EUROPEAN COMMISSION

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Mr Francesco Guarascio
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1000 Brussels
Belgium

DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001[1]

Subject: **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2019/1057**

Dear Mr Guarascio,

I refer to your letter of 14 May 2019, registered on the same day, 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 documents[2] (hereafter 'Regulation (EC) No 1049/2001'). Please accept our apologies for this late reply.

1. SCOPE OF YOUR REQUEST

In your initial application of 20 February 2019, addressed to the Directorate-General for Justice and Consumers, you requested access to '[t]he Commission's assessments ("country fiches") of all 54 priority countries in the scope of the EU assessment on high-risk third countries under Directive (EU) 2015/849 with regard to strategic deficiencies in their AML/CFT regimes.' You further specified that '[t]he list of 54 priority countries screened by the Commission can be found here: https://ec.europa.eu/info/sites/info/files/list_of_scoping-priority-hrtc_aml-cft-14112018.pdf¨.'

1 Official Journal L 345 of 29.12.2001, p. 94.
2 Official Journal L 145 of 31.5.2001, p. 43.

- The European Commission has identified the following documents as falling under the scope of your request, registered under reference ARES(2019)3650440: Country fiche of 13.02.2019 on Afghanistan (hereafter ‘document 1’);
- Country fiche of 13.02.2019 on Albania (hereafter ‘document 2’);
- Country fiche of 13.02.2019 on Algeria (hereafter ‘document 3’);
- Country fiche of 13.02.2019 on American Samoa (hereafter ‘document 4’);
- Country fiche of 13.02.2019 on Armenia (hereafter ‘document 5’);
- Country fiche of 13.02.2019 on Australia (hereafter ‘document 6’);
- Country fiche of 13.02.2019 on Bahamas (hereafter ‘document 7’);
- Country fiche of 13.02.2019 on Bangladesh (hereafter ‘document 8’);
- Country fiche of 13.02.2019 on Bosnia and Herzegovina (hereafter ‘document 9’);
- Country fiche of 13.02.2019 on Botswana (hereafter ‘document 10’);
- Country fiche of 13.02.2019 on China (hereafter ‘document 11’);
- Country fiche of 13.02.2019 on China, Hong Kong SAR (hereafter ‘document 12’);
- Country fiche of 13.02.2019 on Colombia (hereafter ‘document 13’);
- Country fiche of 13.02.2019 on Costa Rica (hereafter ‘document 14’);
- Country fiche of 13.02.2019 on Ethiopia (hereafter ‘document 15’);
- Country fiche of 13.02.2019 on former Yugoslav Republic of Macedonia (hereafter ‘document 16’);
- Country fiche of 13.02.2019 on Ghana (hereafter ‘document 17’);
- Country fiche of 13.02.2019 on Guam (hereafter ‘document 18’);
- Country fiche of 13.02.2019 on Guatemala (hereafter ‘document 19’);
- Country fiche of 13.02.2019 on Guyana (hereafter ‘document 20’);
- Country fiche of 13.02.2019 on the Islamic Republic of Iran (hereafter ‘document 21’);
- Country fiche of 13.02.2019 on Iraq (hereafter ‘document 22’);
- Country fiche of 13.02.2019 on the Isle of Man (hereafter ‘document 23’);
- Country fiche of 13.02.2019 on Democratic People's Republic of Korea (hereafter ‘document 24’);
- Country fiche of 13.02.2019 on Lao People's Democratic Republic (hereafter ‘document 25’);
- Country fiche of 13.02.2019 on Libya (hereafter ‘document 26’);
- Country fiche of 13.02.2019 on Malaysia (hereafter ‘document 27’);
- Country fiche of 13.02.2019 on Mauritius (hereafter ‘document 28’);
- Country fiche of 13.02.2019 on Mexico (hereafter ‘document 29’);
- Country fiche of 13.02.2019 on Morocco (hereafter ‘document 30’);
- Country fiche of 13.02.2019 on Nigeria (hereafter ‘document 31’);
- Country fiche of 13.02.2019 on Northern Mariana Islands (hereafter ‘document 32’);
- Country fiche of 13.02.2019 on Pakistan (hereafter ‘document 33’);
- Country fiche of 13.02.2019 on Panama (hereafter ‘document 34’);
- Country fiche of 13.02.2019 on Puerto Rico (hereafter ‘document 35’);
- Country fiche of 13.02.2019 on the Russian Federation (hereafter ‘document 36’);
- Country fiche of 13.02.2019 on Samoa (hereafter ‘document 37’);
- Country fiche of 13.02.2019 on Saudi Arabia (hereafter ‘document 38’);

- Country fiche of 13.02.2019 on Serbia (hereafter 'document 39');
- Country fiche of 13.02.2019 on Singapore (hereafter 'document 40');
- Country fiche of 13.02.2019 on Sri Lanka (hereafter 'document 41');
- Country fiche of 13.02.2019 on Switzerland (hereafter 'document 42');
- Country fiche of 13.02.2019 on the Republic of Syria (hereafter 'document 43');
- Country fiche of 13.02.2019 on Thailand (hereafter 'document 44');
- Country fiche of 13.02.2019 on Trinidad and Tobago (hereafter 'document 45');
- Country fiche of 13.02.2019 on Tunisia (hereafter 'document 46');
- Country fiche of 13.02.2019 on Turkey (hereafter 'document 47');
- Country fiche of 13.02.2019 on Uganda (hereafter 'document 48');
- Country fiche of 13.02.2019 on Ukraine (hereafter 'document 49');
- Country fiche of 13.02.2019 on the United Arab Emirates (hereafter 'document 50');
- Country fiche of 13.02.2019 on the United States (hereafter 'document 51');
- Country fiche of 13.02.2019 on United States Virgin Islands (hereafter 'document 52');
- Country fiche of 13.02.2019 on Vanuatu (hereafter 'document 53');
- Country fiche of 13.02.2019 on Yemen (hereafter 'document 54').

The Directorate-General for Justice and Consumers prepared these documents in the context of the EU assessment on high-risk third countries under Directive (EU) 2015/849.[3]

In its initial reply of 7 March 2019, the Directorate-General for Justice and Consumers refused access to these documents based on the exceptions of Article 4(1)(a), third indent (protection of international relations) and 4(3), first subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. You underpin your request with detailed arguments, which I will address 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 regret to inform you that access is refused to all requested documents based on the exceptions of Article 4(1)(a), first, third and fourth indent (protection of the public interest as regards public security, international relations and the financial, monetary or economic policy of the European Union or a Member State) and

[3] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, Official Journal 141 of 5.6.2015, p. 73.

4(3), first subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001, for the reasons set out below.

2.1. Protection of the public interest as regards public security, international relations and the financial, monetary or economic policy of the EU or a Member State

Article 4(1)(a), first indent, 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 […] public security'.

Article 4(1)(a), third indent, 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'.

Article 4(1)(a), fourth indent, of Regulation (EC) No 1049/2001 provides that that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of […] the public interest as regards […] the financial, monetary and economic policy of the European Union or a Member State.

The Court of Justice has confirmed that it 'is clear from the wording of Article 4(1)(a) of Regulation 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.'[4]

The General Court has acknowledged that 'the institutions enjoy a wide discretion when considering whether access to a document may undermine the public interest and, consequently, […] the Courts review of the legality of the institutions' decisions refusing access to documents on the basis of the mandatory exceptions 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'.[5]

The requested documents were drawn up by the services of the European Commission in the context of identification of high-risk third countries, which have strategic deficiencies in their national the anti-money laundering and counter terrorist financing regimes that pose significant threats to the financial system of the Union. The purpose of the documents is to present the assessment of the European Commission based on a set of non-cumulative criteria and propose which third countries should be identified as high-risk third countries. For this assessment, 'the Commission takes into account information

[4] Judgement of the Court of Justice of 1 February 2007, C-266/05 P, *Sison v Council*, EU:C:2007:75 paragraph 46.

[5] Judgment of the General Court of 25 April 2007, T-264/04, *WWF European Policy Programme v Council*, EU:T:2007:114, paragraph 40.

from international organisations and standard setters in the field of AML/CFT[6], such as FATF[7] public statements, mutual evaluation or detailed assessment reports or published follow-up reports, and adapt its assessments to the changes therein, where appropriate'.[8] As per their nature, the requested documents contain sensitive information regarding the context, risk profile and level of deficiencies relating to the regime on anti-money laundering and counter terrorist financing of several third countries, as well as the assessment of this information through the European Commission.

The ultimate purpose of this exercise is to protect the proper functioning of the Union financial system and of the internal market from money laundering and terrorist financing. To achieve this purpose, the efforts of the EU must be ongoing, including quick and continuous adaptations of the legal framework as regards high-risk third countries in order to address efficiently existing risks and prevent new ones from arising. The European Commission intends to continue assessing the anti-money laundering and counter terrorist financing regimes of additional countries included in the scope of its analysis, but which were not yet assessed. It aims to perform additional assessments until 2025 at least, in particular review so-called "priority 2" countries in the coming years, but also re-assess a number of countries that were already assessed but are under continuous monitoring.

The documents contain sensitive and confidential information explaining the reasons why the European Commission selected a country, the threat level and key risks for anti-money laundering and counter terrorist financing, as well as the assessment and conclusions of the European Commission on the strategic deficiencies of high-risk countries. The requested documents also contain confidential information obtained from international organisations, third countries or Europol, which were taken into account by the European Commission for its assessment.

Public disclosure of the requested documents or of any parts thereof, at this stage, would undermine the public interest as regards public security, international relations and the financial, monetary and economic policy of the European Union or a Member State in a realistically foreseeable and not purely hypothetical way.

Firstly, the requested documents have not been shared with the third countries concerned. Under these circumstances, their disclosure or disclosure of parts of them to the public at large might be perceived by the third countries as a violation of their right to be heard, would have a negative diplomatic impact in their relations of the European Commission, thus undermining the public interest as regards the international relations of the EU with those third countries. It is essential for the success of this exercise, particularly because it is an ongoing exercise, that the European Commission maintains a dialogue with the high-risk third countries, gains a better understanding of existing risks, promotes the EU policies on anti-money laundering and counter terrorist financing and engages with the

6 Anti-money laundering and counter terrorist financing.
7 Financial Action Task Force.

8 Recital 28 of Directive 2015/849.

third countries concerned.

In this context, I would like to underline that the General Court has acknowledged that 'the way in which the authorities of a third country perceive the decisions of the European Union is a component of the relations established with that third country'.[9]

Secondly, the requested documents contain sensitive information, which is not public and which the European Commission received from third countries and international organisations, like the Financial Action Task Force (FATF)[10] and its International Cooperation Review Group (ICRG) on a confidentiality basis. Disclosure of this confidential information, against express statements of the providing parties, would undermine the relation of trust with these parties, create an unwillingness on their part to share further information, put at risk the participation of the European Commission in the meetings of international organisations, in particular its participation to the work of the Financial Action Task Force, thus negatively affecting the international relations of the EU. It may therefore undermine the Commission's capacity to receive the necessary information from international partners, which is absolutely necessary for it to continue and complement its assessments of additional countries included in the scope of its analysis, but which were not yet assessed.

Thirdly, the requested documents contain the assessment of the European Commission regarding the risks of money laundering or terrorist financing. Public disclosure, at this stage, would reveal to the public at large considerations and assessments of the European Commission, which could be exploited by organised interests in the fields of anti-money laundering and counter terrorist financing to take advantage of existing deficiencies and create new risks, thus undermining the proper functioning of the Union financial system and of the internal market from money laundering and terrorist financing. Such disclosure would clearly undermine the public interest as regards public security, international relations and the financial, monetary or economic policy of the EU or a Member State. For example, criminals or terrorists would be made aware of existing shortcomings in third countries' regimes on criminalising money laundering or terrorist financing, shortcomings on third countries competent authorities' powers, or shortcomings in international cooperation that could be exploited before mitigating measures are put in place in the EU. Similarly, criminals or terrorists would be made aware of loopholes in customer due diligence requirements applied by financial institutions and designated non-financial professions and businesses before mitigating measures are put in place in the EU. Public disclosure at large of the information contained in the documents may also indicate that criminals' and terrorists' modi operandi have been detected and facilitate their efforts to escape law enforcement and undermine the work of the judicial authorities. In addition, once mitigating measures are being put in place in the EU, terrorist and criminals may use the information regarding other third countries reviewed (but not listed) in order to identify specific loopholes to displace their activities and circumvent EU efforts. Hence, disclosure of the requested documents may

[9] Judgment of the General Court of 27 February 2018, T-307/16, *CEE Bankwatch Network v European Commission*, EU:T:2018:97, paragraph 90.

[10] Financial Action Task Force (FATF) is an independent intergovernmental body established in 1989.

increase risks of money laundering and terrorist financing in other reviewed countries.

Please note that the Court has acknowledged that the concept of public security encompasses situations in which public access to particular documents could obstruct the attempts of authorities to prevent criminal activities.[11]

Consequently, I conclude that, pursuant to Article 4(1)(a), first, third and fourth indents of Regulation (EC) No 1049/2001, access cannot be granted to the requested documents, as their public disclosure would undermine the public interest as regards public security, international relations and the financial, monetary and economic policy of the European Union or a Member State.

2.2. Protection of the decision-making process

Article 4(3), first subparagraph of Regulation (EC) No 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'.

In your confirmatory application, you request an additional explanation on how disclosure of the requested documents would undermine the decision-making process. You refer to the evolutions which took place since you made your initial request, namely to the fact that the Council rejected the delegated act. You consider that this put an end to the decision-making process and consider that the conditions of Article 4(3), first subparagraph of Regulation (EC) No 1049/2001 are no longer met.

On 7 March 2019, the Council has indeed rejected the Commission Delegated Regulation.[12] However, this did not put an end to the decision-making process, because the Council invited the Commission to propose a new draft list of high-risk third countries that will address Member States' concerns. The European Commission continues to work on an updated assessment in consultation with the European Parliament and Council in order to fulfil its legal obligations stemming from Directive 2015/849. The European Commission has to re-assess the matter, revise the underlying documents, analyse policy options and adopt a new Commission Delegated Regulation on the same subject matter. The requested documents remain crucial for the new delegated act. For this reason, public disclosure of the requested documents would seriously undermine the decision-making process concerning the adoption of the new delegated act. The College of Commissioners plans to discuss the follow-up of the rejected delegated act in the coming months.

Public disclosure of the requested documents, at this stage, would reveal preliminary views and policy options, which are still under consideration and which will possibly need to be updated. The Council, in its statement of objection, justified its decision on the

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11 Judgment of the Court of First Instance of 17 June 1998, T-174/95, *Svenska Journalistförbundet v Council of the European Union*, EU:T:1998:127, paragraph 121.

12 https://data.consilium.europa.eu/doc/document/ST-7250-2019-INIT/en/pdf.

grounds that it 'cannot support the current proposal that was not established in a transparent and resilient process that actively incentivises affected countries to take decisive action while also respecting their right to be heard'. It is expected that the Commission will engage further with Member States and affected third countries and that the content of the working documents will evolve following new information to be provided by Member States experts and third countries, as part of their 'right to be heard.'

Under these circumstances, public disclosure of the requested documents would put in the public domain, preliminary assessments of the European Commission, on which the affected third countries have not yet been heard. Such an action, which was criticised by the Council, would undermine the trust of the affected third countries to the process, thus seriously undermining the successful adoption of the delegated act. It would also undermine the mutual trust between the Council and the European Commission, which would be perceived as ignoring the statement of the Council. This would certainly put under strain the good relations of the two institutions, which are paramount for the successful adoption of the delegated act and the fulfilment of the Commission's obligations based on Directive 2015/849.

In addition, any public release of the documents would risk to seriously undermining the decision-making process of the European Commission, which is scheduled to discuss the way forward in the coming months. The College of Commissioners and the Commission's services must be free to explore all possible options in preparation of the new delegated act free from external pressure. Given the consequences of including a jurisdiction in the list of high-risk third-countries, this is a not a purely hypothetical risk.

Some parts of the documents reflect confidential information received by Europol. Public release of such confidential information would undermine the European Commission's collaboration with Europol and violate the confidentiality provisions of Regulation (EU) 2016/794.[13] This, in turn, would seriously undermine the decision-making process of the Commission, as it would lead to the Commission being deprived from valuable confidential information, which is absolutely necessary for the fulfilment of its tasks.

Consequently, I conclude that, pursuant to Article 4(3), first subparagraph of Regulation (EC) No 1049/2001, access cannot be granted to the requested documents, as their public disclosure would undermine the ongoing decision-making process.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(3), first subparagraph 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.

[13] Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, Official Journal L 135 of 24.5.2016, p. 53.

In your confirmatory application, you put forward a reasoning pointing to an overriding public interest in disclosing the documents requested. In particular, you state that 'there indeed is an overriding public interest in disclosure that outweighs the potential harm caused by the disclosure. According to Article 33(1) of Directive (EU) 2018/843 (AMLD5), obliged entities are required to file suspicious transaction reports to the FIU where the obliged entity knows, suspects or has reasonable grounds to suspect that funds, regardless of the amount involved, are the proceeds of criminal activity or are related to terrorist financing. In order to target the risks of money laundering and terrorist financing facing the Union and those operating within it more effectively, Recital 22 of AMLD4 and Article 18 of AMLD5 require obliged entities to apply a risk-based approach when carrying out customer due diligence measures. Therefore, it is in the public interest of all obliged entities to have as much information as possible in order to apply the risk-based approach and warn public authorities of possible threats of money laundering or terrorism financing or even terminate business relationships if warranted.'

I do not consider that there is an overriding public interest in disclosure based on your arguments. Art. 18 of Directive (EU) 2018/843[14] and Annex III of that directive provide basic guidance on the risk-based approach and cases for the exemplary application of enhanced customer due diligence. Regardless of the assessments made by the European Commission, obliged entities are required to implement their own risk-based measures taking into account risk factors indicated in Annex III of Directive (EU) 2018/843. Obliged entities use various information sources in order to perform their tasks – which is an obligation for many years. The requested documents are not necessary for obliged entities to perform risk-based controls, which rely on their own various information sources.

Nor have I been able to identify any public interest capable of overriding the public interest protected by Article 4(3), first subparagraph of Regulation (EC) No 1049/2001.

Please note also that the requested documents are also covered by the exceptions of Article 4(1)(a), first, third and fourth indents of Regulation (EC) No 1049/2001. Article 4(1)(a) does 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 partial access to the documents requested.

However, for the reasons explained above and given the format and the way in which the documents are drafted, public disclosure of <u>any</u> part of the documents may endanger the interests protected at this stage of the procedure. Therefore, no partial access is possible without undermining the interests described above.

[14] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (Text with EEA relevance), Official Journal L 156 of 19.6.2018, p. 43.

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,

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

For the Commission
Martin SELMAYR
Secretary-General