



EUROPEAN COMMISSION
Secretariat-General

The Secretary-General

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By registered mail:

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**DECISION OF THE SECRETARY GENERAL PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation N° 1049/2001 - Gestdem 2015/3273**

Dear Ms Fernández,

I refer to your e-mail of 7 September 2015, registered on 8 September 2015, by which you lodge a confirmatory application in accordance with Article 7(2) of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereafter Regulation 1049/2001).

1. SCOPE OF YOUR REQUEST

In your initial application of 18 June 2015, you requested access to *documents which contain information related to the trilogues on the Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent (the 'Telecommunications Single Market Regulation' or 'TSM'), including:*

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

² Official Journal L145, 31.05.2001 p.43.

- *list of participants of the trilogues;*
- *list of the categories of documents held in relation to the trilogues on the TSM, technical meetings and Commission's internal meetings;*
- *three- and four-column documents;*
- *reports;*
- *minutes;*
- *notes.*

In its reply to your request the Directorate-General for Communications Networks, Content and Technology (hereafter 'DG CNCT') identified the following documents as falling within the scope of your request:

- Lists of participants to three informal trilogues on the draft Telecoms Single Market Regulation held at the date of your request (annexes a, b and c of the initial reply);
- A 4-column document which served as the meeting document for the first informal trilogue held on 23 March 2015 on TSM (annex d);
- A 4 column document which served as the meeting document for the second informal trilogue held on 21 April 2015 on TSM (annex e);
- A 5-column document which served as the meeting document for the third informal trilogue held on 2 June 2015 on TSM (annex f);
- A consolidated version of Directive 2002/22/EC including amendments adopted by the Plenary of the European Parliament (annex g);
- A consolidated version of Regulation n. 531/2012 including amendments adopted by the Plenary of the European Parliament and by the preliminary positions of and compromise proposals by the Presidency, for which access can only be granted to the Plenary position (annex h).
- Three Internal Flash Reports of the three trilogues held in the period included in your access request, drafted by the Secretariat General of the European Commission. No minutes were identified;
- a number of documents circulated among all or some of the institutions concerned as well as some internal documents of the Commission drafted in view of the trilogue and some unsolicited notes submitted by third parties in view of the trilogues, in particular:

- A powerpoint presentation prepared by the Latvian Presidency for the first trilogue (annex i);
- Three documents circulated by the European Parliament containing compromise proposals on roaming, net neutrality and end-users rights;
- Seven informal Commission non-papers;
- Three briefing notes for the three trilogues held in the period covered by your request;
- One fiche drafted by the Commission services in view of the meeting of the Commission's internal Inter-institutional Relations Group held before the third trilogue (s.c. GRI Fiche);
- Five unsolicited notes provided by third parties in view of the trilogues, in particular:
- Position on TSM in view of triologue by the Center for Democracy & Technology (CDT);
- BEUC's key demands in view of tripartite discussions, available at http://www.beuc.eu/publications/beuc-x-2015-028_gbetelecom_single_market_trilogue-key_beuc_demands.pdf (public document);
- Two position papers on net neutrality and roaming respectively in view of trilogues sent by GSMA;
- A position paper sent by ETNO for the TSM trilogue.

DG CNCT confirmed that it holds no list of the categories of documents held in relation to the trilogues on the TSM, technical meetings and Commission's internal meetings.

DG CNCT granted:

- Full access to annex g and i and to the GSMA's position paper on net neutrality;
- Partial access to annexes a, b and c after redaction of personal data according to Article 4 (1)(b) of Regulation 1049/2001;
- Partial access was also granted to the first and second columns of A 4-column documents which served as the meeting document for the first, second and third informal trilogues 5 on TSM (annex d, e and f);
- Partial access to the Plenary position included in annex h;

- Partial access to CDT's paper, GSMA's roaming paper and ETNO's position paper;

Access was refused to the rest of the identified documents.

The non-disclosure of the withheld documents and parts thereof was based on Article 4(3) of Regulation 1049/2001 (protection of the decision making process). The withheld documents and parts thereof were drawn by the institutions for internal use, contain opinions for internal use as part of deliberations and preliminary consultations and relate to an still ongoing inter-institutional decision-making process on the TCM file. DG CNECT explained to you that, with the final adoption of the act at stake by Council and Parliament, disclosure to the public of this information could entail a reasonably foreseeable and specific risk of putting the inter-institutional decision making process under external pressure thereby jeopardising the delicate compromises reached.

In your confirmatory application, you contest *the refusal to disclose the preliminary positions of and compromise proposals by the Presidency in the multicolumn documents and to grant access to the Internal Flash Reports*. You expressly request *an internal review to reconsider the publication of the three- and four- column documents*. You further request *information containing the specific copyright law provision on which your refusal for full disclosure [of the unsolicited notes] is based*. In addition, you *inquire about the existence of notes from third parties that the Commission (at the DG level or cabinet level) solicited and a confirmation by the Commission that no other "unsolicited" notes were received with regard to this legislative dossier*. The contested parts of the initial reply will be assessed below.

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.

2.1. Full access to the multicolumn documents of the first, second and third trilogues

As part of this review, the Commission has consulted the Council of the European Union, in accordance with Article 4(4) of Regulation 1049/2001, on the possible disclosure of the withheld parts of the multicolumn documents that all originate from the Council. The Commission also informed the European Parliament of your confirmatory request.

On 1st October 2015, the Council adopted its position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and the Council concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks

within the Union. This document is now public³. The Council also published its statement of reasons⁴. Previous to the adoption of the position of the Council at first reading, the Council published several documents referring to the COREPER mandate for the first, second and third trilogues on the TSM file⁵. It would seem that detailed information about the COREPER mandates for these trilogues is already public. In addition, the adoption of the position of the Council at first reading is finalised. In response to the third party consultation, the Council and the European Parliament were of the view that the multicolumn documents can be disclosed at this stage.

Therefore, I pleased to inform you that full access can be granted to the multicolumn documents concerning the first, second and third trilogues on TSM.

2.2. Undisclosed parts of the Internal Flash Reports: protection of the decision-making process

Article 4 (3), first subparagraph of Regulation 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.

The Internal Flash Reports are the meeting reports drafted by the Commission services after the first, second and third *trilogues*. Every report contains, respectively, the following sections:

- Participants;
- Summary;
- Details;
- Next Steps.

In your confirmatory application, you contest the refusal to grant access to the Internal Flash Reports. I am pleased to inform you that partial access can be granted to the three Internal Flash Reports.

This partial access reflects a restrictive interpretation of the exceptions of Article 4 of Regulation 1049/2001, in line with the applicable legislation and the case law of the European Courts.

³ <http://data.consilium.europa.eu/doc/document/ST-10788-2015-REV-2/en/pdf>

⁴ <http://data.consilium.europa.eu/doc/document/ST-10788-2015-REV-2-ADD-1/en/pdf>

⁵ <http://data.consilium.europa.eu/doc/document/ST-9167-2015-INIT/en/pdf>
<http://data.consilium.europa.eu/doc/document/ST-7741-2015-REV-1/en/pdf>
<http://data.consilium.europa.eu/doc/document/ST-9815-2015-INIT/en/pdf>

I regret to inform you that no full access can be granted to all parts of the Internal Flash Reports, at this stage, as such disclosure would seriously undermine the decision-making process protected by Article 4(3), first paragraph of Regulation 1049/2001, in four, closely connected, ways:

- the trilogue meetings took place in a sphere of confidence and trust, with the aim of finding a ground for compromise between the respective institutions. As long as the inter-institutional decision-making process has not been finalised, disclosure, to the public, of the positions expressed in the trilogue meetings by the representatives from the Commission, the Council and the Parliament would entail a reasonably foreseeable and specific risk of putting the inter-institutional decision-making process under external pressure, thereby jeopardising the delicate compromises reached.

Such disclosure would therefore seriously undermine the ongoing decision-making process protected by Article 4(3), first paragraph of Regulation 1049/2001;

- parts of the documents reflect the position of individual representatives or delegations, or enable the latter to be inferred from the wording used. In the framework of preliminary discussions and negotiations within the trilogue meetings, it is essential that representatives and delegations of the three institutions are able to express their views freely so that compromise solutions can be found and progress can be achieved on delicate questions. Disclosure at this stage of those parts of the documents, which allow identification of the delegations that have adopted positions on the subject still under discussion, would jeopardise this process. Indeed, such disclosure would seriously narrow delegations' room for manoeuvre to review their positions in the light of arguments put forward during discussion. Such disclosure would therefore seriously undermine the ongoing decision-making process protected by Article 4(3), first paragraph of Regulation 1049/2001;
- the Internal Flash Reports reflect interpretations by Commission staff of positions expressed by the other institutions' delegations, in the framework of meetings that were not open to the public. The reports were drafted for internal, Commission, purposes only, in the expectation that they would remain confidential. For this reason, they were never submitted for approval to the other two institutions. If the Commission were to disclose these documents, this would have the effect of seriously prejudicing the climate of mutual confidence necessary for the effectiveness of the Commission's actions and leverage in its inter-institutional negotiations with the Council and the Parliament. This, in turn, would seriously undermine the Commission's and the inter-institutional decision-making process protected by Article 4(3), first paragraph of Regulation 1049/2001;

- the Internal Flash Reports contain unfiltered, unpolished views of Commission staff regarding the other institutions' negotiating stance, which were drafted in the legitimate expectation that they would not be made public, at least while the decision-making process is ongoing. There is a real and non-hypothetical risk that disclosure of the respective parts of the documents would seriously undermine the trust of the other institutions in the Commission and, ultimately, the Commission's position and leverage in the ongoing negotiations.

For the reasons set out above, and having regard to the fact that the decision-making process has not yet been finalised, access is refused, pursuant to the exception of Article 4(3), first paragraph of Regulation 1049/2001, to those parts of the Internal Flash Reports which reflect the positions of the Commission, the Council and the Parliament to the extent that these have not been made public and/or contain individual assessments and opinions for internal use.

2.3. Undisclosed Personal Data in the Internal Flash Reports: protection of the privacy and integrity of the individual

The Internal Flash Reports contain the names of the participants to the trilogues and the names of the officials who authored the notes.

Article 4(1) (b) of Regulation 1049/2001 provides that access to documents is refused where disclosure would *undermine the protection of [...] privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.*

The names of the participants and of Commission staff mentioned in the documents constitute personal data in the meaning of Article 2(a) of the Data Protection Regulation⁶. In its judgment in the *Bavarian Lager* case, the Court of Justice has ruled that, when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable. This means that the necessity of disclosing the personal data must be established and that there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced. These conditions are cumulative.

Given that you have expressed no need for, nor a particular interest in obtaining these names, the names of participants and of Commission staff who are not cabinet members and do not have senior management function, have been redacted from the documents pursuant to Article 4(1) (b) of Regulation 1049/2001, so as to protect the privacy and the integrity of the individuals concerned.

⁶ 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

The names of Members of the European Parliament and of the President of Coreper I that participated to the trilogues have not been redacted, because these participants are public persons.

2.4. No Overriding Public Interest

Pursuant to Article 4(3) of Regulation 1049/2001, the exceptions to the right of access must be waived if there is an overriding public interest in disclosing the (parts of the) documents whose non-disclosure is contested. In order for an overriding public interest in disclosure to exist, this interest, firstly, has to be public and, secondly, overriding, i.e. in this case it must outweigh the interests protected by Article 4(3).

In your confirmatory application, you refer to Article 15 of the TFEU as well as to the Protocol 1 and 2 to the Treaty. However, you have not substantiated, the existence of any public interest that would override the protection of the decision making process, protected by Article 4 (3) of Regulation 1049/2001. Nor have I been able, based on the elements at my disposal, to identify such an interest, in particular now that full access is granted to the multicolumn documents.

I therefore consider that in this case the public interest is better served by keeping the parts of the Internal Flash Reports undisclosed in conformity with the interests protected by the exception of Article 4(3) of Regulation 1049/2001.

Please note that Article 4(1)(b) of Regulation 1049/2001 does not provide for a possibility for the interests protected to be overridden by a public interest in disclosure.

3. YOUR QUESTIONS ON UNSOLICITED NOTES

In your confirmatory request, you *inquire about the existence of notes from third parties that the Commission (at the DG level or cabinet level) solicited and a confirmation by the Commission that no other "unsolicited" notes were received with regard to this legislative dossier*. I can confirm that no such notes exist.

The withheld parts of the CDT's paper, GSMA's roaming paper and ETNO's position paper can now be disclosed to you. The reason for withholding them was that they referred to internal positions of the Council which were not final and not publicly available. Since access is now granted to the multicolumn documents, full access can be also granted to these papers.

In addition, you further *request information containing the specific copyright law provision on which your refusal for full disclosure* [of the unsolicited notes] *is based*. The notes in question were (partially) disclosed at initial stage under Regulation 1049/2001. However, they do not originate from the Commission services. Documents of third parties cannot be re-used without the agreement of the originators because the authors hold intellectual property rights on their content. This interpretation is in line with Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information⁷.

4. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may, under the conditions of Article 263 TFEU, bring proceedings before the General Court or, under the conditions of Article 228 TFEU, file a complaint with the European Ombudsman.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'p.o. A. Italianer', followed by a long, sweeping horizontal stroke.

Alexander Italianer

⁷ Official Journal L 345 of 31.12.2003, p. 90.