Brussels, 4.10.2021
C(2021) 7323 final

Mr Alexander Fanta
Rue de la Loi 155
1040 Brussels
Belgium

DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2021/1360

Dear Mr Fanta,

I refer to your e-mail of 28 April 2021, registered on the same day, 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 (hereafter ‘Regulation (EC) No 1049/2001’).

Please accept our apologies for the delay in the handling of your request.

1. **SCOPE OF YOUR REQUEST**

In your initial application of 9 March 2021, addressed to the European Commission’s Directorate-General for Communications Networks, Content and Technology, you requested access to ‘[a]ll documents related to a meeting between cabinet members and Axel Springer SE on January 22, 2021 as found in the Transparency Register. The request includes e-mails, meeting minutes and any other document related to the meeting’.

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The Directorate-General for Communications Networks, Content and Technology identified two documents as falling within the scope of the request:

- Briefing for Commissioner Breton for a meeting with Axel Springer SE on 22 January 2021, reference Ares(2021)2871768 (hereafter ‘document 1’); and


In its initial reply of 28 April 2021, the Directorate-General for Communications Networks, Content and Technology refused access to these documents on the basis of the exceptions laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual), the first indent (protection of commercial interests) of Article 4(2) and the first subparagraph (protection of the decision-making process) of Article 4(3) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of the initial reply of the Directorate-General for Communications Networks, Content and Technology and you put forward a number of arguments in support of your position. These arguments will be addressed 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 can inform you that:

- Partial access is herewith granted to document 1. As regards the redacted parts of this document, I have to confirm the initial decision of the Directorate-General for Communications Networks, Content and Technology based on the exceptions laid down in the third indent (protection of international relations) of Article 4(1)(a), Article 4(1)(b) (protection of privacy and the integrity of the individual), the first indent (protection of commercial interests) of Article 4(2), and the first subparagraph (protection of the decision-making process) of Article 4(3) of Regulation (EC) No 1049/2001; and

- partial access is granted to document 2, subject only to the redaction of personal data in accordance with Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

The detailed reasons underpinning the assessment are set out below.
2.1. Protection of the public interest as regards international relations

The third indent of Article 4(1)(a) 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 […] international relations […]’.

The Court of Justice has confirmed that it ‘is clear from the wording of Article 4(1)(a) of [Regulation (EC) No 1049/2001] that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests’.

The Court of Justice stressed in the In ‘t Veld ruling that the institutions ‘must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by [the exceptions provided for in Article 4(1)(a) of Regulation 1049/2001] could undermine the public interest’.

Consequently, ‘the Court’s review of the legality of the institutions’ decisions refusing access to documents on the basis of the mandatory exception […] 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’.

Documents 1 and 2 concern a meeting between the European Commission services and representatives of Axel Springer SE, which took place on 22 January 2021.

Pages 1, 2, 5, 10 and 11 of document 1 contain an internal debrief prepared by the European Commission services concerning the Australian News Media and Digital Platforms Mandatory Bargaining Code. The analysis is based on information shared by the third country at a time when the legislation was not yet adopted. It reflects the main developments of the draft Australian legislation and the preliminary views of the European Commission services, based on the information provided by the third country.

Disclosure of this preliminary assessment to the public at large could affect the future sharing of knowledge and best practices between the European Union and the third country concerned. Indeed, the disclosure of the said preliminary assessment could negatively impact the public opinion about ongoing legislative initiatives in the third country and therefore hamper an environment based on collaborative exchange and mutual trust, deterring the third country concerned from sharing information with the

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3 Judgement of the Court of Justice of 1 February 2007, C-266/05 P, Sison v Council, EU:C:2007:75, paragraph 46.
European Commission services in the future. In turn, this would put under strain the bilateral relations between the said third country and the European Commission.

Hence, the disclosure of this information, which was meant for internal use, could undermine future cooperation between the European Union and the third country concerned, thereby undermining the public interest in the protection of international relations in the sense of the above-referred exception.

Please note that the assessment of the draft legislation was made in a brief and summarised manner, making it susceptible to misinterpretation, taking into account that at that time of the analysis the legislation at issue had not yet been adopted. Misinterpretations on the content of the preliminary assessment would come at the expense of sharing of knowledge and best practices in the future and are likely to affect the relations with the third country.

Given the preliminary nature of this assessment, the risk of misinterpretations and the potential repercussions through negative public opinion, I consider that the risk of harm to the relations with the third country concerned is reasonably foreseeable and not purely hypothetical.

The case-law has clarified that it is not required to establish the existence of a definite risk of undermining the protection of the European Union’s international relations, but merely the existence of a reasonably foreseeable and not purely hypothetical risk.

In light of the above, I conclude that the above-referred parts of the document containing internal views of European Commission staff on the Australian legislation must be protected under the third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001, and that access to the above-referred parts of document 1 must be refused on that basis.

2.2. 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), 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

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Community institutions and bodies and on the free movement of such data (hereafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.


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’.

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’.

Documents 1 and 2 contain personal data such as the names, surnames and telephone numbers of persons who do not form part of the senior management of the European Commission. Moreover, they contain the names, surnames and position of representatives of an editorial and communication group.

The names 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 […] the 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’.

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10 European Commission v The Bavarian Lager judgment, cited above, paragraph 59.
11 Judgment of the Court of Justice of 20 May 2003, Rechnungshof and Others v Österreichischer Rundfunk, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.
12 European Commission v The Bavarian Lager judgment, cited above, paragraph 68.
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. 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.

2.3. Protection of commercial interests of a natural or legal person

The first indent of Article 4(2) of Regulation (EC) No 1049/2001 provides 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’.

In your confirmatory application, you refer to a number of European Ombudsman cases and you consider that the applicability of the above-referred exception was not sufficiently motivated in the initial reply of the Directorate-General for Communications Networks, Content and Technology.

Pages 3 and 12 of document 1 contain details of the position of Axel Springer on the European Commission’s Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act)\textsuperscript{14}, the company’s preferences regarding this legislative initiative, and its possible impact on the business models of publishers. This information was submitted to the European Commission and was not meant to be disclosed to the public, contrary to the exchange of “open letters” from 27 and 29 January 2020 to which you refer in your confirmatory application.

The relevant non-public withheld parts in pages 1, 9 and 10 also reflect the views of press publishers concerning their competitive situation on the market and their commercial relations with market-dominant platforms in relation to licensing conditions. The fourth paragraph in page 1 and the fourth paragraph in page 9 contain in fact the same information.

The disclosure of the position of the above-referred company regarding the Digital Markets Act, its policy preferences regarding this legislative initiative, and its impact on the business models, would allow for conclusions on the business preferences of this company and press publishers. Knowledge of this information could result in a competitive advantage for the company’s competitors, as it would reveal non-public positions and the preferred policy outcomes in relation to its business model. Taking into account its preliminary nature, it is likely that further access to this document would lead to erroneous interpretations of the actual business or strategic priorities of the market actors concerned.

Furthermore, the disclosure of the abovementioned parts of document 1, in particular the policy preferences of press publishers in regard to licensing conditions, could expose them to repercussions by market actors that would be negatively affected by these policy priorities. The disclosure of these parts, which concern business relations of Axel Springer and other press publishers, could affect the negotiations on future licensing agreements with market-dominant actors, thereby harming the commercial interests of the companies concerned.

Consequently, I conclude that, pursuant to the first indent of Article 4(2) of Regulation (EC) No 1049/2001, access to the relevant redacted parts of document 1 cannot be granted as this would pose a real and non-hypothetical risk for the commercial interests of the third party concerned.

2.4. Protection of the decision-making process

Article 4(3) of Regulation (EC) No 1049/2001 provides that ‘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.

\textsuperscript{14} The Digital Services Act (DSA) and the Digital Markets Act (DMA) encompass a single set of new rules applicable across the whole European Union to create a safer and more open digital space. See https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN.
Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

As explained in Section 2.1 above, document 1 was drawn up by relevant European Commission services for internal use before the meeting with Axel Springer took place. The document is a briefing including lines-to-take, objectives, defensives and internal, preliminary assessments addressed to Commissioner Thierry Breton. The document reflects the views of the European Commission staff on various topics relevant to the meeting in question, including issues such as the rights of publishers under Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (hereafter ‘Directive (EU) 2019/790’)\(^{15}\), the Digital Markets Act, and the revision of the German Antitrust Law.

In particular, pages 2 and 3 of the document reflect internal analysis of the Member State legislation drafted to transpose Directive (EU) 2019/790, in particular regarding Article 17 of the draft German Copyright Act. They contain preliminary views in the context of the finalisation of the Guidance on Article 17 of Directive (EU) 2019/790. Whereas the Guidance was adopted by the European Commission on 4 June 2021\(^{16}\), the German Copyright Act is subject to a conformity assessment with Directive (EU) 2019/790 (taking into account the Guidance on Article 17), on which no decision has been taken yet. After a final assessment, the European Commission can take a decision regarding the possible launching of infringement procedures.

Disclosure of the abovementioned parts of document 1 at this stage could lead to speculations, premature conclusions and serious interference with the decision-making process regarding the ongoing conformity assessment of the draft German Copyright Act and the possible launch of infringement proceedings. The undue external pressure on the European Commission caused by disclosure would undermine an independent and impartial decision-making process with regard to the assessment of compliance of a Member State with the relevant Union rules.

Furthermore, the Commission has a certain margin of discretion whether to open infringement proceedings against a Member State. Article 17(1) of the Treaty of the European Union and Article 258 of the Treaty on the Functioning of the European Union confer an obligation on the European Commission to oversee the correct application of European Union law by Member States\(^{17}\). According to case-law the European Commission has a wide margin of discretion in deciding whether to open an

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\(^{15}\) OJ L 130, 17.5.2019, p. 92.


infringement procedure against a Member State. This discretion would be unduly influenced by disclosure of the requested information.

Pages 3, and 5-7 of document 1 contain the views of the staff concerned regarding the new obligations under the Digital Markets Act, and its possible impact on national rules, including the new German Antitrust Law. They include internal reflections on possible next steps at Union level and internal opinions on the position of third parties. Page 13 contains a summary of the German Antitrust Law.

In December 2020, the European Commission published its proposal for a Regulation on contestable and fair markets in the digital sector (the Digital Markets Act). The proposed legislation lays down harmonised rules aimed at regulating the behaviour of digital platforms acting as gatekeepers between business users and their customers in the European Union. The proposal is subject to ongoing discussions and deliberations in the inter-institutional negotiations, as the proposal has to be approved by the European Parliament and the Council of the European Union. The decision-making leading to the adoption of the proposal is therefore ongoing.

The above-referred parts of document 1 cannot be disclosed as their disclosure would seriously undermine the ongoing negotiations on the Digital Markets Act, and the Commission’s internal discussions regarding the draft German Copyright Act and the German Competition Law. It would expose the current internal assessments to undue external pressure and disseminate preliminary conclusions that do not represent the final position of the European Commission.

The risk of such external pressure is real and non-hypothetical given the specific and fundamental interests large companies and business associations of the publishing sector as well as large market operators take in the issue.

Consequently, the premature public disclosure of the above-mentioned parts of the document would harm the European Commission’s ability to have frank internal discussions on draft legislation related to the transposition of European Union law and in relation to a legislative proposal that is currently being discussed at inter-institutional level. It could affect the exploration of different policy options for the future, including if necessary any possible inquiries on the compliance of national rules with Union legislation. It could also have a negative impact on the ongoing inter-institutional negotiations, rendering it more difficult to discuss the policy options at hand during the negotiations.

Moreover, further disclosure of the document would negatively affect the ability of the European Commission staff members to put forward their views on strategic questions relating to discussions with Member States without undue external pressure. For instance, page 10 contains the opinion of the European Commission staff regarding the results of the good-faith negotiation obligation rendered by the French competition authority. The opinions, internal advice and suggestions put forward in the document, which were not meant to be disclosed to the public, reflect solely the author’s
interpretation on this and the other relevant topics and do not set any official position of
the institution or the actors concerned.

Consequently, the document has to be considered as containing opinions for internal use,
as part of deliberations and preliminary consultations within the institution in the sense of

Further public access to the document is likely to bring a serious harm to the institution’s
decision-making process as it would deter members of the European Commission from
putting forward their views on the above-referred and other related matters in an open
and independent way and without being unduly influenced by the prospect of disclosure.
The staff of the services concerned would become more wary to provide a frank and open
device to the Commissioner and share their views openly if they knew that their opinions
would be released to the public.

Indeed, as the General Court has held, ‘the possibility of expressing views independently
within an institution helps to encourage internal discussions with a view to improving the
functioning of that institution and contributing to the smooth running of the decision-
making process’\textsuperscript{18}. Consequently, I conclude that the relevant undisclosed parts of the
briefing note contained in document 1 are protected under the first and second

3. OVERIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) and 4(3) 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\textsuperscript{19}.

In your confirmatory application, you argue the existence of an overriding public interest
in disclosure because, I quote, ‘[a]s the Digital Markets Act will shape European digital
policy-making over the next decade, the public should be able to see at least some of the
arguments being made in regards to specifics of the proposal in due time as to be relevant
to public debate. I would like to add that I make my request as journalist, therefore acting

\textsuperscript{18} Judgment of the General Court of 15 September 2016, Phillip Morris v Commission, T-18/15,

\textsuperscript{19} Judgment of the General Court of 9 October 2018, Anikó Pint v European Commission, T-634/17,
Environment, z.s v European Commission, T-727/15, EU:T:2017:18, paragraph 53; Judgment of the
General Court of 5 December 2018, Falcon Technologies International LLLLC v European
in my function as public watchdog as set out in jurisprudence by the European Court of Human Rights’.

First of all, I agree that there is a public interest in the Digital Markets Act. Indeed, this legislative initiative was put forward by the European Commission in order to adapt the European Union legislation to the current challenges, and will contribute to the enforcement of long-term strategies in the European digital sector.

However, having analysed your arguments, I consider that they do not demonstrate any pressing need for the public to obtain access to the redacted parts of the requested documents. Such general considerations, or references to transparency or the purpose of the journalistic activity, do not demonstrate a pressing need of the public for the disclosure of the concrete redacted parts of the documents and cannot provide an appropriate basis for establishing that a public interest prevails over the reasons justifying the protection of these parts. They do not explain in what way disclosure of preliminary opinions of the staff of the European Commission, or the preferred policy outcomes of identified private companies, would contribute to assuring protection of any public interest in a way that the principle of transparency takes precedence over the protection of the interests explained in Sections 2.1-2.4 above.

Although as per the settled case-law it is for the applicant to demonstrate the existence of an overriding public interest in disclosure, I have not been able to identify in this specific case any public interest capable of overriding the interests in the protection of commercial interests and the decision-making process in the sense of the first indent of Article 4(2) and Article 4(3) of Regulation (EC) No 1049/2001. Any public interest is best served at this stage by protecting this information from public disclosure.

Please note also that Article 4(1)(a) and 4(1)(b) of Regulation (EC) No 1049/2001 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 (further) partial access to the documents requested.

As stated above, partial access is herewith granted to documents 1 and 2. For the reasons explained above, no further partial access is possible without undermining the interests described above. These parts are covered in their entirety by the invoked exceptions to the right of public access.
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

Enclosures: (2)