



EUROPEAN COMMISSION

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DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2017/2627**

Dear Mr Schindler,

I refer to your e-mail of 30 June 2017, registered on 4 July 2017, 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 documents² (hereafter ‘Regulation 1049/2001’).

I would like to apologise for the significant delay in replying to your confirmatory application.

1. SCOPE OF YOUR APPLICATION

In your initial application of 3 May 2017, you requested access to ‘the [b]riefing documents for meetings of Commissioner Oettinger with third parties as well as [b]riefing documents for meetings of [C]abinet members of Commissioner Oettinger with third parties’. You defined the temporal scope of your application as ‘from September 1, 2016 to May 3, 2017’. You also underlined that your application related to

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

² Official Journal L 145 of 31.5.2001, p. 43.

the meetings listed on the *Europa* website³. You specified however that, '[i]f Mr. Oettinger and/or his [C]abinet members held meetings with third parties that were not listed on this page for any reason, [you] want these briefings to be included in the request nonetheless'.

Your initial application was attributed to the Directorate-General for Human Resources and Security for handling and reply.

By letter dated 20 June 2017, the Directorate-General for Human Resources and Security informed you that your application covered a potentially large number of documents, as a result of which the treatment of your application would constitute a disproportionate administrative burden. In the same letter, the Directorate-General for Human Resources and Security pointed out that, during the period from 1 September 2016 to 3 May 2017, the policy portfolio of Commissioner Oettinger changed from Digital Economy and Society to Budget and Human Resources. Consequently, the Directorate-General for Human Resources and Security asked you to narrow down the scope of your application, so that the number of documents falling under its scope would become more manageable.

By email of 21 June 2017, you replied to the above-mentioned letter. You rejected the proposal to narrow down the scope of your application. You agreed, however, that the number of the documents falling under its scope might indeed be high and consequently acknowledged that the handling of your application would take longer than usual. You requested, however, that the European Commission provide you with the list of documents identified as falling under the scope of the application.

As the European Commission did not provide any reply to your initial application during the statutory time limits, you submitted, on 30 June 2017 a confirmatory application, through which you contested the tacit refusal of access to the documents requested.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

2.1 Identification of documents falling under the scope of your initial and confirmatory applications

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 concerned at the initial stage in light of the provisions of Regulation 1049/2001.

In the case at hand, as no initial reply has been provided by the Directorate-General for Human Resources and Security, the Secretariat-General has proceeded with the

³ List of meetings with organisations and self-employed individuals:
<http://ec.europa.eu/transparencyinitiative/meetings/meeting.do?host=f24e4f06-d181-4f58-9604-3aaf3ce391ea> and <http://ec.europa.eu/transparencyinitiative/meetings/meeting.do?host=595cf53f-c018-4fc8-afa0-9d66c289795c&d-6679426-p=1>.

identification of documents potentially falling under the scope of your application, as part of its confirmatory review.

According to the list of meetings with organisations and self-employed individuals available on the *Europa* website, to which you refer in your initial application, Commissioner Oettinger held 124 meetings with various external organisations, companies and establishments during the period from 1 September 2016 to 3 May 2017. To that number must be added meetings with representatives of national (or other) authorities, or other meetings that are not required to be included in the above-mentioned list on *Europa*. If for each of (at least) 124 meetings mentioned above the services of the European Commission prepared a briefing and assuming that the average length is 20 pages⁴, your initial application would cover at least 2480 pages.

Given the very wide scope of your request and your refusal to narrow it down, the identification and retrieval of the documents potentially falling under its scope took a considerable amount of time.

As part of the above-mentioned review, the Secretariat-General has proceeded to estimate the workload associated with the handling of your confirmatory request. Due to the volume and content of the documents under review and the third-party positions reflected therein, and taking into account the fact that several other confirmatory requests originating from you have been dealt with by the Secretariat-General recently⁵, the number of working days required to analyse the documents falling under the above-mentioned confirmatory application would be very high.

Indeed, according to the Secretariat-General's preliminary estimates and based on past experience with requests concerning the same type of documents, the workload for dealing with your confirmatory application would correspond to more than 150 working days, covering the following steps:

- preliminary assessment of your confirmatory requests;
- contacts and exchanges with the Cabinet of Commissioner Oettinger concerning its position on the disclosure of documents;
- assessment of the content of the documents;
- conducting third-party consultations under Article 4(4) and/or 4(5) of Regulation 1049/2001, if necessary;
- performing possible redactions of the relevant parts falling under exceptions of Regulation 1049/2001;
- preparation of the draft reply, consulting the Cabinet of Commissioner Oettinger and the Legal Service on the draft reply;
- finalisation of the reply at administrative level and formal approvals of the draft decision;

⁴ Calculated on the basis of the average length of the 12 briefings examined in the context of this confirmatory application (without taking into account the attachments).

⁵ Confirmatory applications registered under the reference numbers Gestdem 2018/811 and 2018/1846.

- final verification of the documents to be released and dispatch of the replies.

These estimates also take into account the fact that the staff concerned in the Cabinet of Commissioner Oettinger and the Secretariat-General would have to deal with other tasks and applications in parallel with the handling your confirmatory request.

The Secretariat-General therefore concludes that the workload relating to the disclosure of the documents requested by your confirmatory applications would be disproportionate as compared to the objectives set by the application for access to those documents and does not allow to reconcile your interest as an applicant with those of good administration⁶. Indeed, according to the first estimates referred to above, a maximum of 12 documents could possibly be dealt with within the extended deadline of 30 working days, counting from the identification and retrieval of the documents concerned.

Taking into account your rejection of the proposal of the Directorate-General for Human Resources and Security to limit the scope of your application, the Secretariat-General, at confirmatory stage, decided to limit unilaterally its scope to the 12 documents listed below:

- Briefing for the meeting between *Verbund AG* and Commissioner Oettinger on 1 September 2016, reference: Ares(2016)5414775 (hereafter: ‘document 1’);
- Briefing for the meeting between *Mitteldeutscher Rundfunk* and Commissioner Oettinger on 1 September 2016, reference: Ares(2016)5414611 (hereafter: ‘document 2’);
- Briefing for the presence of Commissioner Oettinger at the Venice Film Festival 2016 on 3 - 4 September 2016, with annex, reference: Ares(2016)5428415 (hereafter: ‘document 3’);
- Speech at 42nd Annual Forum of the European House on 3 September 2016, reference: Ares(2016)5428408 (hereafter: ‘document 4’);
- Briefing for the meeting between *Energieversorgung Weser-Ems AG* and Commissioner Oettinger on 5 September 2016, with three annexes, reference: Ares(2016)5472995 (hereafter: ‘document 5’);
- Briefing for the meeting between the Council of European Employers of the Metal Engineering and Technology-Based Industries and Commissioner Oettinger on 5 September 2016, reference: Ares(2016)5473014, together with the annex (hereafter: ‘document 6’);
- Briefing for the meeting between Digital Europe and Commissioner Oettinger on 5 September 2016, reference: Ares(2016)5473019 (hereafter: ‘document 7’);

⁶ Judgment of the General Court (then: "Court of First Instance") of 13 April 2005 in Case T-2/03, *Verein für Konsumenteninformation v Commission of the European Communities*, (ECLI:EU:T:2005:125), paragraph 101.

- Briefing for the meeting between *Europeana Foundation* and Commissioner Oettinger on 5 September 2016, with two annexes, reference: Ares(2016)5472987 (hereafter: 'document 8');
- Briefing for the meeting between *Vodafone* and Commissioner Oettinger on 6 September 2016 with two annexes, reference: Ares(2016) 5472926 (hereafter: 'document 9');
- Briefing for the meeting between the Association of European Telecommunications Network Operators and Commissioner Oettinger on 6 September 2016, reference: Ares(2016)54729816 (hereafter: 'document 10');
- Briefing for the meeting between the European Producers Club and Commissioner Oettinger on 6 September 2016, reference: Ares(2016)5472933 (hereafter: 'document 11');
- Briefing for the meeting between the European Competitive Telecommunications Association and Commissioner Oettinger on 6 September 2016, with three annexes reference: Ares(2016)5472975 (hereafter: 'document 12').

3. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

Following the examination of the above-mentioned documents, in which, where relevant, I took into account the position of third party originators, I am pleased to inform you that:

- wide partial access is granted to documents 1, 2, 3, 4, 6, 7 and 11, subject only to the redaction of personal data, based on the exception in Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and the integrity of the individual);
- partial access is granted to documents 5, 8, 9, 10 and 12. The withheld parts of the documents contain personal data and were redacted based on the above-mentioned exception in Article 4(1)(b) of Regulation 1049/2001. Additionally, certain information was redacted based on the exception protecting commercial interests provided for in Article 4(2), first indent of Regulation 1049/2001 (as far as documents 8 and 9 are concerned) and the decision-making process, provided for in Article 4(3) of the said Regulation (in so far as documents 5, 9, 10 and 12 are concerned).

Please note that documents 8⁷ and 12 include annexes that originate from third parties (the *Europeana Foundation* and the *European Competitive Telecommunications Association*). They are disclosed for information only and cannot be re-used without the agreement of the originator. It does not reflect the position of the Commission and cannot be quoted as such.

The detailed reasons are set out below.

⁷ Annex 8(b) is publicly available at:
https://www.ifla.org/files/assets/clm/position_papers/copyright_reform-the_library_and_cultural_heritage_institution_view.pdf.

2.1 Protection of 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'.

The relevant undisclosed parts of documents 1 – 12 contain the names, surnames and contact details (telephone numbers and email address) of staff members of the European Commission not holding any senior management position. They also contain the names, surnames, contact details, biographic information and biometric data such as photographs, of third-party representatives.

These undoubtedly constitute personal data within the meaning of Article 2(a) of Regulation 45/2001, which defines it 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'.

It follows that public disclosure of all above-mentioned personal information would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

In accordance with the *Bavarian Lager* ruling⁸, 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 cumulative⁹.

Only if both conditions are fulfilled and the transfer constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

In that context, whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the Institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject¹⁰. This has been confirmed in the recent judgment in the *ClientEarth*

⁸ Judgment of the Court (Grand Chamber) of 29 June 2010 in Case C-28/08 P, *European Commission v the Bavarian Lager Co. Ltd.*, (ECLI:EU:C:2010:378), paragraph 63.

⁹ Ibid, paragraphs 77-78.

¹⁰ Ibid.

case¹¹. I refer also to the *Strack* case, where the Court of Justice ruled that the Institution does not have to examine by itself the existence of a need for transferring personal data¹².

Neither in your initial, nor in your confirmatory application, have you established the necessity of disclosing the personal data included in documents 1 – 12.

Therefore, I have to conclude that the transfer of personal data through the public disclosure of the personal data included in documents 1 - 12 cannot be considered as fulfilling the requirements 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 publicly to 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.

Furthermore, as the photographs included in the documents concerned are biometric data, there is a risk that their disclosure would prejudice the legitimate interests of the persons concerned.

2.2 Protection of commercial interests of a natural or legal person

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'.

The relevant undisclosed part of document 8 contains business information concerning the Europeana Foundation. The information withheld relates to the economic aspects of the activities of the Foundation, together with the information about the changes in its business strategy.

The relevant withheld parts of document 9 include business information of both technical and economic nature concerning Vodafone. In particular, it contains information about pricing policy and technical product features.

The above-mentioned information has to be considered as commercially sensitive business information of the economic operators concerned.

Its public disclosure, through the release of the relevant parts of documents 8 and 9 under Regulation 1049/2001, would clearly undermine the commercial interests of the above-mentioned operators. It can be presumed that the latter provided the commercially sensitive information contained in the documents under the legitimate expectation that it would not be publicly released.

¹¹ Judgment of the Court of Justice of 16 July 2015 in Case C-615/13 P, *ClientEarth v EFSA*, (ECLI:EU:C:2015:219), paragraph 47.

¹² Judgment of the Court of Justice of 2 October 2014 in Case C-127/13 P, *Strack v Commission*, (ECLI:EU:C:2014:2250), paragraph 106.

In consequence, there is a real and non-hypothetical risk that public access to the above-mentioned information would undermine the commercial interests of the economic operators in question. I conclude, therefore, that access to the relevant parts of documents 8 and 9 must be denied, based on the exception laid down in the first indent of Article 4(2) of Regulation 1049/2001.

2.3 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'.

Article 4(3), second subparagraph Regulation 1049/2001 provides that '[a]ccess 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 relevant undisclosed parts of documents 5 and 9 contain information reflecting internal exchanges of views within the European Commission and with third parties regarding the notifications DE/2016/1876, DE/2016/1934 and DE/2016/1954 submitted by the German regulatory body Bundesnetzagentur für Elektrizität, Gas, Telekommunikation, Post und Eisenbahnen (hereafter: 'Bundesnetzagentur') under Article 7 of Directive 2009/140/EC¹³. The notification concerned the implementation of vectoring technology, in particular with regards to proposed prices and technical parameters of an alternative access product for access seekers in the case of a loss of physical unbundling opportunities, and the planned changes in the domestic regulatory framework linked thereto. The undisclosed parts of the above-mentioned documents reflect the exchanges in the context of preparation or during the assessment process of the notification by the European Commission. They constitute therefore, deliberations and preliminary consultations at the early phase of the assessment process.

The assessment process of the notification in question has been finalised, with the adoption of Commission decisions in the above-mentioned cases¹⁴, however, the European Commission still receives regularly other notifications under the above-mentioned Article 7 of Directive 2009/140/EC from the same regulator (Bundesnetzagentur) concerning the same companies.

¹³ Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, OJ L 337, 18.12.2009, p. 37–69.

¹⁴ C(2016) 4834 final; C(2016) 8366 final and C(2016)8896 final respectively.

In the *Muñiz*¹⁵ case, the General Court held that access to documents can be refused on the grounds of Article 4(3), first subparagraph of Regulation 1049/2001, where disclosure of the documents requested (in the case at hand, parts of the documents) would have a substantial negative impact on the decision-making process in question, in particular where disclosure of the documents would lead to a real and reasonably foreseeable risk of external pressure¹⁶ and/or an objectively justified risk of self-censorship¹⁷.

In my view, such risk exists in the case at hand. It needs to be emphasised that the assessment process under above-mentioned Articles 7 and 7a of Directive 2002/21/EC (as amended by Directive 2009/140/EC) is based, to large extent on the information provided by the notifying regulator (in this case, Bundesnetzagentur) and the interested third parties (stakeholders), such as the telecommunication operators. Therefore, it is paramount for the efficient running of the assessment procedure, that third parties (stakeholders affected by potential regulatory intervention through the national regulators) feel able to come forward to raise their concerns with the services of the European Commission while ensuring that details included in the exchanges with the European Commission remain not publicly disclosed. If such details were released, the relationship of mutual trust would be undermined and the risk that such stakeholders would not seek engagement with the European Commission would materialise. That, in turn, would result in the assessment of the market conditions becoming more difficult and, consequently, the Commission's room for manoeuvre and *space to think* in the framework of the new decision-making process (the assessment of other notifications) would be seriously reduced. Indeed, since the European Commission does not have any formal information gathering powers under the regulatory framework for electronic communications, it relies on the information obtained directly from undertakings. I consider that risk as reasonably foreseeable and not purely hypothetical.

Additionally, the relevant undisclosed parts of documents 5, 9, 10 and 12 contain information relating to the revision of the telecom framework.

The decision-making process leading up to the revision is composed of two consecutive stages that are concluded, respectively, by:

- 1) the adoption by the European Commission of the proposal of the legislative act and submission of the proposal to the co-legislators (the European Parliament and the Council);
- 2) the interinstitutional decision-making process aiming at the actual adoption of the legislative act by the Parliament and the Council.

On 14 September 2016, the European Commission adopted the proposal for a Directive of the European Parliament and of the Council establishing the European Electronic

¹⁵ Judgment of 18 December 2008 in Case T-144/05, *Muniz v Commission*, (EU:T:2008:596).

¹⁶ *Ibid*, paragraph 86.

¹⁷ *Ibid*, paragraphs 89, 90.

Communications Code¹⁸, thus concluding the first stage of the process. The decision-making process, however, cannot be seen as completed, insofar as the European Commission is also involved in the subsequent, inter-institutional stage of the process, which is still ongoing. The European Commission can alter its proposal at any time during the legislative procedure, as long as the Council has not acted (Article 293(2) TFEU). Therefore, I consider that the Commission's decision-making powers are not exhausted at this stage, and that the decision-making process has not yet been finalised.

The relevant undisclosed parts of the briefings forming documents 5, 9, 10 and 12 reflect the internal discussions within the services of the European Commission before the adoption of the above-mentioned proposal by the College. As part of the discussions, the European Commission assessed the position of various external stakeholders expressed by the latter in the course of the preparation of the above-mentioned proposal.

Document 5 contains the summary of the assessment of the position of *Energieversorgung Weser-Ems AG* included in the annex.

Documents 9, 10 and 12 were prepared in the context of meetings with the various stakeholders. The content of document 9 and 12 is, to a large extent, based on the contribution provided by the relevant stakeholders, to the public consultations on the proposal of the European Commission. The relevant undisclosed parts of these documents do not include the direct quote of the position of the above-mentioned stakeholders, but an interpretation of this and the result of the assessment by the services of the European Commission.

Based on the above, I conclude that the relevant parts of documents 5, 9, 10 and 12 cannot be disclosed to you pursuant to Article 4(3), first subparagraph, of Regulation 1049/2001, as disclosure thereof would specifically and actually result in serious harm to the ongoing decision-making process protected by that provision. Disclosing those redacted parts would seriously reduce the possibility for the institution to obtain independent assessments from his staff and consult the services on very sensitive issues, thereby undermining the capacity of the institution to promote compromises internally and between the co-legislators.

If the decision-making process was nevertheless considered to be closed following the adoption of the proposal of the European Commission, I consider that the refused parts of the documents would nevertheless be covered by the exception provided for in Article 4(3), second subparagraph, for similar reasons as those set out above. Indeed, disclosing those documents, reflecting opinions for internal use as part of preliminary deliberations regarding the revision of the telecom framework, would seriously harm the (future) decision-making process of the European Commission as regards the review of the telecom framework, including – but not limited to – the interinstitutional decision-making process aiming at the actual adoption of the legislative act.

¹⁸ COM(2016)590.

Against this background, I consider that the limited undisclosed parts of documents 5, 9, 10 and 12 need to be protected against the risks associated with public disclosure under the exception provided for under Article 4(3), first and second subparagraphs of Regulation 1049/2001.

4. PARTIAL ACCESS

Wide partial access is granted to documents 1, 2, 3, 4, 6, 7 and 11 and partial access is granted to the remaining documents.

5. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(1)(b) of Regulation 1049/2001 are absolute exceptions, i.e. their applicability does not need to be balanced against overriding public interest in disclosure.

The exceptions laid down in Article 4(2) and 4(3) 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 refer to any particular overriding public interest that would warrant public disclosure of the withheld parts of documents 5, 8, 9, 10 and 12.

Nor have I, based on my own analysis, been able to identify any elements capable of demonstrating the existence of a public interest that would override the need to protect the commercial interests of the economic operators grounded in the first indent of Article 4(2) of Regulation 1049/2001 and the decision-making process in Article 4(3) of the said Regulation.

6. 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,



For the Commission
Martin SELMAYR
Secretary-General