



EUROPEAN COMMISSION

LEGAL SERVICE
The Director General

Brussels, 16 June 2020

BY E-MAIL

Mr Robert Gorwa
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Subject: Request for access to documents

Ref.: Your application of 20 April 2020 registered under reference GestDem 2020/3307

Dear Mr Gorwa,

I refer to your application mentioned above, addressed to Directorate-General Internal Market, Industry, Entrepreneurship and SMEs (DG GROW), by which you request, under Regulation (EC) No 1049/2001¹, access to:

1. *“the comments issued by Italy and Sweden;*
2. *the draft law assessment on 2017/127/D put together by JUST and CNECT, and shared internally between JUST and CNECT via email on 23 May 2017 [potential reference number: Ares(2017)5237754];*
3. *any other analysis, commentary or opinions on the notification 2017/127/D from the Legal Service, DG CNECT, DG GROW, DG JUST, or other DGs, including draft reports, memos, or other documents“.*

As you were informed, your request has been attributed to DG GROW (GestDem reference 2020/2274), DG CNECT² (GestDem reference 2020/3305), DG JUST³ (GestDem reference 2020/3306) and the Legal Service (GestDem reference 2020/3307). The present reply refers to the documents under the competence of the Legal Service.

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 L145, 31.05.2001, page 43).

² Directorate-General for Communications Networks, Content and Technology.

³ Directorate-General for Justice and Consumers.

After examination of the files of the Legal Service, the following document has been identified as matching the terms of your request:

- email of 30 May 2017 to the attention of DG CNECT and DG JUST with title “*DE Notification TRIS/2017/217 – NetzDG*” (document reference Ares(2017)4266643).

1. ASSESSMENT

The document requested is a preliminary legal assessment drafted by the Legal Service, in response to an informal consultation of 24 May 2017 by DG CNECT, on the joint preliminary legal analysis drawn up by DG JUST / DG CNECT of the draft law notified by the German authorities under Directive (EU) 2015/1535⁴ (“Transparency Directive”) to improve law enforcement in social networks (Netzdurchsetzungsgesetz, “*NetzDG*”).

Having carefully examined the requested document, I regret to inform you that it cannot be disclosed since it is covered by the exceptions provided for in Article 4(2), second indent (“*the protection of legal advice*”) and Article 4(3), first subparagraph (“*the protection of the decision-making process*”), of Regulation (EC) No 1049/2001.

2. FRAMEWORK AND REASONS FOR REFUSAL OF THE REQUESTED LEGAL OPINION

At the outset, it should be noted that document Ares(2017)4266643 does not relate to any legislative activity. As stated before, it was drawn up by the Legal Service as part of its preparatory work for its response to a consultation by DG CNECT in the context of an administrative procedure, namely the notification by Germany of a draft technical regulation under Article 5 of Directive (EU) 2015/1535.

The document requested contains a preliminary assessment of some legal issues concerning the notification “*TRIS/2017/217/D – NetzDG*” of the draft law in light of Union law, namely the E-commerce Directive⁵ (ECD), and the EU Charter of Fundamental Rights⁶. It was drawn up by the Legal Service at short notice and does not represent the final position of the Legal Service, let alone of the Commission. In this respect, please be informed that the Commission did not finally react to the German notification.

Furthermore, on 30 March 2020 the German authorities notified to the Commission the “*Draft Act amending the Network Enforcement Act*” (TRIS/2020/174/D) which provides an amendment to the NetzDG notified to the Commission in 2017 (TRIS/2017/217/D) with the objective, among others, to reinforce the fight against illegal content on social networks. The Commission’s services are, at present, assessing the notified draft and, in this context, the legal assessment contained in the document requested is still relevant and subject of discussion.

In addition, the issue is currently under discussion at the highest political level in the context of the *EU Digital Services Act* initiative announced by Commission President von der Leyen in her political guidelines, which will aim precisely at ensuring a coherent European approach to effectively address the question of illegal activities on the Internet, as well as to regulate the obligations for platforms in this regard.

⁴ 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).

⁵ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ L 178, 17.7.2000, p. 1).

⁶ Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, p. 391).

In the light of the above, I consider that disclosure of the document requested would, firstly, undermine the protection of legal advice provided for under Article 4(2), second indent⁷, of Regulation (EC) No 1049/2001. As recognised by the Court of Justice, this exception must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice⁸. Its disclosure would make known to the public an internal and preliminary legal assessment on sensitive matters that are the subject of ongoing discussions at different levels, drafted under the responsibility of the Legal Service and intended for the Commission's services responsible for the implementation of the Union law on the matter.

Consequently, I consider that disclosure of the document requested would have, in a foreseeable manner, a serious impact both on the Commission's interest in seeking and receiving legal advice and on the Legal Service's capacity to assist the Commission and its services in the assessment of this sensitive matter. The frankness, objectivity and comprehensiveness as well as the expeditiousness of the legal advice would be seriously affected if legal advice on sensitive matters, including documents reflecting preparatory activities for the provision of such advice, as in the present case, were to be disclosed, thus depriving the Commission of an essential element in the framework of its work.

This, in turn, would seriously undermine the Commission's capacity to take decisions in the framework of the ongoing bilateral discussions with the German authorities on the notified draft law TRIS/2020/174/D amending *NetzDG* (notification TRIS/2020/174/D), where the legal issues assessed on a preliminary basis in the document requested are still relevant. Disclosure would also seriously jeopardize the ongoing discussions and the decisions to be taken by the Commission in the framework of *EU Digital Services Act*, where the questions assessed in that document are relevant as well. Therefore, I conclude that the requested document is also covered by the exception provided for in Article 4(3), first paragraph ("*the protection of the decision-making-process*")⁹, of Regulation (EC) No 1049/2001.

In the light of the foregoing, I consider that the document with the reference Ares(2017)4266643 must remain confidential.

3. POSSIBILITY OF GRANTING PARTIAL ACCESS

As laid down in Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the document requested. However, after careful examination, I have come to the conclusion that it is entirely covered by the exceptions invoked so that a partial disclosure cannot be granted without harming the protected interests.

4. OVERRIDING PUBLIC INTEREST

Pursuant to Article 4(2) and (3) of Regulation (EC) No 1049/2001, the exceptions to the right of access must be waived if there is an overriding public interest in disclosing the requested document. In order for an overriding public interest in disclosure to exist, this interest, firstly, has to be public and, secondly, overriding, *i.e.* in this case, it must outweigh the interests

⁷ "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".

⁸ C-39/05P and C-52/05P, *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, ECLI:EU:C:2008:374, paragraph 42.

⁹ "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."

protected under Article 4(2), second indent, and Article (3), first subparagraph, of Regulation (EC) No 1049/2001. In the present case, I see no elements capable of showing the existence of an overriding public interest in disclosure of the requested document that would outweigh the public interest in the protection of legal advice and the institution's decision-making processes.

The fact that the document requested relates to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness¹⁰, provides further support to this conclusion.

5. MEANS OF REDRESS

Should you wish this position to be reconsidered, you should present in writing, within fifteen working days from receipt of this letter, a confirmatory application to the Commission's Secretariat-General at the following address:

European Commission
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/76
B-1049 Brussels

or by e-mail to : sg-acc-doc@ec.europa.eu

Yours sincerely,

[*signed electronically*]
Luis ROMERO REQUENA

¹⁰ Case C-139/07P, *Commission v. Technische Glaswerke Ilmenau GmbH*, ECLI:EU:C:2010:376, paragraphs 53-55 and 60.