



EUROPEAN COMMISSION

Brussels, 17.6.2019
C(2019) 4534 final

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01-909 Warsaw
Poland

**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 2019/0540**

Dear [REDACTED],

I refer to your letter of 18 March 2019, registered on 19 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 Commission documents² (hereafter ‘Regulation (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 29 January 2019, addressed to the Directorate-General for Taxation and Customs Union and clarified in your email dated 1 February 2019, you requested access to ‘EU Pilot 13/5576 – all answers given to the Commission by the Polish Ministry of Finance (via EU Pilot or mail or traditional correspondence)’. The subject matter of the EU Pilot case was a complaint regarding the exemption from excise tax on denatured ethyl alcohol in Poland.

The European Commission has identified 20 documents falling under the scope of your request (see list in annex, hereafter ‘requested documents’).

In its initial reply of 5 March 2019, Directorate-General for Taxation and Customs Union partially refused access to these documents based on the exception of the second indent

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

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

of Article 4(2) (protection of court proceedings and legal advice) 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 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 non-disclosed requested documents, I regret to inform you that I have to confirm the initial decision of Directorate-General for Taxation and Customs Union to refuse access, based on the exception of the second indent of Article 4(2) (protection of court proceedings and legal advice) of Regulation (EC) No 1049/2001, for the reasons set out below.

2.1. Consultation of the Member State

As the non-disclosed requested documents originated from the Polish authorities, the European Commission consulted the Polish authorities under Article 4(4) and (5) of Regulation (EC) No 1049/2001 with a view to assessing whether the exception in the second indent of Article 4(2) of Regulation (EC) No 1049/2001 is applicable. The Polish authorities maintained their opinion that access to the non-disclosed requested documents should be withheld based on the second indent of Article 4(2) (protection of court proceedings and legal advice) of Regulation (EC) No 1049/2001. They also listed the registration numbers and the subject matters of those ongoing procedures before the Supreme Administrative Court that are related to the position of the Polish authorities taken in the above-mentioned EU Pilot case.

2.2. Protection of court proceedings and legal advice

As a preliminary note, I have to point out that the EU Pilot procedure no. 5576/13/TAXU had been closed on 5 February 2019. For documents relating to closed (pre-)infringement cases, the Court of Justice established that, '[...] it should first be pointed out that [...] there is *no general presumption* that the disclosure of exchanges between the Commission and a Member State in the context of an infringement procedure which has been closed would adversely affect the purposes of the investigations, as referred to in the *third indent* of Article 4(2) of Regulation (EC) No 1049/2001'³ (emphasis added).

The *second indent* of Article 4(2) of Regulation (EC) No 1049/2001, invoked by the Polish authorities, aims to protect 'the principles of equality of arms and the sound

³ Judgment of the General Court of 14 February 2012, *Federal Republic of Germany v European Commission*, T-59/09, EU:T:2012:75, paragraph 78.

administration of justice’.⁴ The Court declared that ‘it does not follow from the case-law [...] that other documents [in addition to pleadings] are to be excluded, should the case arise, from the scope of the exception relating to the protection of court proceedings’⁵, and that ‘[t]he need to ensure equality of arms before a court justifies the protection not only of documents drawn up solely for the purposes of specific court proceedings, such as pleadings, but also of documents whose disclosure is liable, in the context of specific proceedings, to compromise that equality’⁶. Thus, the requested documents may, in principle, fall under the said exception.

However, at the same time, the Court has equally emphasised that ‘in order for the exception to apply, it is necessary that the requested documents, at the time of adoption of the decision refusing access to those documents, should have a relevant link either with a dispute pending before the Courts of the European Union, [...] or with proceedings pending before a national court [...]’⁷.

The European Commission is not aware of any pending case before the Court of Justice, which would be linked to the requested documents. However, the Polish authorities indicated that the following ongoing cases before the Supreme Administrative Court have a relevant link with the requested documents that justifies the application of Article 4(2), second indent, of Regulation (EC) No 1049/2001 in the present case:

- Case no. I GSK 2462/18 (WSA III SA/Łd 927/17): the key issue is exceeding limits of uses by taxpayer following which the tax authorities determined excessive losses and shortages of ethyl alcohol;
- Case no. I GSK 719/17 (WSA III SA/Łd 56/16): the key issue is that it was not proved that denatured ethyl alcohol was used for the purposes that are exempted from excise duty;
- Case no. I GSK 731/17 (WSA III SA/Łd 57/16): the key issue is that it was not proved that denatured ethyl alcohol was used for the purposes that are exempted from excise duty;
- Case no. I GSK 732/17 (WSA III SA/Łd 373/16): the key issue is exceeding limits of uses by taxpayer following which the tax authorities determined excessive losses and shortages of ethyl alcohol; and
- In addition, Case no. WSA III SA/Łd 88/18 is suspended until the Supreme Administrative Court issues the judgments in the above mentioned cases.

As regards the actual grievances subject to these cases, the case-law compels the European Commission to ‘examine whether that [Member] State has based its objection on the substantive exceptions in Article 4(1) to (3) of Regulation (EC) No 1049/2001 and

⁴ Judgment of the General Court of 15 September 2016, *Philip Morris v Commission*, T-18/15, EU:T:2016:487, paragraph 64.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

has given proper reasons for its position.’⁸ However, the European Commission ‘does not have to carry out an exhaustive assessment of the Member State’s decision to object by conducting a review going beyond the verification of the mere existence of reasons referring to the exceptions in Article 4(1) to (3) of Regulation No 1049/2001.’⁹ Accordingly, I have to note that all the ongoing cases communicated by the Polish authorities concern the application of national rules relating to ethyl alcohol taxation, which was the subject matter of the EU Pilot case mentioned above.

Following a *prima facie* assessment of the Polish authorities' reasons for refusal, I considers that the existence of the ongoing related court proceedings is appropriate for justifying the application of the exception laid down in the second indent of Article 4(2) of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in the second indent of 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.

In your confirmatory application, you do not put forward any reasoning pointing to an overriding public interest in disclosing the requested documents.

I have not been able to identify any public interest capable of overriding the public and private interests protected by the second indent of Article 4(2) of Regulation (EC) No 1049/2001.

The fact that the requested 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,¹⁰ 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 partial access to the documents requested.

However, for the reasons explained above, no meaningful partial access is possible without undermining the interests described above.

Consequently, I have come to the conclusion that the documents requested are covered in their entirety by the invoked exceptions to the right of public access.

⁸ Judgment of the Court of Justice of 21 June 2012, *IFAW Internationaler Tierschutz-Fonds v Commission*, C-135/11 P, EU:C:2012:376, paragraph 62.

⁹ Ibid, paragraph 63.

¹⁰ 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; *Commission v Bavarian Lager* judgment, cited above, paragraphs 56-57 and 63.

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

Enclosure: 1