



EUROPEAN COMMISSION

Brussels, 14.5.2019  
C(2019) 3795 final

[REDACTED]  
[REDACTED]  
B-3010 Louvain  
Belgium

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE  
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2019/0455**

Dear [REDACTED],

I refer to your letter of 6 March 2019, registered on 7 March 2019, 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 European Commission documents<sup>2</sup> (hereafter ‘Regulation (EC) No 1049/2001’). In accordance with Articles 7 and 8 of Regulation (EC) No 1049/2001, this confirmatory decision is addressed only to the applicant of the initial application, that is, [REDACTED], for access to documents as registered in GESTDEM 2019/0455.

**1. SCOPE OF YOUR REQUEST**

In your initial application of 25 January 2019, addressed to the Directorate-General for Financial Stability, Financial Services and Capital Markets Union, you requested access to ‘the consultation on the Fitness check on the EU framework for public reporting by companies’ open to the public from 21/3 to 31/7 2018 that were not published on the Commission's website’.

As the consultation has been carried out on-line, the contributions of the participants have been collected into a database. The European Commission has identified 66 (sixty-six) documents that can be generated from the database as falling under the scope of your request (hereafter: ‘requested documents’).

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<sup>1</sup> Official Journal L 345 of 29.12.2001, p. 94.

<sup>2</sup> Official Journal L 145 of 31.5.2001, p. 43.

In its initial reply of 15 February 2019, Directorate-General for Financial Stability, Financial Services and Capital Markets Union refused access to these documents based on the exceptions of Article 4(2), first indent (protection of commercial interests of a natural or legal person, including intellectual property) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. You support your request with detailed arguments, which I will address, to the extent necessary, in the corresponding sections below.

## **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.

### **2.1. The structure of the requested documents**

The requested documents consist of two parts. First, the questionnaire, established by the European Commission. Second, the replies, submitted by each of the participants. I note that the questionnaire part of the requested documents is public.<sup>3</sup>

In the questionnaire, there are two types of questions. First, some non-numbered questions identify the participant. Second, Questions 1 to 65 seek the opinion or evaluation of the participant in relation to various issues related to the EU framework for public reporting by companies.

### **2.2. Consultation of third parties**

The replies in each of the requested document is a content that originates from a third party. Article 4(4) of Regulation (EC) No 1049/2001 states that, '[a]s regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 [of Article 4 of Regulation (EC) No 1049/2001] is applicable, unless it is clear that the document shall or shall not be disclosed.'

The European Commission consulted all the participants who identified themselves when replying to the public consultation, with the exception of only one participant who did not identify himself. Each participant was asked whether he agrees to grant full or partial access to his replies. The participant could restrict access in relation to only his identification data or his identification data plus some or all their replies to Questions 1 to 65.

Of the 65 contacted participants, 17 replied to the European Commission. Of these responses, 2 allowed full access and 15 allowed partial access with his identification data redacted.

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<sup>3</sup> The identification questions and Questions 1 to 65 are available under the following link:  
<https://ec.europa.eu/eusurvey/publication/finance-2018-companies-public-reporting?surveylanguage=en>

I note that according to the case-law of the Court of Justice, the opinion of the third party does not bind the European Commission: '[i]t must be borne in mind that [...] the consultation of a third party other than a Member State that is provided for in Article 4(4) of the regulation is not binding on the institution but is to enable it to assess whether an exception provided for under Article 4(1) or (2) is applicable.'<sup>4</sup> In addition, according to the Article 5 of the Implementing Rules to Regulation (EC) No 1049/2001, '[i]n the absence of an answer within the prescribed period, or if the third party is untraceable or not identifiable, the 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.'

Following this consultation, I can inform you that full access is granted to the questionnaire. In respect of two of the requested documents, full access is granted also to the replies. As for the remaining 64 of the requested documents, partial access is granted to the replies, with the redaction of only the personal data (i.e. the replies given to some of the identification questions, as indicated below) based on the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) no 1049/2001.

### **2.3. 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*)<sup>5</sup>, 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 data<sup>6</sup> (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 movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC<sup>7</sup> (hereafter 'Regulation (EU) 2018/1725').

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<sup>4</sup> Judgment of the Court of First Instance of 30 January 2008, *Terezakis v Commission*, T-380/04, EU:T:2008:19, paragraph 60.

<sup>5</sup> 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.

<sup>6</sup> Official Journal L 8 of 12.1.2001, page 1.

<sup>7</sup> Official Journal L 205 of 21.11.2018, p. 39.

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’.<sup>8</sup>

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’.<sup>9</sup>

The requested documents contain personal data such as the names and e-mail addresses of natural persons as the replies given to the following questions are information that makes the participants identifiable:

- First name and last name:
- Name of your organisation:
- Name of the public authority:
- Contact email address:
- If so, please indicate your [Transparency] Register ID number:

Accordingly, the replies to the above questions, in particular the names<sup>10</sup> of the participants 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.

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<sup>8</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

<sup>9</sup> 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.

<sup>10</sup> *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 data.<sup>11</sup> 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 personal data, that is, the replies to the identification questions, 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.

The participants who replied to the European Commission's consultation opposed the disclosure of their personal data except for two participants, who expressly agreed to grant access to their replies given to the identification questions. In relation to these two participants, their formerly negative reply to the confidentiality question in the questionnaire<sup>12</sup> is thus considered positive.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data – that is, the replies given by the participants to the identification questions – 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.

### **3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

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

### **4. PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the requested documents. For the reasons

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<sup>11</sup> 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.

<sup>12</sup> "Contributions received are intended for publication on the Commission's website. Do you agree to your contribution being published? (see specific privacy statement)"

explained above, partial access is granted to the requested documents with the redaction of personal data.

## **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 Commission*  
*Martin SELMAYR*  
*Secretary-General*

Enclosures: 1