



EUROPEAN COMMISSION

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OUT OF SCOPE

National Union of Road Hauliers
from Romania (UNTRR)
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Bucuresti, ROMÂNIA

**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 2018/6011**

Dear ,

I refer to your letter of 5 December 2018, registered on the same day, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation 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 19 October 2018, you requested access to the letter of formal notice send to the Romanian authorities relating to the infringement file number 2018/4075 regarding the compatibility of national rules on motor third-party liability insurance with Directive 2009/138/EC (‘the Solvency II Directive’).

In its initial reply of 19 November 2018, the Directorate-General for Financial Stability, Financial Services and Capital Markets Union 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).

In your confirmatory application, you request a review of the initial reply.

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

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

In particular, you request access to the letter of formal notice send to the Romanian authorities on 19 July 2018. You submit your confirmatory application on behalf of the National Union of Road Hauliers from Romania (UNTRR), which has been asked by the Financial Supervisory Authority of Romania for a contribution regarding possible changes in the current national rules pertaining to motor third-party liability insurance pursuant to the opening of infringement procedure 2018/4075.

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 regret to inform you that I have to confirm the initial decision of the Directorate-General for Financial Stability, Financial Services and Capital Markets Union and refuse access to the documents forming part of the infringement proceedings in case 2018/4075, based on the exception defined in Article 4(2), third indent (protection of purpose of investigations), for the reasons set out below.

The documents to which you request access form part of the procedure laid down in Article 258 of the Treaty on the Functioning of the European Union, which consists of two consecutive stages, the administrative pre-litigation stage and the judicial stage before the Court of Justice. The purpose of the pre-litigation procedure is to allow the Member State to put an end to any alleged infringement, to enable it to exercise its rights of defence and to define the subject-matter of the dispute with a view to bringing an action before the Court.³

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.'

The Court has interpreted Article 4(2), third indent of Regulation 1049/2001 *inter alia* in its *LPN* judgment, in which it underlined that in ongoing infringement cases, the institution may base itself on a general presumption of non-disclosure applied to the documents concerned in their entirety.⁴ 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 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

³ Judgment of 10 December 2002, *Commission v Ireland*, C-362/01, EU:C:2002:739, paragraphs 15 and 16.

⁴ Judgment of 14 November 2013, *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraphs 55, 65-68.

Justice’.⁵ Also, in the *ClientEarth* case, the General Court stated that ‘the exception relating to the protection of the purpose of investigations does not apply solely to documents relating to infringement proceedings which have been commenced but also to documents concerning investigations the outcome of which might be such proceedings’.⁶

Consequently, all documents in the infringement file, including the letter of formal notice, 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.

In your specific case, the requested document is the letter of formal notice sent to the Romanian authorities with the opening of infringement procedure 2018/4075, which has neither reached the stage of a ruling of the Court of Justice nor been closed by the European Commission, and is, therefore, still ongoing.

Please note in this respect that in the *Sea Handling v Commission* judgment, the Court of Justice stated that the general presumption applies even to one single document.⁷

As confirmed in the above-mentioned case law, public disclosure of the requested document would negatively influence the dialogue between the European Commission and Romania, for which a climate of trust is essential. This climate of mutual trust between the European Commission and Romania must be ensured throughout the different stages of the procedure concerned, at least until the investigation is definitively closed. Disclosure of the requested documents at this stage would be incompatible with that aim.

Having regard to the above, I consider that the use of the exception under Article 4(2), third indent of Regulation 1049/2001 on the grounds of protecting the purpose of inspections, investigations and audits is justified, and that access to the documents in question must be refused on that basis.

You argue in your initial application that the National Union of Road Hauliers from Romania (UNTRR) has been asked, by the Financial Supervisory Authority of Romania to provide its opinion regarding the possible changes in the current national rules on motor third-party liability insurance pursuant to the sending of the letter formal notice to the Romanian authorities.

I would like to point out in this respect that disclosure of documents under Regulation 1049/2001 is, legally speaking, public disclosure and it is not, therefore, possible to take the status of applicants into consideration when examining the opportunity to grant or to refuse access to documents under Regulation 1049/2001.

⁵ Judgment of 11 December 2001, *Petrie and Others v Commission*, T-191/99, EU:T:2001:284, paragraph 68.

⁶ Judgment of 13 September 2013, *ClientEarth v European Commission*, T-111/11, EU:T:2013:482, paragraph 80.

⁷ Judgment of 14 July 2016, *Sea Handling v Commission*, C-271/15 P, EU:C:2016:557, paragraph 41.

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 which 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 file.⁸

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 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 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.

Furthermore, I note that recently the General Court confirmed again that the right of access to documents does not depend on the nature of the particular interest which the applicant for access may or may not have in obtaining the information requested.⁹

In any case, 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 to reach 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 maintaining an atmosphere of mutual trust between the European Commission and that Member State.

Therefore, I have not been able to identify any public interest that would outweigh the need for protection the purpose of the ongoing investigation in this specific case.

⁸ Judgment of 25 March 2015, *Sea Handling v Commission*, T-456/13, EU:T:2015:185, paragraph 93.

⁹ Judgment of 27 November 2018, *VG v Commission*, joined cases T-314/16 and T-435/16, EU:T:2018:841, paragraph 55.

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