



EUROPEAN COMMISSION

Directorate-General for Communications Networks, Content and Technology

Director-General

Brussels,
CONNECT/R4

Mr. Peter Teffer
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REGISTERED LETTER WITH ACKNOWLEDGEMENT OF RECEIPT

Subject: Your application for access to documents – Ref GestDem No 2018/2849

Dear Mr Teffer,

We refer to your access to documents application received on 9 May 2018 and registered on 24 May 2018 under the above mentioned reference number. I also refer to our holding reply dated 13 June 2018, our reference [Ares\(2018\)3119935](#), whereby we informed you that the time limit for handling your application was extended by 15 working days pursuant to Article 7(3) of Regulation (EC) No 1049/2001 on public access to documents (hereinafter 'Regulation 1049/2001').

1. SCOPE OF YOUR APPLICATION

In your application, you request:

- (i) A list of the Member States that have notified, by 9 May 2018, their penalty provisions to the European Commission, as required by Article 21 of Directive (EU) 2016/1148 of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union (hereinafter, 'the NIS Directive');
- (ii) The content of all the aforementioned notifications received from Member States;
- (iii) The content of any communication between the European Commission and Member States concerning the provisions on penalties envisaged by Article 21 of the aforementioned Directive.

We consider your request to cover documents held up to the date of your initial application, i.e. 9 May 2018.

2. DOCUMENTS FALLING WITHIN THE SCOPE OF THE REQUEST

Your application concerns the following documents:

1. Email received from Finnish authorities dated 18 January 2018 providing an update on the measures envisaged under Finnish law to implement the NIS Directive. The email includes one attachment which concerns a summary of the legislative proposals envisaged and the legislative proposals themselves ([our ref. Ares\(2018\)3403691](#));
2. Email received from Belgian authorities on 18 January 2018 providing an update in the context of an information gathering exercise on the penalty measures foreseen in other Member States under Article 21 of the NIS Directive. The email includes four attachments (i) contribution sent by Spain to the Belgian authorities; (ii) contribution sent by Slovakia to the Belgian authorities; (iii) summary of all contributions received prepared by Belgium (iv) contribution sent by France to Belgian authorities; ([our ref. Ares\(2018\)3403891](#));
3. Reply by the Commission to Belgian authorities on 19 January 2018 to the email dated 18 January 2018 (referred to under Document 2) ([our ref. Ares\(2018\)3404051](#));

3. ASSESSMENT UNDER REGULATION 1049/2001

Part (i) of your application:

Concerning part (i) of your request which concerns the list of the Member States that have notified, by 9 May 2018, their penalty provisions to the European Commission, we regret to inform you that the Commission does not hold any documents corresponding to the description given in your application.

As specified in Article 2(3) of Regulation 1049/2001, the right of access as defined in that regulation applies only to existing documents in the possession of the institution. Given that no such document, corresponding to the description given in your application, is held by the Commission, it is not in a position to handle this part of your request.

Part (ii) of your application:

In relation to part (ii) of your request which concerns the content of all notifications received from Member States concerning the aforementioned penalty provisions, we would like to inform you that the Commission has received several submissions from Member States comprising transposition measures in relation to the NIS Directive. However, at this stage the Commission

services are still identifying and assessing such measures. As indicated in Tool 37 of the Better Regulation toolbox (https://ec.europa.eu/info/better-regulation-toolbox_en), the Commission aims at completing transposition checks for EU Directives, within six months after the transposition deadline expires. Since the transposition deadline for the NIS Directive expired on 9 May 2018, the Commission services expect to have a more complete overview of the penalty provisions by the end of 2018.

At this stage, the Commission services have not identified such penalty provisions in the transposing measures already notified. As a result, the Commission is not yet in a position to grant access to such penalty notifications.

Part (iii) of your application:

With respect to part (iii) of your request, we have identified the documents outlined in Section 2. Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents (hereinafter "Regulation 1049/2001"), we have come to the conclusion that they can be partially disclosed. Some parts of the documents have been redacted as their disclosure is prevented by exceptions to the right of access laid down in Article 4 of Regulation 1049/2001.

Since documents (1) and (2) and their accompanying attachments originate from third parties, the latter have been consulted pursuant to Article 4(4) of Regulation 1049/2001.

Disclosure assessment for document (1) and the accompanying attachment

Document (1) includes one email and an accompanying attachment. The email contains personal data, in particular names, functions and contact details. Following an examination of this document and taking into account the opinion of the third party, we have come to the conclusion that it can be partially disclosed, with some extractions of personal data..

Pursuant to Article 4(1)(b) of Regulation 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 Union legislation regarding the protection of personal data. The applicable legislation in this field is 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 (hereinafter "Regulation 45/2001")¹.

According to Article 8(b) of Regulation 45/2001, personal data shall be transferred to recipients only 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 that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. Therefore, we are disclosing a version of the specified document in which these personal data have been redacted.

¹ Official Journal L 8 of 12.1.2001, p. 1 See also judgment of the Court of Justice of the EU of 29 June 2010 in case 28/08 P, *Commission/The Bavarian Lager Co. Ltd*, ECR 2010 I-06055.

Please note that this document was received by the Commission from Finnish authorities. It is disclosed for information only and cannot be re-used without the agreement of the originator, who holds a copyright on it. The document and its attachment do not reflect the position of the Commission and cannot be quoted as such.

Disclosure assessment for documents (2) and (3) and the accompanying attachments

Having examined document (2) and its accompanying attachments and document (3) under the provisions of Regulation 1049/2001 and taking into account the opinion of the consulted third parties, we regret to inform you that disclosure of these documents is prevented by an exception to the right of access laid down in Article 4 of this Regulation.

The content of the documents mostly includes updates given by various Member States on the implementation of *inter alia* Article 21 of the NIS Directive. This Article relates to notifications of rules on penalties applicable to infringements of national provisions adopted pursuant to such Directive. Some parts of these documents also include information provided by Member States on the manner in which they intend to apply and implement the provisions of the aforementioned Directive. The documents also include draft laws from Member States of the transposing measures for the aforementioned Directive which concerns the security of network and information systems across the Union.

The Commission services have consulted the third party authors of document (2) and its accompanying attachments. One of the third parties has objected to the disclosure on the grounds that it undermines the protection of the public interest as regards public security in accordance with Article 4(1)(a) first indent of Regulation 1049/2001. The exception under Article 4(1)(a) first indent of Regulation 1049/2001 is considered applicable given that the content of the aforementioned documents relates to draft laws concerning the security of networks and information systems in Member States. In addition, the process leading up to the adoption of some of these draft laws is still ongoing. Therefore the interest protected under Article 4(1)(a) first indent Regulation 1049/2001 could be undermined if security elements which are still under discussion were disclosed.

Against the background of the third party consultation and our own assessment, we have come to the conclusion that the exception under Article 4(1)(a), first indent of Regulation 1049/2001 is applicable to document (2) and its accompanying attachments..

The content of document (3) is identical to document (2) (email, not attachments) except for a 'thank you' email sent by the Commission services in reply to the correspondence received from the Belgian authorities under document (2). In view of the exception applying to document (2), we consider that partial disclosure for document (3) should not be granted since the document would be rendered meaningless.

4. PARTIAL ACCESS

Pursuant to Article 4(6) of Regulation 1049/2001 "*[i]f only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released*". Accordingly, we have considered whether partial access can be granted to documents (2) and (3).

After a careful review, we conclude that partial access to documents (2) and (3) should not be granted. This is on the basis that partial access to these documents would be meaningless after extraction of the parts that are covered by the exception in Article 4 of Regulation 1049/2001. According to the General Court, the Commission is entitled "*to refuse partial access in cases where examination of the documents in question shows that partial access would be meaningless because the parts of the documents that could be disclosed would be of no use to the applicant*"². In line with the reasoning of the judgment, partial access to documents (2) and (3) is therefore refused.

5. CONCLUSION ON THE DISCLOSURE ASSESSMENT UNDER REGULATION 1049/2001

Following a careful examination of your application, we conclude that with regard to part (i) of your application, no documents corresponding to the description given in your application, is held by the Commission and therefore we are not in a position to handle this part of your request.

Concerning part (ii) of your application, the Commission is still assessing the transposing measures received from Member States with regard to the NIS Directive and it will have a more complete overview of the penalty provisions notified under Article 21 of the aforementioned Directive by the end of 2018. As a result, the Commission is not yet in a position to grant access to such penalty notifications.

With regard to part (iii) of your application, following the examination of the identified documents and taking into account the third party consultation, we have come to the conclusion that partial access (with only personal data redacted) will be provided for document (1). Document (1) and its attachment are included under the Annexes to this reply. Access is refused for documents (2) and (3) based on the exception to the right of access laid down in Article 4 (1)(a) first indent of Regulation 1049/2001.

6. CONFIRMATORY APPLICATION

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review the above positions.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

² Judgment in *Mattila v Council and Commission*, T-204/99, EU:T:2001:190, paragraph 69.

European Commission
Secretary-General
Transparency unit SG-B-4
BERL 5/288
1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,



Roberto Viola

Enclosures: 2