EUROPEAN COMMISSION

Brussels, 15.5.2020
C(2020) 3325 final

Mr Mathias Schindler
Bundestagsburo Julia Reda
MdEP Unter den Linden 50
11011 Berlin
Germany

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 2019/7172**

Dear Mr Schindler,

I refer to your letter of 28 February 2020, registered on 4 March 2020, 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[2] (hereafter 'Regulation (EC) No 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 16 November 2019, addressed to the Legal Service, you requested access to, I quote:

> 'all information held by the European Commission including the Legal Service concerning the notification requirements of the German ancillary copyright law as well as the [S]panish ancillary copyright law. This includes any communication between [the] Legal Service and DG Grow preceding and following the request of 2015'.

[1] OJ L 345, 29.12.2001, p. 94.
[2] OJ L 145, 31.5.2001, p. 43.

You note that the 2015 request is a note for the attention of the Director-General of the Legal Service concerning legal guidance on the scope of Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services in relation to the rules on ancillary copyright adopted in Germany and Spain, referenced GROW/B/2 (2015) 4899298.

As you have been informed, your request was split into three separate requests[3] and the Directorate-General for Communications Network, Content and Technology replied to the part of your request which relates to 'all information held by the European Commission including the Legal Service concerning the notification requirements of the German ancillary copyright law as well as the [S]panish ancillary copyright law'.

The current review performed by the Secretariat-General relates only to the reply of Directorate-General for Communications Network, Content and Technology.

In its initial reply if 27 February 2020, the Directorate-General for Communications Network, Content and Technology stated that some of the documents falling within the scope of your current request were already identified and disclosed to you in the context of your previous request for access GESTDEM 2019/5565 of 15 November 2019 (referenced Ares(2019)7073401) and did not re-identify them.

The Directorate-General for Communications Network, Content and Technology has identified the following documents in the scope of your request:

- Complaint received by the European Commission, referenced CHAP(2015)02897, (hereafter 'document 1'), which includes the following annex:
    - Article 'Tasa Google o canon AEDE: una reforma desacertada' by Rodrigo Bercovitz and its summary in English (hereafter 'document 1.1');
- Pre-closure letter sent by the Commission to the complainants in CHAP(2015)02897 and CHAP(2017)00318 dated 12 June 2019, reference, Ares(2019)3743591, (hereafter 'document 2');
- Complaint received by the European Commission, referenced CHAP(2016)01816, (hereafter 'document 3'), which includes the following annexes:
    - Ley 21/2004 de 5 de noviembre 2014 (hereafter 'document 3.1');
    - Article 'The effect of failure to notify the Spanish and German ancillary copyright laws' by Bo Vesterdorf (hereafter 'document 3.2');
    - Oposición de varios grupos parlamentarios a la adopción del nuevo apartado 2 del artículo 32, data la falta de notificación (hereafter 'document 3.3');

[3] GestDem 2019/6767 attributed to Legal Service, GestDem 2019/7172 attributed to the Directorate-General for Communications Network, Content and Technology, GestDem 2019/7175 attributed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs.

- Anteproyecto de Ley por la que se modifica el Texto Refundido de la Ley de Propiedad Intelectual, aprobado por Real Decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil (hereafter 'document 3.4');
- Article 'The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government - Its Compliance with International and EU Law' by Raquel Xalabarder (hereafter 'document 3.5');
- Informe de la CNMC, (PRO/CNMC/0002/14) Propuesta referente a la modificación del artículo 32.2 del Proyecto de Ley que modifica el Texto Refundido de la Ley de Propiedad Intelectual, de 16 de mayo de 2014 (hereafter 'document 3.6');
- Lista de agregadores que han cesado sus actividades en España tras la Medida Legislativa Española (hereafter 'document 3.7');
- Artículo sobre el Informe de Julia Reda (hereafter 'document 3.8');
- Coalición Prointernet – AFI, "Argumentación económica sobre la propuesta de modificación de la LPI en lo relativo a la agregación de contenidos informativos", julio 2014 (hereafter 'document 3.9');
- Notas de prensa de AEEPP (Asociación Española de Editoriales de Publicaciones Periódicas) (hereafter 'document 3.10');
- Preguntas del Parlamento Europeo de 12 de febrero y 3 de marzo de 2015 (hereafter 'document 3.11');
- Denuncia ante la Comisión Europea de septiembre de 2014 (antes de la aprobación definitiva de la reforma de la Ley de Propiedad Intelectual Española) y respuesta de la Comisión (hereafter 'document 3.12');
- Escritos al Congreso de los Diputados y en el Senado Español instando a la eliminación de los cánones que introducía la reforma de la Ley de Propiedad Intelectual y respuestas recibidas (hereafter 'document 3.13');
- Presentación de un escrito en el Consejo Asesor del Gobierno en Telecomunicaciones y Sociedad de la Información (CATSI) (hereafter 'document 3.14');

– Pre-closure letter sent by the Commission to the complainant dated 11 June 2019, reference, Ares(2019)3717100, (hereafter 'document 4');
– Complaint received by the European Commission, referenced CHAP(2017)00318, (hereafter 'document 5'), which includes the following annexes, that are partly the same as those annexed to document 1 and 3:
  - Ley 21/2004 de 5 de noviembre 2014 (hereafter 'document 3.1');
  - Denuncia presentada ante la Comisión Europea (DG GROW) con fecha 1 de octubre de 2015 (hereafter 'document 1');
  - Informe de la CNMC, (PRO/CNMC/0002/14) Propuesta referente a la modificación del artículo 32.2 del Proyecto de Ley que modifica el Texto Refundido de la Ley de Propiedad Intelectual, de 16 de mayo de 2014 (hereafter 'document 3.6');
  - Informe sobre la gestión colectiva de derechos de propiedad intelectual de la CNC (hereafter 'document 5.1')

- Article 'Tasa Google o canon AEDE: una reforma desacertada' by Rodrigo Bercovitz and its summary in English (hereafter 'document 1.1').

In its above-mentioned initial reply, the Directorate-General for Communications Network, Content and Technology fully refused access to these documents based on the exceptions of Article 4(1)(b) (protection of privacy and the integrity of the individual) and the first indent of Article 4(2) (protection of the commercial interests) 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 fresh review of the reply given by the Directorate-General concerned at the initial stage.

– Following this review, I can inform you that:

  - partial access is granted to documents 2, subject to redactions based on Article 4(1)(b) (protection of the privacy and the integrity of the individual) and the first indent of Article 4(2) (protection of commercial interests) of Regulation (EC) No 1049/2001;
  - wide partial access is granted to documents 1, 3, 4 and 5, with all their annexes, subject to redactions based on Article 4(1)(b) (protection of the privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

– Please note that some parts of documents 1, 3 and 5 have been marked as 'out of scope' as they do not relate to the notification requirements of the Spanish ancillary copyright law.

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.

[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] OJ 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 […]'.

The documents contain personal data such as the names and initials of staff members of the European Commission who do not form part of the senior management of the institution. Moreover, they contain the personal data of other individuals, who are not public figures acting in their public capacity, such as their names, phone numbers, email addresses, identity numbers. The documents also contain handwritten signatures.

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.

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[9].

---

6 OJ L 205, 21.11.2018, p. 39.

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

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

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, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the 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 commercial interests

The first indent of Article 4(2) of Regulation (EC) No 1049/2001 stipulates that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of […] commercial interests of a natural or legal person, including intellectual property, […] unless there is an overriding public interest in disclosure'

A very limited part of document 2 has to be withheld in application of Article 4(2), first indent of Regulation (EC) No 1049/2001, as this information is commercially sensitive since it represents information about the legal representative of one of the complainants.

Information revealing details about clients of law firms is not publicly available, as it results from an understanding between the firm and its client that such information would remain confidential, according to the professional ethical obligations.

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

Given the competitive environment in which law firms operate, information disclosing the identity of their clients, or vice-versa, might give competitors an unfair advantage. Moreover, it can undermine the client's trust in the law firm concerned, if the existence of their business relationship becomes publicly known. Therefore, this information should be considered as commercially sensitive business information.

Consequently, there is a real and non-hypothetical risk that public access to the above-mentioned limited information would undermine the commercial interests of the company involved. I conclude, therefore, that access to the withheld parts of the requested documents must be denied on the basis of the exception laid down in the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(2) 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 raise any specific arguments demonstrating the existence of an overriding public interest.

In the *Port de Brest* v *Commission* judgment[10], the General Court confirmed once again that the applicant must rely on specific circumstances to show that there is an overriding public interest, which is able to justify the disclosure of the documents.

In addition, I have not been able to identify any public interest that would outweigh the protection of interests protected under Article 4(2) of Regulation (EC) No 1049/2001.

Please note also that Article 4(1)(b) 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

Please note that partial access is granted to all the above-mentioned documents.

[10] Judgment of the General Court of 19 September 2018, *Port de Brest* v *Commission*, T-39/17, EU:T:2018:560, paragraph 104.

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

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

Enclosures: (5)