



EUROPEAN COMMISSION

Secretariat-General

Directorate C – Transparency, Efficiency & Resources

The Director

Brussels
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By registered mail with AR

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Subject: Your application for access to documents – GESTDEM 2021/4871

Dear Ms Cox,

I refer to your email of 4 August 2021, registered on the same day, in which you make a request for access to documents, under the above-mentioned reference number.

Please accept our apologies for the delay in handling of your request.

1. SCOPE OF YOUR REQUEST

You request access to, I quote:

‘All documents—including but not limited to correspondence, emails, minutes, notes (hand written or electronic), audio or video recordings, verbatim reports, operational conclusions, lines to take, briefings, and presentations—related to the meeting on 2021-05-28 between Věra Jourová and Svaz průmyslu a dopravy ČR.’

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) No 1049/2001

The Secretariat-General of the European Commission has identified the following document as falling under the scope of your request: BRIEFING Confederation of Industry CZ 28 MAY, registered under reference Ares(2021)6911545 (Hereafter ‘Document 1’).

I can inform you that partial access is granted to the requested document subject to redactions based on the exceptions laid down in the fourth indent of Article 4(1)(a) (protection of the public interest as regards the financial, monetary or economic policy of the European Union or a Member State), Article 4(1)(b) (protection of privacy and the integrity of the individual) and the first subparagraph of Article 4(3) (protection of the decision-making process) 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*)¹, 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 data² (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/EC³ (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'.⁴

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person [...]'.⁴

¹ 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.

² OJ L 8, 12.1.2001, p. 1.

³ OJ L 295, 21.11.2018, p. 39.

⁴ *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’.⁵

The requested document contains personal data such as the names and functions of natural persons external to the European Commission who are not public figures.

The names⁶ 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.⁷ 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 request for access to documents, 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.

⁵ 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.

⁶ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

⁷ 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.

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 requested document, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

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.

2.2. Protection of the public interest as regards the financial, monetary or economic policy of the European Union or a Member State and the decision-making process

In accordance with the case-law of the Court of Justice, ‘a European Union institution may take into account cumulatively more than one of the grounds for refusal set out in Article 4 of Regulation No 1049/2001 when assessing a request for access to documents held by it’⁸. Accordingly, the exceptions relating to the protection of the financial, monetary or economic policy and the decision-making process are, in the present case, closely connected.

2.2.1. Protection of the public interest as regards the financial, monetary or economic policy of the European Union or a Member State

The fourth indent of Article 4(1)(a) 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 public interest as regards the financial, monetary or economic policy of the Community or a Member State’.

I would like to underline that documents disclosed under Regulation (EC) No 1049/2001 are disclosed to the public at large (*‘erga omnes’*) and not only to the applicant who originally requested the documents.

As far as the protection of the financial, monetary or economic policy is concerned, the Court of Justice stressed in the *In ‘t Veld* ruling that the institutions ‘must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by [the exceptions provided for in Article 4(1)(a) of Regulation 1049/2001] could undermine the public interest’⁹.

Consequently, ‘the Court’s review of the legality of the institutions’ decisions refusing access to documents on the basis of the mandatory exception [...] relating to the public interest must be limited to verifying whether the procedural rules and the duty to state

⁸ Judgment of the General Court of 13 September 2013, *Netherlands v Commission*, T-380/08, EU:T:2013:480, paragraphs 26 and 34.

⁹ Judgment of the Court of Justice of 3 July 2014, *Council v In ‘t Veld*, C-350/12, EU:C:2014:2039, paragraph 63.

reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers’¹⁰.

Moreover, the General Court ruled that, as regards the interests protected by the above-mentioned Article, ‘it must be accepted that the particularly sensitive and fundamental nature of those interests, combined with the fact that access must, under that provision, be refused by the institution if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complexity and delicacy that call for the exercise of particular care.

Such a decision requires, therefore, a margin of appreciation’¹¹. This was further confirmed by the Court of Justice¹².

According to Article 18(3) of Regulation (EU) 2021/241, ‘the recovery and resilience plan presented by the Member State may be submitted in a single integrated document together with the National Reform Programme and shall be officially submitted, as a rule, by 30 April. A draft recovery and resilience plan may be submitted by Member States from 15 October of the preceding year’.

The identified document includes confidential information on the draft recovery and resilience plan of the Czech Republic, submitted to the European Commission for consultation purposes, as a preparatory step for the purpose of the final submission of the plan. Moreover, the identified document includes confidential information on recovery and resilience plans including financial provisions of other Member States.

The European Commission assessed the plan of the Czech Republic based on the criteria set out in Regulation (EU) 2021/241. The European Commission's analysis considered, in particular, whether the investments and reforms set out in the plan contribute to effectively addressing challenges identified in the context of the European Semester, contain measures that effectively support the green and digital transitions, and contribute to strengthening the growth potential, job creation and economic and social resilience of the Member State.

I consider that the release of the concerned parts of the requested document at this stage could negatively impact the economic policy of the Czech Republic, given the size of the plan on the Gross Domestic Product. Disclosing the detailed withheld information would produce serious political implications that could negatively impact the disbursements of the €7 billion.

¹⁰ Judgment of the General Court of 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114, paragraph 40.

¹¹ Judgment of the General Court of 11 July 2018, *ClientEarth v European Commission*, T-644/16, EU:T:2018:429, paragraph 23. See also Judgment of the Court of Justice of 3 July 2014, *Council v In 't Veld*, C-350/12, EU:C:2014:2039, paragraph 63.

¹² Judgment of the Court of Justice of 19 March 2020, *ClientEarth v European Commission*, [C-612/18 P](#), [EU:C:2020:223](#), and paragraphs 68 and 83.

Furthermore, public access to the concerned parts of the requested document may lead to interferences and speculations and eventually entail risks to financial stability. Taking into account their preliminary nature, it is likely that the disclosure would lead to unjustified speculations on the financial policy of the Member State by means of textual comparisons. The disclosure would also generate unwarranted pressures on the European Commission and the other European Union institutions. Given the preliminary nature and the content of the document requested, I consider this risk as reasonably foreseeable and non-purely hypothetical.

In this context, I note that the General Court has expressly recognised that if the release of documents would open the door to speculation and have a negative impact on the stability of a Member State's financial, monetary or economic policy, this can warrant the use of the exception provided for in the fourth indent of Article 4(1)(a) of Regulation (EC) No 1049/2001¹³.

I conclude that the respective parts of the requested document cannot be disclosed in accordance with the fourth indent of Article 4(1)(a) of Regulation (EC) No 1049/2001 due to the detailed information on financial and economic policy in the Czech Republic and other Member States under the Recovery and Resilience Facility, which, if disclosed to the public at this stage, could undermine the protection of '[...] the financial, monetary or economic policy of a Member State'.

2.2.2. *Protection of the decision-making process*

The first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 provides that '[a]ccess to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure'.

On 19 July 2021, the European Commission adopted a positive assessment of the recovery and resilience plan of the Czech Republic¹⁴. The Commission has adopted a proposal for a Council Implementing Decision to provide €7 billion in grants to the Czech Republic under the RRF¹⁵. While the Council has adopted the European Commission's proposal for the plan of the Czech Republic, and the European Commission has disbursed €915 million in pre-financing to the Czech Republic, equivalent to 13% of the country's financial allocation under the Recovery and Resilience Facility, the European Commission will authorize further disbursements based on the satisfactory fulfilment of the milestones and

¹³ Judgment of the General Court of 26 April 2018, *Espírito Santo Financial v European Central Bank*, T-251/15, EU:T:2018:234, paragraph 92.

¹⁴ https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3745

¹⁵ https://eur-lex.europa.eu/resource.html?uri=cellar:bca32510-e878-11eb-93a8-01aa75ed71a1.0001.02/DOC_1&format=PDF

targets outlined in the Council Implementing Decision, reflecting progress on the implementation of the investments and reforms¹⁶.

In addition, the operational arrangements that will further specify elements, in particular, for the monitoring and implementation of the plan, in accordance with Article 20(6) of Regulation (EU) 2021/241, are currently negotiated between the European Commission and the Czech Republic.

The European Commission will authorise further disbursements based on the satisfactory fulfilment of the milestones and targets outlined in the Council Implementing Decision, reflecting progress in the implementation of the investments and reforms. When carrying out the assessment, the European Commission acts in close cooperation with the Member State concerned.

Therefore, the decision-making process is not concluded with the approval of the recovery and resilience plan of the Czech Republic, as the European Commission has to decide whether the milestones and targets are implemented and the performance of the Member State is satisfactory.

The negotiations between the European Commission and the Czech Republic on the recovery and resilience plan lasted for several months and were carried out in conditions of strict confidentiality, which is necessary in order to make progress on a document of technical and political complexity. During this phase, the European Commission provided specific recommendations to the Czech Republic to help it address outstanding issues. When carrying out the assessment, the European Commission acts in close cooperation with the Member State in a climate of mutual trust.

Disclosing the concerned parts of the requested document, at the present stage, would strain the working relations between the European Commission and the Czech national authorities. As a result, the European Commission would be deprived of the possibility to explore all available paths for the ongoing decision-making process.

Consequently, I conclude that access cannot be granted to the respective parts of the requested document, as their public disclosure would seriously undermine the ongoing decision-making process pursuant to the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in the first subparagraph of Article 4(3) 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.

¹⁶ https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4912

According to the case-law, the applicant must, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal¹⁷.

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

However, I would like to note that the right of access to documents is not a general and absolute right, but may be subject to limitations and restrictions, as recognised by the Union Courts¹⁸.

I would like to underline that the European Commission has put significant efforts to increase the transparency of its work in the recent past. The fact that other documents regarding the same subject matter have already been made publicly available on the Europa website¹⁹ only reinforces this conclusion.

It needs to be noted that national plans are prepared by Member States, hence their publication falls under their responsibility. In an effort to promote transparency of National plans, Member States were invited to publish their final plans in a dedicated web page²⁰ and the European Commission compiles the links to the Member States' websites²¹.

Nor have I been able to identify any public interest in the disclosure of the respective parts of the requested document capable of overriding the public interest protected by the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

Please note that Article 4(1)(a) and 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.

¹⁷ Judgment of the General Court of 9 October 2018, *Anikó Pint v European Commission*, T-634/17, EU:T:2018:662, paragraph 48; Judgment of the General Court of 23 January 2017, *Association Justice & Environment, z.s v European Commission*, T-727/15, EU:T:2017:18, paragraph 53; Judgment of the General Court of 5 December 2018, *Falcon Technologies International LLC v European Commission*, T-875/16, EU:T:2018:877, paragraph 84.

¹⁸ See judgment of the General Court of 3 May 2018, *Malta v Commission*, T-653/16, EU:T:2018:241 paragraph 160.

¹⁹ https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en#the-recovery-and-resilience-facility;
https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3745

²⁰ Guidance to Member States Recovery and Resilience Plans, Commission Staff Working Document, Brussels, 22.1.2021, SWD(2021) 12 final, p. 51.

²¹ https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en#national-recovery-and-resilience-plans.

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

5. MEANS OF REDRESS

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretariat-General of the Commission at the following address:

European Commission
Secretariat-General
Unit C.1. 'Transparency, Document Management and Access to Documents'
BERL 7/076
B-1049 Brussels,

or by email to: sg-acc-doc@ec.europa.eu.

Yours sincerely,

Tatjana Verrier
Director

Enclosure: 1 document