



EUROPEAN COMMISSION

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██████████  
Universidad Complutense de Madrid  
██████████  
Madrid  
28010  
Spain

**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 2018/6953**

Dear ██████████,

I refer to your letter of 20 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 documents<sup>2</sup> (hereafter 'Regulation (EC) No 1049/2001').

**1. SCOPE OF YOUR REQUEST**

In your initial application of 24 December 2018, addressed to the Directorate-General for Taxation and Customs Union, you requested access to the documents in the infringement case no. 2005/4290.

The European Commission has identified the following documents as falling under the scope of your request:

- Letter of Formal Notice sent by the European Commission to Spain, dated 10 April 2006, reference C(2006)1375 (Sg-Greffe(2006)D/201780) (hereafter: 'letter of formal notice'); and

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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.

- Reasoned opinion sent by the European Commission to Spain, dated 29 February 2008, reference C(2008)0609 (SG-Greffe(2008)D/200862) (hereafter: ‘reasoned opinion’).

In its initial reply of 5 February 2019, Directorate-General for Taxation and Customs Union – following consultation with the Spanish authorities under Article 4(5) of Regulation (EC) No 1049/2001 – partially refused access to the letter of formal notice and the reasoned opinion based on the following exceptions in Regulation (EC) No 1049/2001:

- Article 4(1)(b) (protection of the privacy and the integrity of the individual);
- Article 4(2), second and third indent, (protection of court proceedings and legal advice and protection of the purpose of inspections, investigations and audits respectively); and
- Article 4(3), second paragraph, (protection of the decision-making process).

In your confirmatory application, you request a review of this position. You support your request with detailed arguments, which I will address 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.

As certain parts of the reasoned opinion contain the position of the Spanish authorities, the European Commission consulted the Spanish authorities under Article 4(4) and (5) of Regulation (EC) No 1049/2001 with a view to assessing whether an exception in paragraph 1, 2 or 3 is applicable. The Spanish authorities opposed disclosure of the parts of the document reflecting their opinion based on Article 4(2), second and third indent (protection of court proceedings and legal advice and protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001. The existence of on-going, related investigations may justify the extension of the exception to documents forming part of closed infringement procedures. The European Commission was not informed by the Spanish authorities of any such procedures. Following a detailed review of the records, no other open investigation has been found the purpose of which would be actually and specifically jeopardised by the disclosure of any of the documents in question. In addition, the European Commission had already taken a position in the subject-matter of the documents. No decision-making process is currently pending within the institution.

Therefore, I concluded that the application of the exceptions based on Article 4(2), second and third indents of Regulation (EC) No 1049/2001, would not be justified at first sight. Following this review, I can inform you that further partial access is granted to both the letter of formal notice and the reasoned opinion under the conditions provided in section 5 of this decision. The withheld parts are only personal data and the partial refusal is based on the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001 for the reasons set out below.

## **2.1. 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>3</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>4</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>5</sup> (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'.<sup>6</sup>

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person [...]'.<sup>6</sup>

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<sup>3</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>4</sup> Official Journal L 8 of 12.1.2001, page 1.

<sup>5</sup> Official Journal L 205 of 21.11.2018, p. 39.

<sup>6</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

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>7</sup>

Both the letter of formal notice and the reasoned opinion contains personal data such as the names, initials and telephone numbers of persons who do not form part of the senior management of the European Commission. Moreover, both documents contain handwritten signatures, which, as biometric data, are prohibited to be processed for the purpose of uniquely identifying a natural person as per Article 10(1) of Regulation (EU) 2018/1725.

The names<sup>8</sup> of the persons concerned 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.

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>9</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.

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<sup>7</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>8</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

<sup>9</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.

You did not put forward any arguments to establish the necessity to have the personal 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 both the letter of formal notice and the reasoned opinion, which constitute biometric data, there is a risk that their disclosure would prejudice the legitimate interest of the person 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 included in the requested documents, 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, further partial access is granted to the letter of formal notice and the reasoned opinion.

### **5. DISCLOSURE AGAINST THE EXPLICIT OPINION OF SPAIN**

According to Article 5(6) of the Implementing Rules to Regulation (EC) No 1049/2001, '[i]f 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.' Certain parts of the reasoned opinion can be considered as originating from Spain.

At both initial and confirmatory level, Spain maintained its position that access to the letter of formal notice and the reasoned opinion shall be refused or at the very least, the redacted parts in the reasoned opinion should be kept on the grounds that disclosure would undermine the protection of court proceedings and legal advice, the purpose of inspections, investigations and audits, as well as the protection of the decision-making process.

The decision to grant wider partial access is taken against the objection of the Member State expressed at initial and confirmatory levels. Therefore, the European Commission will inform Spain of its decision to give wider partial access to the letter of formal notice and the reasoned opinion. The European Commission will not grant such wider partial disclosure until a period of ten working days has elapsed from the formal notification of this decision to Spain, in accordance with the provisions mentioned above.

This time period will allow Spain to inform the European Commission whether it intends to 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 Spain has not signalled its intention to avail itself of the remedies at its disposal, the European Commission will forward the re-redacted versions of the letter of formal notice and the reasoned opinion 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: 2