



EUROPEAN COMMISSION

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Mr Mathias Schindler
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**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 2019/5977**

Dear Mr Shindler,

I refer to your e-mail of 24 January 2020, 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 September 2019, addressed to the Directorate-General for Communication Networks, Content and Technology, you requested access to, I quote:

- ‘all information (including but not limited to letters, emails, email drafts, documents, notes, memoranda, studies, remarks, copies, data, files, facsimiles, drafts and records) about the notification under Directive 98/34/EC related to the German Presseverlegerleistungsschutzrecht (Achstes Gesetz zur Änderung des Urheberrechtsgesetzes dated May 7, 2013 (BGBl 2013 I Nr. 23 ,pg 1161);
- any information (see above) related to the interpretation of Directive 98/34/EC with regards to the notification requirements in the field of copyright;

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

- any information within the Commission and their staff regarding the ancillary copyright law ("Leistungsschutzrecht für Presseverleger");
- any information concerning the recently closed ECJ case on the notification of the German Leistungsschutzrecht’.

On 22 October 2019, the European Commission informed you that points 1 and 2 of your request had been attributed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, and registered under reference GESTDEM 2019/5565. Point 3 and part of point 4 were attributed to the Directorate-General for Communications Networks, Content and Technology and registered under reference GESTDEM 2019/5319.

The remaining part of point 4 was attributed to the European Commission’s Legal Service and registered under GESTDEM 2019/5977. In its initial reply of 12 December 2019, the Legal Service informed you that GESTDEM 2019/5977 concerns documents relating to the judgment of the Court of Justice in Case C-299/17, *VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH v Google LLC*³.

Please be informed the scope of the present confirmatory review is limited to documents under GESTDEM 2019/5977. As regards documents under GESTDEM 2019/5319, you will receive the corresponding reply of the European Commission in due course.

The European Commission’s Legal Service identified the following documents under the relevant part of point 4 of your request:

- Note of the Legal Service to the attention of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs and the Directorate-General for Communications Networks, Content and Technology, 11 August 2017, reference Ares(2017)4015858 (hereafter ‘document 1’), which contains the following annexes:
 - annex 1: request for a preliminary ruling of the Landgericht Berlin (Germany), 8 May 2017, reference Ares(2019)7641071 (hereafter ‘document 1.1’);
 - annex 2: translation in English of the request for a preliminary ruling, reference Ares(2019)7641071 (hereafter ‘document 1.2’);
 - annex 3: translation in French of the request for a preliminary ruling, reference Ares(2019)7641071 (hereafter ‘document 1.3’);
- European Commission’s written observations, 16 October 2017, reference Ares(2017)5062729 (hereafter ‘document 2’);

³ Judgment of the Court of 12 September 2019, *VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH v Google LLC*, C-299/17, EU:C:2019:716.

- note of the European Commission’s Legal Service to the attention of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs and the Directorate-General for Communications Networks, Content and Technology: ‘Presence and preparation of the oral hearing in case C-299/17 VG Media’, 27 July 2018, reference Ares(2018)3985544 (hereafter ‘document 3’);
- Portugal’s written observations, 9 October 2017, reference Ares(2018)58396 (hereafter ‘document 4’);
- Germany’s written observations, 16 October 2017, reference Ares(2018)58396 (hereafter ‘document 5’);
- Greece’s written observations, reference Ares(2018)58396 (hereafter ‘document 6’);
- Spain’s written observations, reference Ares(2018)58396 (hereafter ‘document 7’);
- VG Media’s written observations, 19 October 2017, reference Ares(2018)58396 (hereafter ‘document 8’);
- Google’s written observations, 20 October 2017, reference Ares(2018)58396 (hereafter ‘document 9’).

In its initial reply of 12 December 2019, the European Commission’s Legal Service granted full access to documents 1.1, 1.2, 1.3 and 2. It granted partial access to documents 1 and 3 based on the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001. It granted, upon consultation with the Member States and the third parties concerned pursuant to Article 4(4) of Regulation (EC) No 1049/2001, full access to document 4 and partial access to documents 5, 8 and 9 based on the exception laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001.

In its additional reply of 15 January 2020, the European Commission’s Legal Service granted access to document 6 upon consultation with the Member State from which the document originates. Moreover, it refused to grant access to document 7, as the Spanish authorities had opposed to its disclosure on the basis of the second indent (protection of court proceedings and legal advice) of Article 4(2) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. You state that, I quote, ‘I ha[p]pily confirm that I maintain my request with the full scope defined by the Regulation’. You do not provide any arguments in support of your request.

Therefore, the scope of this confirmatory decision is circumscribed to the review of the reply of the Legal Service as regards the documents that were (partially) refused at the initial stage, namely documents 1, 3, 5, and 7-9.

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.

In the context of the confirmatory review, and in accordance with Article 4(4) and 4(5) of Regulation (EC) No 1049/2001, the European Commission consulted the Spanish authorities on the possible disclosure of document 7, as this document originates from them. In response to this consultation, the Spanish authorities agreed with the disclosure of the document in question, subject to the redaction of personal data. I consider that the position of the Spanish authorities is justified for the reasons set out in section 2.1 below.

Therefore, I can inform you that partial access is granted to document 7 with only limited parts redacted on the basis of the exception laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

As regards the limited redacted parts of documents 1, 3, 5, 8 and 9, I regret to inform you that I have to confirm the initial decision of the European Commission's Legal Service to refuse access, based on the protection of privacy and the integrity of the individual (Article 4(1)(b) of Regulation (EC) No 1049/2001).

The detailed reasons underpinning my assessment are 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*)⁴, 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 data⁵ (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

⁴ Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd* (hereafter referred to as '*European Commission v The Bavarian Lager* judgment') C-28/08 P, EU:C:2010:378, paragraph 59.

⁵ OJ L 8, 12.1.2001, p. 1.

movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC⁶ (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’⁷.

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’⁸.

Documents 1 and 3 contain personal data such as the names, surnames and initials of persons who do not form part of the senior management of the European Commission. Documents 5 and 7-9 contain personal data such as names, surnames, e-mail addresses and telephone numbers of Member States representatives and representatives of private companies. Moreover, documents 1, 5, and 7-9 contain handwritten signatures of the persons concerned.

The names⁹ 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 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.

⁶ OJ L 295, 21.11.2018, p. 39.

⁷ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

⁸ 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.

⁹ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

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 data¹⁰. 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 must 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.

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

3. 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.

As indicated above, partial access is herewith granted to document 7 with only limited parts redacted on the basis of Article 4(1)(b) of Regulation (EC) No 1049/2001. As regards documents 1, 3, 5, 8 and 9, I consider that, for the reasons explained above, no meaningful further partial access is possible without undermining the protection of privacy and the integrity of the individual.

¹⁰ Judgment of the Court of Justice of 16 July 2015, *ClientEarth v European Food Safety Agency*, C-615/13 P, EU:C:2015:489, paragraph 47.

4. 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,



For the Commission
Ilze JUHANSONE
Secretary-General

Enclosures: (1)