



EUROPEAN COMMISSION

Brussels, 20.12.2018
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Greece

**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 2018/5589**

Dear [REDACTED],

I refer to your letter of 4 December 2018, 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 documents² (hereafter 'Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 17 October 2018, you requested access to the documents relating to the infringement file number 2010/4206 regarding the compatibility of Greek legislation with Directive 2000/35/EC, as amended by Directive 2011/7/EU, combatting late payments in commercial transactions.

In its initial reply dated 28 November 2018, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs refused access to the documents in question, based on the exception of Article 4(2), third indent of Regulation 1049/2001 (protection of the purpose of inspections, investigations and audits).

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

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

In your confirmatory application, you request a review of the initial reply. In particular, you argue that there is an overriding public interest in the disclosure of the documents pertaining to the infringement file in question.

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 concerned at the initial stage.

Following this review, I wish to confirm the initial decision of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs and refuse access to the documents forming part of the infringement proceedings in case 2010/4206, based on the exception defined in Article 4(2), third indent (protection of purpose of investigations) of Regulation 1049/2001, for the reasons set out below.

Article 4(2), third indent of Regulation 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the purpose of inspections, investigations and audits.'

Regarding your request to have access to documents, which are part of infringement file 2010/4206 against Greece, please be informed that all documents to which you request access are covered by a general presumption of non-disclosure. This presumption covers exchanges between Member States and the European Commission, as well as the Commission services' internal assessment of the degree of alignment of the relevant Greek legislation with EU law.

In this respect, please note that the Court has interpreted Article 4(2), third indent of Regulation 1049/2001, among others in its *LPN* judgment, in which it underlined that in ongoing infringement cases, the institution may base itself on a general presumption of non-disclosure³. This confirmed the Court's earlier *Petrie* judgment, in which it ruled that '[...] the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure.

This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the European Commission and the Member State in question regarding the latter's voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgment of the Court of Justice'⁴.

Furthermore, in the *ClientEarth* judgment, the General Court stated that 'the exception relating to the protection of the purpose of investigations does not apply solely to

3 Judgment of 14 November 2013, *LPN and Finland v Commission*, Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraphs 55, 65-68.

4 Judgment of 11 December 2001, *Petrie and Others v Commission*, T-191/99, EU:T:2001:284, paragraph 68.

documents relating to infringement proceedings which have been commenced but also to documents concerning investigations the outcome of which might be such proceedings’⁵.

Consequently, all documents in the infringement file are covered by a general presumption of non-accessibility based on the exception of Article 4(2), third indent of Regulation 1049/2001. This means that the institution is not required to carry out a specific and individual assessment of the content of each requested document.

Without prejudice to the question of whether an overriding public interest in releasing the documents can be identified (which is the subject of point 4 below), I would like to underline that the investigative activities in relation to infringement procedure 2010/4206, to which the documents relate, are fully ongoing.

The public disclosure of the requested documents would not only negatively influence the dialogue between the European Commission and Greece, for which a climate of trust is essential, but would also hinder the European Commission in taking a decision in this case and on the follow-up to this infringement procedure, free from undue outside interference. This climate of mutual trust between the European Commission and the Member State concerned must be ensured throughout the different stages of the procedure until the investigation is definitively closed. Disclosure of the requested documents at this stage would be incompatible with that aim.

I conclude, therefore, that access to the requested documents, which form part of administrative infringement file, must be denied, based on the exception laid down in the third indent of Article 4(2) of Regulation 1049/2001.

3. NO PARTIAL ACCESS

I have also examined the possibility of granting partial access to the documents concerned, in accordance with Article 4(6) of Regulation 1049/2001. However, it follows from the assessment made above that the documents that fall within the scope of your request are manifestly and entirely covered by the exception laid down in Article 4(2), third indent of Regulation 1049/2001.

It must also be underlined that the Court of Justice has confirmed that a presumption of non-disclosure excludes the possibility to grant partial access to the file⁶.

Consequently, partial access is not possible, considering that the documents requested are covered in their entirety by the invoked exception to the right of public access.

4. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest, firstly, has to be public and, secondly, has to outweigh the damage caused by the release, i.e. it must in

⁵ Judgment of 13 September 2013, *ClientEarth v European Commission*, T-111/11, EU:T:2013:482, paragraph 80.

⁶ Judgment of 25 March 2015, *Sea Handling v Commission*, T-456/13, EU:T:2015:185, paragraph 93.

this case outweigh the interest protected by virtue of the third indent of Article 4(2) of Regulation 1049/2001.

In your confirmatory application, you do not refer to any particular overriding public interest that would warrant the public disclosure of the document in question and that would outweigh the need to protect it in light of the exceptions of Regulation 1049/2001.

Based on my own analysis, I have not been able to identify any elements capable of demonstrating the existence of a public interest that would override the need to protect the purpose of the ongoing investigation, grounded in Article 4(2), third indent, of Regulation 1049/2001.

Moreover, I consider that in this specific case, the public interest is better served by protecting the purpose of the ongoing investigation. In particular, the public interest in reaching conformity with EU law of the legal framework in the Member State concerned, which constitutes the ultimate purpose of the European Commission's investigations, requires the maintenance of an atmosphere of mutual trust between the European Commission and that Member State.

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,

For the European Commission
Martin SELMAYR
Secretary-General

