



EUROPEAN COMMISSION

Brussels, 8.5.2023

C(2023) 3191 final

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**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 2022/5948**

Dear Mr Rudl,

I refer to your email of 6 December 2022, 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 documents² (hereafter ‘Regulation (EC) No 1049/2001’).

Please accept our apologies for the delay in replying to your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 18 October 2022, addressed to the Directorate-General for Competition, you requested access to the following documents, I quote:

‘All documentation (including but not limited to all email correspondence, attendance lists, agendas, background papers, transcripts, recordings and minutes/notes) relating to the meeting between Bouygues Europe and Penelope Papandropoulos, Werner Stengg, Kim Jorgensen on 10.06.2022.’

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

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

Your request was attributed to the Secretariat-General/Directorate D. The Secretariat-General identified the following documents as falling under the scope of your request:

1. Email exchange - Meeting proposal with Bouygues Telecom, Ares(2022)3493714;
2. Ares(2022)4509254 Briefing document, comprising:
 - 2.1 Meeting Bouygues Telecom - Table of contents;
 - 2.2 Ares(2022)4509254 Meeting Bouygues Telecom - Steering brief;
 - 2.3 Ares(2022)4509254 Meeting Bouygues Telecom - Memory jogger - Data Act;
 - 2.4 Ares(2022)4509254 Meeting Bouygues Telecom - Data Act;
 - 2.5 Ares(2022)4509254 Meeting Bouygues Telecom - Data act and digital policies;
3. Ares(2022)4354387_Note of Conference Call between Kim Jorgensen and Federation française des telecoms 10 June 22.

In its initial reply dated 2 December 2022, the Secretariat-General granted partial access to documents 1, 2.1, 2.3, 2.4, 2.5 and 3 based on the exception laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001. It granted partial access to document 2.2 based on the exceptions laid down in 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.

In your confirmatory application, you request a review of this position as far as it concerns the redacted passages on page 1 and 2 of document 2.2 (Meeting Bouygues Telecom - Steering brief).

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 review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I can inform you that further partial access can be granted to document 2.2, based on the exceptions of 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.

The reasons are 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*)³, 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 data⁴ (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/EC⁵ (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’⁶.

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

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’⁷.

Document 2.2 contains personal data such as the names, surnames, and functions of natural persons external to the European Commission who are not public figures in a public capacity and of staff members of the European Commission not holding a senior management position.

The names 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) 2018/1725⁸.

³ 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.

⁴ Official Journal L 8, 12.1.2001, p. 1.

⁵ Official Journal L 295, 21.11.2018, p. 39.

⁶ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

⁷ 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.

⁸ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

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 data⁹. 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 confirmatory application, 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.

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.

Consequently, the Secretariat-General concludes that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the withheld 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.

⁹ Judgment of the Court of Justice of 16 July 2015, *ClientEarth v European Food Safety Authority*, C-615/13 P, EU:C:2015:489, paragraph 47.

2.2. Protection of the decision-making process

Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 provides that ‘access 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.’

You argue in your confirmatory application that full access should be given to pages 1 and 2 of document 2.2 because the ‘[Over-the-top players (OTTs)] fair contribution issue has been debated quite publicly’ and notably, document 3 (Note of Conference Call between Kim Jorgensen and Federation française des telecoms 10 June 22) was disclosed with only personal data redacted.

Document 2.2 is a briefing prepared by the Commission services in the context of the meeting between the representative of Bouygues Telecom and Cabinet members of the European Commission. The topics discussed concerned the contribution of online service providers to the expenses in infrastructure investment. The redacted parts of document 2.2 contains information and views on particular issues relevant for future initiatives under consideration in this area.

Although the issues of the contribution of OTTs to the network investments has indeed been publicly debated, that has not yet been addressed at EU level. Currently, the Commission is running an exploratory consultation to gather views on the potential developments of the connectivity sector and its infrastructure¹⁰. The exploratory consultation is part of an open dialogue with all stakeholders about the potential need for all players benefitting from the digital transformation to fairly contribute to the required investments. Based on the outcome of the consultation, the Commission will consider the most appropriate actions for the future of the electronic communications sector.

The decision-making process in relation to this area is thus at an incipient stage.

The opinions contained in the requested document do not represent, in light of the specific context at stake, the final views of the Commission. The exchange of information and views took place in the context of activities aimed at ensuring that the Commission has all the information necessary to conduct a wide-ranging assessment of impacts of all available policy options, for which a final decision has not yet been taken.

Public disclosure of preliminary views on sensitive issues that do not necessarily represent the final position of the Commission would undermine the decision-making process of the Commission in relation to the electronic communications sector and its infrastructure. It would reveal preliminary views and policy options which are currently under consideration and may be subject to changes. Briefings are usually drawn up by the Commission services and made available to persons representing the Commission to

¹⁰ <https://digital-strategy.ec.europa.eu/en/consultations/future-electronic-communications-sector-and-its-infrastructure>

inform them of the issues and objectives at political level so that they can prepare for and conduct political discussions or exchanges with stakeholders. Public disclosure of the redacted parts would also have a negative effect on the ability of the services to correctly inform the members of the Cabinet of possible policy options and would undermine the Commission's ability to take well-informed decisions. In addition, if preliminary opinions of the relevant services were disclosed, it would make them more hesitant to express their opinions freely from fear of external pressure.

Therefore, disclosure of the redacted information at this stage would jeopardise the decision-making process in the meaning of the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

The risk of such external pressure is real and not hypothetical given the specific and sensitive nature of the redacted parts.

Indeed, as the General Court has held, 'the possibility of expressing views independently within an institution helps to encourage internal discussions with a view to improving the functioning of that institution and contributing to the smooth running of the decision-making process'¹¹.

Given the limited volume of the redactions, it is not possible to give more detailed reasons justifying the need for confidentiality without disclosing the information and views of the services concerned and, thereby, depriving the exception of its very purpose¹².

Consequently, the Secretariat-General concludes that the relevant parts of document 2.2 are protected under the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

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

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 refusal¹³.

¹¹ Judgment of the General Court of 15 September 2016, *Phillip Morris v Commission*, T-18/15, EU:T:2016:487, paragraph 87.

¹² Please see in this respect: Judgment of the General Court of 24 May 2011, *NLG v Commission*, T-109/05 and T-444/05, EU:T:2011:235, paragraph 82. See also Judgment of the General Court of 8 February 2018, *Pagkyprios organismos ageladotrofon v Commission*, T-74/16, EU:T:2018:75, paragraph 71.

¹³ 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*

In your confirmatory application, you argue that you ‘strongly believe it's in the public interest to be informed about all arguments and considerations regarding this topic.’ I consider that, by relying on general considerations, you have not established a need for members of the public to obtain access to the withheld information. While I appreciate that there is a general interest for the related topic, I consider that the need for full transparency does not outweigh in this case the need to protect the withheld information, pursuant to the exception relating to the ongoing decision-making process. As stated above, the Commission has published the necessary information on the topic in the context of the exploratory consultation on the future of the electronic communications sector and its infrastructure.

The Secretariat-General has not been able to identify any public interest capable of overriding the interests protected by the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

4. PARTIAL ACCESS

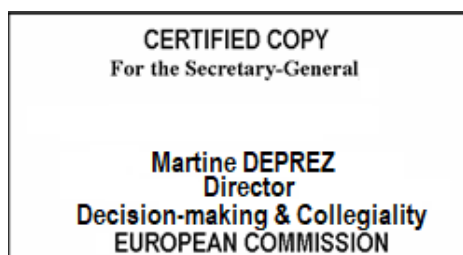
In accordance with Article 4(6) of Regulation (EC) No 1049/2001, the Secretariat-General has considered the possibility of granting further partial access to the document requested.

However, for the reasons explained above, no further partial access is possible without undermining the interests described above. The protected parts are covered in their entirety by the invoked exceptions 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
Ilze JUHANSONE
Secretary-General

Enclosure: [1]

& 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.