

I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY

On 17 and 26 November 2019, the complainant (UK citizen) submitted four initial applications¹ for access to:

1. 'First letter sent by Commission President Ursula von der Leyen to the United Kingdom government in October/November 2019 requesting the appointment of an EU Commissioner (registered under reference GESTDEM 2019/6668);
2. United Kingdom response letter informing the Commission that it is not possible to appoint an EU Commissioner during a general election (registered under reference GESTDEM 2019/6669);
3. Second letter and EU enforcement notice sent by Commission President Ursula von der Leyen to the United Kingdom government in October/November 2019 requesting the appointment of an EU Commissioner, giving the United Kingdom until 22 November 2019 to respond (registered under reference GESTDEM 2019/6670);
4. The United Kingdom response letter to the enforcement notice (registered under reference GESTDEM 2019/6864).'

The application was dealt with by Directorate F of the Secretariat-General of the European Commission, responsible for 'Citizens, Migration and Security Union'.

In its initial reply of 10 December 2019, Directorate F of the Secretariat-General of the European Commission identified the four documents referred to by the applicant. It refused access to the requested documents, based on the exception of the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001.

In the confirmatory decision C(2020)702 final of 4 February 2020, the European Commission confirmed the initial decision of Directorate F of the Secretariat-General of the European Commission to refuse access to the requested documents, based on the exception of the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001.

II. THE COMPLAINT TO THE EUROPEAN OMBUDSMAN

On 13 April 2020, the complainant turned to the European Ombudsman.

In his complaint, the applicant considers that the European Commission was not justified in refusing public access to the four letters it exchanged with the UK authorities in November 2019.

¹ Registered under references GESTDEM 2019/6668, GESTDEM 2019/6669, GESTDEM 2019/6670 and GESTDEM 2020/6864.

III. EUROPEAN OMBUDSMAN'S INQUIRY AND THE PROPOSAL FOR A SOLUTION

In the course of the inquiry, the European Ombudsman reviewed the requested documents and issued the present proposal for a solution.

In her proposal, the European Ombudsman considered that 'the general presumption that disclosure of any of the four requested letters would jeopardise the purpose of the infringement investigation is rebutted. The purpose of that investigation could no longer be attained by the time the European Commission adopted its final decision on the complainant's requests for public access. By then, the requirement for the UK to nominate a candidate for EU Commissioner was no longer applicable. It follows that the purpose of the infringement proceedings could not then be undermined'.

The European Ombudsman also took the view that 'the release of the exchange of correspondence to which the complainant is seeking access is a matter of public interest, given the subject matter and the continuing public interest in the withdrawal process and its consequences'.

Finally, the European Ombudsman proposed that the European Commission should release the four letters at issue taking into account the changed circumstances.

IV. THE REPLY OF THE EUROPEAN COMMISSION TO THE PROPOSAL FOR A SOLUTION OF THE EUROPEAN OMBUDSMAN

The European Commission's confirmatory decision C(2020)702 final contains an extensive reasoning why the European Commission refused access to the documents requested. In its detailed reasoning, the European Commission explained why the exception defined in the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001 prevented it from granting full access to the documents requested. It also explained in detail why it considered that there was no overriding public interest in disclosure and why no partial access could be granted to the documents. The European Commission considers that there is no need to reproduce that reasoning in the present opinion.

The European Commission is of the view that the said confirmatory decision was legally and factually correct at the point in time when it was taken, and that there was no manifest error in the European Commission's assessment. According to settled case law, the legality of a Union measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted. Subsequent events may not affect that assessment. Against this background, the European Commission maintains its view that, at the relevant time, it had correctly invoked and applied the exception laid down in the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation 1049/2001 in relation to the above-mentioned documents.

However, on 2 July 2020, the European Commission closed the infringement procedure 2019/2305. In view of these developments, the requested documents can now be partially disclosed to the applicant, subject only to the redaction of personal data in accordance with Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001. A copy is attached to this reply.

V. CONCLUSIONS

For the reasons set out above, the European Commission considers that its confirmatory decision, which has become final in the absence of any legal challenge before the European Union Court, was fully in line with the applicable legislation and the relevant case-law on access to documents at the point in time it was taken.

However, since the infringement procedure is now closed, the Commission considers that the requested documents can now be disclosed to the applicant.

For the Commission
Maroš ŠEFČOVIČ
Vice-President



EUROPEAN COMMISSION

Ursula von der Leyen
The President-elect

Brussels, 12. 11. 2019

Dear Prime Minister,

I refer to my letter of 6 November 2019, by which I invited the Government of the United Kingdom to suggest, as soon as possible, and at the latest by 11 November, one or more persons who, by their general competence, independence and European commitment, would be suitable to become member of the next Commission. I encouraged you to propose a female candidate.

As I have not received a reply to my letter I would like to recall that Article 17(7) of the Treaty on European Union provides that the candidates to become Member of the Commission are appointed 'on the basis of the suggestions made by Member States'. It is therefore an obligation for each Member State, including for the United Kingdom for as long as it is a Member State of the European Union, to make the necessary suggestion(s).

Moreover, under the principle of sincere cooperation laid down in Article 4(3) of the Treaty on European Union, in the present circumstances of which your Government is well aware, where the procedure for appointment of the next Commission is far advanced, with a vote in the European Parliament scheduled on 27 November, these suggestions should already have been made.

I would like to recall that, as noted in recital 11 of European Council Decision 2019/1810 of 29 October 2019, whereby the period under Article 50(3) of the Treaty on European Union was further extended, your Government undertook the commitment to act in a constructive and responsible manner throughout the extension period in accordance with the duty of sincere cooperation'. I would further recall that the United Kingdom agreed to that European Council Decision which, in the said recital 11, also notes that the consequences of the extension include 'the obligation to suggest a candidate for appointment as a member of the Commission'.

[J..]

H.E. Mr Boris Johnson

Prime Minister of the United Kingdom

I understand that the fact that the United Kingdom is now in a period before a general election makes these matters somewhat more complicated. However, that cannot be a reason, let alone a justification, not to comply with the obligations under the Treaties. Unavoidably, the way in which the United Kingdom acts during the period extended under Article 50(3) of the Treaty on European Union will have an impact on the negotiations on the future relationship between the Union and the United Kingdom. Indeed, a fundamental feature of that relationship must be mutual trust, which requires the respect of the applicable rules.

I would therefore strongly invite you to suggest as soon as possible, and at the latest by Friday 15 November 2019, one or more persons who, by reason of their general competence, independence and European commitment, would be suitable to become member of the next Commission.

Should I not receive the required suggestion by the time-limit set, I will ask the European Commission to make use of its powers under Article 258 of the Treaty on the Functioning of the European Union.

Yours sincerely,

A large black rectangular box redacting the signature of Ursula von der Leyen.

Ursula von der Leyen



*Dr. Ursula von der Leyen
The President-elect*

Brussels, 06. 11. 2019

Dear Prime Minister,

On 29 October 2019, the European Council decided, in agreement with the United Kingdom, to extend the period provided for in Article 50(3) of the Treaty on European Union until 31 January 2020. As a consequence, the United Kingdom will most probably still be a Member State of the European Union, enjoying all of the rights and remaining bound by all obligations laid down in the Treaties, at the moment when the next Commission will enter into office. As recalled in recital 11 of this Decision, this includes the obligation to suggest a candidate for appointment as a member of the Commission. The next Commission will thus have to comprise, as long as the United Kingdom is a Member State, a member suggested by the United Kingdom.

I have noted the commitment by the United Kingdom, as also recalled in recital 11 of the said Decision, to act in a constructive and responsible manner throughout the extension period in accordance with the duty of sincere cooperation.

I would therefore invite the Government of the United Kingdom to suggest, in accordance with Article 17 of the Treaty on European Union, one or more persons who, by their general competence, independence and European commitment, would be suitable to become member of the next Commission. As in the letter from 19 July 2019 and with all Member States, I encourage you to propose a female candidate.

The European Parliament aims at having the vote on the next Commission during its session of 25-28 November 2019 and will prepare that vote in the weeks before notably by requesting written answers to a questionnaire and by hearing those of the candidate Commissioners who were not yet heard in October.

I would therefore very much appreciate if you could reply to this letter as soon as possible and at the latest by 11 November 10:00AM, in order for me to have an interview with the person(s) you will suggest.

Yours sincerely,



Dr. Ursula von der Leyen



*H. E. Mr. Boris Johnson
Prime Minister of the United Kingdom*



EUROPEAN COMMISSION

Brussels, 14.11.2019

2019/2305
C(2019) 8305 final

Dear Secretary of State,

I would draw your attention to Article 17, paragraph 7, second subparagraph, of the Treaty on European Union (TEU), which, read in conjunction with Article 4, paragraph 3 TEU, requires every Member State to make suggestions for one or more persons who, by their general competence, independence and European commitment, would be suitable to be included in the decision of the Council, by common accord with the President-elect, adopting the list of persons whom the Council proposes for appointment as members of the Commission.

On 29 March 2017, the United Kingdom notified the European Council of its intention to withdraw from the European Union and the European Atomic Energy Community in accordance with Article 50 TEU. According to Article 50(3) TEU, the Treaties shall cease to apply to the withdrawing State from the date of entry into force of the Withdrawal Agreement or, failing that, two years after the notification, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

The period under Article 50(3) TEU was initially extended until 12 April 2019 by European Council Decision (EU) 2019/476 (OJ L80 I, 22.3.2019, p. 1). That period was further extended until 31 October 2019 by European Council Decision (EU) 2019/584 (OJ L 101, 11.4.2019, p. 1).

Since the Commission's term of office was due to end on 31 October 2019, once the elections to the European Parliament had been held in May 2019, the procedure laid down in Article 17(7) TEU for the appointment of a new Commission was initiated. On 16 July 2019, the European Parliament elected Ms. von der Leyen as the next Commission President. On 10 September 2019, the Council adopted, by Decision (EU)

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2019/1393 taken by common accord with the President-elect, the list of the other persons whom the Council proposes for appointment as members of the Commission (OJ L 233, 10.9.2019, p. 1).

That list comprised, besides the President-elect, only 26 candidate Members of the next Commission. Indeed, on 23 August 2019 the Council received a letter from the Permanent Representative of the United Kingdom, referred to in recital 6 of Council Decision (EU) 2019/1393, which announced, referring to the fact that the United Kingdom would be leaving the European Union on 31 October 2019, that the United Kingdom would not be nominating a candidate to become member of the next Commission. At that time, that position was correct, since at the date the next Commission was due to take office, on 1 November 2019, the United Kingdom would not have been a Member State anymore, since the period under Article 50(3) TEU was, at that time, only extended until 31 October 2019.

However, on 19 October 2019, the United Kingdom submitted a request for an extension of the period provided for in Article 50(3) TEU until 31 January 2020. Accordingly, on 29 October 2019, the European Council adopted Decision (EU) 2019/1810 extending the period under Article 50(3) TEU (OJ L278, 30.10.2019, p. 1) until 31 January 2020.

This means that until that date, the United Kingdom remains a Member State of the European Union, enjoying all of the rights and remaining bound by all obligations laid down in the Treaties (ECJ, judgment of 10 December 2018, case C-621/18, *Wightman*, paragraph 73 [ECLI:EU:C:2018:999]).

Article 4(3) TEU lays down the principle of sincere cooperation between the Member States and the Union. It follows from that principle *inter alia* that the Member States are required to undertake all appropriate steps foreseen in the Treaties for the appointment of the members of the Union institutions.

As regards the appointment of the European Commission, while the different decisions in the course of the appointment procedure are taken by Union institutions (the Council, the European Parliament and the European Council), Article 17, paragraph 7, second subparagraph, TEU provides that the persons whom the Council, by common accord with the President-elect, proposes for appointment as members of the Commission, "*shall be selected on the basis of the suggestions made by the Member States*" in accordance with the criteria set out in Article 17(3) TEU, namely that the members of the Commission are to be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt.

As the period provided for in Article 50(3) TEU has been extended, the next Commission will most probably take office while the United Kingdom is still a Member State. As a consequence, the United Kingdom is required to undertake the steps foreseen in the Treaty for the appointment procedure of the next Commission, namely to suggest one or more persons who, by their general competence, independence and European commitment, would be suitable to become member of the next Commission. This obligation was recalled in recital 11 of European Council Decision (EU) 2019/1810, which was adopted in agreement with the United Kingdom.

¹ In the event that the Parties to the Withdrawal Agreement complete their respective ratification procedures and notify the depositary of the completion of those procedures in November 2019, in December 2019 or in January 2020, the decision provides that the Withdrawal Agreement enters into force on the first day of the following month.

However, the United Kingdom has not done so.

On 6 November 2019, President-elect von der Leyen wrote to Prime Minister Johnson, to recall this obligation, and to invite suggestions by 11 November 2019, for a member of the next Commission.

Not having received any response to that letter, President-elect von der Leyen wrote again to Prime Minister Johnson on 12 November 2019, whereby she strongly invited the United Kingdom to suggest as soon as possible, and at the latest by Friday 15 November 2019, one or more persons who, by reason of their general competence, independence and European commitment, would be suitable to become member of the next Commission. The President-elect indicated that, should she not receive the required suggestion by the time-limit set, she would ask the European Commission to make use of its powers under Article 258 of the Treaty on the Functioning of the European Union.

On 13 November 2019, the President-elect received a letter from the Permanent Representative of the United Kingdom, stating that in line with long-standing practice, the United Kingdom's pre-election guidance was clear that "the UK should not normally make nominations or put forward candidates for senior international appointments (including appointments to European institutions) until after the election".

While Article 17(7) TEU does not explicitly set a time period within which the Member States are to suggest suitable candidates for becoming members of the Commission, it is inherent in the procedure set out there that the Member States and the institutions must act swiftly in order to ensure that the new Commission can take office the day following the end of the term of the previous Commission.

The need for swift action is further increased by the fact that the term of office of the Commission appointed in 2014 has ended on 31 October 2019. Since the new Commission has not yet been appointed, the current Commission remains in office to conduct only current business. This situation, however, is exceptional and should be kept as short as possible in order to ensure the good functioning of the Union institutions and the realisation of the political objectives of the Union.

As the United Kingdom is aware, the vote of consent on the next Commission as a body, provided for in Article 17(7), third subparagraph, TEU, is due to take place during the plenary session of the European Parliament of 25-28 November 2019. A favourable vote would allow the European Council to adopt a decision on the appointment of the next Commission in the following days.

In the letter of the United Kingdom of 13 November 2019, reference is made to the current situation in the United Kingdom, where a general election to the House of Commons is to take place on 12 December 2019.

In that respect, the Commission would like to recall that, in accordance with the settled case-law of the Court of Justice, a Member State may not invoke provisions prevailing in its domestic legal system, even its constitutional system, to justify failure to observe obligations arising under Union law (ECJ, judgment of 5 February 2015, case C-317/14, *Commission v Belgium*, paragraph 33 [ECLI:EU:C:2015:63]).

In any case, the Commission would like to recall that, on the one hand, at the latest on 19 October 2019, when the United Kingdom requested a further extension of the period provided for in Article 50(3) TEU, it was well aware of the obligations that would be the result of such an extension, while, on the other hand, the act setting the date for the general elections entered into force on 31 October 2019. Moreover, as already noted, the appointment of the Commission is a matter of urgency.

The European Commission consequently takes the view that the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Article 17, paragraph 7, second subparagraph TEU, in conjunction with Article 4, paragraph 3 TEU.

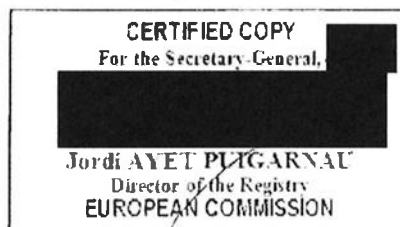
The Commission invites your Government, in accordance with Article 258 of the Treaty on the Functioning of the European Union, to submit its observations on the foregoing at the latest by Friday 22 November 2019. This short time period is justified by the fact that the next Commission must enter into office as soon as possible.

After examining these observations, or if no observations have been submitted within the prescribed time-limit, the Commission may, if appropriate, issue a Reasoned Opinion as provided for in the same Article.

Yours faithfully,

For the Commission,

Jean-Claude Juncker
President of the Commission





UK Representation
to the EU Brussels

**The Permanent Representative
Ambassador Sir Tim Barrow**

13 November 2019

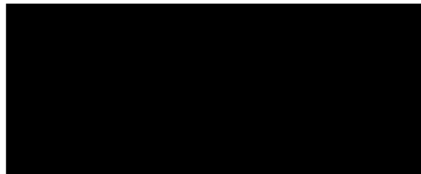
Björn Seibert
Head of the Transition Team
Office of the European Commission President-elect

Dear Mr Seibert,

Thank you for the letters of 6 and 12 November to the Prime Minister from the European Commission President-elect about the future European Commission.

The UK recognises its obligations as a Member State and does not wish to frustrate the functioning of the EU as regards the formation of a new Commission. However, in line with long-standing practice, the UK's pre-election guidance is clear that "the UK should not normally make nominations or put forward candidates for senior international appointments (including appointments to European institutions) until after the election".

In the meantime, the UK does not of course intend or wish to stop the EU proceeding with the formation of a new Commission at the earliest possible moment, and stands ready to cooperate to enable this to be achieved.



SIR TIM BARROW
United Kingdom Permanent Representative to the European Union