EUROPEAN COMMISSION

Brussels, 22.10.2019
C(2019) 7705 final

Mr Alexander Fanta
Netzpolitik.org
rue de la Loi 155
1000 Brussels
Belgium

DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001¹

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2019/4160

Dear Mr Fanta,

I refer to your letter of 29 August 2019, registered on the same day, in which you submitted 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 (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 17 July 2019, addressed to the Directorate-General for Taxation and Customs Union, you requested access to:

- ‘[a] list of lobby meetings your Directorate-General held with Apple or its intermediaries from November 2014 up to the present. The list should include: date, individuals attending and organisational affiliation, as well as the issues discussed;
- [m]inutes and other reports of these meetings;
- [a]ll correspondence including attachments (i.e. any emails, correspondence or telephone call notes) between […] DG (including the Commissioner and the Cabinet) and Apple or any intermediaries representing its interests in that time;

- all documents prepared for the meetings and exchanged in the course of the meetings between both parties in the given time frame’.

The European Commission has identified the following documents as falling under the scope of your request:


In its initial reply of 29 August 2019, the Directorate-General for Taxation and Customs Union granted partial access to documents 1-3 based on the exceptions of Article 4(1)(b) (protection of privacy and integrity), Article 4(2), first indent (protection of commercial interests) and Article 4(2), second indent (protection of court proceedings) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. Specifically, you contest the application of the exception in Article 4(2), first and second indent, of Regulation (EC) No 1049/2001 regarding Apple’s commercial interests and the closed State aid case. 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 can inform you that further partial access is granted to documents 1 and 2. As regards the redacted parts of documents 1-3, I regret to inform you that I have to confirm the initial decision of Directorate-General for Taxation and Customs Union to refuse access based on the exceptions of Article 4(1)(a), third indent (protection of public interest as regards international relations), Article 4(1)(b) (protection of privacy and integrity) and Article 4(2), second indent (protection of court proceedings) of Regulation (EC) No 1049/2001, for the reasons set out below.

**2.1. Protection of privacy and the integrity of the individual**

Article 4(1)(b) of Regulation (EC) No 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 its judgment in Case C-28/08 P (Bavarian Lager)\(^3\), the Court of Justice ruled that when a request is made for access to documents containing personal data, 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\(^4\) (hereafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.

Please note that, as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by 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/EC\(^5\) (hereafter ‘Regulation (EU) 2018/1725’).

However, the case law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 2018/1725.

In the above-mentioned judgment, the Court stated that Article 4(1)(b) of Regulation (EC) No 1049/2001 ‘requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with […] [the Data Protection] Regulation’.\(^6\)

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person […]’.

As the Court of Justice confirmed in Case C-465/00 (Rechnungshof), ‘there is no reason of principle to justify excluding activities of a professional […] nature from the notion of private life’.\(^7\)

Documents 1-3 contain personal data such as the names and initials of persons who do not form part of the senior management of the European Commission, as well as representatives of Apple.

The names\(^8\) of the persons concerned as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725.

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


\(^6\) European Commission v The Bavarian Lager judgment, cited above, paragraph 59.

\(^7\) Judgment of the Court of Justice of 20 May 2003, Rechnungshof and Others v Österreichischer Rundfunk, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

\(^8\) European Commission v The Bavarian Lager judgment, cited above, paragraph 68.
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 fulfilled 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.

In Case C-615/13 P (ClientEarth), the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data. This is also clear from Article 9(1)(b) of Regulation (EU) 2018/1725, which requires that the necessity to have the personal data transmitted must be established by the recipient.

According to Article 9(1)(b) of Regulation (EU) 2018/1725, the European Commission has to examine the further conditions for the lawful processing of personal data only if the first condition is fulfilled, namely if the recipient establishes 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 confirmatory application, 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 subjects’ legitimate interests might be prejudiced.

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

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2.2. Protection of court proceedings and legal advice

Article 4(2), second 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: […] court proceedings and legal advice […] unless there is an overriding public interest in disclosure’.

In its judgment in Case T-84/03 (Turco)\(^{10}\), the Court of First Instance\(^{11}\) underlined that the exception provided for in Article 4(2), second indent of Regulation (EC) No 1049/2001 protects two distinct interests: court proceedings and legal advice.\(^{12}\) In the case at hand, the refusal of the withheld parts of the requested document is based on the need to protect pending court proceedings.

In your confirmatory application, you argue that there should not be any commercial interests undermined since the State aid case against Apple and Ireland concluded in 2016.

In 2016, the Commission adopted a final decision C(2016) 5605 final that the tax rulings granted by Ireland in favour of Apple Sales International and Apple Operations Europe International constituted state aid. The Commission considered that the aid was unlawfully put into effect by Ireland in breach of Article 108(3) of the Treaty and is incompatible with the internal market. Ireland was requested to immediately and effectively recover the aid.

However, Ireland and Apple lodged with the General Court an application for annulment of the above-mentioned decision in November and December 2016, respectively. The General Court commenced hearings in Joined Cases T-778/16, Ireland v. Commission and T-892/16, Apple Sales International and Apple Operations Europe v. Commission on 17 and 18 September 2019.

In the Philip Morris case, the General Court confirmed that the scope of that exception is not limited to the protection of documents drawn up solely for the purposes of specific judicial proceedings, such as pleadings. The Court held indeed that ‘[…] in order for the exception to apply, it is necessary that the requested documents […] should have a relevant link with a dispute pending before the Courts of the European Union […] and that disclosure of those documents, even though they were not drawn up in the context of pending court proceedings, should compromise the principle of equality of arms […]. In other words, it is necessary that those documents should reveal the position of the institution concerned on contentious issues raised during the court proceedings relied upon’\(^{13}\).


\(^{11}\) Currently the General Court.

\(^{12}\) Turco v Council, cited above, paragraph 65.

By analogy, the above-mentioned case-law applies to internal documents inextricably linked to ongoing, imminent or potential (though not purely hypothetical) proceedings, which reveal the position of the European Commission in a dispute before the court.

The redacted parts of document 2 contain Apple’s position regarding the Commission decision, which is subject to the action for annulment.

The purpose of the exception for the protection of court proceedings is to maintain the independence of the European Union institutions in their dealings with the Court and to ensure the proper course of justice and a fair hearing for the parties.\(^{14}\)

Public disclosure of the redacted parts document 2 is liable, in the context of specific pending proceedings, to compromise the equality of arms. In this regard, the Court of Justice has stated in its judgment in Joined Cases C-514/07 P, C-528/07 P and C-532/07 P that ‘such a situation could well upset the vital balance between the parties to a dispute – the state of balance which is at the basis of the principle of equality of arms – since only the institution concerned by an application for access to its documents, and not all the parties to the proceedings, would be bound by the obligation of disclosure’.

Indeed, there is a real and non-hypothetical risk that its release would adversely and seriously affect the court proceedings in the meaning of Article 4(2), second indent, of Regulation (EC) No 1049/2001 with regard to the court proceedings ongoing before the Court of Justice.

Against this background, I consider that public access to the redacted parts of document 2 has to be refused on the basis of Article 4(2), second indent (protection of court proceedings), of Regulation (EC) No 1049/2001.

\[2.3. \textbf{Protection of the public interest as regards international relations}\]

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’.

With regard to this provision, the Court of Justice has acknowledged in \textit{In’t Veld} judgment that the institutions enjoy ‘a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest’.\(^{15}\)

The redacted text of document 3 represents a position expressed by the Commission representative at the meeting. It includes frank, subjective comments expressing individual views and suggestions about future relations with a third country. The country concerned could perceive such comments as an interference in their national taxation

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policy, which would jeopardise the international relations of the European Union with that country. 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.\(^{16}\)

Therefore, access to the withheld parts of the requested document would undermine the protection of public interest as regards international relations protected by Article 4(1)(a), third indent, of Regulation (EC) No 1049/2001, and that access has to be refused on that basis.

3. **OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exceptions laid down in Article 4(2) 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.

Please note also that Articles 4(1)(a) and 4(1)(b) of Regulation (EC) No 1049/2001 does not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

In your confirmatory application, you do not put forward any specific arguments to establish the existence of an overriding public interest. You invoke general considerations such as ‘public interest in the subject of digital companies and taxation’. In that regard, I would like to refer to the judgment in the *Strack* case, where the Court of Justice ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient to merely rely on that principle and its importance. Instead, an applicant has to show why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure.\(^{17}\)

Nor have I been able to identify any public interest capable of overriding the public and private interests protected by Article 4(2) of Regulation (EC) No 1049/2001.

Therefore, I conclude that these considerations of a general nature and would not outweigh the interests protected under Article 4(2) of Regulation (EC) No 1049/2001.

4. **PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting further partial access to the documents requested.

For the reasons explained above, wider partial access is now granted to documents 1 and 2 without undermining the interests described above.


In this context, please note, that general considerations cannot provide an appropriate basis for establishing that the principle of transparency was in this case especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question.\textsuperscript{18}

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,

\begin{center}
\textbf{CERTIFIED COPY}\\
For the Secretary-General,\\
\end{center}

\begin{flushright}
Jordi \textsc{Ayet Puigarnau}\\
Director of the Registry\\
EUROPEAN COMMISSION\\
\end{flushright}

\begin{flushright}
For the Commission\\
Ilze \textsc{Juhanson}\\
Acting Secretary-General\\
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Enclosures: (2)

\textsuperscript{18} Judgment of the Court of Justice of 14 November 2013, \textit{Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission}, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93.