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Secretariat-General

The Secretary-General

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By registered mail:
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DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE 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 2015/3828

Dear Mr Schindler,

I refer to your e-mail of 11 September 2015, registered on the same day, by 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 ("Regulation 1049/2001").

1. SCOPE OF YOUR REQUEST

In your initial application of 20 July 2015 you requested access to

- [a]ny document that relates to an ancillary copyright (*Leistungsschutzrecht für Presseverleger*), both referring to existing or proposed laws in EU Member states as well as any information relating to the introduction of such right into EU legislation, of the Commission, the Commissioner or another DG or Commission unit.

You specified that you were *especially but not exclusively* looking for information in the form of proposals, memos, studies, notes, meeting records, letters to Commissioner Oettinger and Cabinet staff members dealing with EU copyright and the protection of press publishers by application or amendment of EU copyright law.

¹ Official Journal L 345 of 29.12.2001, p. 94.

In its initial reply of 10 September 2015, the Directorate-General for Communications Networks, Content and Technology (DG CNECT, hereinafter) granted full access to one document, granted partial access to 17 briefings and letters, and refused access to 43 briefings and letters or emails. Full and partial refusals were based on Article 4(1)(b) (protection of privacy and integrity of the individual), Article 4(2), first indent (protection of commercial interests), and on Article 4(3) (protection of the decision-making process) of Regulation 1049/2001.

Through your confirmatory application you request a review of this position.

The following documents fall under the scope of your confirmatory application. To the extent possible, the titles and the order of documents have been taken over from *Annexes 2 and 3* of the initial reply²:

Documents falling under *Annex 2* of the initial reply (to which DG CNECT granted partial access):

- Briefing Basis CNECT/4594 - Commissioner Oettinger - dbb forum Berlin GMBH – DLM Symposium, 02/04/2015 (Ref. Ares(2015)1465822) – 'document 1';
- Briefing Basis CNECT/4728 - Président Juncker - Bureau du Président - la visite au collège du Roi Philippe VI d'Espagne (Marché unique numérique), 29/04/2015 (Ref. Ares(2015)1830030) – 'document 2';
- Briefing Basis CNECT/4503 - Michael Hager meeting EPC on ancillary right, 24/02/2015 (Ref. Ares(2015)791428) – 'document 3';
- Briefing Basis CNECT/4403 - Commissioner Oettinger - EP - ITRE-Committee, 10/03/2015 (Ref. Ares(2015)1067546) – 'document 4';
- Briefing Basis CNECT/5093 - VP Ansip meeting with Spanish Minister of Culture and Education, 15/07/2015 (Ref. Ares(2015)2990043) – 'document 5';
- Briefing Basis CNECT/4517 - VP Ansip - Berlin - VP Ansip meeting with Mr Döpfner, CEO Axel Springer, 26/02/2015 (Ref. Ares(2015)839852) – 'document 6';
- Briefing Basis CNECT/4978 - Keynote speech by Commissioner Oettinger at high level conference "Creative Industries in Europe", 07/07/2015 (Ref. Ares(2015)2855107) – 'document 7';
- Letter of Statement and support to the Digital Economy (Dobrindt Alexander - De Maiziere Thomas - Maas Heiko - Gabriel Sigmar), 17/11/2014 (Ref. Ares(2014)3819221) – 'document 8';
- Letter of Mr Wolfgang Brandstetter to Commissioner Oettinger, 31/03/2015 (Ref. Ares(2015)1425724) – 'document 9';

² Three additional documents have been identified as falling under the scope of your request, i.e. documents 39, 52 and 62, which have been added to the list of documents to which DG CNECT fully refused access in its initial reply, i.e. *Annex 3*. Furthermore, document 56 includes both the letter from S.G. on ancillary copyright for press publishers (dated 25/08/2014) and the Commission's reply from 2/9/2014 (which were listed separately in DG CNECT's initial reply).

- Complaint against the Spanish State in relation to Draft Law to amend the Consolidated Law on Intellectual Property, (Asociación de usuarios de internet), 19/12/2014 (Ref. Ares(2014)4298991) – 'document 10';
- Letter of Mr Podkanski (Polish Chamber of Press Publishers) comments on EU initiatives in the area of the protection of Intellectual Property Rights / copyright exceptions, 19/12/2014 (Ref. Ares(2014)4295297) – 'document 11';
- Letter of Mr Wanderwitz (MdB) and Heveling (MdB) - Sending of internal working paper on the draft report of the European Parliament on the implementation of Directive 2001/29 / EC (copyright) by Julia Reda MEP, 13/04/2015 (Ref. Ares(2015)1568929) – 'document 12';
- CCIA German position paper, 12/06/2015 (Ref. Ares(2015)4646170) – 'document 13';
- Letter - Press publishers key concerns on the Digital Single Market Strategy, 24/04/2015 (Ref. Ares(2015)4681426) – 'document 14';
- Reply to Mr Podkanski (Polish Chamber of Press Publishers) comments on EU initiatives in the area of the protection of Intellectual Property Rights / copyright exceptions, 20/01/2015 (Ref. Ares(2015)4675891) – 'document 15';
- Reply to Asociacion de usuarios de internet concerning Spanish State in relation to Draft Law to amend the Consolidated Law on Intellectual Property, 19/12/2014 (Ref. Ares(2014)4299110) – 'document 16';
- Reply to Coalicion ProInternet, 22/10/2014 (Ref. Ares(2014)3496667) – 'document 17'.

Documents falling under *Annex 3* of the initial reply (to which DG CNECT refused access):

- Briefing Basis CNECT/5057 - Meeting Netzwerk Medien & Regulierung / CSU-Medienkommission, 20/07/2015 (Ref. Ares(2015)3052921) – 'document 18';
- Briefing Basis CNECT/4474 - Commissioner Oettinger - Berlin - Meeting Federal Government Commissioner for Culture and the Media, StM Griitters, 16/02/2015 (Ref. Ares(2015)655882) – 'document 19';
- Basis CNECT/4355 - VP Ansip - Commissioner Office - VP ANSIP meeting with Mr Eric Schmidt (Google), 04/02/2015 (Ref. Ares (2015)464057) – 'document 20';
- Briefing Basis CNECT/4598 - VP Ansip - Commissioner Office - VP Ansip meeting with German Federal Minister Maas, 27/03/2015 (Ref. Ares(2015)1367133) – 'document 21';
- Briefing Basis CNECT/4412 - President Juncker - President Office - President Juncker at the SPD annual retreat (Jahresauftakt Klausur) (Digital Single Market), 22/02/2015 (Ref. Ares(2015)748219) – 'document 22';
- Briefing Basis CNECT/4980 - VP Ansip meeting with CCIA & EDIMA, 30/06/2015 (Ref. Ares(2015)2747296) – 'document 23';
- Briefing Basis CNECT/4365 - President Juncker - President Office - Lunch with the European Publishers' Council, 12/03/2015 (Ref. Ares(2015)1105916) – 'document 24';

- Briefing Basis CNECT/4394 - Meeting with different associations and companies on Digital Agenda, 04/02/2015 (Ref. Ares(2015)464037) – 'document 25';
- Briefing Basis CNECT/5015 - Meeting with German Bundestag Committee on Media, 13/07/2015 (Ref. Ares(2015)2945476) – 'document 26';
- Briefing Basis CNECT/4661 - Commissioner Oettinger - 23/03/2015 - Commissioner Office - Deutsche Content Allianz, 06/04/2015 (Ref. Ares(2015)1481692) – 'document 27';
- Briefing Basis CNECT/5048 - Meeting with the Wirtschaftsrat der CDU (The Economic Council), 08/07/2015 (Ref. Ares(2015)2876422) – 'document 28';
- Briefing Basis CNECT/5024 -Meeting with Georg Thieme, 03/07/2015 (Ref. Ares(2015)2809158) – 'document 29';
- Briefing Basis CNECT/4343 - Commissioner Oettinger - 19/01/2015 - BERL - Meeting on Google, 03/02/2015 (Ref. Ares(2015)436272) – 'document 30';
- Briefing Basis CNECT/4794 - Commissioner Oettinger - 07/05/2015 - LV Baden-Württemberg - BDZV Delegiertenversammlung, 21/05/2015 (Ref. Ares(2015)2136754) – 'document 31';
- Briefing Basis CNECT/4813 - Commissioner Oettinger - 08/05/2015 - Berlin - Google, 22/05/2015 (Ref. Ares(2015)2159566) – 'document 32';
- Briefing Basis CNECT/4789 - Commissioner Oettinger - Commissioner Office - Meeting with European federation of Journalists on copyright, 14/05/2015 (Ref. Ares(2015)2048156) – 'document 33';
- Briefing Basis CNECT/4360 - Meeting with BMJV on copyright De Graaf Gerard, 04/02/2015 (Ref. Ares(2015)464035) – 'document 34';
- Briefing Basis CNECT/4347, Meeting with Mr Biilen/Kelber, 04/02/2015 (Ref. Ares(2015)464066) – 'document 35';
- Briefing Basis CNECT/4871 - Commissioner Oettinger - Brussels - Meeting Minister Wert Ortega, 02/06/2015 (Ref. Ares(2015)2305771) – 'document 36';
- Briefing Basis CNECT/4441 - Commissioner Oettinger - Lunch with Secretary of State Mr Victor Calvo-Sotelo + Mr Daniel Noguera + Mr Alberto Rodriguez, 26/02/2015 (Ref. Ares(2015)839857) – 'document 37';
- Briefing Basis CNECT/4986 - EP adoption of Reda report on Copyright Thursday 9th July, 23/07/2015 (Ref. Ares(2015)3099965) – 'document 38';
- Briefing Basis CNECT/4986 Attachment - Assessment of the EP JURI (MEP Julia Reda) report, 23/07/2015 (Ref. Ares(2015)3099965) – 'document 39'
- Briefing Basis CNECT/4395 - Meeting with Ms Lizaranzu, Director General for Cultural Policies and Intellectual Property, 18/02/2015 (Ref. Ares(2015)696854) – 'document 40';
- Briefing Basis CNECT/5012 - Speech VG Media Conference, Ancillary rights and Media Diversity, 01/07/2015 (Ref. Ares(2015)2769149) – 'document 41';
- Briefing Basis CNECT/5079 - Briefing for the discussion: on Google, ancillary rights, 15/07/2015 (Ref. Ares(2015)2990049) – 'document 42';
- Briefing Basis CNECT/5047 - Briefing Mr Döpfner, Axel Springer Foundation, 13/07/2015 (Ref. Ares(2015)2945474) – 'document 43';

- Briefing Basis CNECT/4371 - Commissioner Oettinger - Legal Affairs Committee of the German Bundestag, 04/02/2015 (Ref. Ares(2015)436551) – 'document 44';
- Briefing Basis CNECT/4744 - Commissioner Oettinger - Berlin - Intellectual Property Day, 08/05/2015 (Ref. Ares(2015)1969906) – 'document 45';
- Briefing Basis CNECT/4346 - Commissioner Oettinger - Meeting with Dr. Mathias Döpfner, Vorstandsvorsitzender Axel Springer, 03/02/2015 (Ref. Ares(2015)436257) – 'document 46';
- Briefing Basis CNECT/4737 - Commissioner Oettinger - Berlin - Meeting with Dr. Matthias Döpfner, Axel Springer SE, 11/05/2015 (Ref. Ares(2015)1993902) – 'document 47';
- Briefing Basis CNECT/4772 - Commissioner Oettinger - Berlin - meeting with Minister Maas, 08/05/2015 (Ref. Ares(2015)1969910) – 'document 48';
- Briefing Basis CNECT/4337 - Commissioner Oettinger - Brussels - Culture-Committee, 10/02/2015 (Ref. Ares(2015)564973) – 'document 49';
- Briefing Basis CNECT/4402 - Commissioner Oettinger - Berlin - Meeting Heiko Maas, 09/02/2015 (Ref. Ares(2015)542947) – 'document 50';
- Briefing Basis CNECT/4608 - Commissioner Oettinger - Committee on Transport and digital infrastructure of the German Bundestag, Background Brief, 18/03/2015 (Ref. Ares(2015)1206132) – 'document 51';
- Briefing Basis CNECT/4608 - Commissioner Oettinger - Committee on Transport and digital infrastructure of the German Bundestag, Defensive points, 18/03/2015 (Ref. Ares(2015)1206132) – 'document 52';
- Briefing for the Hearing at the European Parliament, 11/09/2014 (Ref. Ares(2015)4646426) – 'document 53';
- Note for the Jour Fixe with Commissioner Oettinger on copyright of 17 March 2015 (Ref. Ares(2015)1078815) – 'document 54';
- Letter from Google, meeting request, 20/01/2015 (Ref. Ares(2015)226774) – 'document 55';
- Exchange with S. G. (Researcher) on Ancillary Copyright for press publisher, 02/09/2014 (Ref. Ares(2015)4646573) – 'document 56';
- Letter from AEEPP - Concerns of Spanish publishers about the free flow of information across Europe, 11/12/2014 (Ref. Ares(2015)313773) – 'document 57';
- Letter from COADEC to Madelin, Ancillary copyright and start-ups, 27/10/2014 (Ref. Ares(2014)3658719) – 'document 58';
- Letter from United Internet on position paper on DSM Strategy, 26/05/2015 (Ref. Ares(2015)2185532) – 'document 59';
- Reply to AEEPP - Concerns of Spanish publishers about the free flow of information across Europe, 23/01/2015 (Ref. Ares(2015)313773) – 'document 60';
- Reply to COADEC on Ancillary copyright and start-ups, 28/10/2014 (Ref. Ares(2014)3658719) – 'document 61';

- Letter from COADEC to Faull, Ancillary copyright and start-ups, 27/10/2014 (Ref. Ares(2014)3550357) – 'document 62'.

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 or service concerned at the initial stage.

Having carried out a detailed assessment of your request in light of the provisions of Regulation 1049/2001, I am pleased to inform you that full access is granted to six documents (documents 8, 9, 11, 12, 13 and 57), wider partial access is granted to three documents (documents 2, 3 and 14) and partial access is granted to 42 documents (documents 18 – 38, 40 – 53, 55, 56, 58 – 62).

Please find a copy of these 51 documents attached. Those parts of the documents which fall outside the scope of your request have been blanked out with a written indication [*out of scope*] at the beginning of the corresponding passage. In contrast, *redactions* and *redacted / withheld parts* in this decision refer to those parts to which access is refused based on one of the exceptions of Article 4 of Regulation 1049/2001 (to which the followings sections refer) and which have been greyed out in the attached documents.

Concerning the redacted parts of documents 1, 4, 5, 6, 7, 10, 15, 16 and 17, the refusal of DG CNECT to grant access has to be confirmed, as the respective parts falling under the scope of your request are personal data which have to be protected based on Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001, for the reasons set out further below. As regards a small part of document 7, the refusal of DG CNECT to grant access has to be confirmed based on Article 4(3), first subparagraph (protection of the decision-making process), of Regulation 1049/2001, as explained in section 2.1.

Regarding documents 39 and 54 (to which access is fully refused) as well as the withheld parts of those documents to which (wider) partial access is granted (documents 2, 3, 14, 18 – 38, 40 – 53, 55, 56, 58 – 62), the refusal of DG CNECT to grant access to the parts falling under the scope of the request has to be confirmed, based on Article 4(3), first subparagraph (protection of the decision-making process), Article 4(2), first indent (protection of commercial interests), and Article 4(1)(b) (protection of privacy and integrity of the individual), of Regulation 1049/2001, for the reasons set out below.

2.1. Protection of the decision-making process: documents 2, 3, 7, 18, 19, 20, 22, 23, 24, 25, 26, 28 – 50, 53, 54 and 60

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.*

Documents 2, 3, 7, 18, 19, 20, 22, 23, 24, 25, 26, 28 – 50 and 53 are briefings including lines-to-take, objectives, speaking points, defensives and internal, preliminary assessments addressed to Vice-President Ansip, the Member of the Commission responsible for Digital Economy and Society Oettinger and his Cabinet, or to senior

management officials of DG CNECT. They contain parts which deal with the Commission's copyright policy and more specifically the issue of ancillary copyright for press publishers, to which you request access. Parts of these documents (in case of document 39, its entirety) cannot be disclosed as their disclosure would seriously undermine the ongoing decision-making process regarding the Commission's future proposals for the modernisation of EU copyright rules, and more precisely, the question of how to tackle the issue of a possible ancillary copyright or copyright levies in favour of press publishers.

The Digital Single Market Strategy³, adopted by the Commission on 6 May 2015, sets out the main elements of the modernisation of EU copyright rules. The Communication *Towards a modern, more European copyright framework* (COM(2015) 626 final), adopted on 9 December 2015⁴, details the next steps in this regard, including on possible legislative proposals and timelines. The preparation of the (legislative) steps to be taken following the adoption of the Communication is ongoing. In particular, concerning the question of copyright levies or ancillary copyright rules in favour of press publishers, which is at the very centre of your application, no final decision has been taken as to whether legislative intervention at EU level is needed and if so, which form it should take. As explained in the Communication, the Commission is currently considering whether any action specific to news aggregators is needed, including intervening on rights (e.g. in favour of press publishers). The decision-making process is therefore fully open and ongoing.

The withheld parts of documents 2, 20, 22, 24, 25, 30, 33, 34, 35, 37, 40, 44, 46, 49 and 50 contain preliminary reflections, for exclusively internal use, on several policy options, and their possible timing, regarding the modernisation of EU copyright rules in general. Document 54, in its entirety, represents a detailed policy options paper on the EU's copyright policy, addressed to the attention of Member of the Commission Oettinger. Furthermore, the redacted parts of documents 2, 19, 20, 22, 24, 25, 30, 33, 34, 35, 37, 38 (latter only on the European Parliament), 40, 44, 46, 49 and 50 contain an internal assessment of the positions of political groups in the European Parliament, and of Member States, regarding the modernisation of EU copyright rules. Document 39, in its entirety, constitutes an internal assessment of the European Parliament resolution of 9 July 2015 on the implementation of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society⁵. Documents 3, 24 and 32 contain internal opinions on the position of third parties and provide preliminary indications on the Commission's preferred way forward on copyright modernisation.

Apart from these preliminary assessments of possible options and positions of the co-legislators and third parties regarding the modernisation of EU copyright rules as a whole, there are also assessments and opinions addressing specifically the question of ancillary copyright for press publishers. A short paragraph or sentence of documents 18, 23, 26, 28, 29, 38, 42 and 47, respectively, tackles expressly the question whether legislative intervention at EU level is needed. Short sections of documents 7, 18, 23, 26, 28, 29, 31, 32, 33, 36, 38, 41, 42, 43, 45, 46, 47, 48 and 53 give indications about preliminary reflections regarding the possible future action in the area of copyright for

³ <http://ec.europa.eu/priorities/digital-single-market/>

⁴ Information on the Commission's vision to modernise EU copyright rules, including hyperlinks to the Communication mentioned, can be found here: http://europa.eu/rapid/press-release_IP-15-6261_en.htm

⁵ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0273+0+DOC+XML+V0//EN>

press publishers. Parts of documents 25, 30, 31, 32, 33, 36, 37, 40, 41, 42, 43, 45, 46, 47 48 and 60 (only on Spanish law) contain a preliminary assessment of the two national laws introduced in Germany (establishing an ancillary copyright for press publishers, adopted in March 2013 [Drucksache 17/11470])⁶ and Spain (Law No. 21/2014 of 4 November 2014, amending the Consolidated Text of the Law on Intellectual Property)⁷, including an initial reflection on whether such laws could be useful at EU level and possible next steps.

Disclosure of documents 39 and 54, as well as of the (narrow) parts of the other documents mentioned in this section, at this stage, would seriously undermine the Commission's decision-making process with regard to the ongoing modernisation of EU copyright rules in general, and concerning the assessment of the necessity of legislative intervention at EU level in favour of an ancillary copyright for press publishers in particular. It would expose the current preparatory actions and internal assessments to undue external pressure and disseminate preliminary, internal conclusions. The risk of such external pressure is real and non-hypothetical given the specific and fundamental interest large companies and business associations of the publishing sector as well as large online news aggregators take in the issue. The events unfolding in Germany and Spain following the introduction of national laws of ancillary copyright rules or copyright levies in favour of press publishers⁸ (e.g. Google's decision to stop the provision of the Google News services in Spain; complaint by the collecting society VG Media, representing press publishers, against Google with the German Federal Competition Authority; constitutional complaint by Yahoo News against the German law with the Federal Constitutional Court; etc.) highlight the sensitive nature of the issue and the determination of stakeholders to protect their interests, including through legal action. Furthermore, at the beginning of October 2015 the Commission received a formal complaint against the Spanish law on news aggregators⁹ which it is currently analysing in order to assess whether an EU Pilot procedure is necessary (which decision is still to be taken).

Therefore, following premature public release of the above-mentioned (parts of the) documents the Commission would no longer be free to explore all possible options in this sensitive area free from external pressure. It would prejudice the institution's margin of manoeuvre and severely reduce its capacity to contribute to reaching compromises internally, which is essential in an area by which several important Commission policies and competences are affected (e.g. information and communication policies, internal market, competition policy, etc.). Furthermore, the dissemination of preliminary, potentially obsolete positions would risk confusing the public and stakeholders rather than providing clarity on the issue in question.

The sensitive nature of the matters at stake, such as the introduction or not of copyright levies or ancillary copyright rules in favour of news publishers at EU level, increases the need for an in-depth internal assessment. It provides further support to the conclusion that certain preliminary assessments and positions must be protected in order to shield the Commission's internal assessment against any outside pressure and premature conclusions, by the public, until the final decisions are taken, including the adoption of legislative acts.

⁶ https://www.bundestag.de/dokumente/textarchiv/2013/43192540_kw09_de_leistungsschutz/211146

⁷ http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-81-5.PDF

⁸ Cf. footnotes 6 and 7.

⁹ Ibid.

In light of the foregoing, I conclude that access to documents 39 and 54, and to certain parts of documents 2, 3, 7, 18, 19, 20, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 53 and 60 has to be refused based on the exception of Article 4(3), first subparagraph (protection of the decision-making process), of Regulation 1049/2001.

2.2. Protection of commercial interests: documents 32, 42, 46 and 47

Article 4(2), first indent of Regulation 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.*

Certain small parts of documents 32 (*Position of publishers*, last page), 42 (redacted sentence on the first and last page respectively), 46 (two sentences of *Their Position*, first and second page) and 47 (two sentences of *Their Position*, first page) contain non-public positions of the European Publishers Council (EPC), Axel Springer and News Corp regarding the national laws in Germany and Spain on ancillary copyright rules and copyright levies in favour of press publishers¹⁰ and / or the preferred form of intervention at EU level on the issue.

The positions in favour of, or against, the German ancillary copyright for press publishers or the Spanish law on news aggregators creating a remuneration right for press publishers, or the respective non-public positions regarding the preferred form of intervention at EU level on the issue, allow for conclusions on whether the relevant companies or associations would prefer certain business models over others. For example, it could be assumed that a company in favour of a mere remuneration right (similar to the Spanish national law) might actually not be interested in having exclusive rights to allow or prohibit the making available of their contents. Knowledge of this non-public information on strategic preferences and choices of business models could result in a competitive advantage for the company's competitors.

Furthermore, following the introduction of the Spanish national law on news aggregators, and Google's subsequent decision to stop the provision of the Google News services in Spain as from 16 December 2014, there are currently negotiations between collecting societies representing press publishers, and news aggregators with a view to reaching an agreement as regards the tariffs, and their calculation, for compensating the making available of news snippets by the news aggregators (e.g. search engines, social networks). Disclosure, at this stage, of the non-public positions on the subject matter would undermine negotiating positions, in particular of the collecting societies representing EPC members or publishing companies Axel Springer and News Corp, by revealing specific non-public objectives or business strategies of the latter companies and association which relate directly to the subject of the negotiations (i.e. the implementation of the remuneration right by establishing tariffs).

In consequence, there is a real and non-hypothetical risk that public access to the above-mentioned information would undermine the commercial interests of EPC (and its members), Axel Springer and News Corp. I conclude, therefore, that access to certain small parts of documents 32, 42, 46 and 47 must be denied on the basis of the exception

¹⁰ Cf. footnotes 6 and 7.

laid down in the first indent of Article 4(2) (protection of commercial interests) of Regulation 1049/2001.

2.3. Protection of the privacy and the integrity of the individual: documents 2, 3, 14, 18 – 38, 40 – 53, 55, 56, 58, 59, 60, 61 and 62

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 your confirmatory application you do not seem to question the applicability of the above-mentioned exception to the requested documents. Nevertheless, I would like to provide additional explanations of how the disclosure of certain parts of the documents in question would undermine the interests protected by this exception.

Documents 2, 3, 14, 18 – 38, 40 – 53, 55, 56, 58, 59, 60, 61 and 62 contain names, email addresses, phone numbers, office numbers, positions and handwritten signatures of staff members and third-party representatives. These constitute personal data within the meaning of Article 2(a) of Regulation 45/2001¹¹, which defines personal data 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.*

In consequence, the public disclosure of this data in the requested documents would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

In accordance with the *Bavarian Lager* ruling¹², 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.¹³ Only fulfilment of both conditions enables one to consider the processing (transfer) of personal data as compliant with the requirement of lawfulness provided for in Article 5 of Regulation 45/2001.

I would also like to bring to your attention the recent judgment in the *ClientEarth* case, where the Court of Justice ruled that the Institution does not have to examine *ex officio* the existence of a need for transferring personal data¹⁴. In the same ruling, the Court stated that if the applicant has not established a need, the institution does not have to examine the absence of prejudice to the person's legitimate interests¹⁵.

¹¹ 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.

¹² Judgment of the Court (Grand Chamber) of 29 June 2010, *European Commission v the Bavarian Lager Co. Ltd.*

¹³ Judgment of the Court (Grand Chamber) of 29 June 2010, *European Commission v the Bavarian Lager Co. Ltd.*, paragraphs 77-78.

¹⁴ Case C-615/13P, Judgment of the Court of Justice 16 July 2015 *ClientEarth v EFSA*, paragraph 47.

¹⁵ Case C-615/13P, Judgment of the Court of Justice 16 July 2015 *ClientEarth v EFSA*, paragraphs 47-48

Neither in your initial, nor in your confirmatory application, have you established the necessity of disclosing any of the above-mentioned personal data. Therefore, I have to conclude that the transfer of personal data through the disclosure of the requested documents cannot be considered as fulfilling the requirement of lawfulness provided for in Article 5 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.

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

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2), first indent, and Article 4(3), first subparagraph, 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 put forward any reasoning pointing to an overriding public interest in disclosing the requested document. Nor have I been able to identify any elements capable of demonstrating the existence of any possible overriding public interest in disclosing the refused elements that would outweigh the interests protected by the first indent of Article 4(2) (protection of commercial interests) and the first subparagraph of Article 4(3) (protection of the decision-making process) of Regulation 1049/2001.

To the contrary, since the decision-making process is ongoing and full disclosure of the briefing documents would affect the Commission's ability to act freely from external pressure in exploring all possible options at the current preparatory stage, I consider that such disclosure would be contrary to the public interest, as it would have the effect of undermining the quality of the results of the Commission's deliberations. Furthermore, I assure you that the Commission interpreted and applied the exceptions of Article 4 of Regulation 1049/2001 strictly, which results in granting full access to six documents (documents 8, 9, 11, 12, 13 and 57), wider partial access to three documents (documents 2, 3 and 14) and partial access to 42 documents (documents 18 – 38, 40 – 53, 55, 56, 58 – 62).

In consequence, I consider that in this case there is no overriding public interest that would outweigh the interests in safeguarding the ongoing decision-making process and the protection of commercial interests, based on Article 4(3), first subparagraph, and Article 4(2), first indent, of Regulation 1049/2001.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting (wider) partial access to the documents requested. However, for the reasons explained above, no meaningful (wider) partial access is possible without undermining the interests described above.

Consequently, I have come to the conclusion that the (redacted parts of the) documents requested are covered in their entirety by the invoked exceptions to the right of public access.

5. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



Alexander Italianer

Enclosures (51):

- Documents 2, 3, 8, 9, 11, 12, 13, 14, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 55, 56, 57, 58, 59, 60, 61 and 62.