



EUROPEAN COMMISSION

Brussels, 4.6.2019  
C(2019) 4280 final

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SW22JS London  
United Kingdom

**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 2019/1252**

Dear [REDACTED],

I refer to your letter of 27 March 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 5 March 2019, addressed to the Directorate-General for Justice and Consumers, you requested access to the English version of the Letter of Formal Notice sent by the European Commission to the Czech Republic in infringement Case no. 2014/2174 (hereafter: ‘requested document’).

The Letter of Formal Notice in the Czech language was sent by European Commission to the Czech Republic on 26 September 2014 under reference SG-Greffe(2014) D/13925.

In its initial reply of 27 March 2019, Directorate-General for Justice and Consumers refused access to the requested document based on the exception of the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001.

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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 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 regards the requested document, I regret to inform you that I have to confirm the initial decision of Directorate-General for Justice and Consumers to refuse access, based on the exception of the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001, for the reasons set out below.

As a preliminary note, I have to point out that the infringement no. 2014/2174 is an on-going procedure of which the requested document forms part. The European Commission considers infringement procedures as a form of investigation.

The third indent of Article 4(2) of Regulation (EC) 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'.

It is settled case-law of the Court of Justice 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 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. The preservation of that objective, namely an amicable resolution of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, justifies refusal of access [...] on the ground of protection of the public interest relating to inspections, investigations and court proceedings [...].'<sup>3</sup>

Public access to documents forming part of on-going investigations can be refused under the third indent of Article 4(2) of Regulation (EC) No 1049/2001 based on a general presumption. The Court of Justice ruled that, 'documents relating to an infringement procedure during the pre-litigation stage may be covered by the general presumption of confidentiality [because] "it can be presumed that the disclosure of the documents concerning an infringement procedure during its pre-litigation stage risks altering the nature of that procedure and changing the way it proceeds and, accordingly, that

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<sup>3</sup> Judgment of the Court of First Instance of 11 December 2001, *Petrie and Others v Commission*, T-191/99, EU:T:2001:284, paragraph 68.

disclosure would in principle undermine the protection of the purpose of investigations, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001”.<sup>4</sup>

The Court of Justice specified that this general presumption covered all documents relating to the infringement procedure under Article 258 Treaty on the Functioning of the European Union: ‘[c]onsequently, [...] all the documents, irrespective of whether they had been drawn up during the informal stage of that procedure, that is to say before the Commission sent the letter of formal notice to the Member State concerned, or during the formal stage thereof, that is to say after that letter was sent, were regarded as being covered by that presumption’.<sup>5</sup>

The mere fact that a document in Czech exists on the internet does not imply that the presumption of confidentiality has ceased to apply to the ongoing dialogue between the European Commission and the Czech authorities, for which a climate of trust remains essential.

I note that, as the Letter of Formal Notice originates from the European Commission, any attempt on behalf of the Czech authorities to disclose this document should have normally been preceded by a consultation request under Article 5 of Regulation (EC) No 1049/2001. However, the European Commission did not receive any such consultation request.

Furthermore, according to the General Court, even the fact that national authorities disclosed a document belonging to an infringement file under their national law is not decisive to assess if the presumption of non-disclosure applies under Regulation (EC) 1049/2001 since that Regulation does not have the effect to amend national legislations on access to documents.<sup>6</sup>

Therefore, the disclosure of the requested document at this stage of the procedure would essentially deprive the Czech authorities from their lawful expectation of sincere cooperation on the part of the European Commission during the infringement procedure. Refusal of access to the requested document is therefore justified under the third indent of Article 4(2) Regulation (EC) No 1049/2001.

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

The exceptions laid down in Article 4(2) 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.

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<sup>4</sup> Judgment of the Court of Justice of 14 November 2013, *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 40.

<sup>5</sup> Ibid, paragraph 41.

<sup>6</sup> Judgment of the General Court of 5 December 2018, *Sumner v European Commission*, Case T-152/17, EU:T:2018:875, paragraph 40.

In your confirmatory application, you argue that the Czech version of the requested document is already available online and that '[d]isclosing the English version would in this situation then only equalise access to the said letter and allow English speakers to access it as well.'

Such a statement setting out purely general considerations is not sufficient for the purpose of establishing that an overriding public interest prevails over the reasons justifying the refusal to disclose the documents in question.<sup>7</sup>

Nor have I been able, based on the elements at my disposal, to establish the existence of any overriding public interest in disclosing the Letter of Formal Notice in its English version. Such a disclosure would be to the detriment of the principle of legal certainty. Indeed, the Letter of Formal Notice was sent by European Commission to the Czech Republic in the Czech language. According to Article 3 of Regulation No 1 determining the languages to be used by the European Economic Community, as amended,<sup>8</sup> '[d]ocuments which an institution of the [European Union] sends to a Member State [...] shall be drafted in the language of such State.' Thus, the European Commission shall always use the official language of the addressed Member State when sending documents relating to infringement procedures.

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

#### **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 document requested.

However, as stated by the Court of Justice, where the document requested is covered by a general presumption of non-disclosure, such document does not fall within an obligation of disclosure, in full, or in part.<sup>9</sup>

Consequently, I have come to the conclusion that the document requested is covered in its entirety by the invoked exceptions to the right of public access.

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<sup>7</sup> Judgments of the Court of Justice of 14 November 2013, *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93).

<sup>8</sup> Official Journal P 017 of 6.10.1958, p. 385.

<sup>9</sup> Judgment of the Court of Justice of 28 June 2012, *European Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 133.

## **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*