicants and in the Negotiation Guide of FP6 and FP7 related to the inclusion in the proposals or in the contract/agreement of short CV's or profiles and the requirement set out in the FP6 and FP7 Guides to include in the contract/agreement conditions on the key persons taking part in the work (point 5 to 7 of your request)...

After examination of the Legal Service's files, the following documents have been identified as falling within the scope of your request:

I. Documents drawn up by the Legal Service for internal use reflecting the judgment of the Court of Justice in the joined Cases C-92/09 and C-93/09 (hereafter "the Schecke judgment") as well as notes of the Legal Service to the various Directorates-General reflecting the Schecke judgment and advising them on legislative matters, on administrative procedures and on FP6 and FP7 contractual procedures.

2. Note SJ.b(2010)1011204 of 7 December 2010 to Directorate-General for Agriculture and Rural Development (DG AGRI) and to Directorate-General for Budget (DG BUDG).

II. Documents drawn up by the Legal Service upon specific topics on FP6 and FP7.

The Legal Service has not identified any document corresponding to points 5, 6 and 7 of your request.

Having carefully examined the concerned documents abovementioned under numbers 1 to 5, I have come to the conclusion that full access can be granted to document under number 1 whereas, pursuant to Article 4(6) of Regulation 1049/2001, partial access can be granted to those parts of document under number 2, 3, 4 and 5 that are not covered by any of the exceptions foreseen at Article 4 of this Regulation. Accordingly, please find enclosed a copy of document under number 1 and a copy of the expunged version of document under number 2, 3, 4 and 5. I must however remind you that they cannot be reproduced or disseminated for commercial purposes without prior consent given by the Commission.

As regards the withheld parts of documents under number 2, 3, 4 and 5, I regret to inform you that they cannot be disclosed since they are covered by the exceptions provided for in Article 4(2) second indent ("the protection of legal advice") and Article 4(3) second paragraph ("the protection of the decision-making process") of Regulation 1049/2001.

Document under number 2 is a legal opinion delivered by the Legal Service to the attention of DG AGRI and DG BUDG following the Schecke Judgment of 9 November 2010. The refused parts of this document contain the opinion of the Legal Service on the consequences of the Schecke Judgment and the concrete measures to be taken by the Commission to comply with the judgment of the Court as well as a general analysis of other legal issues arising from the judgment in the referred case.

2 "The institutions shall refuse access to a document where disclosure would undermine the protection of: [...] legal advice [...] unless there is an overriding public interest in disclosure".
3 "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".
Legal opinions under numbers 3 and 5 were delivered by the Legal Service in response to consultations by DG REGIO and DG MARE with regard to the impact of the Schecke Judgment on the publication rules applying to beneficiaries of the Structural/Cohesion Funds and the European Fisheries Fund. Legal opinion under number 4 was delivered by the Legal Service in response to a consultation by DG AGRI on the follow-up necessary to take into account the Schecke Judgment as regards the publication of data of the beneficiaries of EU agricultural funds. These legal opinions contain, on the one hand, the analysis of the impact of the Schecke Judgment on the publication rules applying to beneficiaries of the referred EU funds and, on the other hand, an in depth assessment of the different options of publication of such personal data in view of future legislative proposals.

In this respect, the Commission adopted, on 2 December 2011, the draft proposal for a Regulation COM(2011)804 final⁴; on 11 September 2012, an amended proposal for a Regulation COM(2012)496 final⁵ and, on 25 September 2012, the amendment to the Commission draft proposal COM(2012)628 final/2 for a Regulation on the financing, management and monitoring of the common agricultural policy⁶. These drafts proposals contain provisions on the publication of information on beneficiaries of the referred EU funds in line with the Schecke Judgment. The legislative procedures for their adoption are still pending.

Full disclosure of the concerned legal opinions would, firstly, undermine the protection of legal advice provided for under Article 4(2) second indent of Regulation 1049/2001, which, as recognised by the Court of Justice, must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice⁷. Indeed, it would make known to the public internal opinions drafted under the responsibility of the Legal Service and intended for the Commission's services responsible for the application of the Schecke Judgment and for preparing new legislation on the matter. As stated above, the refused parts of the documents contain the analysis of the Legal Service on a wide range of legal issues relating to a highly sensitive matter, which is the protection of personal data. These legal issues have been subject of discussion in the framework of the adoption of the Commission's draft proposals and will be still subject of discussion in the course of the ongoing interinstitutional procedures.

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In the course of the ongoing discussions, the Commission may, at any moment and in particular following possible amendments proposed by the Parliament, amend its initial proposals. Disclosing the legal analysis contained in the withheld parts of the documents, at this stage of the interinstitutional legislative procedure, would clearly have a serious impact on the Commission's interest in seeking and receiving frank, objective and comprehensive legal advice on this sensitive matter and would deprive the Commission of an essential element in the framework of the preparation and negotiation of such draft proposals.

Secondly, full disclosure of these legal opinions would also prejudice the Commission's margin of manoeuvre in the ongoing discussions. Indeed, putting in the public domain the possible options the Commission may consider in the discussions with the Parliament and the Council would severely reduce its capacity to contribute to reaching compromises, thus seriously affecting its decision-making process as well as the best possible outcome of the negotiations. Consequently, the said legal opinions are also covered by the exception provided for in Article 4(3), second subparagraph, of Regulation 1049/2001.

In addition, disclosure of the concerned legal opinions would also weaken the Commission's position in any possible dispute relating to this matter, including its right of defence. This risk is not hypothetical, but a real and concrete one.

Pursuant to Article 4(2) and (3) of Regulation 1049/2001, the exceptions to the right of access must be waived if there is an overriding public interest in disclosing the requested documents. I understand the interest of transparency in that it enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. However, in the present case, for the reasons explained above, I consider that the interest in transparency does not outweigh the general interest that the Commission and its services receive frank, objective and comprehensive legal advice and that the institution's decision-making process is protected, including the Commission's right of defence.

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position. Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

The Secretary General  
European Commission  
B-1049 Bruxelles  
e-mail: sg-acc-doc@ec.europa.eu

Yours sincerely,

[Signature]

Luis ROMERO REQUENA

Enclosures: 5