EUROPEAN COMMISSION

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Mr Patrick Breyer
Rue Wiertz 60,
1047 Brussels,
Belgium

DECISION OF THE EUROPEAN 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 2019/7288**

Dear Mr Breyer,

I refer to your email of 2 March 2020, registered on 3 March 2020, 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[2] (hereafter: 'Regulation (EC) No 1049/2001').

1. SCOPE OF YOUR REQUEST

On 11 December 2019, you submitted the initial application for access to, I quote, '[…] documents relating to […] consultations [with the Member States and industry] (both incoming and outgoing correspondence)' launched, I quote, '[b]efore proposing a regulation on preventing the dissemination of terrorist content online on 12 [September] 2018 […]'.

1 Official Journal L 345 of 29.12.2001, p. 94.
2 Official Journal L 145 of 31.5.2001, p. 43.

Your initial application were attributed to the Directorate-General for Migration and Home Affairs for handling and reply. It identified 30 documents[3] as falling under the scope of your application.

In its initial reply of 14 February 2020, the Directorate-General for Migration and Home Affairs:

- granted full access to two documents (documents 1 and 3),
- granted (wide) partial access to twenty documents (documents 2 and 4-22). With regard to document 2, which is composed of three documents (email message and two attachments), the information constituting the personal data was redacted in line with the provisions of Article 4(1)(b) of Regulation (EC) No 1049/2001. Each of documents 4-22 is composed of two documents: email message and the attachment – the questionnaire completed by the Member States. The Directorate-General for Migration and Home Affairs granted (wide) partial access to the emails, with only personal data redacted, based on the above-mentioned exception in Article 4(1)(b) of Regulation (EC) No 1049/2001. As regards the attachments, it granted partial access, with the relevant parts redacted based on the exceptions in Article 4(1)(a), first indent, of Regulation (EC) No 1049/2001 (protection of the public interest as regard public security) and Article 4(3)[4], first subparagraph, of the said regulation (protection of decision-making process),
- refused access to the remaining eight documents (documents 23-30), which are composed of two documents (email message and the completed form[5]). The underlying exception is provided for in Article 4(2), first indent, of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position and put forward detailed arguments, which I will address 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.

Following this review, I inform you that (wide) partial access is confirmed with regard to document 2 and email messages included in documents 4-22. The withheld parts of these documents require protection under Article 4(1)(b) of Regulation (EC) No 1049/2001. With regard to the questionnaires included in documents 4-22:

- full access is granted to documents 4, 5, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19

[3] The Directorate-General for for Migration and Home Affairs attached the full list of documents to its initial reply of 14 February 2020.

[4] The initial reply erroneously refers to 'Article 4(2)' of Regulation (EC) No 1049/2001.

[5] In case of document 28, it is the email message and the document containing the statement. Document 30 includes only the completed form.

- further partial access is granted to the questionnaires included in documents 6, 11 and 20, with the relevant parts redacted, based on the exception in Article 4(1)(a), first indent, of Regulation (EC) No 1049/2001 (protection of the public interest as regard public security),
- no further partial access is granted to the undisclosed part of the questionnaire included in document 21. The underlying exceptions are provided for in Article 4(1)(a), first indent, of Regulation (EC) No 1049/2001 and Article 4(1)(b) of the said regulation.

As regards documents 23-30, following my review, I inform you that:

- wide partial access is granted to the email messages included in documents 23-29, with personal data redacted based on the exception in Article 4(1)(b) of Regulation (EC) No 1049/2001.
- wide partial access is granted to the questionnaire included in document 24, with the information of personal character redacted based on the exception in Article 4(1)(b) of Regulation (EC) No 1049/2001,
- full access is granted to the questionnaires included in documents 26, 27, 29 and 30,
- partial access is granted to the questionnaire and the statement included in documents 25 and 28, with the relevant parts redacted based on the exception provided for in Article 4(2), first indent, of Regulation (EC) No 1049/2001.

In its assessment, the European Commission took into account the position of the third party originators, consulted (where relevant) in line with the provisions of Article 4(4) and (5) of Regulation (EC) No 1049/2001.

The detailed reasons are set out below.

2.1 Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that 'the 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)*[6], 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 data[7] ('Regulation (EC) No 45/2001') becomes fully applicable.

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6 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.

7 Official Journal L 8 of 12.1.2001, p. 1.

As from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by Regulation (EU) No 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/EC[8] ('Regulation (EU) No 2018/1725').

However, the case-law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) No 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'.[9]

Article 3(1) of Regulation (EU) No 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'.[10]

The relevant parts of document 2 and the email messages included in documents 4-29 contain the names, functions and contact details (telephone numbers) of the staff members of the European Commission who do not hold any senior management position. They also include the names of third parties (representatives and employees of the Ministries of the Member States and of companies).

The questionnaire included in document 24 contains the information of personal character relating to the individual that completed the questionnaire.

The names[11] of the persons concerned as well as other data from which their identity can be deduced constitute personal data in the meaning of Article 2(a) of Regulation (EU) No 2018/1725.

Pursuant to Article 9(1)(b) of Regulation (EU) No 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

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8 Official Journal L 205 of 21.11.2018, p. 39.

9 *European Commission* v *The Bavarian Lager* judgment quoted above, paragraph 59.

10 Judgment of the Court of Justice 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.

11 *European Commission v The Bavarian Lager* judgment quoted above, paragraph 68.

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) No 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 of its own motion the existence of a need for transferring personal data.[12] This is also clear from Article 9(1)(b) of Regulation (EU) No 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) No 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 proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighted the various competing interests.

Neither in your initial, nor in your confirmatory application, have you established the necessity of disclosing any of the above-mentioned personal data.

Consequently, I consider that the necessity for the transfer of personal data (through its public disclosure) included in the documents concerned has not been established. 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 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.

[12] 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.

2.2 Protection of the public interest as regards public security

Article 4(1)(a), first indent, 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.'[13]

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'[14].

In in your confirmatory application, you argue that, I quote, '[t]he policy considerations of Member States can obviously not endanger public safety'.

As explained in part 2 of this decision, full access is granted to the majority of the questionnaires provided by the Member States. In certain cases, however, the Member States objected to the (full) disclosure of the questionnaires.

Indeed, the undisclosed parts of the questionnaire in document 6, contain information concerning the practices of the providers of the online content-sharing platforms. Its public disclosure would allow for assessing the chances of the illegal content be maintained by a given provided. In consequence, the individuals and organisations wishing to disseminate terrorist content would be able to establish which platforms the chances of such content not be removed is highest. That in turn, would facilitate the dissemination of this extremely dangerous content, thus increasing the risk of terrorist attacks.

With regard to the undisclosed parts of document 11, contain information regarding measures which the Member State considers introducing into the domestic legislation. Premature disclosure of this information, would allow the individuals and organisations to design the countermeasures before the measures are actually introduced and deployed, thus making them virtually ineffective.

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

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

As regards the undisclosed parts of document 20, contain information regarding the practical aspects of the cooperation between Slovenian authorities (Police) and the provider of the online content-sharing platform. Indeed, the information relates to the internal operations of the Police and its public disclosure would cause disturbances in its operations or activities. This information is intended for the internal use of the Police, as it describes its procedures or methods of work, as well as its internal policy.

Further partial access to the questionnaire included in document 21 is refused. Indeed, the originator of the document, provided therein the information that could be considered as highlighting the challenges that the Member State concerned is facing in countering terrorist content online. Therefore, releasing this information to the public domain would be interpreted as officially revealing the vulnerabilities and the existing capabilities, which could be used for malicious purposes and consequently, would undermine public security. Furthermore, the information included in the document, if publically disclosed, would give rise to misinterpretations, as it only provides a synthesis of the efforts carried out to counter terrorist content online.

In the view, of the European Commission, the above-mentioned considerations, are at first sight, valid and consequently, the use of the exception under Article 4(1)(a), first indent (protection of the public interest as regards public security) of Regulation (EC) No 1049/2001 is justified concerning the relevant undisclosed information included in the undisclosed information included in documents 6, 11, 20 and 21 and that access thereto must be refused on that basis.

2.3 Protection of commercial interests of a natural or legal person

Article 4(2), first indent, 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'.

In your confirmatory application you contest the position of the Directorate-General for Migration and Home Affairs, that the public disclosure of the information included in documents 24-30 (completed questionnaires and the statement provided by the companies) would undermine the protection of the above-mentioned interest. Indeed, you point out that, I quote, '[…] [you] do not believe that these unclassified responses contain any commercially sensitive information'.

The limited undisclosed parts of the questionnaire included in documents 25 contain information provided by the company concerned, relating to the problems encountered in the context of the removing the (illegal) online content and the reference to the type of content that is particularly dangerous (in the view of that company) for its image. Public disclosure of this information might put the companies running the platform in the negative light, thus undermining their reputation. That, in turn would clearly undermine their commercial interests.

The relevant undisclosed parts of the statement included in documents 28 contains information concerning internal organisation of the company, including the number and profiles of the staff members. It includes also the information regarding the type and volume of data hosted at the platform managed by the company. This information constitutes the internal know-how of the company and has to be considered as commercially sensitive business information.

The participation of the companies in the questionnaire was voluntary and the information included therein was provided to the European Commission with the legitimate expectation that commercially sensitive information would not be disclosed to the public. Such public disclosure of the information concerned would undermine the commercial interests of the economic operators concerned.

Consequently, there is a real and non-hypothetical risk that public access to the above-mentioned information would undermine the commercial interests of the economic operators in question. I conclude, therefore, that access to the undisclosed parts of documents 25 and 28 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.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions in Article 4(1)(a) and Article 4(1)(b) of Regulation (EC) No 1049/2001 do not need to be balanced against overriding public interest in disclosure.

The exception laid down in Article 4(2) 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 (as opposed to any possible private interests of the applicant) and, secondly, overriding, it must outweigh the harm caused by disclosure.

In your confirmatory application, you argue that, I quote, '[t]he answers given by Member States concern serious interferences with the fundamental right to free speech. Disclosure is needed to enable a public debate. Member States governments are subject to democratic accountability, but only if democratic representatives can hold them accountable for their positions. For example there is a strong public interest in the Member States positions concerning the "risk of erroneous removal by platforms of legal content" or concerning the "impact on fundamental rights"'.

Consequently, in your view, the interest that warrants public disclosure of the (undisclosed parts of) documents concerned relates to the importance of the subject matter and the public right to know the reasons underlying the measures proposed in this context.

In this context, I would like to refer to the judgment of the Court of Justice in the *Strack* case, where it 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[15].

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[16].

I understand that the public indeed might be interested in the subject matter concerned, however, the European Commission publically disclosed the Staff Working Document 'Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online'[17]. This document summarises all information which has been used in the preparation of the draft proposal. It includes the feedback received from Member States and service providers to the questionnaire on terrorist content online and from the consultation meeting with Member States. I consider therefore that the public has been properly informed about the underlying reasons of the proposal.

In addition, the undisclosed parts of the questionnaires provided by the Member States (included in documents 6, 11, 20 and 21) contain information requiring protection under the exception in Article 4(1)(a), first indent, of Regulation (EC) No 1049/2001, which, as mentioned above, may not be outweigh by the overriding public interest.

You do not refer to any public interest that would warrant public disclosure of the documents 24-30.

Consequently, I consider that aspects capable of demonstrating the existence of a public interest that would override the need to protect the commercial interests provided for in Article 4(2), first indent, of Regulation (EC) No 1049/2001 have not been established.

4. PARTIAL ACCESS

Further partial access is granted to the questionnaires included in documents 6, 11 and 20 and full or (wide) partial access is granted to documents 24-30.

No meaningful (further) partial access is possible to document 21, as the only information that could be disclosed are the questions which were the same in all questionnaires and which have been already disclosed.

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15 Judgment of the Court of Justice of 2 October 2014, *Strack* v *Commission*, C-127/13 P, EU:C:2104:2250, paragraph 128 (hereafter *Strack v Commission*).

16 *Strack v Commission*, cited above, paragraph 129.

17 SWD (2018) 408 final.

5. 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,

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

For the Commission

Ilze Juhansone
Secretary-General