EUROPEAN COMMISSION

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Mr Matthias SCHINDLER
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Unter den Linden 50
11011 Berlin
Germany

DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001[1]

Subject: **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2017/859**

Dear Mr Schindler,

I refer to your letter of 29 March 2017, 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 documents[2] ('Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 8 February 2017, addressed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW), you requested access to:

– *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 (Achtes Gesetz zur Änderung des Urheberrechtsgesetzes dated May 7, 2013 (BGBl 2013 I Nr. 23 ,pg 1161);*

1 Official Journal L 345 of 29.12.2001, p. 94.
2 Official Journal L 145 of 31.5.2001, p. 43.

– *any information (see above) related to the interpretation of Directive 98/34/EC with regard to the notification requirements in the field of copyright;*

– *any information within the Commission, including Commissioner Günther Oettinger and his staff regarding the ancillary copyright law ("Leistungsschutzrecht für Presseverleger").*

You specified that you had filed a similar request in 2015, which was registered under GESTEM number 2015/3352, and that you now requested access to the documents which had not, or had only partially, been released following that request.

You also requested access to all information (as defined above) related to the answer of Commissioner Bieńkowska to a written question by MEP Reda in 2015 (E-005574/2015).

The Commission has identified the following set of documents as falling under the scope of your request:

(1) Documents falling within the scope of your earlier application 2015/3352 as listed in annex I of the initial reply, with the exception of documents 31 and 37, to which full access was granted under that earlier request, and which consequently fall outside the scope of your application;

(2) Documents about the notification under Directive 98/34/EC[3] of the German *Presseverlegerleistungsgesetz*, and documents related to the interpretation of this directive with regard to the notification requirements in the field of copyright. These documents were listed in annex II of the initial reply;

(3) Documents related to information within the Commission, including Commissioner Günther Oettinger and his staff, regarding ancillary copyright law. These documents were listed in annex III of the initial reply;

(4) Reply of 18 July 2015 by MEP Ms Reda to Commissioner Bieńkowska, relating to written Question E-005574/2015;

(5) Draft reply of 24 July 2015, prepared by the Commission services.

In its initial reply of 29 March 2017, DG GROW:

- provided the links to the requested documents which are in the public domain, namely to:

  - the German law on ancillary copyright (link: http://dipbt.bundestag.de/extrakt/ba/WP17/486/48674.html);

  - the Spanish law on ancillary copyright (link: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-11404.

[3] Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, Official Journal L 204 of 21.7.1998, p. 37–48.

- granted full access to those parts of documents 7-28, listed in annex III, which fell within the scope of your request, after redaction of personal data in accordance with Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001;

- granted wide partial access to documents 1-6 of annex III, after redacting personal data in accordance with Article 4(1)(b) of Regulation 1049/2001;

- refused further access to the documents listed in annex I, falling within the scope of your earlier request under GESTDEM number 2015/3352, on the basis of Article 4(1)(b), 4(2), third indent and 4(3), second subparagraph, of Regulation 1049/2001, pertaining to the protection of, respectively, privacy and the integrity of the individual, the purpose of investigations and the decision-making process;

- refused access to documents 2, 3, 6 and 7 of annex II, based on Article 4(2), third indent and 4(3), second subparagraph of Regulation 1049/2001, pertaining to the protection of, respectively, the purpose of investigations and the decision-making process.

Through your confirmatory application you request a general review of this position.

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 given by the Directorate-General concerned at the initial stage.

Following this review, I am pleased to inform you that:

– full access is granted to document 18 and the attachment to document 39 of annex I[4], as well as document 2 of annex II;

– wide partial access, subject only to redaction of personal data, is granted to documents 14, 16, 17, 20[5] and 39 of annex I;

– partial access is granted to documents 19, 22, 40, 41 of annex I and document 3 of annex II;

– the initial decision is confirmed for the remaining documents.

The (partial) refused is based on Article 4(1)(b), 4(2), second and third indents and 4(3), first subparagraph of Regulation 1049/2001, pertaining to the protection of, respectively, privacy and the integrity of the individual, the purpose of investigations, court proceedings and the decision-making process, for the reasons set out below.

4 This document is identical to document 7 of annex II.
5 This document is identical to document 6 of annex II.

2.1. Position of the Spanish authorities

Pursuant to Articles 4(4) and 4(5) of Regulation 1049/2001, the Secretariat-General consulted the Spanish authorities regarding the possible disclosure of the documents originating from them (namely documents 14, 17, 18, 20 and 22 of annex I).

In response to that consultation, the Spanish authorities objected to the public release of these documents on the basis of the exceptions provided for in Articles 4(1)(a), 4(2) and 4(3) of Regulation 1049/2001.

2.2. Commission's assessment under the Regulation

Having conducted a *prima facie* assessment of the arguments against public disclosure put forward by the Spanish authorities, in light of with settled case law[6], I conclude that these arguments appear, at first sight, to be well-founded in respect of point 2 of document 22 of annex I.

I also confirm the grounds invoked by DG GROW at the initial stage for refusing access to point 2 of document 21, originating from the Commission, as explained below.

2.2.1. a) Protection of the purpose of investigations (Point 2 of documents 21 and 22 of annex I)

Article 4(2), third indent of Regulation 1049/2001 provides that [t]*he institutions shall refuse access to a document where disclosure would undermine the protection of:* […] *the purpose of inspections, investigations and audits unless there is an overriding public interest in disclosure.*

Document 21 contains the comments issued by the Commission in the framework of notification procedure 2013/244/E. In this notification the Spanish authorities notified to the Commission on 10 May 2013 the draft Bill amending the Recast Text of the Act on Intellectual Property, approved by Royal Legislative Decree 1/1996, of 12 April, and Law 1/2000, of 7 January, on Civil Procedure.

Document 22 is the reply of the Spanish authorities to the Commission's comments contained in document 21. It expressly reflects the position of the Spanish authorities on the specific issues addressed by the Commission in its comments.

Point 2 of both documents 21 and 22 relates to ongoing EU-Pilot procedure 4098/12/MARKT. The latter investigates the degree of compliance of the provisions of the Spanish Act on Intellectual Property 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. The EU Pilot procedure, which is still fully ongoing, may lead to opening the formal phase of an infringement procedure under Article 258 of the Treaty on the Functioning of the European Union (TFEU).

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[6] Judgment of the Court of Justice of 21 June 2012 in case C-135/11 P, *IFAW*, para. 63.

In its recent judgment of 11 May 2017 in case C-562/14 P, *Sweden and Spirlea v Commission,* the Court of Justice stated that *the EU Pilot procedure constitutes a cooperation procedure between the Commission and the Member States which makes it possible to ascertain whether EU law has been complied with and correctly applied within those States. That type of procedure seeks efficiently to resolve any infringements of EU law by avoiding, so far as possible, the formal opening of an infringement procedure under Article 258 TFEU.* The Court of Justice concluded that, *so long as, during the pre-litigation stage of an inquiry carried out as part of an EU Pilot procedure, there is a risk of affecting the nature of the infringement procedure, altering its progress or undermining the objectives of that procedure, the application of the general presumption of confidentiality of the documents exchanged between the Commission and the Member State concerned is justified.*[7]

Although the comments of the Commission and the reply of the Spanish authorities took place in the framework of notification procedure 2013/244/E, point 2 of documents 21 and 22 cannot be disclosed, as they have a clear and direct connection with ongoing EU-Pilot procedure 4098/12/MARKT. Their public disclosure would negatively influence the dialogue between the Commission and Spain, for which a climate of trust is essential.

Such disclosure would consequently adversely affect the Commission's investigations, as it would undermine the climate of mutual trust required to resolve disputes between the Commission and the Member State without having to use the judicial phase of the infringement procedure. It would have a negative effect on the extent to which the Commission can conduct negotiations with the Member State, free from external pressure, with the objective that the Member State complies voluntarily with European Union law.

Having regard to the above, I consider that the use of the exception under Article 4(2), third indent of Regulation 1049/2001 on the grounds of protecting the purpose of inspections, investigations and audits is justified, and that access to point 2 of documents 21 and 22 must be refused on that basis.

2.2.2. a) Protection of the court proceedings (withheld parts of documents 19, 40 and 41 of annex I and document 3 of annex II)

Article 4(2), second indent of Regulation 1049/2001 provides that *[t]he institutions shall refuse access to a document where disclosure would undermine the protection of […] court proceedings and legal advice, unless there is an overriding public interest in disclosure.*

[7] Judgment of the Court of Justice of 11 May 2017, *Sweden and Spirelea v Commission,* C-562/14 P, EU:C:2017:356, paragraph 45.

The withheld parts of documents 19, 40 and 41 of annex I, and document 3 of annex II contain opinions for internal use expressed by Commission staff in the context of deliberations and preliminary consultations within the Commission. These opinions do not necessarily reflect the final Commission position. They concern an issue which has become a subject of litigation in Germany, and on which the Court of Justice is requested to deliver a preliminary ruling[8], namely the notification requirements under Directive 98/34/EC, (now repealed and replaced by Directive (EU) No 2015/1535) and the interpretation of the notions of 'technical regulation' and 'rule on services' under that Directive).

Disclosure would put into the public domain internal opinions on highly sensitive issues, drafted by Commission staff and intended for internal use as part of deliberations and preliminary consultations, which have become subject of litigation. Under those circumstances, disclosure of the redacted parts of the documents would undermine the ongoing court proceedings.

This risk is not hypothetical, but real and concrete and must be seen against the background of the pending litigation. Public disclosure, at this stage, would disturb the serenity of the proceedings initiated by Landgericht Berlin through its request for a preliminary ruling.

Disclosure of the redacted parts would make them public *erga omnes*. It is very probable that the press and other organised private interests would try to use the documents to influence the outcome of these proceedings. This would have the effect of exposing the judicial activities to external pressure. Even if this would be so only in the perception of the public, it would undermine the protection of court proceedings in the meaning of Article 4(2), second indent of Regulation 1049/2001. Indeed, to protect the sound administration of justice, it has to be ensured that, throughout the court proceedings at national, European or international level, the exchange of arguments by the parties and the deliberations of the court in the case before it take place in an atmosphere of serenity. This has been recognised by the Court of Justice in its Judgment of 21 September 2010 in case C-514/07P, *Sweden and others v API and Commission*[9].

In addition, making public, at this stage, the redacted parts of the above-mentioned documents would seriously undermine the ability of the Commission's Legal Service to effectively defend the interests of the Commission before the Court of Justice on an equal footing with the other parties. It would upset the vital balance between the parties to the disputes before the courts, because only the Commission and other European institutions, and not all the parties to the proceedings, are concerned by an application for access to documents.

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[8] VG Media Case C-299/17, see press release of Landgericht Berlin: https://www.berlin.de/gerichte/presse/pressemitteilungen-der-ordentlichen-gerichtsbarkeit/2017/pressemitteilung.558728.php.

[9] Judgement of the Court of Justice of 22 September 2010, *Sweden and others v API and Commission*, C-514/07P, EU:C:2010:541, paragraphs 86-87.

The General Court confirmed in a recent judgment that *the need to ensure equality of arms before a court justifies the protection not only of documents drawn up solely for the purposes of specific court proceedings, such as pleadings, but also of documents whose disclosure is liable, in the context of specific proceedings, to compromise that equality, which is a corollary of the very concept of a fair trial*. The General Court stated further that, *in order for the exception to apply, it is necessary that the requested documents, at the time of adoption of the decision refusing access to those documents, should have a relevant link either with a dispute pending before the Courts of the European Union in respect of which the institution concerned is invoking that exception, or with proceedings pending before a national court, on condition that they raise a question of interpretation or validity of an act of EU law so that, having regard to the context of the case, a reference for a preliminary ruling appears particularly likely*[10], which is the case here.

In light of the above-mentioned pending preliminary ruling, I take the view that the Commission's internal discussions on those sensitive and controversial issues should remain confidential at present, as their public disclosure would seriously undermine the ability of the Commission's Legal Service to effectively defend the Commission's interests before the EU Courts on an equal footing with other parties, in contradiction with the principle of the equality of arms.

The redactions in the above-mentioned documents are therefore justified on the basis of Article 4(2), second indent of Regulation 1049/2001, as their full disclosure would undermine the above-mentioned court proceedings pending before the Court of Justice or the national courts.

2.2.3. Protection of the decision- making process (parts of documents 40 and 41 of annex I)

Article 4(3) 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.*

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Documents 40 and 41 are exchanges between former DG ENTR, former DG MARKT[11] and DG COMP staff in the framework of the drafting of a reply to written parliamentary question P-6993/2014.[12]

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10 Judgment of the General Court of 15 September 2016, Philip Morris v Commission, T-18/15, EU:T:2016:487, paragraph 64.

11 Now Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW).

12 http://www.europarl.europa.eu/sides/getDoc.do?type=WQ&reference=P-2014-006993&language=EN

This parliamentary question concerns notification procedure 2013/244/E, the necessity or not to re-notify the draft legislation, and a possible infringement in this regard by the Spanish authorities.

Parts of these exchanges consist of opinions for internal use as part of deliberations and preliminary consultations between Commission services staff that eventually led to the final reply to the parliamentary question.[13] They contain preliminary views that are only partially reflected in the final reply, and may thus be misleading as regards the opinion of the Commission services in relation to the Spanish legislation. The issues addressed in the withheld opinions are now subject to a request for a preliminary ruling by the Court of Justice.

Full disclosure of these opinions for internal use, exchanged between Commission services' staff as part of preliminary consultations, would seriously affect the decision-making process within the Commission. Indeed, the latter's staff would no longer be able to freely exchange views and opinions in order to progress from a draft reply established by the services to the final reply adopted by the Commission. This would curtail the possibility of staff to freely submit uncensored advice and would entail as a result the serious non hypothetical risk that the quality of the administrative decision-making process would be irremediably impaired. The EU Courts have acknowledged that the institution benefits from the frankly-expressed and complete views required of its agents and officials[14].

Having regard to the above, I consider that the use of the exception set forth in Article 4(3), second subparagraph for the protection of the decision-making process is justified for the withheld parts of documents 40 and 41.

2.2.4. Protection of privacy and the integrity of the individual (all documents of annex I (except documents 18, 21, 22 and 39), document 3 of annex II and all documents on annex III)

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.*

In its judgment in the *Bavarian Lager* case[15], the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No. 45/2001[16] (hereinafter the 'Data Protection Regulation') becomes fully applicable.

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13 http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2014-006993&language=EN

14 Judgment of the Court of first Instance of 9 September 2008 in case T-403/05, *MyTravel v Commission,* EU:T:2008:316, paragraph 52.

15 Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd*, Case C-28/08P, EU:C:2010:378, paragraph 59.

16 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.

In this Judgment the Court stated that Article 4(1)(b) *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 Regulation No 45/2001*[17].

Article 2(a) of the Data Protection Regulation provides that *'personal data' shall mean any information relating to an identified or identifiable person […].* As the Court of Justice confirmed in Case C-465/00 (*Rechnungshof*)[18], *there is no reason of principle to justify excluding activities of a professional […] nature from the notion of private life.*

The requested documents contain names of Commission officials not forming part of senior management or not being Commissioners' Cabinet members. It also contains names of natural persons as well as names and contact details of individuals who are not the main representatives of the entities they work for. This information clearly constitutes personal data in the sense of Article 2(a) of Data Protection Regulation 45/2001.

Pursuant to Article 8(b) of Regulation 45/2001, the Commission can only transmit personal data to a recipient subject to Directive 95/46/EC 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.[19] Only if both conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

In the *ClientEarth* case, the Court of Justice ruled that the institution does not have to examine *ex officio* the existence of a need for transferring personal data[20]. In the same ruling, the Court stated that if the applicant has not established a need to obtain the personal data requested, the institution does not have to examine the absence of prejudice to the person's legitimate interests[21].

In your confirmatory application, you do not put forward any arguments to establish the necessity of, or any interest in, accessing these personal data. Therefore, the need to grant access to those data has not been established.

Furthermore, there are reasons to assume that the legitimate interests of the individuals concerned would be prejudiced by 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.

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17 Paragraph 59.

18 Judgment of the Court of 20 May 2003 in joined cases C-465/00, C-138/01 and C-139/01, preliminary rulings in proceedings between *Rechnungshof and Österreichischer Rundfunk*, EU:C:2003:294, paragraph 73.

19 Judgment of the Court of Justice of 29 June 2010, *Bavarian Lager*, quoted above, paragraphs 77-78.

20 Case C-615/13P, Judgment of the Court of Justice 16 July 2015 *ClientEarth v EFSA,* EU:C:2015:489, paragraph 47.

21 Ibid, paragraph 47-48.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation 1049/2001, access cannot be granted to the redacted personal data included in the requested documents.

I would also like to point out that Article 4(1)(b) has an absolute character and does not envisage the possibility to demonstrate the existence of an overriding public interest.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Articles 4(2) and 4(3) 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.

As explained above, public disclosure of the documents would lead to premature conclusions, by third parties on the degree of compliance with EU law by Spain and Germany. This would, in turn, not only negatively influence the dialogue between the Commission and these Member States, but would also hinder the Commission in defining the line to take in this file in freedom and without undue outside interference. In addition, disclosure would carry a real and non-hypothetical risk of leading to a sub-optimal outcome of the dialogue with the Member States and, hence, to negative impacts for the interests of the general public, including those of citizens. It would also undermine the court proceedings pending before the Court of Justice and the decision-making process of the Commission.

In consequence, I consider that in this case there is no overriding public interest that would outweigh the interest in safeguarding the protection of the court proceedings, purpose of investigations and the decision-making process protected, respectively, by Article 4(2), second and third indents and Article 4(3) of Regulation 1049/2001.

The fact that the documents requested relates to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness[22], provides further support to this conclusion.

4. DISCLOSURE AGAINST THE EXPLICIT OPINION OF THE AUTHOR

According to Article 5(5) and (6) of Commission Decision of 5 December 2001 amending its rules of procedure[23], *[t]he third-party author consulted shall have a deadline for reply which shall be no shorter than five working days but must enable the Commission to abide by its own deadlines for reply. In the absence of an answer within the prescribed period, or if the third party is untraceable or not identifiable, the Commission shall decide in accordance with the rules on exceptions in Article 4 of Regulation (EC) No 1049/2001, taking into account the legitimate interests of the third*

[22] Judgment of the Court of Justice of 29 June 2010 in Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau*, paragraph 60.

[23] Commission Decision of 5 December 2001amending its rules of procedure (notified under document number C(2001) 3714), O.J. of 29.12.2001, L 345, p. 94.

party on the basis of the information at its disposal. If the Commission intends to give access to a document against the explicit opinion of the author, it shall inform the author of its intention to disclose the document after a ten-working day period and shall draw his attention to the remedies available to him to oppose disclosure.

Since the decision to grant full access to document 18, wide partial access to documents 14, 17 and 20 subject only to redaction of personal data and partial access to document 22 of annex I is taken against the objection of the Spanish authorities, the Commission will inform the Spanish authorities of its decision to give partial access to the documents requested. The Commission will not grant such partial disclosure until a period of **ten working days** has elapsed from the formal notification of its intention to disclose the documents to the Spanish authorities, in accordance with the provisions mentioned above.

This time-period will allow the Spanish authorities to inform the Commission whether it will object to the disclosure using the remedies available to it, i.e. an application for annulment and an application for interim measures before the General Court. Once this period has elapsed, and if the Spanish authorities have not signalled their intention to avail themselves of the remedies at their disposal, the Commission will forward the documents to you.

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,

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

For the Commission
Alexander ITALIANER
Secretary-General

Enclosures (8)