Dear Mr Schindler,


1. SCOPE OF YOUR APPLICATION

Your application reads as follows:

‘Dear Communications Networks, Content and Technology,

Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, I am requesting documents which contain the following information:


INFR(2021)0362 (Slovakia)
INFR(2021)0354 (Slovenia)
INFR(2021)0337 (Romania)
INFR(2021)0321 (Poland)
INFR(2021)0296 (Latvia)
I am requesting all information held by the European Commission and its DGs and Agencies concerning the transposition of this Directive into national law and the infringement cases concerning this matter. This includes all internal and external conversation in email, writing, notes, memos, briefings, as well as any inter- or intra-service-consultation.

Information and Documents such as comments by the Commission on ongoing or completed transposition work is to be considered within the scope of this request.

Information and Documents are to be understood in a broadest possible sense, including those information which is not considered important and not subject to archival or filing rules.

In case the Commission considers this to be a case concerning many documents ("wide scope request"), I am disputing this assessment. However, in the interest of finding a fair solution, I am willing to consider proposals for splitting this request up into multiple requests for single infringement cases.[…]

2. DOCUMENTS FALLING WITHIN THE SCOPE OF THE REQUEST

We have identified the following categories of documents which fall within the scope of your application:

A. Documents relating to Interservice consultations (4 documents)

B. Letters of formal notice sent by the Commission to Member States and their Annexes (40 documents)

C. Correspondence from the Member States (24 documents)

D. National transposition measures (12 documents)
3. ASSESSMENT UNDER REGULATION 1049/2001

Following our assessment under Regulation 1049/2001, we have arrived at the conclusion that full access can be granted to the documents identified under category D (National transposition measures – 12 documents). Disclosure is refused for the documents identified under the remaining categories (Categories A-C), as their disclosure is prevented by the exception to the right of access laid down in Article 4(2) third indent of Regulation 1049/2001 (protection of the purpose of inspections, investigations and audits).

a. Full disclosure

The documents concerning the national transposition measures of Lithuania (one document), France (three documents), Denmark (one document) and Czechia (seven documents) are publicly available online and can be accessed via the following links:

- Lithuania

Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymas Nr. VIII-1185/1999 (suvestinė redakcija nuo 2019-07-01); available at https://www.etar.lt/portal/lt/legalAct/TAR.551F0CDE5B64/asr

- France

LOI no 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse (1) ; Official publication: Journal Officiel de la République Française (JORF); Publication date: 2019-07-26; available at https://www.legifrance.gouv.fr/loda/id/JORFTEXT000038821358/

LOI no 2020-1508 du 3 décembre 2020 portant diverses dispositions d'adaptation au droit de l'Union européenne en matière économique et financière ; Official publication: Journal Officiel de la République Française (JORF) ; Publication date: 2020-12-04 ; available at https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000041566073/

Ordonnance n° 2021-580 du 12 mai 2021 portant transposition du 6 de l'article 2 et des articles 17 à 23 de la directive 2019/790 du Parlement européen et du Conseil du 17 avril 2019 sur le droit d'auteur et les droits voisins dans le marché unique numérique et modifiant les directives 96/9/CE et 2001/29/CE (NOR : MICB2106674R) JORF n°0111 du 13 mai 2021 ; Official publication: Journal Officiel de la République Française (JORF); Publication date: 2021-05-13 ; available at https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043496429#:~:text=du%20Parlement%20...,Ordonnance%20n%C2%B0%202021%2D580%20du%202021%20mai%202021%20important,CE%20et%2020201%2F29%2FCFE

- Denmark

Lov om ændring af lov om ophavsret (Implementering af dele af direktiv om ophavsret og beslægtede rettigheder på det digitale indre marked og direktiv om regler for udøvelse af ophavsretten og beslægtede rettigheder, der gælder for visse af tv- og radioselskabernes onlinetransmissioner og retransmissioner af tv-og radioprogrammer m.v.) available online at https://www.lovtidende.dk/api/pdf/223817

- Czechia
Please note that information about the national transposition measures communicated by the Member States concerning Directive (EU) 2019/790 is publicly available online at https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32019L0790&qid=1630919359802

b. Non-disclosure

We regret to inform you that access to the documents under categories A – C cannot be granted, as disclosure is prevented by the exception laid down in Article 4(2) third indent of Regulation 1049/2001 with regard to the protection of the purpose of inspections, investigations and audits.

Article 4(2) third indent of Regulation 1049/2001 stipulates 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 abovementioned documents concern infringement procedures which are still ongoing.

The Court of Justice recognized the existence of a general presumption of non-accessibility in ongoing infringement cases¹. 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'².

Consequently, all abovementioned documents which form part of the files of the concerned ongoing infringement procedures are covered by a general presumption of non-accessibility based on the exception of Article 4(2), third indent of Regulation 1049/2001.

Disclosure of these documents would negatively influence the dialogue between the European Commission and the Member States in question for which a climate of mutual trust is essential and would deter the Member States from cooperating with the Commission. This would be detrimental to the proper conduct of the investigations and would have a negative effect on the effective fulfilment of the duties of the European Commission. Furthermore, such disclosure could expose the Commission services to undue external pressure during the performance of their tasks.

Consequently, there is a real and non-hypothetical risk that public release of these documents would adversely affect the ongoing abovementioned investigations and their follow-up. Therefore, access should be denied based on the exception of Article 4(2) third indent of Regulation 1049/2001.

We have considered whether partial access could be granted. However, partial access is not possible considering that the documents concerned are covered in their entirety by the exception under Article 4(2), third indent, of Regulation 1049/2001.

The exceptions laid down in Article 4(2) of Regulation 1049/2001 apply, unless there is an overriding public interest in the disclosure of documents. Such an interest must, firstly, be a public interest and, secondly, outweigh the harm caused by disclosure. We have examined whether there could be an overriding public interest in the disclosure of the aforementioned documents but we have not been able to identify such an interest. On the contrary, we consider that in this case the public interest is best served by protecting the purpose of the investigations and the climate of mutual trust between the Commission and the Member States concerned in order to achieve full compliance with the Union law.

4. CONFIRMATORY APPLICATION

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

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Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretariat-General of the Commission at the following address:

European Commission  
Secretariat-General  
Transparency, Document Management & Access to Documents (SG.C.1)  
BERL 7/076  
B-1049 Bruxelles or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

Electronically signed

Roberto Viola