EUROPEAN COMMISSION

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Ms Julia REDA
European Parliament
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DECISION OF THE EUROPEAN 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 2017/4478**

Dear Ms Reda,

I refer to your letter of 20 December 2017, registered on the following day, wherein 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 28 July 2017, addressed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, you requested access to documents which contain information concerning notification 2017/127/D of the German government to the European Commission, of 27 March 2017, regarding the Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (NetzDG). You requested all information, including internal and interservice communication of the European Commission regarding or in connection with this law.

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

At the initial stage, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs identified 32 documents as falling under the scope of your request.

Those documents were drafted in the framework of the transparency procedure under Directive 2015/1535[3]. In line with this Directive, the German authorities notified the draft Act improving law enforcement on social networks[4] to the Commission. The respective notification was registered under TRIS Reference Number 2017/127/D.

In its initial replies of 14 September 2017 and 13 December 2017, respectively, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs provided full access to 16 documents, (wide) partial access to 12 documents, and refused access to four documents[5]. The (partial) refusal of access was based on the exceptions of Article 4(1)(b) (protection of privacy and the integrity of the individual), and Article 4(3), second subparagraph (protection of the decision-making process), of Regulation 1049/2001.

Through your confirmatory application, you request a review of this position. You indicate that you are 'led to believe that more information at the Commission exists', and that '[t]he documents that have been released have been overly broadly redacted'.

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.

First, I would like to clarify that the scope of your request was understood to cover documents, which contain information concerning notification 2017/127/D and have been drawn up or received by the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs in the implementation of Directive 2015/1535.

Following our review, four additional documents have been identified:

1) E-mail from an external stakeholder to the European Commission, dated 30 June 2017, Reference Number Ares(2017)3301557.

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[3] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Official Journal L 241 of 17.9.2015, p. 1) – hereinafter 'Directive 2015/1535'.

[4] Act improving law enforcement on social networks (i.e. Netzdurchführungsgesetz – NetzDG). Its draft is publicly available online in the TRIS database: http://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2017&num=127.

[5] Full access was provided to documents 1, 3, 4, 6-8, 10-14 and 17-21. Partial access was provided to documents 2, 5, 9, 15, 16, 22-27 and 32. No access was provided to documents 28-31.

At the initial stage, only the letter attached to the respective e-mail had been identified as document 22. However, document 22 consists of two parts, the respective e-mail (hereafter 'document 22.1') and the letter attached to it (hereafter 'document 22.2').

Document 22 originates from a third party. As it was not clear whether it could be disclosed, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, at the initial stage, consulted the third-party author concerned pursuant to Article 4(4) of Regulation 1049/2001. Only after the second partial initial reply had been sent, did the third party reply that it had no objections to granting access to the document.

2) Two attachments to document 24:

   a. Observations from the European Commission concerning notification 2015/0305/D, dated 11 September 2015, Reference Number TRIS/(2015) 02834; and

   b. Response of Germany to the comments of the European Commission concerning notification 2015/0305/D, dated 16 September 2015, Reference Number TRIS/(2015) 04025.

   At the initial stage, only the e-mail without the respective two attachments, has been identified as document 24. However, document 24 consists of three parts: the e-mail (hereafter 'document 24.1') and the above two attachments (hereafter 'document 24.2' and 'document 24.3').

   Documents 24.1, 25 and 28 contain a preliminary assessment, at desk officer level, of a possible link between notification 2017/127/D and notification 2015/305/D. Consequently, only those parts of documents 24.2 and 24.3 concerning that possible link fall within the scope of your request.

   Please note that mere references to a possible link between notifications do not mean that the Commission's assessment of notification 2015/305/D is similar to the Commission's assessment of notification 2017/127/D. The references only serve as indication that both notifications concern a similar topic.

   Document 24.3 originates from the German authorities, and document 24.2 refers to their opinion. As it was not clear whether those documents could be disclosed, the Secretariat-General consulted the German authorities pursuant to Article 4(4) and 4(5) of Regulation 1049/2001. They agreed with public disclosure of both document 24.3 emanating from them and their opinion as reflected in document 24.2;

3) E-mail exchange between the staff of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, the Directorate-General for Communication Networks, Content and Technology and the Directorate-General for Justice and Consumers between 31 March 2017 and 24 April 2017, Reference Number Ares(2017)5237700 (hereafter 'document 33').

Having carried out a detailed assessment of your request in light of the provisions of Regulation 1049/2001, I am pleased to inform you that:

- document 23 is publicly available online[6]; and

- (wider) partial access is granted to documents 5, 16, 22, 24-28 and 30-33.

As regards document 29 and the (remaining) redacted parts of documents 2, 5, 9, 15, 16, 22, 24-28 and 30-33, I regret to inform you that I have to confirm the initial decision of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs to refuse access. The refusal is based on the exceptions of Article 4(1)(b) (protection of privacy and the integrity of the individual), Article 4(2), second indent (protection of legal advice), and Article 4(3) (protection of decision-making process) of Regulation 1049/2001, for the reasons set out below.

Please note that parts of documents 26 and 27 fall outside the scope of your request as they refer to issues under discussion at the time, which do not concern the transparency procedure regarding notification 2017/127/D under Directive 2015/1535.

Finally, document 33 consists of document 24 and its follow-up. Whereas wide partial access is given to document 24, access to the other parts of document 33 (follow-up to document 24) is refused. Consequently, document 33 is not provided separately.

The list of all documents identified is attached as an annex to this decision.

2.1. Protection of privacy and the integrity of the 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'.

In accordance with the *Bavarian Lager* ruling[7], when a request is made for access to documents containing personal data, Regulation 45/2001[8] becomes fully applicable. Article 2(a) of Regulation 45/2001 defines personal data as 'any information relating to an identified or identifiable natural person'.

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[6] Publicly available on the website of one of the respective stakeholders: https://edri.org/files/201705-letter-germany-network-enforcement-law.pdf.

[7] Judgment of 29 June 2010 in *Commission* v *Bavarian Lager*, C-28/08 P, EU:C:2010:378.

[8] 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, p. 1) – hereinafter 'Regulation 45/2001'.

In this instance, documents 2, 5, 9, 15, 16, 22, and 24-33 contain personal data of European Commission and third-party staff. More specifically, they contain their names, contact data and signatures, and other information from which their identity can be deduced.

Pursuant to settled case law, the concept of 'private life' must not be interpreted restrictively and there is no reason of principle to justify excluding activities of a professional nature from the notion of 'private life'[9].

The above-mentioned information relating to individuals clearly constitutes personal data in the sense of Article 2(a) of Regulation 45/2001. Its public disclosure would therefore constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

Pursuant to Article 8(b) of Regulation 45/2001, personal data shall only be transferred to recipients if they establish 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[10] and only the fulfilment of both conditions and the lawfulness of processing in accordance with the requirements of Article 5 of Regulation 45/2001 enables one to consider the processing (transfer) of personal data as compliant with the requirements of Regulation 45/2001.

In the *ClientEarth* judgment, the Court of Justice ruled that the institution does not have to examine of its own motion the existence of a need for transferring personal data. 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[11].

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. 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 for access[12].

In the above-mentioned *Bavarian Lager* ruling, the Court of Justice clarified that the necessity of transfer must be demonstrated 'by express and legitimate justifications or convincing arguments'[13].

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[9] See, amongst others, judgment of 20 May 2003 in *Rechnungshof v Österreichischer Rundfunk*, C-465/00, EU:C:2003:294, paragraph 73.

[10] Judgment in *Commission v Bavarian Lager*, cited above, paragraphs 77-78.

[11] Judgment of 16 July 2015 in *ClientEarth v European Food Safety Authority*, C-615/13 P, EU:C:2015:489, paragraphs 47-48.

[12] Judgment in *Commission v Bavarian Lager*, cited above, paragraphs 77-78; judgment of 2 October 2014 in *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraphs 107-108; and also judgment of 9 November 2010 in *Schecke and Eifert v Land Hessen*, C-92/09 and C-93/09, EU:C:2010:662, paragraph 85.

[13] Judgment in *Commission v Bavarian Lager*, cited above, paragraph 78.

As regards the personal data of individuals contained in the respective documents, you have not provided any arguments and/or justifications that would show in what respect the processing (i.e. transfer) of their personal data was necessary to satisfy a public interest.

In this respect, the Court of Justice has confirmed, in its *Strack* judgment, that a mere interest of members of the public in obtaining certain personal data cannot be equated with a necessity to obtain the said data in the meaning of Regulation 45/2001[14].

Consequently, the personal data in documents 2, 5, 9, 15, 16, 22, and 24-33 may not be disclosed under Regulation 1049/2001 as the need for public disclosure of those personal data has not been substantiated, and there is reason to assume that the data subjects' legitimate interests might be prejudiced.

Against this background, I must conclude that the transfer of the respective personal data cannot be considered as fulfilling the requirements of Regulation 45/2001. Such a transfer is consequently also prohibited under Article 4(1)(b) of Regulation 1049/2001.

2.2. Protection of court proceedings and legal advice

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'.

In its *Turco* judgement, the Court of First Instance[15] underlined that the exception provided for in Article 4(2), second indent, protects two distinct interests: court proceedings and legal advice[16]. In the case at hand, the refusal of access to document 29 and part of document 33 is based on the need to protect legal advice.

I note that the concept of legal advice, as well as the applicability of the exception protecting it, have been interpreted by the EU Court. Indeed, in its *Freehills* judgment, the General Court took the position that legal advice is 'advice relating to a legal issue, regardless of the way in which that advice is given'. The General Court also explicitly underlined that 'it is irrelevant, for the purposes of applying the exception relating to the protection of legal advice, whether the document containing that advice was provided at an early, late or final stage of the decision-making process'[17].

As recognised by the Court of Justice, the exception protecting legal advice must be construed as aiming to protect an institution's interest in seeking legal advice and receiving frank, objective and comprehensive advice[18].

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[14] Judgment in *Strack v Commission*, cited above, paragraphs 107-108.

[15] Now: the General Court.

[16] Judgment of 23 November 2004 in *Turco v Council*, T-84/03, EU:T:2004:339, paragraph 65.

[17] Judgment of 15 September 2016 in *Herbert Smith Freehills v Commission*, T-755/14, EU:T:2016:482, paragraph 47.

[18] Judgment of 1 July 2008 in *Kingdom of Sweden and Maurizio Turco* v *Council*, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 42.

Documents 29 and 33 concern the preliminary considerations of the Directorate-General for Communication Networks, Content and Technology and the Directorate-General for Justice and Consumers on the preliminary consultation of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, set out in document 24.

They contain purely internal legal opinions in matters of a sensitive nature, drafted under the responsibility of different European Commission services concerned. They list the possible legal questions that the Commission could ask German authorities in order to better assess the notified act, both for the purpose of the transparency procedure under Directive 2015/1535 and going beyond that purpose.

Moreover, those documents also contain informal exchanges amongst the staff of the respective services on the compliance of the draft Member State act with EU law. These exchanges are based on a preliminary legal assessment of the draft act, which does not represent the Commission's position, and legal advice on how to monitor the situation and national implementation closely, beyond the purpose of the transparency procedure provided for in Directive 2015/1535.

Against this background, the disclosure of (the redacted parts of) the requested documents would undermine the protection of legal advice provided for under Article 4(2), second indent, of Regulation 1049/2001.

In case of premature disclosure of those (parts of the) documents, the Commission would be exposed to undue external pressure. Indeed, a complete release of documents 29 and 33 at this stage would disseminate preliminary, internal considerations into the public domain. Those considerations remain relevant for the preparation of an impact assessment, which will also be based on a voluntary dialogue with Member States on possible fragmentation.

The risk of external pressure is real and non-hypothetical, given the specific and fundamental interest of different stakeholders to obtain an outcome, which is favourable to them. This could create unjustified and disproportionate reactions, which would render the provision of frank, objective and comprehensive legal advice concerning the monitoring of the national implementation more difficult.

In light of the foregoing, access to document 29 and the redacted part of document 33 is refused based on the exception of Article 4(2), second indent (protection of legal advice), of Regulation 1049/2001.

2.3. Protection of the decision-making process

Article 4(3) of Regulation 1049/2001 stipulates 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.'

'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 25, 26 and 28 contain a preliminary assessment of notification 2017/127/D under Directive 2015/1535 by the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, and references to the assessment of other services of the European Commission within and beyond Directive 2015/1535. They also refer to the development of possible EU measures to improve the effectiveness of the fight against illegal content online. Documents 29 and 33 contain the assessment of notification 2017/127/D by other Commission services within and beyond the scope of Directive 2015/1535.

Consequently, parts of documents 25, 26, 28, 29 and 33 go beyond the purposes of the transparency procedure under Directive 2015/1535 even though they are intrinsically linked to it.

2.3.1 Ongoing decision-making process

I note that the European Commission did not react to notification 2017/127/D within the time limit set out under Directive 2015/1535. Nevertheless, Article 5(5), second subparagraph, of Directive 2015/1535 stipulates that 'the absence of reaction from the Commission under [that] Directive to a draft technical regulation shall not prejudice any decision which might be taken under other Union acts'.

The respective documents contain preliminary opinions of European Commission services. The redacted parts concern detailed and open preliminary discussions amongst their staff, were intended for internal use and remain relevant for the preparation of an impact assessment. Their disclosure would seriously undermine the respective ongoing decision-making process of the Commission, as follows.

In March 2018, the European Commission informed EU citizens and stakeholders about its plans of drawing up an Impact Assessment concerning possible measures to improve further the effectiveness of the fight against illegal content online. As a first step, it published its Inception Impact Assessment[19], allowing citizens and stakeholders to provide their feedback and to participate effectively in future consultation activities.

[19] The Inception Impact Assessment is publicly available at: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-1183598_en. Pursuant to Better Regulation Agenda, the preparation of an impact assessment involves several steps, starting with the inception impact assessment (European Commission's initial analysis of the problem, policy objectives and different solutions as well as their likely impacts). The inception impact assessment is followed-up by an impact assessment when stakeholders are consulted on all key aspects through open public consultations.

The Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs is one of the lead Directorates-General for this initiative. The German draft act, notified under Reference Number 2017/127/D, is specifically mentioned in the Inception Impact Assessment as one of the measures under its scope. The disclosure of internal assessments, which contributed to the Inception Impact Assessment, would expose the respective ongoing decision-making process to external pressures.

In that respect, the General Court, in its *ClientEarth* judgment, has expressly acknowledged the entitlement of the European Commission to protect the preparation process of the impact assessment from attempts by external parties to influence its decision-making process. It recognised that the Commission must be placed in a position to decide 'wholly independently, in the general interest and free from any external pressure or third party influence on the policy initiatives to be proposed'[20].

The General Court has further underlined that allowing the European Commission this space contributes to preserving the essence of its power of initiative. It also protects it from any influences exerted by public or private interests which would attempt, outside of organised consultations, to compel the Commission to adopt, amend or abandon a policy initiative and which would thus prolong or complicate the discussion, taking place within that institution.[21]

This case law is certainly applicable in cases where the European Commission intends to protect parts of internal documents reflecting preliminary considerations of its services put forward purely for internal use, and which are tightly linked with its decision-making process concerning the impact assessment of possible measures to further improve the effectiveness of the fight against illegal content online.

It is settled case law of the EU Courts that the exception pertaining to the protection of the decision-making process laid down in Article 4(3), first sub-paragraph, of Regulation 1049/2001 is linked to the risk of undue external influence, which can affect the quality of the final decision to be adopted by the European Commission.

Disclosure of the withheld opinions for internal use contained in the documents would seriously jeopardise the ongoing impact assessment, in particular where the scope, objective and details of the European Commission's initiatives are still being clarified.

Against this background and given the controversial discussions as regards the fight against illegal content online, it is important that the European Commission can present, explain and defend its initiatives without having to disclose preliminary internal views of its services, which do not represent the Commission's position. The Commission's ability to act in a fully independent manner and at the service of the general interest, and to take its decisions in serenity, would be severely impaired by full disclosure of the respective documents, thereby seriously undermining its decision-making process.

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[20] Judgment of 13 November 2015 in *ClientEarth v Commission*, T-424/14 and T-425/14, EU:T:2015:848, paragraph 94.

[21] *Idem*, paragraph 95.

The General Court confirmed that the exception of Article 4(3), first subparagraph, of Regulation 1049/2001 applies also to documents directly linked to the decision-making process[22], such as, in present case, documents containing preliminary internal considerations relevant to the ongoing impact assessment.

Against this background, there is a real and non-hypothetical risk that the release of the respective parts of documents 26, 29 and 33 would adversely and seriously affect the ongoing decision-making process of the European Commission. Consequently, public access to the redacted parts of those documents has to be refused also pursuant to Article 4(3), first subparagraph, of Regulation 1049/2001.

2.3.2 Opinions for internal use as part of deliberations and preliminary consultations

The minimally redacted parts of documents 25, 26 and 28 contain internal, preliminary opinions of the services of the European Commission for internal use as part of deliberations and preliminary consultations within the Commission as regards the closed transparency procedure under Directive 2015/1535.

Specifically, they reflect preliminary considerations of the European Commission staff, which, if disclosed, would discourage them from discussing, in writing, any issues related to sensitive dossiers of political importance at the EU or national level. In turn, this would effectively deprive the Commission from having frank, internal discussions before the adoption of its acts.

Therefore, the disclosure of those parts of documents would curtail the 'space to think', i.e. the possibility of the respective staff to freely exchange uncensored opinions and use this information in the accomplishment of their tasks. Such disclosure would deter staff from making suggestions independently and without being unduly influenced by the prospect of wide disclosure, thereby exposing the institution of which they are part.

The refusal of access to those exchanges is, therefore, necessary in order to ensure the independence of the institution and the smooth implementation of its decision-making processes.

The possibility of expressing views independently within an institution helps to encourage internal discussions with a view to improving the functioning of that institution and contributing to the smooth running of the decision-making process[23].

In this respect, the jurisprudence of the EU Courts has recognised that the capacity of the staff of the European Commission to express their opinions freely must be preserved[24], to avoid the risk that the disclosure would lead to future self-censorship.

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[22] Judgment of 11 December 2014 in *Saint-Gobain Glass Deutschland v Commission*, T-476/12, EU:T:2014:1059, paragraphs 80 and 88.

[23] Judgment of 15 September 2016 in *Philip Morris v Commission,* T-18/15, EU:T:2016:487, paragraph 87.

[24] Judgment of 18 December 2008 in *Muñiz v Commission*, T-144/05, EU:T:2008:596, paragraph 89.

As the General Court held, the result of such self-censorship 'would be that the Commission could no longer benefit from the frankly-expressed and complete views required of its agents and officials and would be deprived of a constructive form of internal criticism, given free of all external constraints and pressures and designed to facilitate the taking of decisions'[25].

Therefore, fully disclosing the respective documents would unduly expose the European Commission's internal deliberative processes to external pressure. As a result, the Commission's ability to act in a fully independent manner and at the service of the general interest, and to take its decisions in serenity would be severely impaired, thereby seriously undermining such decision-making processes under Directive 2015/1535.

Against this background, there is a real and non-hypothetical risk that the full disclosure of documents 25, 26 and 28 would adversely and seriously affect the future decision-making processes of the European Commission. Consequently, public access to the minimal redacted parts of those documents has to be refused on the basis of Article 4(3), second subparagraph, of Regulation 1049/2001.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Please note that Article 4(1) of Regulation 1049/2001 does not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

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

In your confirmatory application, you do not put forward any reasoning pointing to an overriding public interest in disclosing the documents requested. Nor have I been able to identify any public interest capable of overriding the interests protected by Article 4(2), second indent, and Article 4(3) of Regulation 1049/2001.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting (further) partial access to the documents requested. However, for the reasons explained above, no meaningful (further) partial access is possible without undermining the interests described above.

Consequently, I have come to the conclusion that the respective (parts of) the documents requested are covered in their entirety by the invoked exceptions to the right of public access.

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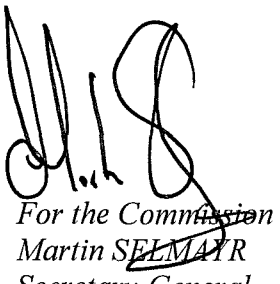
[25] Judgment of 10 January 2013 in *MyTravel v Commission*, T-403/05, EU:T:2008:316, paragraph 52.

5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European 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
Martin SELMAYR
Secretary-General

Enclosures: 1 annex (list of documents identified) and 14 documents (redacted)