



EUROPEAN COMMISSION

LEGAL SERVICE
The Director-General

Brussels, 23 March 2022

By e-mail

Ms Ine Lejeune
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Subject: Request for access to documents

Ref.: Your request of 3 February 2022, registered on 4 February 2022, under reference GestDem 2022/0768

Dear Ms Lejeune,

I refer to your above-referenced letter, under Regulation (EC) No 1049/2001 regarding public access to documents¹, by which you request access to the following submissions made in the Cases:

C-563/12, *BDV Hungary Trading*², by:

1. the European Commission
2. the Greek Government;

C-33/16, *A Oy*³, by:

3. the European Commission
4. the Greek Government;
5. the Netherlands Government

C-288/16, *L. Č.*⁴, by:

6. the European Commission

C-275/18, *Milan Vins*⁵, by:

7. the European Commission;
8. the Greek Government;

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.05.2001, page 43).

² Judgment of the Court of Justice of 19 December 2013, ECLI:EU:C:2013:854.

³ Judgment of the Court of Justice of 04 May 2017, ECLI:EU:C:2017:339.

⁴ Judgment of the Court of Justice of 29 June 2017, ECLI:EU:C:2017:502.

⁵ Judgment of the Court of Justice of 28 March 2019, ECLI:EU:C:2019:265.

C-653/18, *Unitel*⁶, by:

9. the European Commission

C-656/19, *BAKATI PLUS*⁷, by:

10. the European Commission.

As regards the written observations submitted by the European Commission in Case **C-495/17, *Cartrans Spedition SRL***, please note that this document has been sent to you on 17 March 2021, following your request of 24 February 2021 and registered under reference GestDem2021/1046. Since this document is now public, you can find it by consulting this link: https://ec.europa.eu/dgs/legal_service/submissions_cour_en.htm.

1. WRITTEN OBSERVATIONS SUBMITTED BY THE COMMISSION (DOCUMENTS 1, 3, 6, 7, 9 AND 10)

After a concrete assessment of the documents concerned, I am pleased to inform you that partial access can be granted in accordance with Regulation (EC) No 1049/2001, with the exception of some personal and commercial data, as will be explained below.

Accordingly, you will find enclosed redacted copies of the French translation⁸ of documents 1 and 10 as well as copies of the French translation of documents 3, 6, 7 and 9, as requested.

You may reuse the disclosed documents free of charge, provided that the source is acknowledged and that you do not distort its original meaning or message. Please note that the Commission does not assume liability stemming from the reuse.

2. WRITTEN PLEADINGS SUBMITTED BY THIRD PARTIES (DOCUMENTS 2, 4, 5 AND 8)

In accordance with Article 4(4) of Regulation (EC) No 1049/2001, the Commission has consulted the authors of the written pleadings submitted by the third parties. Following these consultations, I would like to inform you that:

- the Greek Government has agreed to the disclosure of its written submissions (documents 2, 4 and 8);
- the Netherlands Government has agreed to the disclosure of its written submission (document 5).

Please note however that some personal data has been deleted, as will be explained below.

Accordingly, you will find enclosed redacted copies of the French translation⁹ of documents 2, 4 and 5 as well as a copy of the French translation of document 8, as requested.

The disclosed documents were transmitted by the Court of Justice to the Commission in its capacity as participant to the Court proceedings at stake. Access is granted for information only and cannot be re-used without the agreement of the originator, who holds a copyright on them. They do not reflect the position of the Commission and cannot be quoted as such.

1.1. Protection of commercial interests

As mentioned above, some commercially sensitive information has been redacted on page 2 (paragraph 2) of Document 1, concerning the amount of additional taxation as adjustment imposed on the applicant by the tax authorities following an audit.

⁶ Judgment of the Court of Justice of 17 October 2019, ECLI:EU:C:2019:876.

⁷ Judgment of the Court of Justice of 17 December 2020, ECLI:EU:C:2020:1045.

⁸ Languages of the proceedings: Hungarian, Finnish, Latvian, Czech and Polish.

⁹ *ibid.*

Article 4(2), first indent of Regulation (EC) No 1049/2001 states by way of exception 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"*.

The purpose of this exception is to protect the commercial and business interests of natural or legal persons, especially with respect to confidential information related to their economic activities.

In the light of the above, the withheld information must be covered by the said exception and cannot be disclosed. In fact, considering that the Court of Justice abstained from revealing this piece of information in its judgment, I consider that it constitutes sensitive information, known to a limited number of persons, the disclosure of which may have prejudicial effect to the commercial interests of the applicant. This risk is reasonably predictable and not purely hypothetical.

1.2. Protection of personal data

The initials of the Institutions' officials, not having the function of senior management staff, have been redacted in the documents disclosed (first page of documents 2, 4, 5 and 10). This information must be protected under the exception provided for in Article 4(1)(b) of Regulation (EC) No 1049/2001, in accordance with the European Union legislation regarding the protection of personal data.

According to Article 4(1)(b) of Regulation (EC) No 1049/2001 *"[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] (b) 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-28/08P (Bavarian Lager)¹⁰, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable¹¹.

The applicable legislation in this field is 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/EC¹² ('Regulation (EU) 2018/1725').

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data *'means any information relating to an identified or identifiable natural person [...]'*. The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data¹³.

¹⁰ Judgment of the Court of Justice of 29 June 2010, Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd*, EU:C:2010:378, paragraph 59.

¹¹ *Bavarian Lager* judgment, paragraph 63. Whereas this judgment specifically related to 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 data, the principles set out therein are also applicable under the new data protection regime established by Regulation (EU) 2018/1725.

¹² Official Journal L 205 of 21.11.2018, page 39.

¹³ Judgment of the Court of Justice of 20 December 2017, Case C-434/16, *Peter Nowak v Data Protection Commissioner*, ECLI:EU:C:2017:994, paragraphs 33-35.

As regards the personal data of the officials of the institutions, the General Court has confirmed, in its judgment in Case T-39/17 that the information such as names, signatures, functions, telephone numbers and other information pertaining to staff members of an institution fall within the notion of "private life", regardless of whether this data is registered in the context of a professional activity or not. Accordingly, the initials of the Institutions' officials have been deleted, since this information constitutes personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725¹⁴.

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 met 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.

According to Article 9(1)(b) of Regulation (EU) 2018/1725, the European Commission has to examine the further conditions for a lawful processing of personal data only if the first condition is fulfilled, namely if the recipient has established 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 request, 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 subject's legitimate interests might be prejudiced.

Notwithstanding the above, please note that there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by 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 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.

2. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Pursuant to Article 4(2) of Regulation (EC) No 1049/2001 the exception to the right of access must be waived if there is an overriding public interest in disclosing the requested document. In order for an overriding public interest in disclosure to exist, this interest, firstly, has to be public and, secondly, overriding, *i.e.* in this case it must outweigh the interest protected under Article 4(2), first indent. In the present case, there are no elements capable of showing the

¹⁴ Judgment of the General Court of 19 September 2018, Case T-39/17. *Chambre de commerce and d'industrie métropolitaine Bretagne-Ouest (port de Brest) v Commission*, ECLI:EU:T:2018:560, paragraphs 37, 38 and 43.

existence of an overriding public interest in disclosure of this information, which would outweigh the public interest invoked for the protection of commercial interests of the persons/companies concerned.

Please note that the exception of Article 4(1)(b), concerning the protection of personal data, has an absolute character and does not envisage the possibility of demonstrating the existence of an overriding public interest.

3. MEANS OF REDRESS

Should you wish the position to be reconsidered, you should present in writing, within fifteen working days from receipt of this letter, a confirmatory application to the Commission's Secretariat-General at the address below:

European Commission
Secretariat-General
Unit C.1. 'Transparency, Document Management and Access to Documents'
BERL 7/076
B-1049 Brussels

or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,

[signed electronically]
Daniel CALLEJA CRESPO

Attachments: 10