



EUROPEAN COMMISSION

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OUT OF SCOPE

SLOVENIA

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION No 1049/2001¹**

**Subject: Your confirmatory applications for access to documents under
Regulation No 1049/2001 - GESTDEM 2018/3674, 2018/3453 and
2018/3667**

Dear [REDACTED],

I refer to your two emails of 8 August and your further email of 18 August 2018, registered on 8 and 20 August 2018, respectively, in which you submit three confirmatory applications in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereafter 'Regulation No 1049/2001'). I apologise for the delay in the handling of your confirmatory applications.

1. SCOPE OF YOUR REQUESTS

In your initial application of 26 June 2018 you requested access to a 'Commission document referring to the letter sent by Slovenia to the European Commission in relation to the complaint against Croatia for the [alleged] non-respect of the arbitral award' [that was rendered by the Permanent Court of Arbitration on 29 June 2017 regarding the dispute on the course of the maritime and land boundary between both States³].

You also referred to a legal opinion issued by the European Commission on this letter and requested access to it as well as to any documents ('letters, positions, opinions, etc.')

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

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

³ <https://pcacases.com/web/sendAttach/2175>.

of the European Commission or of ‘departments connected to the Commission’ in relation to this case.

Given that the documents requested relate to a subject matter falling under the remit of various services of the European Commission, your application was attributed to the respective Directorates-General and services⁴, for handling and (separate) replies.

In its initial reply of 6 August 2018, the Secretariat-General’s (then) Directorate C ‘Better Regulation and Work Programme’ informed you that no access was granted to the letter sent by Slovenia to the European Commission on 16 March 2018 concerning the complaint under Article 259 of the Treaty on the Functioning of the European Union against Croatia for the non-respect of the above-mentioned arbitral award. Access was refused based on the exceptions defined in Article 4(2), third indent (protection of the purpose of investigations), Article 4(1)(b) (protection of privacy and the integrity of individual) and Article 4(3) (protection of the decision-making process) of Regulation No 1049/2001.

In its initial reply of 30 July 2018, the Legal Service identified two documents as falling under the scope of your request:

- Legal opinion of 11 October 2017 addressed to the Director-General for Maritime Affairs and Fisheries, Ares(2017)4970138 (hereafter ‘document 1’);
- Legal opinion of 14 May 2018 to the attention of the Head of Cabinet of the President of the European Commission, Ares(2018)2492481 (‘document 2’).

The Legal Service refused access based on the exceptions provided in Article 4(2), second indent (protection of legal advice and court proceedings) and Article 4(2), third indent (protection of the purpose of investigations).

In its initial reply of 7 August 2018, the Directorate-General for Maritime Affairs and Fisheries refused access to over 180 documents based on the two above-mentioned exceptions.

After a renewed assessment of the documents identified by the Directorate-General for Fisheries and Maritime Affairs in its initial reply, it is to be concluded that the documents which contain or refer to the position/opinion of the European Commission’s services on various aspects related to the dispute between Slovenia and Croatia and thus falling under the scope of your confirmatory applications are the following:

- Note for the file of the Directorate-General for Fisheries and Maritime Affairs of 5 March 2018, Ares(2018)1220308 (‘document 3’);

⁴ Secretariat-General, then Directorate C (GESTDEM 2018/3667), Legal Service (GESTDEM 2018/3453) and Directorate-General for Maritime Affairs and Fisheries (GESTDEM 2018/3674).

- Note from the Directorate-General for Fisheries and Maritime Affairs to the Cabinet of Commissioner Vella of 24 January 2018, Ares(2018)418039 ('document 4');
- Internal Note of the Directorate-General for Fisheries and Maritime Affairs of 4 December 2017, Ares(2017)5921145 ('document 5');
- Note for the file regarding the meeting between Commissioner Vella and the Croatian Deputy Prime Minister of 22 November 2017, Ares(2017)5699409 ('document 6');
- Note from the Directorate-General for Fisheries and Maritime Affairs to the Legal Service of 3 October 2017, Ares(2017)4812451 ('document 7').

The other documents originating from the Directorate-General for Fisheries and Maritime Affairs identified at the initial stage do not as such contain an opinion or a position on the issues raised in the letter from the Slovenian authorities concerning the complaint against Croatia, but rather provide an overview of the impact of the dispute on several ongoing files dealt with by the Directorate-General for Fisheries and Maritime Affairs following the arbitral award. These notes describe different internal steps and approaches taken or to be taken, on different files that can be affected in one way or another by the dispute. Therefore, these documents do not fall within the scope of your confirmatory applications and do not form part of this review.

In addition to the documents identified above, the initial reply of the Secretariat-General refers to the letter sent by the Slovenian authorities to the European Commission, as well as to documents which are part of the infringement proceedings lodged by Slovenia against Croatia, as follows:

- Letter from the Permanent Representation of the Republic of Slovenia of 16 March 2018 containing the complaint sent to the European Commission under Article 259 of the Treaty on the Functioning of the EU ('document 8');
- Acknowledgement of receipt sent by the Secretary-General to the Permanent Representation of the Republic of Slovenia on this complaint, dated 22 March 2018 ('document 9').

Therefore, this confirmatory decision covers the assessment of the above-mentioned nine documents.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION NO 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation No 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorates-General concerned at the initial stage.

Following this review, I regret to inform you that I have to confirm the initial decisions of, respectively, the Legal Service, the (then) Directorate C of the Secretariat-General and the Directorate-General for Maritime Affairs and Fisheries to refuse access to the documents pertaining to the administrative file linked to the dispute between Slovenia and Croatia, based on the exceptions defined in Article 4(2), third indent (protection of the purpose of investigations), and Article 4(2), second indent (protection of legal advice and of court proceedings) of Regulation No 1049/2001, for the reasons set out below.

2.1. Protection of the purpose of investigations

Article 4(2), third indent of Regulation No 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 requests for access to positions of the European Commission on the relevant dispute between Slovenia and Croatia, please be informed that the nine above-mentioned documents belong to the administrative file of the action of Slovenia against Croatia, which is currently pending before the European Court of Justice (Case C-457/18).

On 16 March 2018, Slovenia brought the matter before the European Commission under Article 259 of the Treaty on the Functioning of the European Union, considering that Croatia has failed to fulfil its obligations under EU law, among which obligations under the Common Fisheries Policy.

In accordance with Article 259 of the Treaty on the Functioning of the European Union, Slovenia and Croatia were given the opportunity to submit their observations both orally and in writing.

With Article 259, the Treaty has established an alternative investigation procedure to the one laid down in Article 258 of the Treaty on the Functioning of the European Union. Article 259 provides any Member State with the possibility to start an infringement procedure. Consequently, both the infringement procedure launched under Article 258 and the one launched under Article 259 of the Treaty on the Functioning of the European Union require the same level of protection by the Union legal order.

Therefore, the protection of the investigations carried out in the framework of infringement procedures provided for by the third indent of Article 4(2) of Regulation No 1049/2001, as recognised by the European Court of Justice, is also to be applied to an infringement procedure carried out under Article 259 of the Treaty on the Functioning of the European Union. Indeed, it is not only the purpose of a procedure under Article 258 of the Treaty on the Functioning of the European Union to induce the Member State concerned to comply voluntarily with Treaty requirements, but also of a procedure launched by a Member State under Article 259 of the Treaty. It follows that the discussions before the European Commission are to be led in the same spirit of confidentiality as other ongoing investigations, in order to be able to find an amicable solution.

Furthermore, in the recent *Spirlea* judgment, the General Court recognised the importance to preserve ‘an atmosphere of mutual trust between the Commission and the Member State concerned in order to enable them to start a process of negotiation and compromise with a view to an amicable settlement of the dispute, without it being necessary to initiate an infringement procedure under Article 258 of the Treaty of the Functioning of the European Union, which would be likely to lead to the dispute being brought before the Court’.⁵

The General Court has considered ‘that the confidentiality which the Member States are entitled to expect of the Commission in such circumstances warrants, under the heading of protection of the public interest, a refusal of access to documents relating to investigations which may lead to an infringement procedure, even where a period of time has elapsed since the closure of the investigation’.⁶

This requirement of confidentiality remains pertinent 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 up to the delivery of the judgment of the Court of Justice’.⁷

I consider therefore that the general presumption of non-disclosure applicable to infringement procedures conducted under Article 258 of the Treaty of the Functioning of the European Union, as recognised by the European Court of Justice, shall also apply to infringement procedures carried out under Article 259 of the Treaty on the Functioning of the European Union, which provides any Member State with the possibility to start an infringement procedure.

In the present case, no reasoned opinion was adopted by the European Commission. However, in the light of the court application lodged by Slovenia in Case C-457/18, the requirement of confidentiality remains up to the delivery of the judgment of the Court of justice.

Under these circumstances, there is a real and non-hypothetical risk that early disclosure of the documents pertaining to the administrative file of the above-mentioned infringement case would adversely affect any subsequent dialogue between the European Commission and Member States concerned. In order for the European Commission to be able to carry out its tasks, there has to be a climate of mutual trust between the latter and the Member States concerned throughout the different stages of the procedures until the case has been definitively closed.

⁵ Judgment of the General Court of 25 September 2014 in Case T-306/12 *Darius Nicolai and Mihaela Spirlea v Commission*, EU:T:2014:816, paragraph 57, confirmed by the Judgment of the Court of 11 May 2017, *Kingdom of Sweden v Commission*, EU:C:2017:356.

⁶ Judgment of the General Court of 5 March 1997, *WWF v Commission*, Case T-105/95, EU:T: 1997:26, paragraph 63.

⁷ Judgment of the General Court of 11 December 2001, *Petrie and others v Commission*, Case T-191/99, EU:T:2001:284, paragraph 68.

For this reason, the European Commission must refuse access to the requested documents, which form part of the infringement file of the dispute between Slovenia and Croatia, based on the third indent of Article 4(2) of Regulation No 1049/2001.

2.2. Protection of legal advice

Access can be refused under Regulation No 1049/2001 if disclosure would undermine the protection of legal advice provided for under Article 4(2), second indent.

Document 1 has been drawn up by the Legal Service in response to a consultation by the Directorate-General for Fisheries and Maritime Affairs on the arbitral award concerning the dispute between the Republic of Croatia and Slovenia. The opinion of the Legal Service contains a legal assessment of the impact of the referred arbitral award on application of the regime of reciprocal access to territorial waters under Article 5(2) of Regulation No 1380/2013⁸, which is one of the issues raised by Slovenia in its complaint under Article 259 of the Treaty on the Functioning of the European Union.

Document 2 contains the legal opinion of the Legal Service, addressed to the Head of Cabinet of the President of the European Commission. It is a follow-up to the oral hearing in the procedure under Article 259 of the Treaty on the Functioning of the European Union and contains the Legal Service's analysis concerning the allegations put forward in the dispute between Slovenia and Croatia. It further analyses the positions expressed by both Member States orally and in writing in the framework of the investigation pursuant to Article 259 of the Treaty on the Functioning of the European Union as well as of internal consultations between the European Commission's services.

The two above-mentioned documents, all of which are legal opinions, contain the Legal Service's assessment regarding issues raised in the pending court case and are therefore also related to the ongoing court proceedings.

In addition, documents 3, 5, 6 and 7 also partially contain legal opinions as follows:

- Document 3 is a note for the file drafted by Directorate-General for Maritime Affairs and Fisheries which takes position on the implementation of the award (following the opinion provided by the Legal Service in its note), then gives an overview of developments on issues that are part of the complaint lodged by Slovenia under Article 259 of the Treaty on the Functioning of the European Union. It provides the position of the Directorate-General for Fisheries and Maritime Affairs as regards the possible infringement of Regulation No 1224/2009⁹. The note refers also to some documents and information sent by

⁸ Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC,

⁹ Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006.

Slovenia and Croatia.

- Document 5 is an internal note of the Directorate-General for Maritime Affairs and Fisheries in which the starting point is a clear position on the implementation of the arbitral award with regard to reciprocal access to territorial waters following the interpretation provided by the Legal Service in its note to the Directorate-General for Maritime Affairs and Fisheries and in which the positions of each Member State are explained and assessed from a legal point of view. This note includes different aspects raised in the complaint introduced by Slovenia under Article 259 of the Treaty on the Functioning of the European Union (access to waters, implementation of Regulation No 1224/2009 and Regulation No 1005/2008¹⁰), and it provides an overview of possible legal implications and scenarios to be taken into account in case of disregard of the Common Fisheries Policy.
- Document 6 is an internal note that contains the minutes of a meeting between Commissioner Vella and the Croatian Deputy Prime Minister. The first issue in the note is out of the scope of the request. The second issue refers indeed to the border dispute, where again the question of the reciprocal access to territorial waters was discussed. In this regard, the opinion of Croatia is reflected in the note, as well as the opinion provided by the Legal Service to the Directorate-General for Maritime Affairs and Fisheries¹¹ on the same issue of the reciprocal access to territorial waters, which is one of the aspects of the complaint lodged by Slovenia under Article 259 of the Treaty on the Functioning of the European Union.
- Document 7 is a note in which the Directorate-General for Maritime Affairs and Fisheries requests the opinion of the Legal Service on the implementation of the arbitral award with regard to several provisions of Regulation No 1380/2013 (in particular those regarding the reciprocal access to the territorial waters of each Member State), providing at the same time its own legal assessments on this issue. Therefore, this note contains the legal opinion of the Directorate-General for Maritime Affairs and Fisheries.

At this stage, disclosure of the above-mentioned documents would put in the public domain internal legal opinions on highly sensitive issues that have become the subject of litigation. Furthermore, public disclosure of the documents at the present time would also risk weakening the European Commission's position at this stage of the infringement and would have a serious impact on the latter's capacity to intervene in this and future similar matters.

¹⁰ Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999.

¹¹ Contained in document 1.

Consequently, the likelihood of the protected interest being compromised by disclosure of those documents in their entirety is not hypothetical but genuine and tangible.

As recognised by the Court of Justice, the exception pertaining to the protection of legal advice must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice.¹²

Therefore, access cannot be granted to the documents 1, 2 and 7 and the parts of documents 3, 5, 6 containing legal advice pursuant to Article 4(2), second indent of Regulation No 1049/2001.

2.3. Protection of court proceedings

Article 4(2) second indent of Regulation No 1049/2001 states that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] court proceedings [...] unless there is an overriding public interest in disclosure'.

The questions discussed in the requested documents are now the subject matter of a dispute which Slovenia has brought before the Court of Justice (Case C-457/18).

In light of the action brought by Slovenia before the Court of Justice alleging the unwillingness of Croatia to implement the arbitral award, the questions addressed in documents 1, 2, 3, 4, 5, 6, 7 and 8 are also relevant for the pending court proceedings since they contain information closely connected to the legal aspects of the pending judicial proceedings.

- Document 4¹³ is a follow-up note to a meeting between relevant Directorate-Generals and the Cabinet of First Vice-President Timmermans. It contains a description of developments on the ground and of the contacts of the Directorate-General for Maritime Affairs and Fisheries with the responsible authorities of Slovenia and Croatia, as well as a presentation of the possible incentives that could be used in the framework of the implementation of the award pending an official position of the European Commission on the dispute.
- Document 8 contains the complaint of Slovenia against Croatia for the non-respect of the above-mentioned arbitral award and forms the basis of the legal action before the Court of Justice in Case C-457/18.

Indeed, the General Court found that the '[n]eed to ensure equality of arms before a court justifies the protection not only of documents drawn up solely for the purposes of specific court proceedings, such as pleadings, but also of documents whose disclosure is

¹² Judgment of the Court of Justice of 1 July 2008, *Kingdom of Sweden and Maurizio Turco/Council*, Joined Cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 42.

¹³ For the content of documents 1, 2, 3, 5, 6 and 7 see the relating description in point 2.2 above.

liable, in the context of specific proceedings, to compromise that equality, which is a corollary of the very concept of a fair trial'.¹⁴

The purpose of the 'court proceedings' exception is to protect the integrity of the ongoing proceedings and to ensure the proper course of justice, as well as to maintain the independence of the European institutions in their dealings with the European Court of Justice. In that respect, although the European Commission did not deliver a reasoned opinion within the three-month deadline referred to in Article 259 of the Treaty on the Functioning of the European Union, it might consider submitting an application to intervene in Case C-457/18 in accordance with Article 40 of the Statute of the Court of Justice of the European Union.

In the event that the requested documents are made public at this stage, such disclosure would seriously undermine the position of the European Commission and subsequently the integrity of the ongoing court proceedings.

Consequently, I consider that it is necessary to maintain, at this point in time, the confidentiality of the content of documents 1, 2, 7 and parts of documents 3, 5, 6, containing legal opinions relevant for the pending case¹⁵. Moreover, parts of documents 2, 3, 4, 5, 6 and document 8 referring to opinions and information sent by Slovenia or Croatia related to the dispute have to be protected based on the case-law on serenity of the judicial debates and equality of arms in the ongoing court proceedings.

3. NO PARTIAL ACCESS

In accordance with Article 4(6) of Regulation No 1049/2001, I have considered the possibility of granting partial access to the documents requested. However, as elaborated by the Court of Justice¹⁶, where the documents requested are covered by a general presumption of non-disclosure, such documents do not fall within an obligation of disclosure, in full, or in part.

Consequently, partial access is not possible considering that the documents requested are covered in their entirety by the invoked exception of Article 4(2), third indent of Regulation No 1049/2001 to the right of public access.

4. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) of Regulation No 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

¹⁴ Judgment of 15 September 2016, *Philipp Morris Ltd. v Commission*, Case T-796/14, EU:T:2016:483, paragraph 88.

¹⁵ Judgment of the General Court of 15 September 2016 in Case T-796/14, quoted above, paragraph 97.

¹⁶ Judgment of the General Court of 28 June 2012, *Commission v Editions Odile Jacob*, Case C-404/10 P, EU:C:2012:393, paragraph 133.

this case outweigh the interests protected by virtue of the third indent of Article 4(2) and second indent of Article 4(2) of Regulation No 1049/2001.

In your confirmatory applications, you invoke the interest of the media, as well as of the people in Slovenia to know the reasons behind the European Commission's internal documents. You mention amongst others the ex-post legislative referendum on the Arbitration Agreement between Slovenia and Croatia, which took place on 6 June 2010 and which demonstrates in your view how important – in the broadest sense – this matter is to people in Slovenia.

According to the Court's case law, considerations as general as those claiming that citizens have the right to be informed cannot establish the existence of an overriding public interest.¹⁷ Such general considerations are therefore not capable of demonstrating that the principles of transparency and democracy raise in this case issues of particularly pressing concern which could have prevailed over the reasons justifying the refusal to disclose in their entirety the contested documents.

Nor have I been able, based on the elements at my disposal, to establish the existence of any overriding public interest in disclosure of the documents in question.

I consider that in this specific case, the public interest is better served by protecting the atmosphere of mutual trust between the European Commission and the Member States involved in the infringement and court proceedings.

In consequence, I consider that in this case there is no overriding public interest that would outweigh the public interest in safeguarding the protection of court proceedings and legal advice as well as the purpose of investigations protected by Article 4(2), second and third indents of Regulation No 1049/2001.

¹⁷ Judgment of 16 July 2015, *ClientEarth v Commission*, C-612/13 P, EU: C:2015:486, paragraphs 91, 93.

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