



EUROPEAN COMMISSION

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C(2020) 6418 final

Ms Frances Lewis
Les Saules
12300 Bouillac
France

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 – GESTDEM 2020/3538**

Dear Ms Lewis,

I refer to your email of 7 August 2020, registered on the same date, 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 documents² (hereafter ‘Regulation (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST

On 31 May 2020, you sent an email to the Directorate-General for Justice and Consumers, in which you asked for information relating to the complaints and procedures initiated as their result, concerning the systematic failure to enforce consumer rights in Cyprus.

In the same email, you requested access to the letters exchanged in 2019 between the European Commission and the Cypriot authorities.

The Directorate-General for Justice and Consumers identified the following documents as falling under the scope of your application:

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

- additional letter of formal notice, dated 25 July 2019, sent by the European Commission to the Cypriot authorities in the context of the infringement procedure 2013/2082, concerning the failure to correctly apply and enforce Directive 2005/29/EC³ on unfair commercial practices and Directive 93/13/EEC⁴ on unfair terms in consumer contracts in the context of the purchase of immovable property in Cyprus (hereafter ‘document 1’),
- the Cypriot authorities’ reply dated 25 September 2019 (hereafter ‘document 2’).

In its initial reply of 22 July 2020, the Directorate-General for Justice and Consumers refused access to the above-mentioned documents, based on the exception provided for in the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001. The Directorate-General for Justice and Consumers provided also the replies to your request for information.

In your confirmatory application, you request a review of this position. You also submitted other observations concerning the replies provided by the Directorate-General for Justice and Consumers to your request for information. Please note that the present reply concerns only your confirmatory application for public access to documents under Regulation (EC) No 1049/2001

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.

Having examined your confirmatory application, I regret to inform you that I have to confirm the initial decision of the Directorate-General for Justice and Consumers to refuse access to the documents in question, on the basis of the third indent of Article 4(2) of Regulation (EC) No 1049/2001 (protection of the purpose of inspections, investigations and audits), for the reasons set out below.

The third indent of Article 4(2) of Regulation (EC) No 1049/2001 provides that the ‘institutions shall refuse access to a document where disclosure would undermine the protection of [...] the purpose of inspections, investigations and audits’.

I note that in your confirmatory application, you do not contest the applicability of the exception invoked by the Directorate-General for Justice and Consumers to the documents requested. Instead, your argumentation concentrates on the issue of the

³ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council. OJ L 149, 11.6.2005, p. 22–39.

⁴ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. OJ L 95, 21.4.1993, p. 29–34.

overriding public interest that, in your view, warrants public disclosure of the documents concerned. This issue is addressed in point 3 of this decision.

The requested documents form part of the file concerning the procedure laid down in Article 258 of the Treaty on the Functioning of the European Union. That procedure consists of two consecutive stages: the administrative pre-litigation stage and the judicial stage before the EU Court. The purpose of the pre-litigation procedure is to allow the Member State to put an end to any alleged infringement, to enable it to exercise its rights of defence and to define the subject matter of the dispute with a view to bringing an action before the Court.⁵

The EU Court has interpreted the third indent of Article 4(2) of Regulation (EC) No 1049/2001, among others, in its *Liga para a Protecção da Natureza* judgment, in which it underlined that in ongoing infringement cases, the institution may base itself on a general presumption of non-disclosure⁶. This confirmed the Court's earlier *Petrie* judgment, in which it ruled that 'the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure.

This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgment of the Court of Justice⁷.

Consequently, all documents in the file are covered by a general presumption of non-disclosure based on the exception of the third indent of Article 4(2) of Regulation (EC) No 1049/2001.

The requested documents relate to the ongoing investigation, under the infringement procedure 2013/2082. Public disclosure of the requested documents would not only negatively influence the dialogue between the European Commission and the Member State, for which a climate of trust is essential, but would also alter the strictly bilateral nature of the infringement procedure as provided for in Article 258 of the Treaty on the Functioning of the European Union.

Please also note that the purpose of Regulation (EC) No 1049/2001 is to give the general public a right of access to documents of the institutions and not to lay down rules designed to protect the particular interest which a specific individual or group of individuals may have in gaining access to a document. Similarly, in assessing an application under Regulation (EC) No 1049/2001, the European Commission takes into

⁵ Judgment of the Court of Justice of 10 December 2002, *Commission v Ireland*, C-362/01, EU:C:2002:739, paragraphs 15 and 16.

⁶ Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza and Finland v Commission*, Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraphs 55, 65-68.

⁷ Judgment of the Court of First Instance of 11 December 2001, *Petrie and Others v Commission*, T-191/99, EU:T:2001:284, paragraph 68.

account whether the disclosure of the requested document may undermine any of the interests protected by Article 4 of Regulation (EC) No 1049/2001.

In this case, and at this stage of the pre-litigation infringement procedure, the disclosure of the requested document would adversely affect the European Commission's investigation, as it would undermine the climate of mutual trust required to resolve disputes between the European Commission and the Member State without having to use the judicial phase of the infringement procedure. It would have a negative effect on the extent to which the European Commission can conduct negotiations with the Member State with the objective that the Member State complies voluntarily with European Union law.

Having regard to the above, I consider that the use of the exception under the third indent of Article 4(2) of Regulation (EC) No 1049/2001 on the grounds of protecting the purpose of inspections, investigations and audits is justified, and that access to the requested documents must be refused on that basis.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions 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 argue that the public disclosure of the requested documents would be in the public interest, given the significant time span since opening of the investigation 2013/2082. You also underline the impact of the alleged non-transposition by Cyprus of Directive 2005/29/EC and Directive 93/13/EEC on the interest of individual consumers.

In this respect, I note that the interest you claim is of a general nature and the considerations you have submitted do not provide an overriding public interest in disclosure of the documents linked to the particular circumstances of this case. Such general considerations cannot provide an appropriate basis for establishing that a public interest prevails over the reasons justifying the refusal to disclose the documents in question⁸. Consequently, I consider that the interests on which you rely do not demonstrate a pressing need for the disclosure of the requested documents or that they prevail over the reasons justifying the refusal to disclose the documents in question.

Please also note that the documents you have requested belong to the administrative file of an ongoing investigation procedure, therefore the claim that since there has been a significant time span since the opening of the investigation and therefore the documents should be disclosed, is not relevant in this context.

⁸ Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza and Finland v Commission*, Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93.

Furthermore, as explained in point 2 of this decision, the European Commission is required to preserve the atmosphere of trust with the authorities of the Member State concerned, which is essential for the possibility of resolving the case without referring it to the EU Court.

Finally, I note that according to the practice of Court of Justice, ‘the overriding interest invoked by the applicant cannot, in principle, take precedence over the general presumption of confidentiality which is attached to investigative activities carried out within the framework of these [infringement] proceedings, since that presumption would itself serve the said interest’⁹.

I consider that the public interest is better served in this case by ensuring the conclusion, in all serenity, of the procedure and the related exchanges with the Member State, without jeopardising the dialogue between the European Commission and the Member State for which, as pointed out above, a climate of trust is essential.

Consequently, I consider that in this case, there is no overriding public interest that would outweigh the public interest in safeguarding the protection of the purpose of investigations protected by the third indent of Article 4(2) of Regulation (EC) No 1049/2001.

The fact that the requested documents relate 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.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting (further) partial access to the requested document.

However, as stated by the Court of Justice, where the requested document is covered by a general presumption of non-disclosure, such document does not fall within an obligation of disclosure, in full, or in part¹¹.

Consequently, I have concluded that the requested documents are covered in their entirety by the invoked exception to the right of public access.

⁹ Judgment of the General Court of 9 October 2018, *Anikó Pint v European Commission*, T-634/17, EU:T:2018:662, paragraph 54.

¹⁰ Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau GmbH*, C-139/07 P, EU:C:2010:376, paragraphs 53-55 and 60.

¹¹ Judgment of the Court of Justice of 28 June 2012, *European Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 133.

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