



**EUROPEAN COMMISSION**

Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs

**Director General**

Brussels, 29.03.2017  
GROW.B.2/AH/bml (2017) 1740189

Mr Matthias Schindler  
Bundestagsbüro Julia Reda, MdEP  
Unter den Linden 50  
11011 Berlin  
Germany

[XXXXXXXXXXXXXXXXXXXXXXXXXXXX@XXXXXXXXX.XXX](mailto:XXXXXXXXXXXXXXXXXXXXXXXXXXXX@XXXXXXXXX.XXX)

**Subject: Your application for access to documents – Ref GestDem No 2017/0859**

Dear Mr Schindler,

We refer to your e-mail dated 8 February 2017 in which you make a request for access to documents, registered under the above mentioned reference number.

Your application concerns:

1. all information (including but not limited to letters, emails, email drafts, documents, notes, memoranda, studies, remarks, copies, data, files, facsimiles, drafts and records) about the notification under Directive 98/34/EC related to the German Presseverlegerleistungsschutzrecht (Achstes Gesetz zur Änderung des Urheberrechtsgesetzes dated May 7, 2013 (BGBl 2013 I Nr. 23 ,pg 1161);
2. any information (see above) related to the interpretation of Directive 98/34/EC with regards to the notification requirements in the field of copyright;
3. any information within the Commission, including Commissioner Günther Oettinger and his staff regarding the ancillary copyright law ("Leistungsschutzrecht für Presseverleger");
4. any document covered by GESTDEM 2015/3352 which was not or only partially released;
5. all information (as defined above) related to the answer that Commissioner Bienkowska gave to written question E-005574/2015.

The documents identified as relevant for your request are listed in the three attached tables.

Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 299 11 11.  
Office: BREY 14/110. Telephone: direct line (32-2) 2956991. Fax: (32-2) 2998043.

E-mail: [grow-xx@xx.xxxxxx.xx](mailto:grow-xx@xx.xxxxxx.xx)

- Table I contains the documents requested under point 4 above, i.e. the documents covered by GESTDEM 2015/3352. Please note that the reassessment of documents in Table I, notably of those already partially or not disclosed in 2015, has not given a different result than in 2015 for the reasons explained below. Therefore, we are not disclosing any further document listed in Table I.
- Table II contains the documents requested under points 1 and 2 above. Please note that we are disclosing 3 documents from this table, as explained below.
- Table III contains the documents requested under point 3 above. Please note that they are disclosed partially, for the reasons described below.

The only document retrieved concerning point 5 above is the answer that Commissioner Bieńkowska gave to written question E-005574/2015, which is publicly available, as explained below.

Please note that some documents that fall under the scope of your request are publicly available. These are:

- The answer that Commissioner Bieńkowska gave to written question E-005574/2015, concerning the documents requested under point 5 above, which is accessible via <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-005574&language=EN>;
- The German law on ancillary copyright listed at No 4 of table II, accessible via <http://dip21.bundestag.de/dip21/btd/17/114/1711470.pdf>
- The Spanish law on ancillary copyright listed at No 5 of table II, accessible via [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2014-11404](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-11404).

## **1) Partial access**

Some of the documents to which you have requested access contain personal data which has to be protected.

Personal data of non-senior management staff appearing therein was redacted when disclosing them to you under GESTDEM 2015/3352 and has been redacted from the new documents disclosed to you under GESTDEM 2017/0859, as these documents have the personal data of the third parties with whom the Commission was in correspondence. Personal data is disclosed only for those documents in relation to which the consulted third party has expressly consented to it. This partial disclosure is grounded on Article 4(1)(b) of Regulation (EC) 1049/2001 concerning the protection of the privacy and integrity of individuals.

Pursuant to Article 4(1)(b) of Regulation (EC) 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with European Union legislation regarding the protection of personal

data. The applicable legislation in this field is Regulation (EC) 45/2001 on the protection of individuals with regard to the processing of personal data by the Union institutions and bodies and on the free movement of such data.

When access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable<sup>1</sup>.

According to Article 8(b) of this Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced.

We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned.

In case you would disagree with the assessment that the expunged data are personal data which can only be disclosed if such disclosure is legitimate under the rules of personal data protection, you are entitled, in accordance with Article 7(2) of Regulation (EC) 1049/2001, to make a confirmatory application requesting the Commission to review this position.

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to submit a confirmatory request to the Secretary-General of the Commission within fifteen working days of receiving this letter.

All correspondence should be sent either electronically to xxxxxxxxxx@xx.xxxxxx.xx or by regular mail to the following address:

European Commission  
Secretary-General  
Transparency unit SG-B-4  
BERL 5/327  
B-1049 Brussels

Regarding documents listed at Nos 7 to 28 of table III, we are pleased to inform you that access is granted to the parts which fall under the scope of your request, described under point 3 above. Please note that the parts of the documents which fall outside the scope of your request under point 3 above, have been blanked out with a written indication "*out of scope*" at the beginning of the corresponding passage.

Personal data of non-senior management staff or of other third parties appearing therein was also redacted when disclosing them, as explained under section 2(b) above.

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<sup>1</sup> Judgment of the Court of Justice of the EU of 29 June 2010 in case 28/08 P, *Commission/The Bavarian Lager Co. Ltd.*

Having re-examined the comments issued by the Commission in the framework of the notification 2013/244/E (listed at No 21 in table I), I have to confirm the conclusion of our reply to GESTDEM 2015/3352, i.e. that the document which was partially disclosed cannot be disclosed in its entirety. A part of the document was blanked out when disclosing it to you under GESTDEM 2015/3352, as its disclosure is prevented by the exception to the right of access laid down in Article 4 of Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents.

The expunged part of the document pertains to an ongoing investigation. I refer you to the exception to the right of access provided for in Article 4(2), 3rd indent of Regulation (EC) 1049/2001, according to which access shall be refused “*where disclosure would undermine the protection of ... the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.*”

Point 2 of the comments issued by the Commission in the framework of notification 2013/244/E is linked to the EU Pilot procedure 4098/12/MARKT, which investigates the compliance of the provisions of the Spanish legislation concerning private copying with Article 5(2)b of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

Disclosure of the document requested would undermine the protection of the purpose of the ongoing investigation; indeed, disclosure of the document would affect the dialogue and the mutual trust between the authorities of the Member State and the Commission. Therefore, the exception laid down in Article 4(2) 3<sup>rd</sup> indent of Regulation (EC) No 1049/2001 applies to this document.

## **2) No access**

Having re-examined the documents listed at Nos 39, 40, 41 of table I and examined the documents listed at Nos 2 and 3 of table II under the provisions of Regulation (EC) 1049/2001, I hereby inform you that your application cannot be granted, as disclosure is prevented by exception to the right of access laid down in Article 4 of this Regulation. These documents contain opinions for internal use as follows:

- Documents listed at Nos 39, 40, 41 of table I are deliberations and preliminary consultations that lead to the final reply to the written question P-6993/2014 (this final answer is available at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2014-006993&language=EN>);
- Document listed at No 2 of table II contains deliberations and internal Commission consultations aimed at replying to the e-mail listed at No 1 of table II; and

- Document listed at No 3 of table II contains deliberations and internal Commission consultations concerning the interpretation of Directive 98/34/EC in relation to the rules on ancillary copyright adopted in Germany and Spain.

These documents contain views that are only partially reflected and may mislead as regards the opinion of the Commission services in relation to the German and Spanish legislation on ancillary copyright. Disclosure of these opinions for internal use exchanged between the services as part of preliminary consultations would significantly affect the decision-making process of the Commission. Therefore, the disclosure thereof is prevented by the exception to the right of access laid down in Article 4(3)2 of Regulation (EC) 1049/2001.

Having re-examined the documents listed at Nos 14, 17, 18, 20 and 22 of table I, and examined the documents listed as Nos 6 and 7 of table II, I have come to the conclusion that we cannot disclose the requested documents because their disclosure at this stage would undermine the purpose of the investigation still ongoing in this case. I refer you to the exception to the right of access provided for in Article 4(2), third indent of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, according to which access shall be refused "*where disclosure would undermine the protection of ... the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.*"

The documents which you seek to obtain are exchanges between the Spanish authorities and the Commission concerning the re-notification of the legislation on copyright in the framework of the notification 2013/244/E. These exchanges form part of the on-going investigation under procedures CHAP(2015)2897, (2016)1816 and (2017)318 which concern the compliance of the provisions of the Spanish legislation concerning private copying with Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society and with Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services. The requested documents form part of the dialogue between the Commission and Spain pertaining to this ongoing investigation.

Following the consultation under Article 4(5) of Regulation (EC) 1049/2001, the Spanish authorities objected to the disclosure of these documents under GESTDEM 2015/3352 and motivated their refusal on the exceptions in Articles 4(1)a, 4(2) and 4(3) of Regulation (EC) 1049/2001. The Spanish authorities claimed in particular that these documents constitute information submitted to the Commission and in relation to which the Commission has not yet taken a decision, as well as that the information requested once disclosed could be used to place the current legal framework in a state of insecurity and it could prejudice its defence.

Given that this investigation is still on-going, disclosure of the requested documents would undermine the protection of the purpose of the on-going investigation; indeed, disclosure of the documents at this point in time would affect the dialogue and the mutual trust between the Spanish authorities and the Commission, which is required to enable them to resolve the case

without having to refer it to the Court of Justice. Therefore the exception laid down in Article 4(2) third indent of Regulation (EC) No 1049/2001 applies to these documents.

The case law of the Court of Justice of the EU confirms the approach above. In case T-111/11 *Client Earth v Commission*, it was held that "(...) in accordance with settled case-law, the Commission may legitimately rely on the exception set out in the third indent of Article 4(2) of Regulation No 1049/2001 in order to refuse access to documents relating to investigations of a possible contravention of European Union law which might lead to the initiation of infringement proceedings or which have in fact led to the initiation of such proceedings. In those circumstances, refusal of access has been considered justified because the Member States concerned are entitled to expect the Commission to observe confidentiality as regards investigations, even where a period of time has elapsed since the closure of those investigations" (case T-111/11 *Client Earth v Commission*, paragraph 58).

The judgment further explains that "(...) it is clear from the case-law that the disclosure of documents relating to the investigation stage, during the negotiations between the Commission and the Member State concerned, could undermine the proper conduct of the infringement proceedings inasmuch as its purpose, which is, as stated in paragraph 52 above, to induce the Member State concerned to comply voluntarily with Treaty requirements or, if appropriate, to give it an opportunity to justify its position, could be jeopardised. (...) " (Case T-111/11 *Client Earth v Commission*, paragraph 59).

The possibility of granting partial access to the documents mentioned under this subsection, in accordance with Article 4(6) of Regulation (EC) No 1049/2001, has also been examined. However, this has not been considered to be possible since the documents in question are entirely covered by the exception under Article 4(2) of Regulation (EC) No 1049/2001. In accordance with the settled case law, "in a situation where, when the decision to refuse access was made, the infringement proceedings were ongoing, the Commission was necessarily required to start from the principle that that general presumption applied to the documents concerned in their entirety" (Case T-111/11 *Client Earth v Commission*, par 75, Case T 29/08 *LPN v Commission*, paragraph 127).

### **3) Overriding public interest in disclosure**

The exceptions laid down in Article 4(2) and 4(3) of Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the document. However, in this case, the information provided by you does not show that the public interest in making the content of the documents requested public would outweigh the harm that disclosure would cause to the interests protected by the invoked exceptions.

### **4) Confirmatory application**

Moreover, I would like to inform you that in accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to submit a confirmatory request to the Secretary-General of the Commission within fifteen working days of receiving this letter.

All correspondence should be sent either electronically to [XXXXXXXXXX@XX.XXXXXX.X](mailto:XXXXXXXXXX@XX.XXXXXX.X) or by regular mail to the following address:

European Commission  
Secretary-General  
**Transparency unit SG-B-4**  
BERL 5/327  
B-1049 Brussels.

Yours sincerely,



Lowri Evans

Enclosures: - Table I  
- Table II  
- Table III  
- Document 1 of table II  
- Documents 1 to 28 of table III