



## EUROPEAN COMMISSION

Brussels, 17.5.2019  
C(2019) 3870 final

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### **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 2019/1001**

Dear ████████████████████,

I refer to your letter of 22 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 31 January 2019, addressed to the Directorate-General for Mobility and Transport, you requested access to ‘your disciplinary proceeding, the report which we asked you on October, and the documents related to the Spanish violations (Spanish government, Spanish Agency, Renfe and Adif) of railway security regulations’.

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

- the letter of formal notice of the European Commission addressed to Spain in infringement case no. 2018/2261, dated 25 January 2019, reference SG-Greffe (2019) D/1390 (hereafter ‘document 1’), which includes the following annex:

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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.

- Report on the state of implementation and application of EU legislation on railway safety and interoperability in Spain, by the European Railway Agency, dated 18 July 2018, reference 003OAA1076 (hereafter ‘document 1.1’).

In its initial reply of 6 March 2019, Directorate-General for Mobility and Transport refused access to these documents based on the exceptions of the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) 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.

Following this review, I regret to inform you that I have to confirm the initial decision of Directorate-General for Mobility and Transport to refuse access, based on the exceptions 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 procedure no. 2018/2261 is an on-going procedure of which both document 1 and document 1.1 form 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 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’ (emphasis added).<sup>5</sup>

Therefore, the disclosure of document 1 and / or document 1.1 at this stage of the procedure would essentially deprive the Spanish authorities from their lawful expectation of sincere cooperation on the part of the European Commission during the infringement procedure. Refusal of access to document 1 and document 1.1 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.

In your confirmatory application, you argue that the safety of rail passengers justifies the disclosure of document 1 and document 1.1. However, in this respect, I note that the main purpose of Directive 2004/49/EC<sup>6</sup> is precisely ‘to ensure the development and improvement of safety on the Community's railways’<sup>7</sup>.

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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.

<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> Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (hereafter: ‘Railway Safety Directive’)

<sup>7</sup> Article 1 of the Railway Safety Directive.

Therefore, compliance with the Railway Safety Directive can guarantee the safety of rail passengers and the European Commission is the responsible institution to ensure such compliance because under Article 17 of the Treaty of the European Union, '[i]t shall oversee the application of Union law under the control of the Court of Justice of the European Union.' This provision empowers the European Commission to enforce the provisions of the Railway Safety Directive vis-à-vis all Member States via the procedures described in Articles 258 and 260 of the Treaty on the Functioning of the European Union. Under these provisions, the European Commission is entitled to refer a non-compliant Member State to the Court of Justice, whose judgment is binding on the Member State.

In addition, the public has already been made aware of the serious concerns discovered in the Spanish railway system and the reaction of the European Commission thereto.<sup>8</sup> Furthermore, the European Railway Agency maintains an up-to-date database<sup>9</sup> recording railway incidents and accidents in the EU. On the other hand, such disclosure would manifestly endanger the atmosphere of cooperation in the infringement procedure, which could lead to the voluntary compliance of the Spanish authorities, the fastest solution of legal disputes. As emphasised by the Court in its above judgment, amicable compliance with EU law requires some degree of confidentiality. Therefore, I conclude that the interest in the safety of railway passengers cannot justify the disclosure of document 1 and/or document 1.1 against the interest in maintaining confidentiality during the infringement procedure.

The General Court acknowledged that 'the individual interest which may be asserted by a requesting party in obtaining access to documents concerning him personally cannot generally be decisive for the purposes both of the assessment of the existence of an overriding public interest and of the weighing up of interests under [...] Article 4(2) of Regulation No 1049/2001',<sup>10</sup>

Nor have I been able to identify any further public interest capable of overriding the interests protected by the third indent of Article 4(2) of Regulation (EC) No 1049/2001.

#### **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 documents 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>11</sup>

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<sup>8</sup> Rail transport: Commission calls on Spain to correctly implement EU rules concerning railway safety ([press release](#))

<sup>9</sup> <https://era.europa.eu/era/>

<sup>10</sup> Judgment of the General Court of 26 May 2016, *International Management Group v European Commission*, T-110/15, EU:T:2016:322, paragraph 56.

<sup>11</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.

Consequently, I have come to the conclusion that document 1 and document 1.1 are covered in their entirety by the invoked exception to the right of public access.

## **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*