



EUROPEAN COMMISSION

Brussels, 2.4.2019
C(2019) 2686 final

[REDACTED]
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10600 Plasencia,
SPAIN

**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 2018/6336**

Dear [REDACTED],

I refer to your letter of 11 February 2019, 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 (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 28 November 2018, addressed to the Directorate-General for Taxation and Customs Union, you requested access to the complete file (including the correspondence between the Member State and the European Commission) of the infringement complaint registered under reference CHAP(2016)3729, after deletion of personal data.³

The Directorate-General for Taxation and Customs Union identified the following documents as falling under the scope of your request:

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

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

³ Your original request reads as follows: *solicito el acceso al expediente completo, previa eliminación o disociación de los datos de carácter personal, del expediente de infracción (incluida la correspondencia entre el Estado Miembro y la Comisión) CHAP(2016)3729.*

- e-mail from the complainant to the European Commission, dated 6 December 2016 – formal complaint CHAP(2016)3729 (hereafter ‘document 1’);
- letter from the European Commission, dated 7 December 2016, reference Ares(2019)786110 (hereafter ‘document 2’);
- e-mail from the complainant to the European Commission, dated 9 December 2016 (hereafter ‘document 3’);
- e-mail from the complainant to the European Commission, dated 5 June 2018 (hereafter ‘document 4’), which includes the following annex:
 - ‘Comments to the Spanish [*Suministro Inmediato de Información*] (‘SII’) System’ (hereafter ‘Annex 4.1’);
- closure letter of the European Commission, dated 2 October 2018, Ares(2018)5050488 (hereafter ‘document 5’);

At initial stage, the Directorate-General for Taxation and Customs Union granted partial access to documents 2 and 5 on the basis of Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(2), first indent (commercial interests) of Regulation (EC) No 1049/2001.

As regards documents 1, 3 and 4, the Directorate-General for Taxation and Customs Union consulted the third party author of these documents in accordance with Article 4(4) of Regulation (EC) No 1049/2001. Following the opposition of the third party to the disclosure of these documents, the Directorate-General for Taxation and Customs Union refused access to these documents on 11 February 2019 based on Article 4(2), first indent (protection of commercial interests of a natural or legal person) and Article 4(2), third indent (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001.

In addition, the Directorate-General for Taxation and Customs Union confirmed that there was no correspondence between the European Commission and the Member State concerned.

In your confirmatory application, you request a review of this position, notably with regard to documents 1, 3 and 4. You state that you do not wish to get access to personal data of the complainant or other third parties. You also state that you are not interested in obtaining documents submitted in the context of the complaint and which contain factual information only.⁴ You mention that you are interested in the arguments raised by the European Commission and the complainant.

⁴ In particular, you stated the following: *al que suscribe no le interesa conocer ni identificar al denunciante ni a terceras personas que puedan aparecer en el expediente de denuncia, ni conocer documentos que –acerca de los hechos– puedan haberse aportado en la denuncia.*

Therefore, the scope of the confirmatory review is limited to documents 1, 3, 4 (including Annex 4.1) and 6 (identified at the confirmatory level, as explained below) (hereafter ‘the requested documents’). As you did not request access to personal data, the relevant parts of the requested documents have been redacted as falling outside the scope of your request.

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.

Although you do not contest the list of documents identified at the initial level, the following document has been identified, at the confirmatory stage, as falling within the scope of your application:

- pre-closure letter of the European Commission, dated 4 June 2018, reference CHAP(2809144) (hereafter ‘document 6’).

As documents 1, 3 and 4 originated from the complainant, the Secretariat-General re-consulted the third party concerned based on Article 4(4) of Regulation (EC) No 1049/2001 with a view to assessing whether an exception in paragraph 1 or 2 could be applicable to these documents.

The third party reiterated its initial opposition to the disclosure of documents 1, 3 and 4 based on Article 4(2), second indent (protection of court proceedings and legal advice) and Article 4(2), third indent (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001. It argued that public access to these documents would affect the outcome of certain administrative and judicial procedures in Spain.

However, following the confirmatory review, and taking into account the reply of the third party to the European Commission’s consultation, the European Commission concludes that there are no grounds to justify a full refusal of the requested documents based on the above-referred exceptions. However, limited parts of the documents warrant protection in accordance with Article 4(2), first indent (protection of commercial interests) of Regulation (EC) No 1049/2001.

Consequently, I can inform you that partial access is granted to the requested documents on the basis of Article 4(2), first indent (protection of commercial interests) of Regulation (EC) No 1049/2001, as explained in Section 2.1 below.

I would like to draw your attention to Article 16 of Regulation (EC) No 1049/2001, which provides that ‘this Regulation shall be without prejudice to any existing rules on copyright which may limit a third party’s right to reproduce or exploit released documents’. Hence, as regards document 6, you may reuse it free of charge for non-commercial and commercial purposes provided that the source is acknowledged and that

you do not distort the original meaning or message of the document. The European Commission does not assume liability stemming from the reuse.

Please note, however, that the actual transmission of the documents is subject to the absence of a request, by the third-party author for interim measures as referred to in Section 5 below.

2.1. Protection of commercial interests

Article 4(2), first indent of Regulation (EC) No 1049/2001 stipulates that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] commercial interests of a natural or legal person, including intellectual property, [...] unless there is an overriding public interest in disclosure'.

In your confirmatory application, you do not contest that the documents falling within the scope of your request may contain commercially sensitive information.

The relevant undisclosed parts of documents 1, 3, 4 (including Annex 4.1) and 6 have been redacted in application of Article 4(2), first indent of Regulation (EC) No 1049/2001, as their disclosure would undermine the commercial interests of the legal persons concerned.

As explained above, the personal data of the complainant has been expunged from the requested documents as falling beyond the scope of your request. In addition, other elements leading to the identification of the legal entity submitting the infringement complaint have been redacted from documents 1, 3, 4 (including Annex 4.1) and 6. In the European Commission's view, the disclosure of this information would undermine the commercial interests of the entity concerned. Indeed, as the European Commission did not open proceedings on the basis of the information and the arguments it provided in the complaint, there is a risk that disclosure of its identity would lead into a reputational damage for the entity concerned and, therefore, to its commercial interests.

I would like to refer to point 6 of the Annex to the Communication from the European Commission 'EU law: Better results through better application'⁵, which provides that '[d]isclosure of complainants' identities and information submitted by them to the Member State concerned is subject to their prior agreement [...]'. In this regard, please note that, when submitting the infringement complaint, the complainant did not authorise the European Commission to reveal its identity to the authorities of the Member State concerned.

Please also note that, given the limited volume of the relevant redacted parts, it is not possible to give more detailed reasons justifying the need for confidentiality without

⁵ Official Journal C 18 of 19.1.2017, p. 10.

disclosing the identity of the legal entity submitting the infringement complaint and, thereby, depriving the exception of its very purpose.⁶

Document 4 was submitted by the complainant in reply to the letter of pre-closure sent by the European Commission on 4 June 2018. The relevant withheld parts of the annex to the document (Annex 4.1) describe how the system on the *suministro inmediato de información* would have affected certain private entities in particular. These parts reflect business data of these private entities, including the result of their VAT return and information from which the volume of their sales could be deduced. Disclosure of these parts would thus undermine the interests of the concerned entities, as they would reveal commercially sensitive information relating to the relations between the Spanish tax authorities and identified taxpayers.

In light of the above, I consider that the use of the exception under Article 4(2), first indent of Regulation (EC) No 1049/2001 on the grounds of protecting commercial interests of a natural or legal person is justified, and that access to the relevant undisclosed parts of documents 1, 3, 4 (including Annex 4.1) and 6 must be refused on that basis.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(2), first indent 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.

According to the case-law, the applicant must, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal.⁷

In your confirmatory application, you argue that ‘there is no plausible argument, nor has it been demonstrated that [there is no overriding public interest in disclosure], in order to refuse access [to the file] [...]’.

As explained above, the case-law of the Court has confirmed that it is for the applicant to demonstrate the existence of an overriding public interest in the disclosure of the documents under the request.

⁶ See, to this effect: Judgment of the General Court of 24 May 2011, *NLG v Commission*, Joined Cases T-109/05 and T-444/05, EU:T:2011:235, paragraph 82 and Judgment of the General Court of 8 February 2018, T-74/16, *Pagkyprios organismos ageladotrofon v Commission*, EU:T:2018:75, paragraph 71.

⁷ Judgment of the General Court of 9 October 2018, *Anikó Pint v European Commission*, T-634/17, EU:T:2018:662, paragraph 48; Judgment of the General Court of 23 January 2017, *Association Justice & Environment, z.s v European Commission*, T-727/15, EU:T:2017:18, paragraph 53; and Judgment of the General Court of 5 December 2018, *Falcon Technologies International LLC v European Commission*, T-875/16, EU:T:2018:877, paragraph 84.

In the present case, you do not put forward any reasoning pointing to an overriding public interest in disclosing the relevant withheld parts of the requested documents, nor have I been able to identify any public interest capable of overriding the interest protected by Article 4(2), first indent (protection of commercial interests) of Regulation (EC) No 1049/2001.

The fact that the documents relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness,⁸ provides further support to this conclusion.

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.

As indicated above, partial access is herewith granted to documents 1, 3, 4 (including Annex 4.1) and 6. As regards the redacted parts of these documents, no meaningful further partial access is possible without undermining the interests protected by Article 4(2), first indent (protection of commercial interests) of Regulation (EC) No 1049/2001, for the reasons explained in Section 2.1 above.

5. DISCLOSURE AGAINST THE EXPLICIT OPINION OF THE AUTHOR

According to Article 5(5) and (6) of the Detailed rules of application of Regulation 1049/2001⁹, '[t]he third-party author consulted shall have a deadline for reply which shall be no shorter than five working days but must enable the [European Commission] to abide by its own deadlines for reply. In the absence of an answer within the prescribed period, or if the third party is untraceable or not identifiable, the [European Commission] shall decide in accordance with the rules on exceptions in Article 4 of Regulation (EC) No 1049/2001, taking into account the legitimate interests of the third party on the basis of the information at its disposal. If the [European Commission] intends to give access to a document against the explicit opinion of the author, it shall inform the author of its intention to disclose the document after a ten-working day period and shall draw his attention to the remedies available to him to oppose disclosure.'

At initial and confirmatory level, the third party concerned objected to the disclosure of the requested documents on the grounds that it would undermine ongoing judicial and administrative proceedings. In the third party's opinion, the documents are covered in their entirety by Article 4(2), second indent (protection of court proceedings and legal advice) and Article 4(2), third indent (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001.

⁸ Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau GmbH*, C-139/07 P, EU:C:2010:376, paragraphs 53-55 and 60; and Judgment of the Court of Justice of 29 June 2010, *European Commission v Bavarian Lager Co. Ltd*, C-28/08 P, EU:C:2010:378, paragraphs 56-57 and 63.

⁹ Commission Decision of 5 December 2001 amending its rules of procedure (notified under document number C(2001) 3714), Official Journal L 345 of 29.12.2001, p. 94.

The European Commission requested additional clarifications regarding the third party's position. It concludes, after examining the arguments provided by the third party, that there are no grounds to justify a full refusal of the requested documents on the basis of the above-referred provisions. However, limited parts of the documents must be protected based on Article 4(2), first indent (protection of commercial interests) of Regulation (EC) No 1049/2001.

Since the decision to grant wide access is taken against the objection of the third-party author expressed at initial and confirmatory level, the European Commission will inform the third-party author of its decision to give wide partial access to the documents requested. The European Commission will not grant such partial disclosure until a period of ten working days has elapsed from the formal notification of this decision to the third-party author, in accordance with the provisions mentioned above.

This time-period will allow the third-party author to inform the European Commission whether it will object to the partial disclosure using the remedies available to it, i.e. an application for annulment and an application for interim measures before the General Court. Once this period has elapsed, and if the third-party author has not signalled its intention to avail itself of the remedies at its disposal, the European Commission will forward the redacted documents to you.

6. 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
Martin SELMAYR
Secretary-General

Enclosures: (4)