



EUROPEAN COMMISSION

Brussels, 26.9.2019
C(2019) 7047 final

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**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 2019/4125**

Dear ██████████,

I refer to your e-mail of 21 August 2019, registered on 22 August 2019, 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

In your application dated 31 May 2019 and addressed to the Ministry of Finance of the Czech Republic, you requested access to the draft audit report drawn up by the European Commission regarding audit number REGC414CZ0133 to Czech institutions.

By letter dated 6 June 2019 (reference MF-14013/2019/9008-2), the Ministry of Finance of the Czech Republic referred your request to the European Commission pursuant to Article 5(2) of Regulation (EC) No 1049/2001, as the document originates from the latter. On 18 July 2019, the European Commission registered your application under reference GESTDEM 2019/4125.

In particular, the European Commission has identified the following document as falling under the scope of your request:

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, p. 43.

- Audit No REGC414CZ0133, draft report (English version), 29 May 2019, reference Ares(2019)3512694 (hereafter ‘the requested document’).

In its initial reply of 1 August 2019, the Directorate-General for Regional and Urban Policy refused access to this document based on the exception of Article 4(2), third indent (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position and you put forward a series of arguments in support of your request. These have been taken into account in my assessment, set out in the corresponding sections below.

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 regret to inform you that I have to confirm the initial decision of the Directorate-General for Regional and Urban Policy to refuse access to the requested document. The refusal is based on the exceptions of Article 4(2), third indent (protection of the purpose of inspections, investigations and audits), Article 4(1)(a), fourth indent (protection of the public interest as regards the financial policy of the European Union), and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

Please find below the detailed reasons for the refusal.

2.1. Protection of the purpose of inspections, investigations and audits

Article 4(2), third indent of Regulation (EC) No 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the purpose of inspections, investigations and audits, [...] unless there is an overriding public interest in disclosure.’

The European Commission has the power to carry out audits to verify that the control and management mechanisms implemented by Member States are adequate and to check whether there are any deficiencies concerning projects funded by the European Union.

Indeed, Article 75(1) of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund (hereafter ‘Regulation (EU) No 1303/2013’)³, provides that

³ Official Journal L 347 of 20.12.2013, p. 320.

‘[t]he Commission shall satisfy itself, on the basis of available information, [...] that the Member States have set up management and control systems that comply with this Regulation and the Fund-specific rules and that those systems function effectively during the implementation of programmes’.

Pursuant to Article 75(2) of Regulation (EU) No 1303/2013, ‘Commission officials or authorised Commission representatives may carry out on-the-spot audits or checks [...]. The scope of such audits or checks may include, in particular, verification of the effective functioning of management and control systems in a programme or a part thereof, in operations and assessment of the sound financial management of operations or programmes’.

Similarly, Article 72 of Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999⁴ sets out the responsibilities of the European Commission for the previous programming period.

The document requested is a draft report forming part of the administrative file covering an audit (and its follow-up) in relation to certain operational programmes and rural development plans in the Czech Republic. The document contains the objective, scope and methodology of the audit, the preliminary findings, recommendations and conclusions for the key requirements audited, and the preliminary audit opinion.

The audit covers the management and control systems in place before the entry into force of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union (hereafter ‘Regulation (EU, Euratom) 2018/1046’)⁵. It also covers operations approved after the entry into force of Regulation (EU, Euratom) 2018/1046. The main objective of the audit is to verify compliance of the management and control systems with the regulatory framework related to the measures to avoid conflict of interests.

It follows from the above that the audit, checks and their follow-up, envisaged by the above-mentioned rules, are audits in the sense of Article 4(2), third indent of Regulation (EC) No 1049/2001.

In this regard, I would like to refer to the judgment of the General Court in Case T-480/11 (*Technion*)⁶, in which the General Court considered that the exception of Article 4(2), third indent of Regulation (EC) No 1049/2001 applies if disclosure of the documents under the request may endanger the completion of inspections, investigations or audits.

⁴ Official Journal L 210 of 31.7.2006, p. 25.

⁵ Official Journal L 193 of 30.7.2018, p. 1.

⁶ Judgment of the General Court of 12 May 2015, *Technion v Commission*, T-480/11, EU:T:2015:272.

The General Court stated that ‘[t]he interest protected by that exception is the interest in allowing audits to be conducted independently and free of pressures, whether these come from the body being audited, from other interested bodies or from the general public’.⁷

In the above-referred judgment, the General Court also held that there is a general presumption that documents forming part of the administrative file of an audit can be considered as manifestly covered, in their entirety, by the exception referred to in Article 4(2), third indent of Regulation (EC) No 1049/2001, at least as long as the audit procedure is ongoing.⁸ Indeed, according to the settled case-law, the institutions may base their decisions on general presumptions which apply to certain categories of documents, as similar general considerations are likely to apply to requests for disclosure relating to documents of the same nature.⁹

I consider that the document identified as falling within the scope of your request is manifestly covered, in its entirety, by the exception referred to in Article 4(2), third indent of Regulation (EC) No 1049/2001, as it forms part of the administrative file of the above-referred audit.

Public access to this document, which has been sent to the Czech authorities as part of the audit procedure, would be detrimental to the proper conduct of the audit in question. Indeed, it would compromise the smooth cooperation between the European Commission and the Czech authorities, which is an essential precondition for the effective fulfilment of the investigative tasks of the institution. It may lead to a reduced willingness, by the authorities of the Member State concerned to participate constructively in ongoing and future audits concerning Union funds.

I would like to underline that the draft audit report is the preliminary (and not final) assessment of the European Commission on the management and control mechanisms audited. The document thus serves as the basis for discussions with the Member State and there is a real and non-hypothetical risk that its premature disclosure would adversely affect this dialogue. In particular, the disclosure of the document would provide an inaccurate picture to the public and lead to premature and unjustified conclusions on the overall compliance of the Member State concerned with the relevant Union rules. This, in turn, would seriously affect the climate of mutual trust between the European Commission and the Member State, which is necessary at any stage of the discussions.

Moreover, I would like to draw your attention to the fact that the audit is still in progress. Indeed, the relevant European Commission services carried out on-the-spot audit missions in the Czech Republic from 8 January to 15 February 2019. The Czech version of the draft report was sent to the Czech authorities on 4 July 2019.

⁷ Ibid, paragraph 63.

⁸ Ibid, paragraphs 55-65.

⁹ Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau* (hereafter referred to as ‘*Commission v TGI* judgment’), C-139/07 P, EU:C:2010:376, paragraph 54; Judgment of the Court of Justice of 14 November 2013, *LPN and Finland v Commission*, Joint Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 45.

The European Commission, therefore, opened the contradictory procedure with the Member State concerned, requesting that the national authorities clarify or validate the facts presented in the draft audit report and express their agreement or disagreement with the draft findings.

Taking into account the additional information provided by the Member State, the European Commission will draft the final audit report as well as the final audit opinion. On the basis of the final audit report, the Member State may be requested to implement the proposed recommendation(s) and/or carry out corrective action(s). The European Commission will close the audit after the Member State has accepted and/or implemented the recommendations/actions proposed in the final audit report. Where the Member State has not accepted or implemented the recommendation(s) and/or action(s) proposed, the European Commission will apply appropriate measures. Only when the possible recommendations and/or corrective actions are implemented and the irregularities sanctioned, the audit will be definitely closed.

Given the ongoing nature of the audit and the sensitivity of the investigations, the disclosure of the document requested would expose the auditors and the relevant European Commission departments to the foreseeable risk of coming under outside pressure, which would be detrimental to the proper conduct of the audit and undermine its effectiveness. It would also affect the European Commission's capacity to carry out appropriate follow-up measures, if deemed necessary. I take the view that the purpose of such audit in the Member State concerned is best achieved through good cooperation and in bilateral discussions free from external pressure, notably when the subject of the inspections concerns the sensitive topic of potential shortcomings in the mechanisms for the prevention of conflict of interests in the allocation of European Union funds.

Therefore, I cannot agree with your argument that the proceeding would not be jeopardised if the document under the request made publicly available.

Against this background, there is a foreseeable and not purely hypothetical risk that public release of the requested document would undermine the purpose of an ongoing audit, which is, in this instance, to ensure that the management and control systems implemented by the Member State are functioning effectively and, ultimately, to protect the Union's financial interests.

I conclude, therefore, that the requested document is covered in its entirety by the exception laid down in Article 4(2), third indent of Regulation (EC) No 1049/2001 and that access must be denied on that basis.

2.2. Protection of the public interest as regards the financial policy of the European Union

Article 4(1)(a), fourth indent of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the public interest as regards [...] the financial, monetary and economic policy of the Community or a Member State'.

In its judgment in Case T-264/04 (*WWF*)¹⁰, the Court of First Instance¹¹ considered that ‘the institutions enjoy a wide discretion when considering whether access to a document may undermine the public interest and, consequently, that the Court’s review of the legality of the institutions’ decisions refusing access to documents on the basis of the mandatory exceptions relating to the public interest must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers’.¹²

The financial policy of the European Union relates closely to the proper management of Union funds. Indeed, an inadequate implementation of the European Structural and Investment Funds, or any irregularity in their management, would have the effect of prejudicing the budget of the European Union and, therefore, its financial interests.

The above-mentioned audit is one of the means to protect the financial interests of the European Union. Should the European Commission services detect a serious dysfunction in the Czech management and control systems, or serious irregularities in the financial management of the programmes and operations concerned, the European Commission may apply the necessary measures to ensure the proper use of the Union funds and protect the financial interests of the European Union.

Public access to the requested document, which would undermine the purpose of the ongoing audit, would also undermine the financial interests of the European Union, as it would hamper the European Commission’s ability to address constructively possible shortcomings in the mechanisms in place to prevent conflict of interests in the Member State and apply appropriate corrective measures, where necessary.

In light of the above, there is a real and non-hypothetical risk that such premature disclosure would undermine the protection of the public interest as regards the financial policy of the European Union, notably with regard to the proper management of European Union funds.

Consequently, I consider that public disclosure of the requested document is also prevented on the grounds of the protection of the public interest as regards the financial policy of the European Union, based on the exception of Article 4(1)(a), fourth indent of Regulation (EC) No 1049/2001.

2.3. 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’.

¹⁰ Judgment of the Court of First Instance of 25 April 2007, *WWF European Policy Programme v Council* (hereafter referred to as ‘*WWF v Council* judgment’), T-264/04, EU:T:2007:114.

¹¹ Currently the General Court.

¹² *WWF v Council* judgment, cited above, paragraph 40.

In its judgment in Case C-28/08 P (*Bavarian Lager*)¹³, 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 data¹⁴ (hereafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.

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/EC¹⁵ (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’.¹⁶

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’.

As the Court of Justice confirmed in Case C-465/00 (*Rechnungshof*), ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life’.¹⁷

The document which you seek to obtain contains personal data such as the names and the surnames of persons who do not form part of the senior management of the European Commission. They also contain personal data from third parties, including the name of representatives of private companies.

The names¹⁸ 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.

¹³ Judgment of the Court of Justice of 29 June 2010, *Commission v The Bavarian Lager Co. Ltd* (hereafter referred to as ‘*Commission v The Bavarian Lager* judgment’) C-28/08 P, EU:C:2010:378, paragraph 59.

¹⁴ Official Journal L 8 of 12.1.2001, p. 1.

¹⁵ Official Journal L 205 of 21.11.2018, p. 39.

¹⁶ *Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

¹⁷ Judgment of the Court of Justice of 20 May 2003, *Rechnungshof and Others v Österreichischer Rundfunk*, Joint Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

¹⁸ *Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

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.¹⁹ 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.

¹⁹ 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.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(2), third indent 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.

According to the case-law, the applicant must, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal.²⁰

In your confirmatory application, you argue that, I quote:

‘[t]here is undoubtedly an overriding public interest in providing the required audit, as this is a matter of conflict of interests of our prime minister, and it is clear from publicly available information that conflict of interest is given persons within the trust funds to which he has transferred his property. A person in the highest political position within a democratic country should surely suffer if the public is interested in the issue of their conflict of interest, because if there is a conflict of interest, this indicates a mismanagement of the public office and doubts about the misuse of public funds for private purposes [...]. The public’s rights to information should surely outweigh the prime minister’s private interest in avoiding harm to his personality [...]’.

Having carefully analysed the above-referred arguments, I consider that they do not demonstrate any pressing need for the public to obtain access to the document requested, which has a preliminary nature and does not set the final position of the institution regarding the activities audited.

Indeed, general considerations relating to the interest of the public in the ongoing investigations cannot establish an appropriate basis for establishing that, in the case at hand, the principle of transparency is capable of prevailing over the reasons justifying the refusal of the requested document. Moreover, I do not see how this interest would override the public interest in ensuring that the ongoing audit is properly conducted, and that the control systems in the Member State are fully aligned with the required Union standards. As explained in section 2.1 above, the public interest is best served by allowing the European Commission to complete the audits in smooth cooperation with the Member State.

²⁰ Judgment of the General Court of 9 October 2018, *Anikó Pint v Commission*, T-634/17, EU:T:2018:662, paragraph 48; Judgment of the General Court of 23 January 2017, *Association Justice & Environment, z.s v Commission*, T- 727/15, EU:T:2017:18, paragraph 53; Judgment of the General Court of 5 December 2018, *Falcon Technologies International LLLC v Commission*, T-875/16, EU:T:2018:877, paragraph 84.

Furthermore, I would like to stress that the requested document relates to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness²¹. The General Court confirmed this jurisprudence in its judgment in Case T-476/12 (*St. Gobain Glass*)²² stressing the serenity of administrative proceedings and the need to protect administrative procedures from external pressure.

In light of the above, I must conclude that the arguments you invoke do not demonstrate how disclosure of the requested document would contribute, in a concrete manner, to the protection of any public interest which would override the public interest protected by Article 4(2), third indent (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001.

Please note also that the requested document is also protected under Articles 4(1)(a) and 4(1)(b) of Regulation (EC) No 1049/2001, which do not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

4. PARTIAL ACCESS

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

However, as stated by the Court of Justice, where the document requested is covered by a general presumption of non-disclosure, such document does not fall within an obligation of disclosure, in full, or in part.²³

Consequently, as explained in sections 2.1 and 2.2 above, I have come to the conclusion that the document is covered in its entirety by the invoked exceptions to the right of public access.

²¹ *Commission v TGI* judgment, cited above, paragraphs 53-55 and 60; *Commission v Bavarian Lager* judgment, cited above, paragraphs 56-57 and 63.

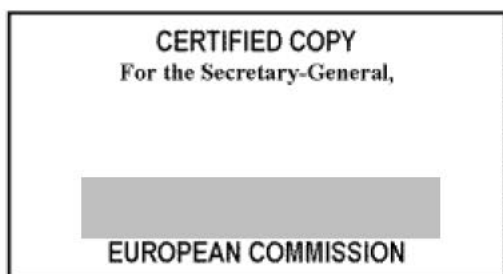
²² Judgment of the General Court of 11 December 2014, *Saint-Gobain Glass Deutschland v Commission*, T-476/12, EU:T:2014:1059, paragraphs 81-82.

²³ Judgment of the Court of Justice of 28 June 2012, *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

