



EUROPEAN COMMISSION

LEGAL SERVICE
The Director General

Brussels, 12 December 2019

Mr Mathias Schindler
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BY E-MAIL AND REGISTERED MAIL WITH ACKNOWLEDGMENT OF RECEIPT

Subject: Your application for access to documents – reference GestDem 2019/5977

Dear Mr Schindler,

I refer to your email of 17 September 2019, addressed to Directorate-General for Communications Networks, Content and Technology (DG CNECT), by which you request, under Regulation (EC) No 1049/2001¹, 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 (Achstes Gesetz zur Änderung des Urheberrechtsgesetzes dated May 7, 2013 (BGBl 2013 I Nr. 23 ,pg 1161);*
- *any information (see above) related to the interpretation of Directive 98/34/EC with regards to the notification requirements in the field of copyright;*
- *any information within the Commission and their staff regarding the ancillary copyright law ("Leistungsschutzrecht für Presseverleger");*
- *any information concerning the recently closed ECJ case on the notification of the German Leistungsschutzrecht.”*

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2011 regarding public access to European Parliament, Council and Commission documents (OJ L145, 31.05.2001, page 43).

As you were informed, on 22 October 2019 your request was notified to the Legal Service as some documents relating to point 4 of your request fall under its competence (request registered under reference GestDem 2019/5977). Points 1 to 3 and part of point 4 were attributed to DG CNECT and DG GROW², and registered under references GestDem 2019/5319 and GestDem 2019/5565, respectively.

The present reply concerns the part of your request under the competence of the Legal Service *i.e.* documents relating to the Case C-299/17, *VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH v Google LLC*.³

1. IDENTIFICATION OF THE DOCUMENTS CONCERNED

The Legal Service has identified the following documents as matching the terms of your request:

1. Note of the Legal Service of 11 August 2017 to the attention of DG GROW and DG CNECT asking for comments on the request for a preliminary ruling (document reference Ares(2017)4015858). This document contains 3 annexes:
2. Annex 1 : request for a preliminary ruling of the Landgericht Berlin (Germany).
3. Annex 2: English⁴ translation of the request for a preliminary ruling.
4. Annex 3: French translation of the request for a preliminary ruling.
5. European Commission's written observations (document reference Ares(2017)5062729).
6. Note of the Legal Service of 27 July 2018 to the attention of DG GROW and DG CNECT informing them on the setting of the oral hearing (document reference Ares(2018)3985544) and on the written observations submitted to the Court of Justice by the following parties (document reference Ares(2018)58396) :
7. Portugal's written observations.
8. Germany's written observations.
9. Greece's written observations.
10. Spain's written observations.
11. VG Media's written observations.
12. Google's written observations.

2. COMMISSION'S WRITTEN OBSERVATIONS AND LEGAL SERVICE'S DOCUMENTS (DOCUMENTS 1 TO 6)

After a concrete assessment of the requested documents, I am pleased to inform you that access can be granted with the exception of some personal data in documents 1 and 6, as explained in point 4 below.

² Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs.

³ <http://curia.europa.eu/juris/liste.jsf?language=fr&num=C-299/07>

⁴ English and French translations have been made by the services of the Court of Justice.

Accordingly, you will find attached a copy of the Commission's written observations in German, the language of the proceedings (document 5), a copy of documents 2, 3 and 4 as well as a redacted version of documents 1 and 6, where personal data has been blanked out.

Please note that you may reuse the disclosed documents free of charge for non-commercial and commercial purposes provided that the source is acknowledged and that you do not distort the original meaning or message of them. Please also note that the Commission does not assume liability stemming from the reuse.

3. THIRD PARTIES' WRITTEN SUBMISSIONS (DOCUMENTS 7 TO 12)

As far as the written submissions of the other parties are concerned, the Commission has consulted the authors of the respective documents on their disclosure, in accordance with article 4(4) of Regulation (EC) No 1049/2001.

Following these consultations, I would like to inform you that:

- the Portuguese and German authorities have agreed to the disclosure of their submissions (documents 7 and 8);
- VG Media, applicant in the national proceedings, did not reply to the Commission's consultation (document 11);
- Google, defendant in the national proceedings, has also agreed to the disclosure of its submission (document 12);
- consultations with Greece and Spanish authorities are still pending (documents 9 and 10). The Legal Service will send you a separate reply regarding their written observations as soon as it receives their reply.

With regards to the document for which the Commission did not receive a reply to its consultation (document 11), I would like to inform you that access can be granted in accordance with Regulation (EC) No 1049/2001. The Court of Justice has recognised in its judgment in Joined Cases C-514/07P, C-528/07P and C-532/07P that, in cases where the proceedings have been closed by a decision of the Court, there are no longer grounds for presuming that disclosure of the pleadings would undermine those proceedings⁵.

Since Case C-299/17 is now closed, and in the absence of an objection from its author, VG Media, I conclude that access can be granted to the relevant document in accordance with Regulation (EC) No 1049/2001.

Accordingly, you will find enclosed a French translation⁶ of document 7 as well as a copy of documents 8, 11 and 12 in German. Please however note that personal data has been deleted in documents 8, 11 and 12, as explained in point 4.

The disclosed documents were transmitted by the Court of Justice to the Commission in its capacity as participant to the court proceedings at stake. Access is granted for information only and cannot be re-used without the agreement of the originators, who hold a copyright on them. They do not reflect the position of the Commission and cannot be quoted as such.

⁵ Judgment of the Court of Justice of 21 September 2010, Joined Cases *Sweden and Others v API and Commission*, C-514/07P, C-528/07P and C-532/07P, ECLI:EU:C:2010:541, paragraphs 130 and 131.

⁶ German was the language of the proceedings. An English version is not available.

4. PROTECTION OF PERSONAL DATA

As stated in points 2 and 3 above, personal data has been blanked out in documents 1, 6, 8, 11 and 12. More precisely, in documents 1 and 6 the names, office address, telephone number and handwritten signatures of the Commission's officials have been deleted. In documents 8, 11 and 12 telephone/fax numbers, email addresses and handwritten signatures of the lawyers acting for Germany, VG Media and Google and the name and handwritten signature of the Court of Justice's official have also been redacted. This information is covered by the exception provided for in Article 4 (1)(b) of Regulation (EC) No 1049/2001 ("*protection of personal data*")⁷, in accordance with the European Union legislation regarding the protection of personal data.

The applicable legislation in this field is 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/EC⁸ ('Regulation 2018/1725').

Article 3(1) of Regulation 2018/1725 provides that personal data '*means any information relating to an identified or identifiable natural person [...]'*'. The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data.⁹

In its judgment in Case C-28/08P (*Bavarian Lager*)¹⁰, the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable¹¹. Furthermore, in its judgment in Joined Cases C-465/00, C-138/01 and C-139/01 the Court has recognized that "*there is no reason of principle to justify excluding activities of a professional nature [...] from the notion of private life*"¹². On this basis, the withheld information regarding the lawyers representing Germany, VG Media and Google has been redacted since it constitutes personal data in the meaning of Article 3(1) of Regulation 2018/1725.

As regards the personal data of the officials of the institutions, the General Court has confirmed, in its judgment in Case T-39/17 that the information such as names, signatures, functions, telephone numbers and other information pertaining to staff members of an institution fall within the notion of "*private life*", regardless of whether this data is registered

⁷ "The institutions shall refuse access to a document where disclosure would undermine the protection of: [...] (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data".

⁸ OJ L 205 of 21.11.2018, page 39.

⁹ Judgment of the Court of Justice of 20 December 2017, Case C-434/16, *Peter Nowak v Data Protection Commissioner*, ECLI:EU:C:2017:994, paragraphs 33-35.

¹⁰ Judgment of the Court of Justice of 29 June 2010, Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd.*, ECLI:EU:C:2010:378, paragraph 59.

¹¹ *Bavarian Lager* judgment, paragraph 63. Whereas this judgment specifically related to 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, the principles set out therein are also applicable under the new data protection regime established by Regulation 2018/1725.

¹² Judgment of the Court of Justice of 20 May 2003, Joined Cases C-465/00, C-138/01 and C-139/01, *Rechnungshof and Others v Österreichischer Rundfunk*, ECLI:EU:C:2003:294, paragraph 73.

in the context of a professional activity or not¹³. Consequently, withheld personal data concerning Commission's and Court's officials has been deleted, since it also constitutes personal data in the meaning of Article 3(1) of Regulation 2018/1725

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 met 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.

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

In your request, you do not put forward any arguments to establish the necessity to have 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, please note that there are reasons to assume that the legitimate interests of the data subjects 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.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 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 disclosure of the personal data concerned.

Please note that the exception of Article 4(1)(b) has an absolute character and does not envisage the possibility of demonstrating the existence of an overriding public interest.

5. MEANS OF REDRESS

Should you wish the position regarding the refusal of personal data to be reconsidered, you should present in writing, within fifteen working days from receipt of this letter, a confirmatory application to the Commission's Secretariat-General at the address below:

¹³ Judgment of General Court of 19 September 2018, Case T-39/17, *Chambre de commerce and d'industrie métropolitaine Bretagne-Ouest (port de Brest) v Commission*, ECLI:EU:T:2018:560, paragraphs 37, 38 and 43.

European Commission
Secretariat-General
Unit SG.C.1 "*Transparency, Document Management & Access to Documents*"
BERL 7/076
B-1049 Bruxelles
or by email to: sg-acc-doc@ec.europa.eu

Yours sincerely,



Luis ROMERO REQUENA

Attachments: 10