



EUROPEAN COMMISSION

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Mr Alexander Fanta
netzpolitik.org
Rue de la Loi 155
1040 Bruxelles

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2020/6032**

Dear Mr Fanta,

I refer to your letter of 24 November 2020, registered on the same day, in which you submitted 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 (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 9 October 2020, addressed to the Directorate-General for Economic and Financial Affairs, you requested access to ‘[a]ll documents related to the video call between Commission Vice-President Valdis Dombrovskis and Huawei on July 23rd, 2020’.

The European Commission has identified the following documents as falling under the scope of your request, registered in file EVP4/2020/135³, briefing from the Secretariat-General to Cabinet of Executive Vice-President Dombrovskis, 17 July 2020, reference Ares(2020)4066319:

- Table of contents of the briefing file (hereafter ‘document 1’);
- The steering brief (hereafter ‘document 2’);

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

³ Please note that what was referenced in the initial reply as ‘document 1’ is a reference to the briefing file and not an actual document.

- The economic impact of Huawei in Europe (hereafter ‘document 3’);
- Digital finance (hereafter ‘document 4’);
- CVs (hereafter ‘document 5’);

In its initial reply of 23 November 2020, Directorate A of the Secretariat-General partially refused access to these documents based on the exceptions of Article 4(1)(b) (protection of the privacy and integrity of the individual) and the second paragraph of Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. In particular, you contest the full identification of documents, the apparent refusal of one document, but also the insufficient reasoning accompanying the application of the exception in Article 4(3) of Regulation (EC) No 1049/2001. You underpin your request with detailed arguments, which I will address, to the extent needed, in the corresponding sections below.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) No 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

In your confirmatory application, you first note that, what was identified in the initial reply as ‘document 1’ was refused without any argumentation. Please note that this reference is to the entire briefing file and not to a specific document. The documents contained in the file are listed above as documents 1-5.

Second, you note that no minutes were identified for this meeting or any other emails or communication in preparation to the meeting.

Against this background, the European Commission has carried out a renewed, thorough search for the documents requested and the following document has been identified at confirmatory stage as falling within the scope of your request:

- Email exchange between Huawei and the Cabinet of Vice-President Dombrovskis, Ares(2020)2316482 (hereafter ‘document 6’).

Following this review, I can inform you that:

- further partial access is granted to documents 3 and 4, and
- wide partial access is granted to document 6, subject to redactions based on Article 4(1)(b) (protection of the privacy and integrity of the individual) of Regulation (EC) No 1049/2001.

As regards the redacted parts of documents 1-5, I regret to inform you that I have to refuse access, based on the exceptions of the first indent of Article 4(1)(a) (protection of the public interest as regards public security), the third indent of Article 4(1)(a)

(protection of the public interest as regards international relations), Article 4(1)(b) (protection of the privacy and integrity of the individual), the first indent of Article 4(2) (protection of commercial interests of a natural or legal person) and Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001, for the reasons set out below.

2.1. Protection of the public interest as regards public security

The first indent of Article 4(1)(a) of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards public security'.

The Court of Justice has confirmed that it 'is clear from the wording of Article 4(1)(a) of Regulation No 1049/2001 that, as regards the exceptions to the right of access provided for by that provision, refusal of access by the institution is mandatory where disclosure of a document to the public would undermine the interests which that provision protects, without the need, in such a case and in contrast to the provisions, in particular, of Article 4(2), to balance the requirements connected to the protection of those interests against those which stem from other interests'⁴.

The General Court has acknowledged that 'the institutions enjoy a wide discretion when considering whether access to a document may undermine the public interest and, consequently, [...] the Courts review of the legality of the institutions' decisions refusing access to documents on the basis of the mandatory exceptions relating to the public interest must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers'⁵.

Moreover, the General Court recently ruled that, as regards the interests protected by Article 4(1)(a) of Regulation (EC) No 1049/2001, 'it must be accepted that the particularly sensitive and fundamental nature of those interests, combined with the fact that access must, under that provision, be refused by the institution if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complexity and delicacy that call for the exercise of particular care. Such a decision requires, therefore, a margin of appreciation'⁶.

The Commission has recognised 5G deployment of network technologies as a major enabler for future digital services and a priority for the Digital Single Market strategy, with many critical services becoming dependant on 5G networks. Consequently, ensuring the cybersecurity of the 5G networks is an issue of strategic importance for the European

⁴ Judgment of the Court of Justice of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75 paragraph 46.

⁵ Judgment of the General Court of 25 April 2007, *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114, paragraph 40.

⁶ Judgment of the General Court of 11 July 2018, *Client Earth v European Commission*, T-644/16, EU:T:2018:429, paragraph 23.

Union and its Member States, at a time when cyber-attacks are increasing in frequency and sophistication.

The redacted passage on page 6 of document 3 contains an assessment about the sensitive systems in certain sectors. Disclosure of this passage would put in the public domain an evaluation of what certain Commission officials view as critical systems and would enable third parties to use this information to exploit security weaknesses in these systems. This could have negative consequences for the security of present and future networks and digital infrastructures and lead to potential security risks for the society as a whole.

Based on the foregoing, there is a real and non-hypothetical risk that disclosure of the relevant redacted passage of document 3 would undermine the protection of public interest as regards public security, as provided for in the first indent of Article 4(1)(a) of Regulation (EC) No 1049/2001.

2.2. Protection of the public interest as regards international relations

The third indent of Article 4(1)(a) of Regulation (EC) No 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the public interest as regards [...] international relations [...]’.

As far as the protection of international relations is concerned, the General Court has acknowledged that ‘the institutions enjoy a wide discretion when considering whether access to a document may undermine the public interest and, consequently, [...] the Court’s review of the legality of the institutions’ decisions refusing access to documents on the basis of the mandatory exceptions relating to the public interest must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers’⁷.

The redacted paragraphs on pages 1 and 4 of document 3 contain statements presenting the position of Commission staff members regarding European or foreign policy initiatives concerning Huawei and China, and possible positions of European ICT companies in relation with Huawei and China whose disclosure would have a direct impact on the EU-China relations.

Similarly, the redaction of the part of the first bullet point in the defensives of document 4 concerns an evaluation made by Commission staff members of ICT third parties. Its disclosure can be detrimental to the EU-China relations.

Please note that, given the limited volume of the relevant redacted parts, it is not possible to give more detailed reasons justifying the need for confidentiality without disclosing the opinion of the staff members and, thereby, depriving the exception of its very purpose.

⁷ Judgment of the General Court of 25 April 2007, *WWF European Policy Programme v Council of the EU*, T-264/04, EU:T:2007:114, paragraph 40.

In light of the above, I must conclude that the use of the exception under the third indent of Article 4(1)(a) (protection of the public interest as regards international relations) of Regulation (EC) No 1049/2001 is justified, and that the relevant undisclosed passages of documents 3 and 4 must be refused on that basis.

2.3. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 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*)⁸, the Court of Justice ruled that when a request 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 data⁹ (hereafter 'Regulation (EC) No 45/2001') becomes fully applicable.

Please note that, as from 11 December 2018, Regulation (EC) No 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/EC¹⁰ (hereafter 'Regulation (EU) 2018/1725').

However, the case law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 2018/1725.

In the above-mentioned judgment, the Court stated that Article 4(1)(b) of Regulation (EC) No 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 concerning the protection of personal data, and in particular with [...] [the Data Protection] Regulation'¹¹.

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

⁸ Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd* (hereafter referred to as '*European Commission v The Bavarian Lager* judgment') C-28/08 P, EU:C:2010:378, paragraph 59.

⁹ OJ L 8, 12.1.2001, p. 1.

¹⁰ OJ L 295, 21.11.2018, p. 39.

¹¹ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

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’¹².

Documents 1-6 contain personal data such as the names and initials of persons who do not form part of the senior management of the European Commission. Moreover, it contains the names and functions of staff of Huawei.

The names¹³ 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 3(1) of Regulation (EU) 2018/1725.

Pursuant to Article 9(1)(b) of Regulation (EU) 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 (EU) 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 by itself the existence of a need for transferring personal data¹⁴. This is also clear from Article 9(1)(b) of Regulation (EU) 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 (EU) 2018/1725, the European Commission has to examine the further conditions for the 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 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 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 subjects’ legitimate interests might be prejudiced.

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

¹³ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

¹⁴ Judgment of the Court of Justice of 16 July 2015, *ClientEarth v European Food Safety Agency*, C-615/13 P, EU:C:2015:489, paragraph 47.

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 (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 the disclosure of the personal data concerned.

2.4. Protection of commercial interests of a natural or legal person

The first indent of Article 4(2) of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, [...] unless there is an overriding public interest in disclosure'.

The second undisclosed sentence on page 1 of document 2 and two redactions on pages 5 and 6 of document 3 contain certain value judgments of Commission staff members regarding the Oxford Economics study commissioned by Huawei. The third undisclosed sentence on page 1 of document 2 refers to a possible new initiative prepared by Huawei, which has not yet been made public by the company. The undisclosed paragraph on page 7 of document 3 refers to the names and market split of vendors on the European market and the evolution of the European market.

Indeed, the General Court confirmed on several occasions that the protection of a commercial undertaking's reputation can require the (partial) refusal of documents based on the first indent of Article 4(2) of Regulation 1049/2001¹⁵.

There is reasonably foreseeable risk that public disclosure of this information could be misinterpreted and in consequence instrumentally used against the reputation of the company. That in turn, would have a negative impact on its market position and would clearly undermine its commercial interests. Furthermore, disclosing the names and information regarding the market split of vendors and the evolution of the market would undermine their commercial interests by revealing their commercial strategies.

I conclude, therefore, that access to the relevant undisclosed sentences of documents 2 and 3 must be denied on the basis of the exception laid down in the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

¹⁵ Judgments of the General Court of 15 January 2013, Case T-392/07, *Strack v Commission*, EU:T:2013:8, paragraph 228 and of 26 April 2016, Case T-221/08, *Strack v Commission*, EU:T:2016:242, paragraph 210.

2.5. Protection of the decision-making process

The first subparagraph of Article 4(3) of Regulation (EC) No 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’.

Pursuant to settled case-law, the above-mentioned exception may be applied where disclosure of preparatory documents containing a critical assessment by Commission staff members would result in a serious, non-hypothetical and objectively justified risk of self-censorship¹⁶.

It is to be noted that the decision-making exception in Article 4(3) of Regulation (EC) No 1049/2001 does not refer only to decisions having legal effect. The wording in Article 4(3) of Regulation (EC) No 1049/2001 includes neither a definition of the decision-making process, nor any indication that would enable to establish the legislator's intention to limit the scope of the decision-making process protected by that exception only to the legislative process. Indeed, the decision-making process has to be interpreted in a broad sense, encompassing also processes relating to administrative and other functions of the Institutions. The European Ombudsman has agreed that the exception can also apply to non-legislative documents¹⁷ and established case law of the EU courts confirms the possibility to apply Article 4(3) both to legislative and to administrative procedures¹⁸.

Documents 2-4 were clearly drawn-up for internal use. They are part of an internal steering brief prepared by the staff of the Secretariat-General in cooperation with other services for Executive Vice-President Dombrovskis in preparation for his meeting with Huawei. They are meant to provide Vice-President Dombrovskis with individual opinions and suggestions on the line to take with the purpose of preparing him for the meeting. Internal opinions of Commission services on similar subjects may diverge in view of the various policies they are pursuing. Consequently, the opinions of the services, expressed in internal briefings, reflect the perspective of Commission staff members and their individual observations on policy suggestions.

A part of the first redaction on page 1 of document 3 refers to possible initiative in the area of mobile communication equipment, which the Commission is considering in order to address the security challenges. The last two redactions on page 2 of document 4 refer to a possible initiative aimed at regulating third party service providers.

¹⁶ Judgment of the General Court of 18 December 2008, *Muñiz v European Commission*, T-144/05, EU:T:2008:596, paragraphs 89 and 90. See also Order of the General Court of 10 January 2013, *My Travel v European Commission*, T-403/05, EU:T:2008:316, paragraph 52.

¹⁷ Please see the Decision in case 70/2008/TS, paragraph 18 available at <https://europa.eu/!FV64Hj>.

¹⁸ Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07, EU:C:2010:376, paragraph 60.

It is important that the Commission can present, explain and defend its initiatives without having to disclose internal views expressed from a particular perspective by individual staff members. Indeed, Commission services working on cybersecurity and digital finance are experiencing pressure from non-governmental organisations, the industry and other stakeholders lobbying for or against the Commission proposal. The interest these areas spark and the views of these actors can be partly seen in the results of the public consultation on the new Digital Finance Strategy and on Cybersecurity.

Disclosing these specific parts of the briefing aiming to present the personal perspective of the authors to Vice-President Dombrovskis would create unjustified expectations of the public and interested parties. In turn, this would risk increasing undue pressure on the Commission, thereby seriously undermining its current and future decision-making process and its margin of manoeuvre.

Releasing these internal opinions is likely to bring a serious harm to the decision-making process concerned, as it would deter staff members of the European Commission from putting forward their views on this and other related matters in an open and independent way and without being unduly influenced by the prospect of disclosure.

Indeed, as the General Court has held, ‘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’.

Therefore, public release of the relevant withheld parts of documents 3 and 4 is likely to bring a serious harm to the decision-making process by severely affecting the ability of the European Commission to hold frank internal discussions on issues related to the interaction with private stakeholders. Given the likelihood of the internal debate being severely impoverished by the disclosure of the internal opinions, I consider that this risk is reasonably foreseeable and non-hypothetical.

In light of the above, the relevant undisclosed parts of documents 3 and 4 should be protected in accordance with the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) and (3) of Regulation (EC) No 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 public and private interests protected by Article 4(2) and (3) of Regulation (EC) No 1049/2001.

The fact that the documents relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness¹⁹, provides further support to this conclusion.

Please note also that Article 4(1)(a) and 4(1)(b) of Regulation (EC) No 1049/2001 do not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting (further) partial access to the documents requested.

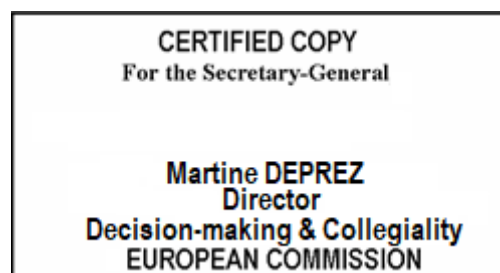
As explained above, further partial access is granted to document 4, and wide partial access is granted to document 6.

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
Ilze JUHANSONE
Secretary-General



Enclosures: (3)

¹⁹ Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau GmbH*, C-139/07 P, EU:C:2010:376, paragraphs 53-55 and 60; *Commission v Bavarian Lager* judgment, cited above, paragraphs 56-57 and 63.