



EUROPEAN COMMISSION

Brussels, 20.12.2018
C(2018) 9193 final

Mr Alexander Fanta
Schönhauser Allee 6-7
DE – 10119 Berlin

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2018/5788**

Dear Mr Fanta,

I refer to your email of 22 November 2018, registered on the same date, 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 documents² (hereafter 'Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 5 November 2018, addressed to the Directorate-General for Taxation and Customs Union, you requested access to 'the position paper of the European Commission on the Digital Services Tax dated to October 26 [...]'.

The European Commission has identified the following document as falling under the scope of your application:

Note to the attention of the Members of the Inter-institutional Relations Group (*Groupe des Relations Interinstitutionnelles*), dated 26 October 2018, reference SI(2018) 571/2.

In its initial reply of 19 November 2018, the Directorate-General for Taxation and Customs Union refused access to the above-mentioned document, based on the exception in Article 4(3), first subparagraph, of Regulation 1049/2001 (protection of the decision-making process).

¹ Official Journal L 345 of 29.12.2001, page 94.

² Official Journal L 145 of 31.5.2001, page 43.

In 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 my review, I can inform you that partial access is granted to the requested document. The redacted parts of the document fall under the exceptions protecting privacy and the integrity of the individual (Article 4(1)(b) of Regulation 1049/2001) and the decision-making process (Article 4(3), first subparagraph, of Regulation 1049/2001).

The reasons for these redactions are set out below.

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 its judgment in Case C-28/08 P (*Bavarian Lager*)³, the Court of Justice ruled that when an application is made for access to documents containing personal data, 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 data⁴ ('Regulation 45/2001') becomes fully applicable.

Please note that, as from 11 December 2018, Regulation 45/2001 has been repealed by Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC⁵ ('Regulation 2018/1725').

However, the case law issued with regard to Regulation 45/2001 remains relevant for the interpretation of Regulation 2018/1725.

In the above-mentioned judgment, the Court stated that Article 4(1)(b) of Regulation 1049/2001 '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

³ Judgment of 29 June 2010 in Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd.*, (ECLI: EU:C:2010:378), paragraph 59.

⁴ Official Journal L 8 of 12 January 2001, page 1.

⁵ Official Journal L 205 of 21 November 2018, page 39.

concerning the protection of personal data, and in particular with [...] [the Data Protection] Regulation’.⁶

Article 3(1) of Regulation 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’.

As the Court of Justice confirmed in Case C-465/00 (*Rechnungshof*), ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life’.⁷

The document in question contains personal data such as the names, surnames and contact details (telephone numbers) of staff members of the European Commission who do not hold any senior management position.

The names⁸ of the persons concerned as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 2(a) of the Data Protection Regulation.

Pursuant to Article 9(1)(b) of Regulation 2018/1725, ‘personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if ‘[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject’s legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests’.

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 2018/1725, can the transmission of personal data occur.

In Case C-615/13 P (*ClientEarth*), the Court of Justice ruled that the institution does not have to examine itself the existence of a need for transferring personal data.⁹ This is also clear from Article 9(1)(b) of Regulation 2018/1725, which requires that the necessity to have the personal data transmitted must be established by the recipient.

According to Article 9(1)(b) of Regulation 2018/1725, the European Commission has to examine the further conditions for a lawful processing of personal data only if the first condition is fulfilled, namely if the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject’s legitimate interests might be prejudiced and, in the affirmative, establish the

⁶ Quoted above, paragraph 59.

⁷ Judgment of 20 May 2003, preliminary rulings in proceedings between *Rechnungshof and Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01 EU:C:2003:294, paragraph 73.

⁸ Judgment in *Commission v The Bavarian Lager*, cited above, EU:C:2010:378, paragraph 68.

⁹ Judgment of 16 July 2015 in Case C-615/13 P, *ClientEarth v European Food Safety Agency*, (ECLI: EU:C:2015:489), paragraph 47.

proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your confirmatory application, you do not put forward any arguments to establish the necessity of having the data transmitted for a specific purpose in the public interest. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the 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.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation 1049/2001, access cannot be granted to the personal data, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by the disclosure of the personal data concerned.

2.3 Protection of the decision-making process

Article 4(3), first subparagraph of Regulation 1049/2001 provides 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'.

The document in question has been prepared by the services of the European Commission in the context of the revision of the rules on the taxation of digital business activities.

The decision-making process leading up to the revision is composed of two consecutive stages that are concluded, respectively, by:

- 1) the adoption by the European Commission of the proposal for the legislative act and the submission of the proposal to the legislator (the Council with consultation of the European Parliament);
- 2) the interinstitutional decision-making process aiming at the actual adoption of the legislative act by the Council, following the opinion of the European Parliament.

On 21 March 2018, the European Commission adopted a proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services¹⁰, thus concluding the first stage of the process. The decision-making process, however, cannot be considered to have been completed, insofar as the European Commission is fully involved in the subsequent, inter-institutional stage

¹⁰ COM (2018)148 final.

of the process, which is still ongoing. This involvement encompasses explaining and defending the proposal at working level at the Council (the Working Party on Tax Questions and High Level Working Party) and in the relevant committees of the European Parliament. The European Commission can also alter its proposal at any time during the legislative procedure, as long as the Council has not acted (Article 293(2) of the Treaty on Functioning of the EU).

Therefore, I consider that the decision-making prerogatives of the European Commission have not been exhausted at this stage and that the decision-making process has not yet been finalised.

The document concerned was prepared in the context of the meeting of the Commission's Interinstitutional Relations Group (*Groupe de Relations Interinstitutionnelles*) on 26 October 2018 and contains the summary of the proposal of the European Commission for the Directive mentioned above, together with the description of the state of play (at the time of preparation of the document) of the legislative process within the Council.

In your confirmatory application, you refer to the judgment of the General Court in the *De Capitani* case¹¹ and underline that, in the light of that judgement, the risk of the ongoing negotiations being undermined, through the disclosure of the document, is '[...] no longer sufficient ground [...] for refusal'.

Please note, however, that the case to which you refer relates to the possibility of granting public access to 'four-column' tables that are prepared in the context of the interinstitutional *trilogue* meetings. In the view of the European Commission, the document requested, which is an internal document prepared for the Interinstitutional Relations Group (*Groupe des Relations Interinstitutionnelles*) cannot be compared to 'four column' documents, as it contains a different type of information.

Indeed, 'four column documents' do not contain detailed positions of particular Member States concerning particular aspects of a proposal. They also do not include information regarding various alternative policy options under discussion and, more importantly, they do not contain the mandate given to the representatives of the European Commission in order to reach an agreement with the other institutions. Consequently, the European Commission considers that it is not possible to apply all the conclusions of the *De Capitani* case by direct analogy to the document requested in the case at hand.

Furthermore, with reference to relevant previous case law¹², the General Court confirmed in the *De Capitani* case that the risk of external pressure can constitute a legitimate ground for restricting access to documents related to the decision-making process¹³.

¹¹ Judgment of the General Court of 22 March 2018 in Case T-540/15, *De Capitani v Parliament*, (ECLI:EU:T:2018:167), paragraph 98.

¹² Judgment of the General Court of 22 March 2018 in Case T-540/15, *De Capitani v Parliament*, (ECLI:EU:T:2018:167), paragraph 98.

In the view of the European Commission, such a risk exists in the case at hand. Indeed, the relevant undisclosed parts of the document include information regarding the positions of the Member States represented in the Working Party on Tax Questions and the High Level Working Group concerning various aspects of the proposal. They also contain a description of some specific issues that are still the subject of the discussions between the Member States and the European Commission. This includes policy options taken into account and a detailed description of the position of particular Member States and the European Commission thereon.

In this context, premature disclosure of these (policy) options and of Member States' positions would seriously undermine the margin for manoeuvre of the European Commission in exploring, in the framework of the ongoing decision-making process, all possible (policy) options free from external pressure. As such, it would also seriously undermine its capacity to propose and promote compromises between the Member States and the legislator. The European Commission cannot disclose to the public its negotiation positions. Such an approach would put the Commission in a weak position *vis-à-vis* the Member States and the other EU institutions.

The fact that the issue under discussion (the taxation of the digital services) is highly sensitive and attracts a lot of public attention, and that the undisclosed parts of the document includes information concerning policy options that the European Commission still uses in the ongoing exchanges with the Council, only reinforces this conclusion.

Based on the above, I conclude that the relevant undisclosed parts of the document requested cannot be disclosed pursuant to Article 4(3), first subparagraph, of Regulation 1049/2001, as disclosure thereof would specifically and actually result in serious harm to the ongoing decision-making process protected by that provision.

3. PARTIAL ACCESS

Partial access is hereby granted to the document requested.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in 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 refer to any particular overriding public interest that would warrant the public disclosure of the withheld parts of the document requested.

¹³ Judgment of the General Court of 18 December 2008 in Case T-144/05 *Muniz v Commission*, (ECLI:EU:T:2008:596), paragraph 86.

Nor have I, based on my own analysis, been able to identify any elements capable of demonstrating the existence of a public interest that would override the need to protect the decision-making process in Article 4(3) of the said Regulation.

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)