

From: [REDACTED] (SJ)
Sent: Friday 10 April 2015 10:57
To: [REDACTED] (SG)
Cc: [REDACTED] (SJ); SG DOSSIERS ACCES; [REDACTED] (SG)
Subject: RE: Demande confirmative - Recours ZINSER Klaus (AskTheEU) - Gestdem 2015/662 & 2015/667 - Consultation SJ - délai 15/4

Importance: High

Dear [REDACTED]

Please find enclosed some comments and questions concerning this draft decision.

As regards the protection of commercial interests, I am wondering whether we should reinforce our reasoning by mentioning the Cosepuri case law (T-339/10 and T-532/10). See in particular some parts of paragraph 100 of the judgment delivered on 29 January 2013.

*Next, it must be noted that the requirement to protect tenderers' bids vis-à-vis other tenderers is consistent with the relevant provisions of the Financial Regulation, in particular Article 100(2) thereof – also referred to by EFSA in its decision of 15 September 2010 – which does not provide for the disclosure of the tenders submitted, even after written application by the unsuccessful tenderers (see, with regard to disclosure of the tender accepted, the order in *Evropaïki Dynamiki v EEA*, paragraph 49 above, paragraph 39 and the case-law cited). **That restriction is integral to the objective of EU rules on public procurement, which is based on undistorted competition. In order to attain that objective, it is important that the contracting authorities do not release information relating to contract award procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures. Furthermore, both by their nature and according to the scheme of EU legislation in that field, contract award procedures are founded on a relationship of trust between the contracting authorities and participating economic operators. Those operators must be able to communicate any relevant information to the contracting authorities in the procurement process without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them** (see, by analogy, Case C-450/06 *Varec* [2008] ECR I-581, paragraphs 34 to 36). It should also be noted that, in the light of Article 100(2) of the Financial Regulation, unsuccessful tenderers are able to obtain the characteristics and relative advantages of the successful tender and the name of the tenderer to whom the contract was awarded.*

In the present case, I do not know which procedure was used – public procurement? Another type of contract?

If there was no competition between Deloitte and other potential tenderers, of course this argument is not relevant. But maybe you should check with DG JUSTICE.

Kind regards,

[REDACTED]

PS – the fiche annexed to the draft decision is not the correct one – Gestdem 2015/639 is another case I dealt with previously.



ZINSER
2015-662-667 - ...

From: SG DOSSIERS ACCES
Sent: Friday, March 27, 2015 10:34 AM
To: [REDACTED] (SJ)
Cc: [REDACTED] (SG)
Subject: Demande confirmative - Recours ZINSER Klaus (AskTheEU) - Gestdem 2015/662 & 2015/667 - Consultation SJ

Chère Collègue,

Je vous transmets officieusement ci-joint le projet de réponse confirmative qui vient d'être officiellement envoyé par **Ares(2015)1351074** à l'entité virtuelle **ve_sj.cons**, pour approbation et/ou commentaires du SJ ainsi que les documents à divulguer.

Bien cordialement.

[REDACTED]

SG.B.4

Transparence.

Berl. [REDACTED].





EUROPEAN COMMISSION
SECRETARIAT-GENERAL
The Secretary General

Brussels,
SG.B.4/MV/rc - sg.dsg2.b.4(2015)1510009

By registered mail:

Mr Klaus Zinser
Hauptstrasse 8
88427 Bad Schussenried
Germany

Copy by email:

klausz@x

**Subject: Your confirmatory request for access to documents – GESTDEM
2015/662 and 2015/667**

Dear Mr Zinser,

I refer to your e-mails dated 26 February 2015, registered on 2 March 2015, in which you make a confirmatory application in accordance with Article 7(2) of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents¹ (hereafter Regulation 1049/2001).

1. SCOPE OF YOUR REQUEST

In your initial applications of 30 January 2015, you had requested access to documents which contain information regarding experts hired by the external contractor who was contracted by the Commission to carry out an impact assessment study for the review of Brussels IIa Regulation². In this context you asked for information on the selection procedure of these experts, their remuneration and CVs, contract as well as the methodology of their work.

The Directorate-General Justice and Consumers (hereafter DG JUST) identified the following documents as falling within the scope of your request:

¹ OJ L145, 31.05.2001 p.43

² OJ L 338, 23.12.2003 p.1, Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

- Terms of reference- Study on the assessment of the Regulation (EC) No 2201/2003 and the policy options for its amendment;
- Proposal on the Study on the assessment of the Regulation (EC) No 2201/2003 and the policy options for its amendment (JUST/2012/JCIV/FW/0195/A4).

In its initial reply of 18 February 2015 and its complementary initial reply of 24 March 2015, DG JUST:

- disclosed the Terms of Reference prepared by the Commission;
- refused access to the Proposal for a Study on the assessment of the Regulation (EC) No 2201/2003 and the policy options for its amendment, prepared by the external contractor, on the grounds of Article 4(2), first indent of Regulation 1049/2001 (protection of commercial interests of a natural or legal person);
- provided further information and links regarding the expert group on the Brussels IIa Regulation, in particular the call for expression of interest with a view to establishing a Group of Experts on the revision of this regulation and the public consultation on the functioning of the Brussels IIa Regulation launched and closed in 2014.

Through your confirmatory application you request a review of the position taken by DG JUST.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts an independent 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 the DG JUST to refuse access to the Proposal on the Study on the assessment of the Regulation (EC) No 2201/2003 and the policy options for its amendment, based on the reasons set out below.

2.1 Protection of the on-going decision-making process

Article 4(3), first subparagraph of Regulation 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.

The work on the Study on the impact assessment of Brussels IIa Regulation under the Framework contract "Impact Assessment for the assignment of the Monitoring and Evaluation of communication activities" is still on-going. The aim of the study is to evaluate the application of Brussels IIa Regulation and to assess its effects in terms of its relevance, coherence, effectiveness, efficiency and EU added value and utility (status quo), recommend possible amendments of the Regulation including their social and economic impacts and to suggest and substantiate the choice of the preferred policy option.

In 2014 the Commission, before deciding on a possible future review of the currently applicable Brussels IIa Regulation, consulted stakeholders, individuals, legal practitioners, academics, courts, national authorities and Member States, gave due consideration to all the views collected during a public consultation³ and published its final results later that year⁴. In this regard, I note that also your opinion submitted during this public consultation will be taken into account in the current review process.

It must be underlined that when drafting legislative proposals, the Commission takes into account all conflicting interests with a view to adopting a balanced proposal in the public interest⁵.

In this sense, the study is a document designed to help structure the preparation of an impact assessment and Commission legislative proposal aiming at developing an EU policy. Policy choices contained in the future legislative proposal itself are supported by the content of this document.

Disclosure of the study at this very early stage would seriously undermine the on-going decision-making process of the Commission. In particular, it would prejudice the institution's margin of manoeuvre and severely reduce its capacity to contribute to reaching compromises.

An atmosphere of trust needs to be protected in order to allow maximum consent between the contractor, experts and services involved. Access to the document requested may, therefore, trigger a risk of external pressure by third-parties which could hinder the delicate long-term process. In this regard it is to be noted that, according to Article 17(1) TEU, *[t]he Commission shall promote the general interest of the Union and take appropriate initiatives to that end*. Furthermore, according to Article 17(3) TEU, *[i]n carrying out its responsibilities, the Commission shall be completely independent*.

However, I would like to point out that with the aim of bringing the decision-making process closer to the citizen and fostering transparency, you can find a number of documents available online which support the ongoing reflections⁶.

³ http://ec.europa.eu/justice/newsroom/civil/opinion/140415_en.htm.

⁴ <https://ec.europa.eu/eusurvey/publication/BXLIIA>.

⁵ See also Report on the application of Brussels IIa Regulation C(2014)225 final of 15 April 2014, http://ec.europa.eu/justice/civil/files/matrimonial_act_part1_v3_en.pdf.

In addition, all other documents related to future impact assessments launched by the Commission will be made public at the Impact Assessment Board's website on Europa once the policy proposal is adopted by the College (http://ec.europa.eu/smart-regulation/impact/index_en.htm).

On the basis of the above, access to the requested document has to be refused on the grounds of Article 4(3), first subparagraph, of Regulation 1049/2001 since the decision-making process is at a very early and delicate stage, and release of the document would seriously undermine that decision-making process.

2.2. Protection of commercial interests

Article 4(2), first indent, of Regulation 1049/2001 provides that *[t]he institutions shall refuse access to a document where disclosure would undermine the protection of (...) commercial interests of a natural or legal person, including intellectual property, unless there is an overriding public interest in disclosure.*

The study to which you seek to obtain access reflects the specific know-how of the successful contractor who submitted the proposal. More specifically, it explains in detail the methodology to be followed, the assessment criteria of experts, their costs, the work plan and the corresponding, detailed financial proposal and total budget.

Disclosure of this information would undermine the commercial interests protected by Article 4(2), first indent of Regulation 1049/2001, as it would reveal sensitive details about the organisation and way of working of the contractor which could be used by competitors to the disadvantage of the competitive position of the company concerned.

It follows from the above that access cannot be granted to the document requested, as such access would undermine the commercial interests of the contractor concerned protected by Article 4(2), first indent of regulation 1049/2001.

General comment: I guess the contractor, Deloitte, was chosen after a competition between several potential candidates. Did the process take place in the framework of a public procurement? If it is the case, the Cosepuri case-law may be used to strengthen the argument related to the protection of commercial interests.

2.3. Protection of privacy and integrity of individual

Article 4(1)(b) of Regulation 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.*

⁶ http://ec.europa.eu/justice/civil/document/index_en.htm;
http://ec.europa.eu/justice/index_en.htm#newsroom-tab

The document requested contains a preliminary list of legal experts chosen by the contractor and a list of the members of the project team, in particular their names, country of origin, organisation they work for or represent, years of professional experience, languages spoken, CV etc. These undoubtedly constitute personal data in the meaning of Article 2(a) of Regulation (EC) No 45/2001⁷ (the Data Protection Regulation). Article 2(a) of Data Protection Regulation provides that "*personal data*" shall mean any information relating to an identified or identifiable person [...].

The Court of Justice confirmed in case C-465/00 (*Rechnungshof*)⁸, *there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of "private life*.

According to Article 8(b) of the Data Protection Regulation, which is fully applicable in this case, personal data shall only be transferred to recipients if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced.⁹ These two conditions are cumulative.¹⁰

Moreover, based on the Commission's own assessment, disclosure of these data would carry a real and non-hypothetical risk of harming the privacy and integrity of the individuals concerned, as this would expose the latter to undue external pressure, criticism and unsolicited contacts.

Having regard to the above, I have to conclude that the exception under Article 4(1)(b) of Regulation 1049/2001 is applicable to the personal data appearing in the document, and that access thereto has to be refused on this basis.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2), first indent and 4(3), first subparagraph of Regulation 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.

⁷ 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 data*, Official Journal L 8 of 12.1.2001.

⁸ Judgment of the Court of 20 May 2003, *Rechnungshof and Österreichischer Rundfunk*, in joined cases C-465/00, C-138/01 and C-139/01

⁹ *Ibid.*, paragraph 73.

¹⁰ Judgment of the Court (Grand Chamber) of 29 June 2010, *Commission v Bavarian Lager*, in case C- 28/08 P, paragraphs 56, 63, 68, 76-79.

In your confirmatory application you do not include any arguments demonstrating the existence of an overriding public interest in disclosure of the study requested that would outweigh the protection of the commercial interests of the contractor and of the on-going decision-making process. Nor have I been able to identify any public interest in the disclosure of the document requested. On the contrary, the reasoning set out above demonstrates that the public interest is better served in this case by ensuring that the document requested is not disclosed.

Furthermore, I must underline that your application for access to documents is being treated under Regulation 1049/2001. This Regulation concerns the right to have public access to European Parliament, Council and Commission documents. Indeed, if access is granted to a document under Regulation 1049/2001, this document becomes accessible to the public at large (*erga omnes*). Therefore, I regret to inform you that any possible individual interest in obtaining the document in question cannot be taken into consideration for the purpose of deciding on your request for access

Indeed, disclosure of the document requested would undermine the on-going decision-making process at this early stage and therefore, hinder the possibility of achieving the best compromise in the interest of the citizens.

Consequently, I consider that in this case there is no overriding public interest that would outweigh the interest in safeguarding the decision-making process protected by Article 4(3), first subparagraph of Regulation 1049/2001.

4. PARTIAL ACCESS

I have also considered the possibility of granting partial access to the document in accordance with Article 4(6) of Regulation (EC) No 1049/2001. However, partial access is not possible considering that the document is covered in its entirety by the invoked exceptions. [Comment: it is true as regards Article 4 (3) and also Article 4 (2), first indent (if one could argue that the whole document is a proposal made in the context of a public procurement), but concerning personal data, redactions would have been possible. Therefore, we should maybe explain that we consider that the whole document should be protected, at least on the basis of Article 4 (3), and possibly also on the basis of Article 4 (2), first indent.]

5. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

Catherine Day