EUROPEAN COMMISSION

Brussels, 2.10.2018
C(2018) 6540 final

Mr Jeremie Charles
23 rue de la science
1040 Bruxelles

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 2018/3266**

Dear Mr Charles,

I refer to your letter of 7 August 2018, registered on 9 August 2018, 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] (hereafter 'Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 14 June 2018, addressed to the Directorate-General for Trade of the European Commission, you requested access to 'any and all document/information identifying the sanctions/penalties imposed by Member States in the event of breach of any relevant provision of Council [R]egulation (EC) No 428/2009 (as provided by Article 24 thereof).'

You also clarified on 25 July 2018 that your request concerned '(1) the most recent documents that each Member State sent to the Commission providing the penalties applicable to infringements of Council Regulation (EC) No 428/2009 in their jurisdiction pursuant to Article 25 thereof; and (2) any document drawn up by the Commission compiling the penalties applicable to infringements of Council Regulation (EC) No 428/2009 by Member State.'

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

In its initial reply of 7 August 2018, the Directorate-General for Trade informed you that the Commission does not hold any documents that would correspond to the description given in your application.

Through your confirmatory application, you request a 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 two documents have been identified:

- Notification email from the Permanent Representation of Germany to Directorate-General for Trade on Council Regulation No 428/2009 comprising the communication from the Federal Government of Germany to the European Commission of 14 October 2013 and two pieces of legislation (Außenwirtschaftsgesetz (AWG) and Außenwirtschaftsverordnung (AWV)), registered jointly under Ares(2013)3247241 ('Document 1');
- Notification by Italy of Legislative Decree No. 221 of December 15th, 2017, updating national provisions implementing Regulation EC 428/2009, Regulation EC 1236/2005 and EU regulations concerning restrictive measures to Third Countries, registered under Ares(2018)808649 ('Document 2').

These two documents consist of notifications from Germany and Italy on national laws published in national journals. These laws are not specifically about penalties, but they contain information on penalties applicable in case of infringements to dual-use legislation.

As Directorate-General for Trade informed you in initial reply, regular exchanges with all Member States on national measures have not been systematically extended to applicable sanctions/penalties as referred to in Article 24 of Regulation no 428/2009 as it might be the case for exchanges on applicable Member State penalties for breaches of EU economic sanctions. For this reason, only two notifications sent by the Member States to the European Commission are provided to you in this confirmatory reply.

Access is granted to the requested documents, subject to the redaction of personal data, pursuant to Article 4(1)(b) of Regulation 1049/2001, which provides for the protection of privacy and the integrity of the individual, for the reasons set out below.

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.'

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[3].

According to Article 2(a) of Regulation 45/2001, personal data consist in 'any information relating to an identified or identifiable natural person […]'. This provision clarifies moreover that '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'.

The European Court of Justice further held that 'there is no reason of principle to justify excluding activities of a professional […] nature from the notion of private life'[4].

In this instance, these personal data contain the name and personal details (emails address) of staff members of the European Commission not holding senior management positions and the names, surnames, contact details and descriptions of the functions of Member States representatives and their respective handwritten signatures.

These undoubtedly constitute personal data within the meaning of Article 2(a) of Regulation 45/2001, 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 public disclosure of all above-mentioned personal 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[5], 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[6]. Only if both conditions are fulfilled and the transfer constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

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3 Hereafter 'Regulation 45/2001'.

4 Judgment of 20 May 2003, *Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

5 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.

6 Ibid, paragraphs 77-78.

This has been confirmed in the recent judgment in the *ClientEarth* case[7]. I refer also to the *Strack* case, where the Court of Justice ruled that the Institution does not have to examine by itself the existence of a need for transferring personal data[8].

Therefore, I have to conclude that the transfer of personal data through the public disclosure of the personal data included in documents 1 and 2 cannot be considered as fulfilling the requirements of Regulation 45/2001. 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.

As to the handwritten signatures or other handwritten text of persons other than the Commissioners and Member States Ministers, which are biometric data, there is a risk that their disclosure would prejudice the legitimate interests of the persons concerned, as it would expose them to the risk of forgery and identity theft.

Therefore, we are disclosing a version of the documents requested in which these personal data have been redacted.

Please also be informed that the applicability of the exception in Article 4(1)(b) of Regulation 1049/2001 does not need to be weighed against any possible overriding public interest in disclosure.

3. 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,

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

For the Commission
Martin SELMAYR
Secretary-General

Enclosures: (2)

[7] Judgment of the Court of Justice of 16 July 2015 in Case C-615/13 P, *ClientEarth v EFSA*, (ECLI:EU:C:2015:219), paragraph 47.

[8] 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.