EUROPEAN COMMISSION
Secretariat-General

The Secretary-General

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Mr Mathias Schindler
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Germany

DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001[1]

Subject: **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2016/4441-Part I**

Dear Mr Schindler,

I refer to your e-mail of 14 September 2016, registered on 15 September 2016, by 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 ("Regulation 1049/2001").

1. SCOPE OF YOUR REQUEST

In your initial application of 1 August 2016 you requested access to :

[a]*ny document that relates to an ancillary copyright (Leistungsschutzrecht für Presseverleger), both referring to existing or proposed laws in EU Member states as well as any information relating to the introduction of such right into EU legislation.*

You specified that you were *especially but not exclusively looking for information in the form of proposals, memos, studies, notes, meeting records, letters to Commissioner*

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

Oettinger and Cabinet staff members dealing with EU copyright and the protection of press publishers by application or amendment of EU copyright law.

In its initial reply of 28 September 2016, the Directorate-General for Communications Networks, Content and Technology (DG CNECT, hereinafter) granted full access to documents contained in Annex 1 and 2 subject to protection of personal data and refused access to documents contained in Annex 4. Full and partial refusals were based on Article 4(1)(b) (protection of privacy and integrity of the individual), Article 4(2), first indent (protection of commercial interests), and on Article 4(3) (protection of the decision-making process) of Regulation 1049/2001.

Through your confirmatory application you contest the absence of a reply within the deadlines by DG CNECT and request a review of this position, according to which access was 'finally rejected'.

Following your agreement to a fair solution, only documents falling under Annex 2 and 4 of the initial reply (to which DG CNECT fully refused access) are covered by the present confirmatory decision. A second confirmatory decision will be covering documents falling under Annex 3 concerning third parties' documents.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General or service concerned at the initial stage.

Concerning the redacted parts of the documents contained in Annex 2 of the initial reply, these are personal data which have to be protected based on Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001, for the reasons set out further below. We reviewed these redactions according to data protection rules and further access has thus been granted.

Having carried out a detailed assessment of your request in light of the provisions of Regulation 1049/2001, I am pleased to inform you that partial access is granted to documents 1-5 and 7-30 contained in Annex 4 of the initial reply.

Regarding document 6 listed in Annex 4, we inform you that at the beginning of October 2015 the Commission received a formal complaint against the Spanish law on news aggregators[2]. This complaint has officially been registered by the Commission (CHAP (2015)02897) and is still currently analysed. Document 6 contains information in this regard which is covered at this stage by the exception relating to the protection of the purpose of investigations, provided for in Article 4(2), paragraph 3 of Regulation 1049/2001. Therefore, access to document 6 is fully refused.

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Please find a copy of the documents to which partial access has been granted attached to the present decision. Those parts of the documents which fall outside the scope of your request have been blanked out with a written indication *[out of scope]* at the beginning of the corresponding passage. Regarding documents 1-5 and 7-30 (to which access was fully refused at initial stage) those parts falling under the scope of your request which have been greyed out in the attached documents fall under the exceptions of Article 4(3), first subparagraph (protection of the decision-making process), Article 4(2), first indent (protection of commercial interests), and Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001, for the reasons set out below.

2.1. Protection of the decision-making process

Article 4(3), first subparagraph of Regulation 1049/2001 provides that [a]*ccess 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.*

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.

The Digital Single Market Strategy[3], adopted by the Commission on 6 May 2015, sets out the main elements of the modernisation of EU copyright rules. The Communication on copyright adopted on 9 December 2015 details the next steps in this regard, including on possible legislative proposals and timelines. Further to the proposed Regulation on cross-border portability of online content services adopted the same day of the Communication, the Commission adopted on 14 September 2016, a set of legislative measures, called the "copyright second legislative package". As the Council and the European Parliament have still to take a position on the Commission's proposals, the decision-making process on these proposals is not definitive. In particular, concerning the introduction of a new related right in favour of press publishers, which is at the very centre of your application, the decision-making process is fully ongoing. In practice, depending on the negotiations on this particular issue, the Commission may indeed have to adapt its position taking into account the elements contained in the above-mentioned documents in Annex 4. The finalisation of the above-mentioned negotiations is not foreseen before the end of 2017.

Documents 1-5, 7-9, 11-14, 16-21, 27, 29 and 30 are briefings, including lines-to-take, objectives, speaking points, defensives and internal, preliminary assessments addressed to Vice-President Ansip and to Commissioner Oettinger responsible for Digital Economy and Society and his Cabinet, or to senior management staff of DG CNECT (such as

[3] http://ec.europa.eu/priorities/digital-single-market/

document 12). Documents 10 and 15 are letters addressed to stakeholders in view of a meeting on the dialogue on copyright policy issues. Documents 22-26 and 28 contain the reports on meetings held with stakeholders. They contain parts which deal with the Commission's copyright policy and more specifically the issue of a right for press publishers, to which you request access. Parts of these documents cannot be disclosed as their disclosure would seriously undermine the ongoing decision-making process regarding the adoption of the Commission's proposals for the modernisation of EU copyright rules, and more precisely, the question of how to tackle the issue of a possible right in favour of press publishers.

The Court of Justice in *ClientEarth* and *AccessEuropeInfo*[4] judgments acknowledged that there may be a need for the Commision to protect internal reflections/assessments on the possible policy options to be taken by the institutions in the phase preceding the (inter-institutional) legislative procedure. It distinguished this preliminary assessments of the institution from the presumption of openness for the institutions acting in their legislative capacity established *Turco*[5]. Furthermore, the dissemination of preliminary and obsolete positions of the Commission preceding the inter-institutional decision-making process would risk confusing the public and stakeholders rather than providing clarity on the proposed option for protection of rights for press publishers.

In the alternative, even if one were to consider that the relevant circumstances from the time of your previous request have changed as a result of the Commission putting forward its proposal *(quod non)* and that consequently Article 4(3), first subparagraph of Regulation 1049/2001 no longer applies, I take the view that for the reasons explained below, the opinions which are reflected in the documents requested are covered by the exception of Article 4(3), second subparagraph of Regulation 1049/2001, as their disclosure would seriously harm the decision-making process of the Commission even after the proposal has been adopted.

Indeed, disclosing the correspondence related to a package of proposals which is still being considered by the EU legislator would seriously undermine the decision-making process with regard to the DSM legislation, insofar as those exchanges reflect changes in the policy options considered and finally proposed by the Commission. This is particularly the case with regard to the proposed copyright legislative, given the sensitivity of the subject matter and the various contradictory interests (of press publishers and big news aggregators companies) at stake. If the documents to which you request access were to be released, the Commission would be deprived of its ability to defend its proposal throughout the legislative procedure. Not only could this content also be used in a possible revised legislative proposal on copyright, but the Commission would also be exposed to undue external pressure in case of premature disclosure.

The withheld parts of documents contain preliminary reflections, exclusively for internal use, on several policy options, and their possible timing, regarding the modernisation of

[4] Judgment of Court of Justice, 17 October 2013 in case C-280/11 P, *Council v Access Info Europe*.
[5] Judgment of Court of Justice, 1 July 2008 in case C-39/05 P and C-52/05 P, *Sweden & Turco v Council*.

EU copyright rules in general. Apart from these preliminary assessments of possible options and positions of the co-legislators and third parties regarding the modernisation of EU copyright rules as a whole, there are also assessments and opinions addressing specifically the question of a right for press publishers. Documents 4, 5, 11, 12, 16, 18, 19, 22, 23, 24 and 27 contain institutions' internal opinions on the position of third parties. Sections of documents 5, 11 and 16 provide preliminary internal reflections regarding the Commission's way forward in the area of copyright for press publishers.

With the recent adoption of the second copyright legislative package, the disclosure of the (narrow) parts of the documents mentioned in this section, at this stage, would, even more than before, seriously undermine the decision-making process with regard to the ongoing modernisation of EU copyright rules in general, and concerning the protection of press publications in particular. A complete release of the documents at this stage would then expose the current negotiations and internal assessments to undue external pressure and disseminate preliminary, internal conclusions into the public domain. The risk of such external pressure is real and non-hypothetical, given the specific and fundamental interest large companies and business associations of the publishing sector as well as large online news aggregators involved in the issue to obtain an outcome which is favourable to them. Furthermore, the dissemination of preliminary positions of the Commission during the inter-institutional decision-making process would risk confusing the public and stakeholders rather than providing clarity on the proposed option for protection of rights for press publishers.

Disclosure of internal assessments on a publisher's right and of opinions of press publishers on the introduction of such a related right is far more sensitive now than at the time of your first request to access since we are now considering this concrete issue through legislative proposals (which was not the case one year ago).

Parts of document 11 contains a preliminary assessment of the two national laws introduced in Germany (establishing an ancillary copyright for press publishers, adopted in March 2013 (Drucksache 17/11470])[6] and Spain (Law No. 21/2014 of 4 November 2014, amending the Consolidated Text of the Law on Intellectual Property)[7], including an initial reflection on possible next steps.

The events unfolding in Germany and Spain following the introduction of national laws of ancillary copyright rules or copyright levies in favour of press publishers (e.g. Google's decision to stop the provision of the Google News services in Spain; complaint by the collecting society VG Media, representing press publishers, against Google with the German Federal Competition Authority; constitutional complaint by Yahoo News against the German law with the Federal Constitutional Court; etc.) highlight the sensitive nature of the issue and the determination of stakeholders to protect their interests, including through legal action.

6 https://www.bundestag.de/dokumente/textarchiv/2013/43192540_kw09_de_leistungsschutz/211146
7 http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-81-5.PDF

Therefore, if the above-mentioned (parts of the) documents were to be released, the Commission would no longer be free to explore all possible options in this sensitive area free from external pressure[8] and may create unjustified and disproportionate reactions which would render the negotiations more difficult. The Commission might also be called upon to adapt certain aspect of its proposals in the current *legislative* negotiations. Premature disclosure at this stage of the documents forming part of the ongoing decision-making process would then prejudice the institution's margin of manoeuvre and severely reduce its capacity to contribute to reaching compromises, which is essential in an area by which several important Commission policies and competences are affected (e.g. information and communication policies, internal market, competition policy, etc.).

The sensitive nature of the matters at stake, such as the introduction or not of a related right in favour of news publishers at EU level, provides further support to the conclusion that certain preliminary assessments and positions must be protected in order to shield the institutions' internal assessment against any outside pressure and premature conclusions, by the public, until the final decisions are taken, including the adoption of the Directive[9].
In light of the foregoing, I conclude that access to (parts of) documents 4, 5, 11, 12, 16, 18, 19, 22, 23, 24, 25, 26 and 27 is to be refused based on the exception of Article 4(3), first and second subparagraph (protection of the decision-making process), of Regulation 1049/2001.

2.2. Protection of commercial interests

Article 4(2), first indent of Regulation 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.*

Certain parts of documents 11, 16, 19 and 27 contain non-public positions of the European Publishers Council (EPC) and of the others main European associations of press publishers (EMMA, ENPA, ENM) regarding the publisher's right issue.

Knowledge of their non-public position on the already existing national initiatives or on other legal options allow for conclusions on strategic preferences and choices of business models that could result in a competitive advantage for the company's competitors. The positions in favour of, or against, the German ancillary copyright for press publishers or the Spanish law on news aggregators creating a remuneration right for press publishers, or the respective non-public positions regarding the preferred form of intervention at EU level on the issue, allow for conclusions on whether the relevant companies or

[8] http://arstechnica.co.uk/tech-policy/2016/08/geoblocking-google-tax-copyright-reform-shunned-eu-plan/; https://thestack.com/world/2016/08/26/eu-copyright-reform-proposes-search-engines-pay-for-snippets/

[9] Judgments of Court of Justice, 1 July 2008 in case C-39/05 P and C-52/05 P, *Sweden & Turco v Council*, paragraph 69 and of General Court, 15 September 2016 in cases T-796/14 and T-800/14, *Philip Morris v Commission*.

associations would prefer certain business models over others. For example, it could be assumed that a company in favour of a mere remuneration right (similar to the Spanish national law) might actually not be interested in having exclusive rights to allow or prohibit the making available of their contents.

Furthermore, following notably the introduction of the Spanish national law on news aggregators, and Google's subsequent decision to stop the provision of the Google News services in Spain as from 16 December 2014, there are currently negotiations between collecting societies representing press publishers, and news aggregators with a view to reaching an agreement as regards the tariffs, and their calculation, for compensating the making available of news snippets by the news aggregators (e.g. search engines, social networks). Disclosure, at this stage, of the non-public positions on the above-mentioned, sensitive subject matter would undermine the negotiating positions, in particular of the collecting societies representing press publishers, by revealing specific non-public objectives or business strategies of the latter companies and association which relate directly to the subject matter of the negotiations.

Other parts of documents 4, 5, 22, 23, 24, 25 and 27 contain non-public positions from Yahoo, Facebook, Amec-Fibep, BEUC, Apple and Google regarding the publishers' right issue, their position in this debate and/or their relation with other stakeholders, which we consider should be deal with the same way as the positions of press publishers. In consequence, there is a real and non-hypothetical risk that public access to the above-mentioned information would undermine the commercial interests of above mentioned parties.

I conclude, therefore, that access to the requested documents 4, 5, 11, 16, 19, 22, 23, 24, 25 and 27 must be denied on the basis of the exception laid down in the first indent of Article 4(2) (protection of commercial interests) of Regulation 1049/2001.

2.3. Protection of the privacy and the integrity of the individual

Article 4(1)(b) of Regulation 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 your confirmatory application you do not question the applicability of the above-mentioned exception to the requested documents. Nevertheless, I would like to provide additional explanations of how the disclosure of certain parts of the documents in question would undermine the interests protected by this exception.

Documents contain names, email addresses, phone numbers, office numbers, positions and handwritten signatures of staff members and third-party representatives. They also contain compilation of CV's (and pictures) of third parties representatives. These

constitute personal data within the meaning of Article 2(a) of Regulation 45/2001[10], which defines personal data as *any information relating to an identified or identifiable natural person (…); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity*.

In consequence, the public disclosure of this data in the requested documents would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

In accordance with the *Bavarian Lager* ruling[11], when a request is made for access to documents containing personal data, Regulation 45/2001 becomes fully applicable. According to Article 8(b) of that Regulation, personal data shall only be transferred to recipients if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. Those two conditions are cumulative.[12] Only fulfilment of both conditions enables one to consider the processing (transfer) of personal data as compliant with the requirement of lawfulness provided for in Article 5 of Regulation 45/2001.

I would also like to bring to your attention the recent judgment in the *ClientEarth* case, where the Court of Justice ruled that the Institution does not have to examine *ex officio* the existence of a need for transferring personal data[13]. In the same ruling, the Court stated that if the applicant has not established a need, the institution does not have to examine the absence of prejudice to the person's legitimate interests[14].

Neither in your initial, nor in your confirmatory application, have you established the necessity of disclosing any of the above-mentioned personal data. Therefore, I have to conclude that the transfer of personal data through the disclosure of the requested documents cannot be considered as fulfilling the requirement of lawfulness provided for in Article 5 of Regulation 45/2001. In consequence, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as there is no need to publicly disclose the personal data included therein and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

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10 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.

11 Judgment of the Court (Grand Chamber) of 29 June 2010, *European Commission v the Bavarian Lager Co. Ltd.*

12 Judgment of the Court (Grand Chamber) of 29 June 2010, *European Commission v the Bavarian Lager Co. Ltd.*, paragraphs 77-78.

13 Judgment of the Court of Justice 16 July 2015 *ClientEarth v EFSA* in Case C-615/13P, paragraph 47.

14 Judgment of the Court of Justice 16 July 2015 *ClientEarth v EFSA* in Case C-615/13P, paragraphs 47-48.

Please note that the exception of Article 4(1)(b) has an absolute character and does not envisage the possibility to demonstrate the existence of an overriding public interest.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2), first indent, and Article 4(3), first and second subparagraph, of Regulation 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.

In your confirmatory application, you do not put forward any reasoning pointing to an overriding public interest in disclosing the requested document. Nor have I been able to identify any elements capable of demonstrating the existence of any possible overriding public interest in disclosing the refused elements that would outweigh the interests protected by the first indent of Article 4(2) (protection of commercial interests) and the first and second subparagraph of Article 4(3) (protection of the decision-making process) of Regulation 1049/2001.

To the contrary, as explained above the inter-institutional decision-making process is ongoing. Full disclosure of the briefing documents would affect the Commission's ability to act freely from external pressure in effectively defending the Commission's proposal for Directive on a Digital Single Market. I therefore consider that such disclosure would be contrary to the public interest. Furthermore, I assure you that the Commission interpreted and applied the exceptions of Article 4 of Regulation 1049/2001 strictly, which results in granting partial access to 35 documents.

In consequence, I consider that in this case there is no overriding public interest that would outweigh the interests in safeguarding the protection of decision-making process and of commercial interests, based on Article 4(3), first and second subparagraph, and Article 4(2), first indent, of Regulation 1049/2001.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting (wider) partial access to the documents requested. However, for the reasons explained above, no meaningful (wider) partial access is possible without undermining the interests described above.

Consequently, I have come to the conclusion that parts of the documents requested are covered by the invoked exceptions to the right of public access.

5. 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 Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

For the Commission
Alexander ITALIANER
Secretary-General

Enclosures: redacted documents contained in Annex 2 and 4