EUROPEAN COMMISSION
Secretariat-General

The Secretary-General

Brussels 28.6.2017
C(2017) 4573 final

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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° 1049/2001[1]

Subject: **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2017/2556**

Dear Mr Pech,

I refer to your message of 24 May 2017, registered on the same day, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents ('Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 1 May 2017, dealt with by the Commission's Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW), you requested access to the *letter of formal notice addressed to Hungary regarding infringement No 2017/2076* (…).

The Commission identified the following document as falling under the scope of your request:

Letter of formal notice sent to the Hungarian authorities by the European Commission on 26 April 2017, SG-Greffe(2017)D/6323.

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

In its initial reply of 17 May 2017, DG GROW refused access to the above-mentioned document, based on the exception provided for in Article 4(2), third indent (protection of the purpose of investigations) of Regulation 1049/2001.

Through your confirmatory application you request a review of this position and present a series of arguments supporting your request. These will be addressed in the respective parts of this decision.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I regret to inform you that I have to confirm the initial decision of DG GROW to refuse access, based on the exception of Article 4(2), third indent (protection of the purpose of inspections, investigations and audits) of Regulation 1049/2001, for the reasons set out below.

2.1 Protection of the purpose of inspections, investigations and audits

Article 4(2), third indent of Regulation 1049/2001 provides that [t]*he institutions shall refuse access to a document where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.*

The document to which you request access forms part of the administrative file NIF 2017/2076, opened in accordance with the procedure laid down in Article 258 TFEU, which consists of two consecutive stages, the administrative pre-litigation stage and the judicial stage before the Court of Justice. The purpose of the pre-litigation procedure is to allow the Member State to put an end to any alleged infringement, to enable it to exercise its rights of defence and to define the subject-matter of the dispute with a view to bringing an action before the Court[2]. The infringement proceedings in the above-mentioned case are open and ongoing.

In your confirmatory application, you refer to the public announcements of the representatives of the Hungarian government, which underline that the latter *will not comply with the Commission's letter of formal notice and is in fact waiting for the Commission to initiate legal action before the Court of Justice.* You also refer to the argumentation used by DG GROW in its initial reply, according to which public disclosure of the document concerned would affect the climate of mutual trust between the Commission and the Hungarian authorities. According to your confirmatory application, [t]*here is no climate of mutual trust between Hungary and the Commission*.

[2] Judgment of the Court of 10 December 2002 in case C-362/01, *Commission v Ireland*, (ECLI:EU:C:2002:739), paragraph 18.

In support of this view, you point out at [u]*nprecedented publication by the Commission of a response to the Hungarian National Consultation known as 'Stop Brussels'*. You underline that [i]*n its answer, the Commission emphasised that 'several of the claims and allegations made in the consultation are factually incorrect or highly misleading'*. Consequently, in your view, [t]*he Commission erred in arguing that there is a need to preserve* [the climate of mutual trust] *by non-disclosing the requested document.*

Despite the position of Hungarian authorities expressed in its public announcements, I still consider that it is Commission's obligation to endeavour that the climate of mutual trust is ensured and maintained in this case.

In this context, public disclosure of the document requested would not help to ensure such trust especially during a period that Hungary, pursuant the procedure provided for in Article 258 TFEU, has been given the opportunity to submit its observations on the matter. Consequently, such disclosure would make the dialogue with Hungary even more difficult and would also hinder the Commission in taking a decision in this file and regarding the follow-up to these infringement proceedings, free from undue outside interference.

It needs to be emphasised that the pre-litigation procedure has a strictly bilateral character, which clearly differs from participation in public consultations. In the light of the above, the publication, by the Commission, of its reply to the public consultation launched by the Hungarian authorities does not in any way prejudge the possibility for the Commission to withhold documents forming part of the bilateral procedure between the Commission and Hungary.

As in the case of other infringement proceedings, it is the Commission's intention in this case to settle the dispute within the framework of the ongoing infringement proceedings, preferably without having to refer the case to the Court of Justice. Even in cases such as the one at hand, where it appears that the Member State is not willing to settle the dispute during the pre-litigation stage, the Commission is still required by the Treaty to give the opportunity to the Member State to defend itself in the framework of a strictly bilateral procedure. The public disclosure of the document concerned would signal to the Hungarian authorities that the Commission does not protect the integrity and the bilateral character of the procedure.

The need to protect documents forming part of ongoing infringement proceedings from disclosure has been recognised by the Court of Justice in its *LPN* judgment, where it ruled that a general presumption of non-disclosure of documents in relation to the pre-litigation stage exists:

[I]t can be presumed that the disclosure of the documents concerning an infringement procedure during its pre-litigation stage risks altering the nature of that procedure and changing the way it proceeds and, accordingly, that disclosure would in principle undermine the protection of the purpose of investigations, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001[3].

With this judgment the Court of Justice confirmed the earlier judgment of the Court of First Instance (now: the General Court) in *Petrie*, where it ruled that the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure, and that this protection continues up until the delivery of the Court judgment[4].

I would like to also point out that, in *ClientEarth* judgment, the General Court ruled that in case of documents covered by a general presumption (such as the one in the case at hand) *it was sufficient for the Commission to establish whether that general presumption should apply to all the documents concerned, without it necessarily being required to undertake a specific and individual prior examination of the content of each of those documents*[5].

Having regard to the above, I consider that public access to the document requested has to be refused, as there is a general presumption that its disclosure would undermine the protection of the objectives of investigation activities protected by Article 4(2), third indent of Regulation 1049/2001.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(2), third indent 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 point to the importance of case 2017/2076 and the public interest it attracts. In this context, you refer to the fact that launching this infringement case was announced by First Vice-President Timmermans in the European Parliament. You also invoke the resolution of the European Parliament and the Council of Europe denouncing the new Hungarian Higher Education law. This, in your view, constitutes an overriding public interest outweighing the need to protect the purpose of the ongoing investigation protected under the exception in Article 4(2), third indent of Regulation 1049/2001.

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3 Judgment of the Court (Fifth Chamber) of 14 November 2013 in joint cases C-514/11 P and C-605/11 P, *Liga para a Protecção da Natureza (LPN) v Commission*, (ECLI:EU:C:2013:738), paragraph 65.

4 Judgment of the Court of First Instance (Fourth Chamber, Extended Composition) of 11 December 2001 in case T-191/99, *David Petrie, Victoria Jane Primhak, David Verzoni and Others v Commission of the European Communities*, (ECLI:EU:T:2001:284), paragraph 68.

5 Judgement of the General Court (Sixth Chamber) of 13 September 2013 in case T-111/11, *ClientEarth v European Commission*, (ECLI:EU:T:2013:482), paragraph 75.

You therefore seem to base the alleged existence of an overriding public interest on a general need for public transparency, linked to interest of the public in the highly controversial subject matter of case 2017/2076.

In this context, I would like to refer to the judgment in the *Strack* case[6], where the Court of Justice ruled that, in order to establish the existence of an overriding public interest in transparency, it is not sufficient to merely rely on that principle and its importance. Instead, an applicant has to show why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure[7].

In my view, such a pressing need has not been substantiated in this case. I certainly understand that, given the subject matter of the case, which can be considered as controversial, there can indeed be a public interest in obtaining information about the ongoing proceedings. However, I consider that that need has already been satisfied by the information which has already been made public in the press in this respect. In any case, I consider that in this case, any possible public interest in obtaining access to the document requested cannot outweigh the public interest in protecting the purpose of the ongoing investigation falling under the exceptions provided for in the third indent of Article 4(2) of Regulation 1049/2001.

In consequence, I consider that in this case there is no overriding public interest that would outweigh the interest in safeguarding the protection of the purpose of investigations protected by Article 4(2) third indent of Regulation 1049/2001.

4. PARTIAL ACCESS

I have also examined the possibility of granting partial access to the requested document in accordance with Article 4(6) of Regulation (EC) No 1049/2001. However, partial access is not possible considering that the document concerned is covered in its entirety by the exceptions under the third indent of Article 4(2) of Regulation 1049/2001.

The Court of Justice confirmed in its judgement in case T-456/13[8] that the general presumption of non-disclosure, covering the entirety of the case file, excludes the possibility to grant partial access to that file by releasing individual documents included therein.

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6 Judgment of the Court of Justice of 2 October 2014 in case C-127/13 P, *Strack v Commission*, (ECLI:EU:C:2014:2250), paragraph 128.

7 Idem, paragraph 129.

8 Judgement of General Court (Fourth Chamber) of 25 March 2015 in case T-456/13, *Sea Handling SpA v Commission*, (ECLI:EU:T:2015:185), paragraph 93.

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 TFEU.

Yours sincerely,

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

For the Commission
Alexander ITALIANER
Secretary-General