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Subject: *Request of the European Ombudsman for a reply in the inquiry into complaint 552/2018/MIG against the European Commission*

Dear Ms O'Reilly,

Thank you for your letter of 11 June 2019 regarding the above-mentioned case.

I am pleased to enclose the reply of the Commission to this recommendation.

The Commission remains at your disposal for any further information you may require.

Yours sincerely,



Enclosure: Reply of the European Commission to the proposal for a solution and recommendation from the European Ombudsman in case 552/2018/MIG regarding the European Commission's alleged refusal to grant public access to documents regarding the German Social Network Enforcement Act

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Reply of the European Commission to the proposal for a solution and recommendation from the European Ombudsman in case 552/2018/MIG regarding the European Commission's alleged refusal to grant public access to documents regarding the German Social Network Enforcement Act

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

On 28 July 2017, the complainant submitted an initial application for access to documents under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter 'Regulation (EC) No 1049/2001')¹. The complainant's request was registered under reference GESTDEM 2017/4478.

In her initial application, addressed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, the complainant requested access to documents which contain information concerning notification 2017/127/D of the German government to the European Commission, of 27 March 2017, regarding the *Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken* (Act improving law enforcement on social networks). She requested all information, including internal and interservice communication of the European Commission regarding or in connection with this law.

At the initial stage, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs identified 32 documents as falling under the scope of the complainant's request. Those documents were drafted in the framework of the transparency procedure under Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (hereafter 'Directive (EU) 2015/1535')². In line with this Directive, the German authorities notified the draft Act improving law enforcement on social networks to the European Commission. The respective notification was registered under Reference Number 2017/127/D.

In its initial replies of 14 September 2017 and 13 December 2017, respectively, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs provided full access to 16 documents, (wide) partial access to 12 documents, and refused access to four documents. The (partial) refusal of access was based on the exceptions of Article 4(1)(b) (protection of privacy and the integrity of the individual), and Article 4(3), second subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001.

At the confirmatory stage, the European Commission identified four additional documents (three attachments to two already identified documents; and a new document, which had not been identified at the initial stage). The European Commission informed the complainant that, out of the documents which were not fully disclosed at the initial stage, one document is

¹ Official Journal L 145 of 31.5.2001, p. 43.

² Official Journal L 241 of 17.9.2015, p. 1.

publicly available online. The European Commission also provided (wider) partial access to 12 documents.

II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN

On 16 March 2018, the complainant complained to the European Ombudsman that she had not received the confirmatory decision within the statutory time limit under Regulation (EC) No 1049/2001.

III. THE EUROPEAN OMBUDSMAN'S INQUIRY

In the course of the European Ombudsman's inquiry, the European Commission provided the documents concerned to the latter. Upon a specific request thereto by the European Ombudsman services, the European Commission provided documents to which the European Commission had granted partial access in the past following an earlier request by another applicant. The European Commission also sent a copy of the confirmatory decision it had taken in the context of that request.

On 12 March 2019, the European Ombudsman proposed that the European Commission conduct a 'fresh assessment of the complainant's request for access on the basis of the scope as intended by the complainant and understood by the Ombudsman'. The European Ombudsman specified that such assessment should include 'documents concerning the draft law and Germany's notification of that law to the Commission held *anywhere* in the Commission'. As regards the documents that have been partially (or not) released to the complainant, the European Ombudsman asked the European Commission to 're-consider its decision not to disclose all or parts of the documents on the basis of the exceptions for the protection of legal advice and its decision-making processes in the light of the recent case law'.³

On 11 June 2019, the European Ombudsman issued a recommendation in the present case, in which she stated that the handling of the complainant's request for access to documents constitutes maladministration. She expressed her concern regarding the delay in the handling of the request. She also maintained her view that the European Commission misinterpreted the scope of the complainant's request and applied the exceptions laid down in Article 4(3) (protection of the decision-making process) and Article 4(2), second indent (protection of the legal advice) of Regulation (EC) No 1049/2001, in a restrictive manner.

IV. THE EUROPEAN COMMISSION'S POSITION ON THE EUROPEAN OMBUDSMAN PROPOSAL FOR A SOLUTION AND RECOMMENDATION

The European Commission hereby submits the following comments regarding the European Ombudsman's proposal for a solution and recommendation.

³ European Ombudsman proposal for a solution in the present case, 12 March 2019, pages 4 and 5.

The scope of the request for access to documents

In her proposal for a solution, the European Ombudsman stated that ‘the complainant was clear that she was seeking access to documents held by the Commission and containing information on both, the draft law and Germany’s notification of that draft law to the Commission’. In the European Ombudsman’s view, ‘the Commission was [...] wrong to conclude that the scope of the request encompassed only documents that were drawn up or received by [the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs] and that concern Germany’s notification only’.⁴

Firstly, as regards the question as to whether the request covered documents on both the draft law and Germany’s notification of that draft law to the European Commission, it is to be noted that the request related to the context of the notification of the draft law to the European Commission. In this regard, the complainant clearly referred to the notification procedure and requested documents on the notified draft law. It was therefore reasonable to interpret the scope of the request as covering documents in relation to the assessment of the draft law within the notification process.

In that respect, in her confirmatory application, the complainant did not comment on the subject-matter of the documents identified at the initial stage although, as stated in the confirmatory decision, all those documents ‘were drafted in the framework of the transparency procedure under [Directive (EU) 2015/1535]’.

Moreover, it is to be noted that the complainant did not complain about the interpretation of the scope of the application in her complaint to the European Ombudsman. She merely complained that the European Commission did not provide a confirmatory reply within the statutory deadline.

Secondly, on the question as to whether the request encompassed documents held anywhere in the European Commission, the European Commission would like to refer to the comments it provided on 25 October 2018, in reply to a request for information from the European Ombudsman. Therein, the European Commission indicated that the notification of the draft law was submitted by the German authorities to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, which is the competent service of the European Commission to process the notification and to make comments on the draft law on behalf of the institution. It also explained that the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs consulted all the relevant services and Directorates-General of the European Commission and collected their views on the notified draft.

In that regard, it is worth noting that the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs liaised with other European Commission’s departments in order to handle the request. Hence, the initial reply dated 13 December 2017 identified documents from several Directorates-General, among which the internal replies of the European

⁴ European Ombudsman proposal for a solution in the present case, 12 March 2019, point 22.

Commission's services to the preliminary internal consultation.

Furthermore, the European Commission would like to underline that the complainant's initial request of 28 July 2017 was addressed, specifically, to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs.

Following a renewed search at the confirmatory stage, it was indeed possible to identify additional documents, including an e-mail exchange between the staff of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, the Directorate-General for Communication Networks, Content and Technology and the Directorate-General for Justice and Consumers between 31 March 2017 and 24 April 2017.

It follows from the above, i) that the European Commission services made a reasonable interpretation of the scope of the request, in the light of the terms of the request that was addressed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs and, ii) that the list of documents identified in the context of the request, reflected the position of all the relevant services and Directorates-General concerned by the notified draft law.

Consequently, the European Commission maintains its view that it interpreted the scope of the complainant's request in a correct way.

The alleged wrongful application of the exceptions relating to the protection of the decision-making process and the legal advice

The European Ombudsman considers that the European Commission failed to grant a broad access to the requested documents in line of recent case-law of the Court. In particular, she refers to the judgment of the Court in Case C-57/16 P (*ClientEarth v Commission*)⁵ and requests that the European Commission re-considers its decision not to disclose (parts of) the requested documents in light of that judgment. The European Ombudsman points out that the documents concerned relate to an impact assessment that might lead to the adoption of a legislative initiative and that, according to the Union courts, 'the level of transparency required for such documents is increased'. In the European Ombudsman's view, 'rather than shielding the discussion from external influencing factors, the Commission should release the respective parts of the documents to allow the public to express their view and to actively participate in the EU law-making'.⁶

At the outset, the European Commission would like to highlight that the confirmatory decision was prepared taking into account the legal and factual circumstances at that point in time, including the state of the Court case-law.

The European Commission would like to emphasise that, in the framework of the present request, it has identified 33 documents as falling within the scope of the application. Among

⁵ Judgment of the Court of 4 September 2018, *ClientEarth v Commission*, C-57/16 P, EU:C:2018:660.

⁶ European Ombudsman proposal for a solution in the present case, 12 March 2019, point 18.

these documents, it gave full access to 17 documents and granted a wide partial access to 13 documents. Against this background, the European Commission considers that it provided the widest possible access to the documents at issue and that public participation was not undermined in any way.

As regards the documents that were (partially) refused, the European Commission carried out a concrete and individual assessment of the documents in question and of the foreseeable impact of their release in the situational context and against the jurisprudential framework existing at the time of the request. In this regard, the European Commission would like to note that the partial refusal was based on several exceptions under Regulation (EC) No 1049/2001.

In particular, the partial refusal of documents 29 and 33 was based on Article 4(1)(b) (protection of privacy and the integrity of the individual), Article 4(2), second indent (protection of court proceedings and legal advice) and 4(3), first subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001. Even if the *ClientEarth* judgment was relevant in this case, the withheld parts were also covered by other exceptions under the Regulation.

As regards documents 25, 26 and 28, the partial refusal was based on Article 4(1)(b) (protection of privacy and the integrity of the individual), and 4(3), first subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001. More specifically, documents 25, 26 and 28 contain internal opinions of the services of the European Commission for internal use as part of deliberations and preliminary consultations within the European Commission.

At the time of the adoption of the confirmatory decision, it was considered that some parts of these preliminary and internal discussions would remain relevant for the preparation of an impact assessment. However, the documents differ substantially, in terms of their content and nature, with regard to the documents that were subject to the *ClientEarth* judgment (concerning impact assessment reports and the accompanying opinions of the Impact Assessment Board). The main focus of the documents relates to the notification procedure of the German law. They were not produced in the context of an impact assessment, nor can they be considered as impact assessment documents in the meaning of the *ClientEarth* judgment. A mere mention of the notified German draft act in connection with an Inception Impact Assessment does not suffice to change the nature of this document and turn it to an ‘impact assessment document’ in the sense of the *ClientEarth* judgment.

Indeed, the level of transparency required for the (limited) withheld parts of the internal discussions on the draft German law cannot be equated to the required transparency for documents, such as impact assessment reports and opinions of the Impact Assessment Board, which the Court considered that form part of ‘the basis for the legislative action of the Union’.

Consequently, the European Commission is of the view that the confirmatory decision was legally and factually correct at the point in time it was taken.

V. CONCLUSIONS

For the reasons set out above, the European Commission considers it had correctly interpreted the scope of the complainant's request for access to documents. Moreover, the European Commission considers that its confirmatory decision, which has become final in the absence of any legal challenge before the Union courts, was legally and factually correct in light of the circumstances and the relevant case-law on access to documents existing at the point in time it was taken.

It is open for the complainant to submit a new initial request for access to documents to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs in accordance with Article 6(1) of Regulation (EC) No 1049/2001. This will enable the European Commission to provide a reply that is fully in line with that scope and with the factual and legal circumstances prevailing at the time of the adoption of its decision. It will also help to ensure that the complainant can fully benefit from all procedural guarantees and means of review and redress put in place by Regulation (EC) No 1049/2001.