EUROPEAN COMMISSION

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[redacted]
1000 Brussels
Belgium

DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001[1]

Subject: **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2018/2662**

Dear [redacted],

I refer to your letter of 16 August 2018, registered on the next 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 documents[2] (hereafter 'Regulation (EC) No 1049/2001'). Please accept my apologies for the delay in handling your confirmatory application.

1. SCOPE OF YOUR REQUEST

In your initial application of 9 May 2018, addressed to the Joint Research Centre, you requested access to 'all data sets, papers, emails and reports relating to [Nitrogen Oxides] NOx emissions tests carried out by the Joint Research Centre in light-duty vehicles, including their brands, carried out since September 2015'.

The Joint Research Centre had handled your initial application in three 'batches' and disclosed 32 documents (i.e. full or wide partial disclosure, subject only to the redaction of personal data, by initial replies of 1 June, 26 June and 7 August 2018).

Furthermore, by its initial reply of 7 August 2018, the Joint Research Centre refused access to two test reports with the reference *JRC109961_fiat*, reference Ares(2018)4284659, (hereafter 'document 1') and *JRC109983_fiat*, reference

[1] Official Journal L 345 of 29.12.2001, p. 94.
[2] Official Journal L 145 of 31.5.2001, p. 43.

Ares(2018)4284659 (hereafter 'document 2'), on the basis of Article 4(2), third indent (protection of the purpose of investigations) of Regulation (EC) No 1049/2001.

Moreover, it refused access to a document containing a test report concerning an anonymised vehicle with the reference *JRC109985_anonymized_vehicle […]*, reference Ares(2018)4284659 (hereafter 'document 3') and pointed out that this 'document contains results of testing activities which are jointly owned by the European Union and a car manufacturer'. The Joint Research Centre further stressed that it had consulted the car manufacturer which objected to the disclosure of the results.

Through your confirmatory application, you request a review of this position.

Furthermore, you consider that 'if the ownership of these testing activities indeed lies with both the EU and the manufacturer, then some kind of contract or document should exist which states the framework of that ownership'. You further specify that such a 'document should have been included in the consideration' 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 or service concerned at the initial stage.

Following this review, I regret to inform you that the decision of the Joint Research Centre to refuse access to documents 1 and 2 has to be confirmed, on the basis of Article 4(2), third indent of Regulation (EC) No 1049/2001 (protection of the purpose of inspections, investigations and audits), for the reasons set out below.

Moreover, I can inform you that there is indeed a vehicle loan agreement originating from the car manufacturer signed by representatives of the latter and of the Joint Research Centre, respectively, reference Ares(2018)4284659 (hereafter 'document 4') which falls into the scope of your application and thus of my confirmatory review.

With regard to document 3 containing test results which are co-owned by a car manufacturer and document 4 originating from the latter, the Secretariat-General re-consulted this third party pursuant to 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.

While the third party opposed disclosure of the two requested documents based on Article 4(2), second indent (protection of the purpose of court proceedings) of Regulation (EC) No 1049/2001, it drew attention to the fact that there are civil court proceedings ongoing at national level.

It further indicated that the information contained in the test report and the vehicle loan agreement was directly linked with these pending court proceedings.

Therefore, the third party considered that public disclosure of these documents would 'largely undermine the distribution of the burden of proof and the general principle of equality of arms' as laid down in the relevant national legal framework and as also interpreted by the EU Courts.[3]

Finally, it considered that the documents contain commercially sensitive information protected by the exception provided for in Article 4(2), first indent (protection of commercial interests of a natural or legal person, including intellectual property) of Regulation (EC) No 1049/2001.

Consequently, the third party fully opposed disclosure of the two requested documents.

Following the confirmatory review and taking into account the reply of the third party to the consultation carried out at confirmatory level, I can inform you that:

- full access is granted to document 3;

- wide partial access is granted to document 4, subject only to the redaction of personal data in accordance with Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001.

Indeed, I consider that the reasons given by the third party for its objection are not capable of justifying the application of the exceptions provided in Article 4(2), first and second indents of Regulation (EC) No 1049/2001 to documents 3 and 4.

Please note, however, that the actual transmission of documents 3 and 4 is subject to the absence of a request, by the third party, for interim measures as referred to in section 5 below.

2.1. Protection of the purpose of investigations

Article 4(2), third indent of Regulation (EC) No 1049/2001 provides that the 'institutions shall refuse access to a document where disclosure would undermine the protection of […] the purpose of inspections, investigations and audits'.

Documents 1 and 2 form part of the administrative file of an infringement procedure which is laid down in Article 258 of the Treaty on the Functioning of the European Union and 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 concerned to put an end to any alleged

[3] The case-law referred to by the third party is the following: Judgment of the General Court of 15 September 2016, *Philipp Morris Ltd. v European Commission*, T-18/15, EU:T:2016:487, paragraphs 80 and 88; Judgment of the Court of Justice of 21 September 2010, *Kingdom of Sweden v Association de la presse internationale ASBL (API) and European Commission; Association de la presse internationale ASBL (API) v European Commission* and *European Commission v Association de la presse internationale ASBL (API)*, Joined Cases C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 85.

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.[4]

The Court has interpreted Article 4(2), third indent of Regulation (EC) No 1049/2001, among others, in its *Liga para a Protecção da Natureza* judgment, in which it underlined that in ongoing infringement cases, the institution may base itself on a general presumption of non-disclosure.[5] This confirmed the Court's earlier *Petrie* judgment, in which it ruled that 'the Member States are entitled to expect the European 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.'[6]

Consequently, all documents forming part of the administrative file of infringement investigations are covered by a general presumption of non-accessibility based on the exception of Article 4(2), third indent of Regulation (EC) No 1049/2001.

Documents 1 and 2 are part of an infringement procedure that is still ongoing.

Indeed, on 17 May 2017, the European Commission issued a letter of formal notice opening the formal infringement procedure NIF 2017/2044 against Italy[7] for failure to fulfil its obligations under EU vehicle type-approval legislation[8] with regards to some vehicles of the Fiat Chrysler Automobiles group.

In this letter of formal notice, Italy has been asked to respond to concerns about insufficient action taken regarding the emission control strategies employed by this car manufacturer.

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4 Judgment of the Court of Justice of 10 December 2002, *European Commission v Ireland*, C-362/01, EU:C:2002:739, paragraphs 15 and 16.

5 Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza and Finland v European Commission*, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraphs 55, 65-68.

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

7 http://europa.eu/rapid/press-release_IP-17-1288_en.htm.

8 Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive), Official Journal L 263 of 9.10.2007, p. 1 and Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, Official Journal L 171 of 29.6.2007, p. 1.

This infringement investigation relates to information brought to the European Commission's attention in the context of a request from the German Ministry of Transport in September 2016 to mediate between the German and Italian authorities on a dissent on Nitrogen Oxides emissions concerning vehicles of a Fiat 500 X 2.0l type approved by Italy.

Documents 1 and 2 contain the summary of the activities of the Joint Research Centre, together with the vehicle emissions results of such a vehicle on various test cycles. This information was initially destined to support the above mentioned mediation process and has finally formed part of the infringement procedure NIF 2017/2044. Therefore, the two documents have been included in the administrative file of this procedure.

The European Commission is currently assessing the technical documents provided by Italy in its reply of 6 August 2018 to the additional letter of formal notice, in the framework of the investigations under this ongoing infringement procedure.

Against this background, public disclosure of the requested documents would not only negatively influence the dialogue between the European Commission and Italy, for which a climate of mutual trust is essential, but would also alter the strictly bilateral nature of the infringement procedure as provided for in Article 258 of the Treaty on the Functioning of the European Union.

Consequently, such disclosure would adversely affect the European Commission's investigations, as it would undermine the climate of mutual trust required to resolve disputes between the European Commission and the Member State without having to use the judicial phase of the infringement procedure. It would have a negative effect on the extent to which the European Commission can conduct a constructive dialogue with Italy with the objective that the Member State complies voluntarily with European Union law and that the case has not to be brought before the Court of Justice.

Having regard to the above, I consider that the use of the exception under Article 4(2), third indent of Regulation (EC) No 1049/2001 on the grounds of protecting the purpose of investigations is justified, and that access to documents 1 and 2 must be refused on that basis.

2.2. 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 Case C-28/08 P (*Bavarian Lager*)[9], the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No 45/2001 of

[9] Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd* (hereafter referred to as *'Bavarian Lager'*), C-28/08 P, EU:C:2010:378, paragraph 59.

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[10] (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 [11] (hereafter 'Regulation (EU) 2018/1725').

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'. [12]

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'. [13]

Document 4 contains the name of an individual representing the car manufacturer concerned as well as the handwritten signatures of this individual and of a representative of the Joint Research Centre.

This information clearly constitutes personal data in the sense of Article 3(1) of Regulation (EU) 2018/1725. [14]

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

10 Official Journal L 8 of 12.1.2001, page 1.
11 Official Journal L 205 of 21.11.2018, p. 39.
12 *Bavarian Lager* judgment, cited above, paragraph 59.
13 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.
14 *Bavarian Lager* judgment, cited above, paragraph 68.

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.

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.[15] 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 data 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.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

As to the handwritten signatures appearing in document 4, which constitute biometric data, there is a risk that their disclosure would prejudice the legitimate interests of the persons concerned.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data, 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.

[15] 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.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

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

In your confirmatory application, you refer to the Aarhus Convention and you are of the view that the NOx emissions test results constitute environmental information and that poisonous NOx emissions can have damaging, potentially lethal, effects on human health, as well as do considerable harm to the environment.

I would like to underline that your application has been assessed under Regulation (EC) No 1049/2001 as well as under Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention[16] (hereafter: 'the Aarhus Regulation'). The Aarhus Regulation does not establish a separate system of public access to documents that would derogate from the general system put in place by Regulation (EC) No 1049/2001. It merely establishes a specific rule of interpretation, which supplements Regulation (EC) No 1049/2001 in case where access to environmental information is sought.

In this regard, please note that Article 6(1) of the Aarhus Regulation on access to information concerning emissions into the environment specifically excludes investigations into possible infringements from the types of cases where an overriding public interest in disclosure of this information is deemed to exist. Indeed, in accordance with this provision, an overriding public interest in disclosure shall not be deemed to exist when investigations, in particular 'those concerning possible infringements of Community law' within the meaning of Article 4(2), third indent (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001 are at stake.

In the case at hand, no overriding public interest is deemed to exist because both documents are covered by a general presumption of non-disclosure due to an ongoing infringement investigation, as set out in section 2.1 above.

The General Court has indeed recently clarified that Article 6(1) of Regulation (EC) No 1367/2006 has no consequences on the assessment to be carried out by the European Commission on the basis of Regulation (EC) No 1049/2001 when a request relates to documents forming part of an investigation[17], as in the present case.

Moreover, I consider that the arguments put forward in your confirmatory application on the general importance of the availability of environmental information as regards the protection of the environment and human health are not capable of demonstrating the

[16] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, Official Journal L 264 of 25.09.2006, p. 13.

[17] Judgment of the General Court of 4 October 2018, *Daimler AG v European Commission*, T-128/14, EU:T:2018:643, paragraph 103.

existence of an overriding public interest in the disclosure of documents 1 and 2 protected by Article 4(2), third indent of Regulation (EC) No 1049/2001.

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.

In any case, I consider that the public interest is better served in this case by ensuring the conclusion, in all serenity, of the infringement procedure and the related exchanges with Italy, without jeopardising the dialogue between the European Commission and the Member State for which, as pointed out above, a climate of mutual trust is essential.

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 the purpose of infringement investigations protected by Article 4(2), third indent of Regulation (EC) No 1049/2001.

The fact that documents 1 and 2 relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness[18], provides further support to this conclusion.

With regard to document 4 containing personal data, please note that Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001 does not include the possibility for the exception defined therein to be set aside by an overriding public interest.

4. PARTIAL ACCESS

Wide partial access is hereby granted to document 4, as set out above.

I have also examined the possibility of granting partial access to documents 1 and 2, in accordance with Article 4(6) of Regulation (EC) No 1049/2001. However, it follows from the assessment made under section 2.1 above that these documents are manifestly and entirely covered by the exception laid down in Article 4(2), third indent of Regulation (EC) No 1049/2001.

It must also be underlined that the Court of Justice confirmed that, 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.[19]

5. DISCLOSURE OF DOCUMENTS 3 AND 4 AGAINST THE EXPLICIT OPINION OF THE THIRD PARTY AUTHOR

According to Article 5(5) and (6) of the Detailed rules of application of Regulation (EC) No 1049/2001[20], '[t]he third-party author consulted shall have a deadline for reply which

[18] Judgment of the Court of Justice of 29 June 2010, *European Commission v Technische Glaswerke Ilmenau*, C-139/07, EU:C:2010:376, paragraph 60.

[19] Judgment of the Court of Justice of 25 March 2015, *Sea Handling v European Commission*, T-456/13, EU:T:2015:185, paragraph 93.

shall be no shorter than five working days but must enable the 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 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 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 objected to the disclosure of documents 3 and 4 on the grounds that it would undermine the protection of court proceedings as well as of its commercial interests.

The European Commission concluded, after a detailed examination of documents 3 and 4 including a dialogue with the third party, that these interests would not be undermined, at this stage, by (wide partial) disclosure.

Since the decision to grant (wide partial) access is taken against the objection of the third-party expressed at initial and confirmatory level, the European Commission will inform the third-party of its decision to give (wide partial) access to these two documents requested.

The European Commission will not grant such disclosure until a period of ten working days has elapsed from the formal notification of this decision to the third party, in accordance with the provisions mentioned above.

This time-period will allow the third party to inform the European Commission whether it will object to the (wide 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 has not signalled its intention to avail itself of the remedies at its disposal, the European Commission will forward document 3 and document 4 (the latter subject to the redaction of personal data) 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.

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[20] 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.

7. ISSUES FALLING OUTSIDE THE SCOPE OF REGULATION (EC) NO 1049/2001

In your confirmatory application you request explanations on 'why the result of testing activities [are] jointly owned by the European Union and a car manufacturer', as set out in the initial reply of the Joint Research Centre.

This is a request for information that does not fall under the scope of Regulation (EC) No 1049/2001, but is dealt with under the Code of Good Administrative Behaviour.

You had asked this question, among others, also to the Spokesperson's Service of the European Commission and I refer to the latter's reply of 24 August 2018.

Yours sincerely,

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

For the Commission
Martin SELMAYR
Secretary-General

Enclosures: (2)