



EUROPEAN COMMISSION

Brussels, 18.9.2019
C(2019) 6850 final

[REDACTED]
Luther Rechtsanwaltsgesellschaft
mbH Gänsemarkt 45
20354 Hamburg
Germany

**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 2018/6114**

Dear [REDACTED],

I refer to your letter of 4 March 2019, registered on the next day, in which you submit 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 (hereafter ‘Regulation (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 29 October 2018, addressed to the Directorate-General for Energy, you requested access to ‘all information available at the European Commission in relation to Article 12 of the proposal for a Regulation of the European Parliament and of the Council on the internal market for electricity - Recast-COM(2016)861’.

At the initial stage, the Directorate-General for Energy identified the following documents, as falling under the scope of your request:

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

- 1) Regulation of the European Parliament and of the Council on the internal market for electricity as submitted for Inter-service consultation in November 2016 (Ares(2019)981370, document 1);
- 2) Flash report on Energy Working Party of 25 June 2018 (document 2);
- 3) Flash report on Technical Trilogue of 5 November 2018 (document 3);
- 4) E-mail exchange between the Federal Ministry of Economy and Energy and the Directorate-General for Energy of October and November 2017 (ener.b2(2018)6674645, document 4);
- 5) Stellungnahme der deutschen Bundesregierung zur Mitteilung KOM(2015)340 'Einleitung des Prozesses der Konsultation zur Umgestaltung des Energiemarkts' of 23 October 2015 (Ares(2019)981370, document 5);
- 6) Konsultationsbeitrag des Ministeriums für Umwelt, Klima und Energiewirtschaft des Landes Baden-Württemberg zur Einleitung des Prozesses der öffentlichen Konsultation zur Umgestaltung des Energiemarkts of 4 October 2015 (Ares(2019)981370, document 6).

In accordance with Article 4(4) of Regulation (EC) No 1049/2001, as regards documents originating from a third party, the institution shall consult the latter with a view to assessing whether an exception in paragraphs 1 to 3 (if the third party is a Member State) is applicable, unless it is clear that the documents shall or shall not be disclosed.

According to Article 4(5) of Regulation (EC) No 1049/2001, a Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

In accordance with Article 4(4) and (5) of Regulation (EC) No 1049/2001, the Directorate-General for Energy consulted the German authorities on the disclosure of the documents originating from them, namely document 4, 5 and 6.

In its initial reply of 14 February 2019, taking into account the position of the German authorities, the Directorate-General for Energy:

- granted access to documents 1, 5 and 6;
- refused access to documents 2, 3 and 4 invoking the exception of Article 4(3), first subparagraph of Regulation (EC) No 1049/2001 (protection of the decision-making process).

The refusal to document 4 was based on the objections to disclosure expressed by the German authorities in the light of Article 4(3), first subparagraph of Regulation (EC) No 1049/2001 (protection of the decision-making process).

Through 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 of the European Commission

conducts a fresh review of the reply given by the relevant Directorate-General at the initial stage.

Having carried out a detailed assessment of documents 2 and 3 originating from the European Commission, I am pleased to inform you that I can grant access to both documents requested.

As regards document 4 and in order to give the German authorities the possibility to reconsider their position in the light of the arguments presented in your confirmatory application, the Secretariat-General re-consulted those authorities.

The German authorities agreed to disclosure of document 4, subject only to the redaction of personal data in accordance with Article 4(1)(b) (protection of privacy and the integrity of the individual).

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 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*),² 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 data³ (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/EC⁴ (hereafter 'Regulation (EU) No 2018/1725').

However, the case law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) No 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

² Judgment of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd*, C-28/08 P, EU:C:2010:378, paragraph 59.

³ Official Journal L 8 of 12.1.2001, p. 1.

⁴ Official Journal L 205 of 21.11.2018, p. 39.

the Union concerning the protection of personal data, and in particular with [...] [the Data Protection] Regulation’⁵.

Article 3(1) of Regulation (EU) No 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’.

The requested document 4 includes the names and personal details (e-mail address, telephone numbers) of staff members of the European Commission not holding senior management positions and the names, surnames, contact details of Member States representatives. This information clearly constitutes personal data in the sense of Article 3(1) of Regulation (EU) No 2018/1725.

Pursuant to Article 9(1)(b) of Regulation (EU) No 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) No 2018/1725, can the transmission of personal data occur.

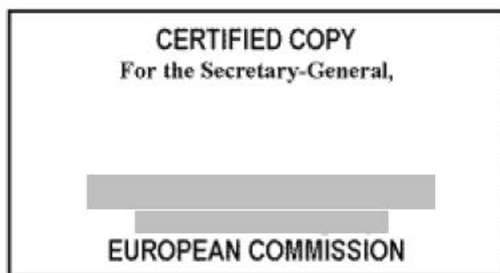
Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

⁵ Cited above, paragraph 59.

4. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to 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



Enclosures: 2