



## EUROPEAN COMMISSION

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### **DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2016/1708**

Dear Mr Schindler,

I refer to your letter of 27 May 2016, registered on 30 May 2016, 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> ('Regulation 1049/2001').

#### **1. SCOPE OF YOUR REQUEST**

On 5 April 2016, you requested the Commission's Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW) to provide you with the following documents:

*Documents which contain the following information:*

*\* information (including memos, letters, drafts, protocols, databases, emails) with employees, representatives and contractors by or associated with Baker & McKenzie and its subsidiaries.*

*\* information (including memos, letters, drafts, protocols, databases, emails) about any contractual relation with Baker & McKenzie and its subsidiaries.*

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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.

*\* information (including memos, letters, drafts, protocols, databases, emails) about third party services hired, contracted or consulted (with or without financial compensation) in relation with the drafting of legislative or non-legislative files with employees, representatives and contractors by or associated with Baker & McKenzie and its subsidiaries.*

On 6 April 2016, DG GROW sent you a clarification request and you replied on the same day as follows:

*Baker & McKenzie is the name of a company providing legal services. The information I am looking for is described in my initial request sufficiently. Specific documents I am looking for include correspondence between the Commission and Baker & McKenzie representatives and correspondence from or to Baker & McKenzie that the Commission holds. The period should encompass the ongoing legislative term. If information belongs to conversations that started before that time, it should be included.*

*This information can also include documents (in a broader sense) stemming from legal services given to the Commission, such as legal advice, lobbying, help in legislative work, studies for legal issues and so on.*

DG GROW identified nine (9) documents as falling into the scope of your request, provided in the enclosure (list of documents) to the initial reply. DG GROW:

- granted full access to documents 4 and 5 from the list;
- granted very wide partial access (subject to the redaction of personal data only) to documents 2, 6, 7, 8 and 9;
- refused access to documents 1 and 3. Before taking a decision, DG GROW had consulted the organisations from which documents 1 and 3 originate, namely Baker & McKenzie and the Association of European Businesses in Russia. One of them (the Association of European Businesses in Russia) replied to the consultation request by objecting to the possible release.

Through your confirmatory application, you request a review of the position of DG GROW.

## **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 a fresh review of the reply provided by the relevant service at the initial stage.

### Concerning documents 1 and 3:

Documents 1 and 3 were submitted to the Commission by a third party and constitute e-mail correspondence between Baker & McKenzie and the Association of European Businesses in Russia. This correspondence is drafted in Russian.

More specifically, the content of these documents can be summarised as follows:

**Document 1** (ref: Ares(2016)2711482): e-mail exchanges between Baker & McKenzie and the Association of European Businesses, dated 18-19 April 2014 concerning the preparation of a presentation by Baker & McKenzie on the consequences of the sanctions by the European Union and the US and the legal situation in Crimea. These exchanges have procedural nature and the actual presentation by Baker & McKenzie was already disclosed to you with the initial reply.

**Document 3** (ref: Ares(2016)2711699): e-mail exchanges between Baker & McKenzie and the Association of European Businesses, dated 21-26 May 2014, where Baker & McKenzie was asked to comment on two questions concerning the legal regime of doing business in Crimea for Russian companies through branch offices and the applicable legislation, including labour and tax law. The e-mail chain contains explanations/answers provided by Baker & McKenzie in this regard.

In the context of the confirmatory review and under the provisions of Article 4(4) of Regulation 1049/2001, a renewed third-party consultation was initiated by the Secretariat-General of the Commission. More specifically, the Commission inquired whether the originators of documents 1 and 3 would agree to a partial release, subject to the redaction of personal data only.

In reply to this consultation, Baker & McKenzie agreed to such a partial disclosure.

As for the Association of European Businesses in Russia, it had refused disclosure of the documents at the initial level with the argument that the e-mail exchanges contain references to third parties and private conversations. In the framework of the renewed consultation conducted in June 2016, the Association had some questions concerning Regulation 1049/2001 and the consultation process, but finally did not provide an explicit reply to the consultation request, even following the additional explanations provided by the responsible Commission service. The Commission had informed the Association of European Businesses in Russia that, in case it did not receive a reply within the prescribed time-limit, it would take a position on disclosure of the said correspondence taking account of AEB's and Baker&McKenzie's legitimate interests on the basis of the information in our possession.

Further to the redactions of personal data, explained above, the Commission has reviewed the content of these documents. The Commission has also taken into consideration the position of the authors concerned as to the possible disclosure of the documents in question, including the absence of reply to its consultation.

The content of the first document is of a purely procedural/organisational nature and does not contain any discussions on the substance of the underlying issues. The Commission therefore considers that its disclosure would not harm any of the interests protected under Article 4 of Regulation 1049/2001 except for personal data, which have been redacted in accordance with Article 4(1)(b) of Regulation 1049/2001, for the reasons set out below.

As for document 3 considering that the said e-mail exchange took place in 2014 and that Baker & McKenzie has explicitly agreed to its release, the Commission sees no reason to withhold the content of document 3 at present.

Finally, the argument of non-release, expressed only at initial level by the Association of European Businesses in Russia, which was that the e-mail exchanges contain references to third parties and private conversations, cannot be sustained, as all such personal data and references to private persons has been redacted from the documents, as explained in section 2.1 above.

Having carried out a detailed examination of the documents requested and taking into account the result of the third-party consultations at both initial and confirmatory level, I am pleased to inform you that wide partial access – subject to redaction of personal data only - is granted to documents 1 and 3.

Concerning documents 2, 6, 7, 8 and 9:

With regard to the undisclosed personal data in documents 2, 6, 7, 8 and 9, I regret to inform you that I have to confirm the initial decision of DG GROW to refuse access thereto. Access to undisclosed personal data in these documents is refused on the basis of the exception relating to the protection of privacy and the integrity of the individual provided for in Article 4(1)(b) of Regulation 1049/2001.

The detailed reasons are set out below.

**2.1. Protection of the privacy and the integrity of the individual**

Article 4(1)(b) of Regulation 1049/2001 provides that *the 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.*

Although in your confirmatory application you do not seem to question the applicability of the above-mentioned exception to the undisclosed parts of documents 2, 6, 7, 8 and 9, I would like to provide additional explanations of how such disclosure would undermine the interests protected by this exception. These explanations are relevant also for the personal data redactions made in documents 1 and 3.

The documents requested contain either the names, surnames and contact details of the Commission staff members not holding senior management positions or the names, surnames, positions, signatures and contact details of third parties (such as employees of Baker & McKenzie and/or their interlocutors).

These are undoubtedly personal data in the meaning of Article 2(a) of Regulation 45/2001<sup>3</sup>, which defines it as *any information relating to an identified or identifiable natural person (...); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity*.

It follows that the public disclosure of the above-mentioned information would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

In accordance with the *Bavarian Lager* ruling<sup>4</sup>, when a request is made for access to documents containing personal data, Regulation 45/2001 becomes fully applicable. According to Article 8(b) of that Regulation, 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. Those two conditions are cumulative.<sup>5</sup> Only if both conditions are fulfilled and constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

In that context, whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject<sup>6</sup>.

I would also like to bring to your attention the judgment in the *ClientEarth* case, where the Court of Justice ruled that “*whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject. If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request*”

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<sup>3</sup> 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.

<sup>4</sup> Judgment of the Court (Grand Chamber) of 29 June 2010 in case C-28/08 P, *European Commission v the Bavarian Lager Co. Ltd.* (ECLI:EU:C:2010:378), paragraph 63.

<sup>5</sup> Judgment of the Court (Grand Chamber) of 29 June 2010 in case C-28/08 P, *European Commission v the Bavarian Lager Co. Ltd.* (ECLI:EU:C:2010:378), paragraphs 77-78.

<sup>6</sup> Judgment of the Court of Justice of 16 July 2015 in case C-615/13P, *ClientEarth v EFSA*, (ECLI:EU:C:2015:489), paragraph 47.

*for access*”<sup>7</sup>. Furthermore, in the *Strack* case, the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data<sup>8</sup>.

Neither in your initial, nor in your confirmatory application, have you established the necessity of disclosing any of the above-mentioned personal data.

Therefore, I have to conclude that the transfer of personal data through the disclosure of the redacted parts of requested documents cannot be considered as fulfilling the requirement of Regulation 45/2001 and in consequence, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as there is no need to publicly disclose the personal data included therein, and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

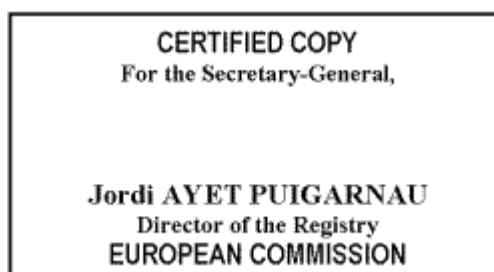
Finally, please note that Article 4(1)(b) of Regulation 1049/2001 does not provide for the possibility for interests protected therein to be set aside by an overriding public interest.

### **3. 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,

*For the Commission*  
*Alexander ITALIANER*  
*Secretary-General*



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<sup>7</sup> Judgment of the Court of Justice of 16 July 2015 in case C-615/13P, *ClientEarth v EFSA*, (ECLI:EU:C:2015:489), paragraph 47.

<sup>8</sup> Judgment of the Court of Justice of 2 October 2014 in case C-127/13 P, *Strack v Commission*, (ECLI:EU:C:2014:2250), paragraph 106.