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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 2015/5866

Dear Ms Stefanova,

I refer to your letter of 19 January 2016, registered on that 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 documents² ('Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 7 November 2015, addressed to the Directorate-General for Economic and Financial Affairs (DG ECFIN), you requested, based on Regulation 1049/2001, access to *information regarding [the] EURATOM loan granted by the EC Decision C(2013) 3496 final from 24.6.2013 to Ukraine's state energy utility Energoatom for the Complex (Consolidated) safety upgrade program of nuclear power plants in Ukraine (CCSUP)* :

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

² Official Journal L 145 of 31.5.2001, p. 43.

- [(1)] *Loan Facility Agreement [(the 'LFA')] between Ukraine and EURATOM signed on 7 August 2013, especially in parts concerning environmental and social conditionality [(category (1))];*
- [(2)] *specific evidence and opinions from inter-services consultations (as pointed in recital 12 of the EC Decision C(2013) 3496 final) the EC has considered when assessing implementation of conditions precedent to disbursement of the first instalment (Annex of Decision C(2013) 3496) mainly undertakings by Ukraine in the nuclear and environmental area [(category (2))];*
- [(3)] *formal communication between EC and Ukraine regarding Ukraine's undertakings to comply with environmental international agreements (including Espoo and Aarhus conventions), especially in a view of Espoo MoP decision from June 2014 where Ukraine has been acknowledged to be in non-compliance with its obligations under article 2, paragraph 2, with regards to general legal and administrative framework applicable in the decision-making for the extension of the lifetime for nuclear reactors (paragraph 69 of Decision_VI.2 [(category (3))].*
- [(4)] *The recommendation on the financial and economic aspects of the Project issued by the European Investment Bank as part of Loan appraisal process [(category (4))].*
- [(5)] *any communication received from the Ukrainian government or other parties about the planed lifetime extension of Unit 2 at South Ukraine nuclear power plant and Unit 1 at Zaporizhia nuclear power plan [(category (5))];*

In its initial reply of 21 December 2015, DG ECFIN replied to the above-numbered categories of your request as follows:

- (1) As regards the LFA, DG ECFIN provided you with an excerpt from the LFA on the environmental and social conditionality;
- (2) DG ECFIN refused access to the documents considered in the inter-service consultation based on the exception of Article 4(3), second subparagraph (protection of the decision-making process) of Regulation 1049/2001;
- (3) DG ECFIN provided you with copies with two letters sent by the Directorate-General for Environment to Ukraine;
- (4) DG ECFIN refused access to the EIB recommendation based on the exception of Article 4(2), first indent (protection of commercial interests) of Regulation 1049/2001;
- (5) DG ECFIN stated that it had no such documents and referred to you to the publically available stress test documents on the website ENSREG.

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

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 would like to inform you of the following outcome:

- (1) access to the LFA (document falling under category (1) of your request) is refused based on the exceptions of Article 4(1)(a) (protection of international relations) and Article 4(2), first indent (protection of commercial interests) of Regulation 1049/2001;³
- (2) partial access is granted to the following documents falling under category (2) of your request:
 - note of the Directorate-General for Environment (DG ENV) to DG ECFIN of 24 October 2014, and
 - two letters from Energoatom to DG ENV dated 31 July 2014;The partial access is subject only to the exception in Article 4(1)(b) of Regulation 1049/2001 (protection of privacy and the integrity of the individual);
- (3) no documents exist that would fall under category (3) of your request⁴;
- (4) partial access is also granted to the EIB recommendation (document falling under category (4) of your request), subject to the exception in Article 4(2), first indent (protection of commercial interests) of Regulation 1049/2001;
- (5) no documents exist that would fall under category (5) of your request.

Against the above background, you will find below the detailed reasoning concerning the specific exceptions under Regulation 1049/2001 in relation to the categories (1), (2) and (4) of your request.

2.1. Preliminary remarks

In your confirmatory application, you put forward arguments based on access to environmental information pursuant to Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies ('Regulation 1367/2006 ').⁵

Please note that, whilst Regulation 1049/2001 applies to documents falling under the EURATOM Treaty, the Commission considers that Regulation 1367/2006 cannot.

³ Save for the excerpt on social and environmental conditionality already provided by DG ECFIN.

⁴ Save for the ones provided to you already at the initial stage.

⁵ OJ 2006 L 264, p. 13.

All the relevant provisions of Titles II, III and IV of Regulation 1367/2006 (e.g., Articles 3, 4, 5 9 and 10) apply to *Community institutions and bodies* which, in accordance with Article 2(1)(c) include *any public institution, body, office or agency established by, on the basis of, the Treaty*. In this context, *the Treaty* was understood at the time as a reference to the EC Treaty, and should now be understood as a reference to the TFEU.

The Commission, when acting pursuant to the EURATOM Treaty, acts in accordance with the powers and the procedures foreseen in this Treaty and thus as an institution initially established on the basis of the EURATOM Treaty. That interpretation is consistent with Article 1 of the Regulation 1367/2006 according to which its objective is to contribute to the implementation of the obligations under the Aarhus Convention to which the European Community, but not EURATOM, is a party.

The fact that Regulation 1367/2006 is based exclusively on Article 175 of the EC Treaty, which is now Article 192 of the TFEU, also provides an indication that EURATOM is not covered, insofar as Article 192, TFEU is not covered by the provisions of the TFEU which are applicable to EURATOM, pursuant to Article 106a of the EURATOM Treaty.

The fact that the definition of 'environmental information' in Article 2(1)(d)(iii) of the Regulation 1367/2006 includes references to 'radiation' and 'radiation and waste' does not affect that conclusion. Those references cannot have the effect that a Community act would govern matters falling specifically under the EURATOM Treaty.

Therefore the Commission will not address the request in so far as reference is made to Regulation 1367/2006. Nevertheless, we have applied Regulation 1049/2001 so as to grant the widest possible access in the circumstances of the present case.

2.2. Protection of international relations

Article 4(1)(a), third indent of Regulation 1049/2001 provides that *[t]he institutions shall refuse access to a document where disclosure would undermine the public interest as regards international relations*.

As regards the LFA – category (1) of your request

The LFA is a contract between the European Atomic Energy Community and the state enterprise Energoatom of the Republic of Ukraine. In the context of the international negotiations between the Commission, Energoatom and Ukraine, the latter accepted to pass the EU stress test regarding nuclear safety⁶. The Republic of Ukraine was not legally obliged to carry out such stress tests and decided to do so on a voluntary basis. These stress tests formed an important input for assessing the environmental and societal risks related to the upgrade of Ukrainian nuclear power plants, as well as for the decision to approve the loan to Energoatom. As a result of this international negotiation process, the Commission and Ukraine had a better understanding of existing risks as well as affirmed

⁶ More information about said stress tests can be found at <http://www.ensreg.eu/EU-Stress-Tests/Country-Specific-Reports>.

their shared interest in improvements to the safety of Ukraine's nuclear power plants. Indeed, it is clearly in the EU's interest is to maintain this quality of international relations (in general, as well as specifically in the nuclear safety field) and to promote the highest level of EU nuclear safety standards in its neighbouring countries.

Disclosure of the LFA would compromise the efforts and progress achieved this far to harmonise the nuclear safety requirements and deteriorate the international relations with Ukraine on future nuclear safety cooperation.

Moreover, looking beyond merely nuclear energy, Ukraine is one of EU's strategic partners on ensuring its security of energy supply. For Ukraine, the question of ensuring its security of energy supply, in view of its own specific geostrategic position, is at least as important as it is for the EU.

Finally, the disclosure of commercially sensitive information (for example, such as clauses aimed at addressing identified potential business risks and the financial covenants) related to Ukraine's state enterprise Energoatom would foreseeably have not only a negative commercial (see point 2.3 below) but also a diplomatic impact.

Against this background, disclosure of the LFA would, in a reasonably foreseeable way, undermine the international relations between the EU and the Ukraine.

2.3. Protection of commercial interests

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.*

As regards the LFA – category (1) of your request

The project being financed is a 300-million-euro loan facility on the Ukrainian 'Complex Safety Upgrade Program of Power Units of Nuclear Power Plants'. It is a legal document that sets out the specific rights and obligations of the two contractual parties and addresses a wide range of potential and identified business risks. In addition, a number of clauses in the LFA contain commercially sensitive references, for example to Energoatom's electricity tariffs or thresholds of financial covenants, the disclosure of which would undermine the protection of Energoatom's commercial interests.

Please note also that the LFA with Energoatom is currently in the process of being implemented. The LFA with Energoatom is based on a contractual format which the Commission has used for other EURATOM contracts. Disclosure of the LFA with Energoatom would, in a reasonably foreseeable way, obstruct the implementation of (i) the loan contract with Energoatom, (ii) other presently ongoing loan contracts of this kind and (iii) render more difficult the Commission's position in future financial negotiations for projects of a similar kind. Therefore, access to the LFA agreement would undermine Energoatom's as well as the Commission's commercial interests as regards the EURATOM loan(s). The General Court has confirmed that the exception of Regulation

1049/2001 relating to commercial interests may be applied also to Commission's own interests.⁷

As regards the EIB recommendation – category (4) of your request

The EIB, after having examined the loan application and the underlying financial and economic aspects of the transaction, issued a recommendation on the LFA.

In said recommendation, the EIB put forward specific advice as regards contractual aspects that in its view the LFA needed to address. In the framework of your confirmatory application, the Commission has reviewed the initial position of DG ECFIN and, after having consulted the EIB, decided to grant partial access to EIB's recommendation. Nevertheless, the EIB recommendation also contains commercially sensitive information provided by Energoatom as well as advice on addressing business risks inherent to the loan that is embedded in the recommendation. Moreover, wider disclosure of the EIB opinion would make public the content of certain contractual provision contained in the LFA, which would undermine Energoatom's and the Commission's commercial interests, for the reasons explained above.

2.4. Protection of privacy and the integrity of the individual

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.*

As regards the documents in relation to the inter-service consultation – category (2) of your request

The personal data of individuals in the three documents falling under category (2) has been redacted. Article 2(a) of Regulation 45/2001⁸ provides that *'personal data' shall mean any information relating to an identified or identifiable person.*

The names, titles and signatures of Commission and Energoatom's staff undoubtedly constitute personal data in the meaning of Article 2(a) of Regulation 45/2001. In its judgment in the *Bavarian Lager* case⁹, the Court of Justice ruled that, when a request is made for access to documents containing personal data, the Regulation 45/2001, and in particular its Article 8(b), becomes fully applicable.

According to Article 8(b) of the Regulation 45/2001, personal data shall only be transferred to a recipient if the latter establishes the necessity of having the data

⁷ See Case T-167/10, *Evropaiki Dynamiki v Commission*, not yet published, paragraph 86. See also recital 15 of Regulation 1367/2006, which provides that *[t]he term 'commercial interests' covers confidentiality agreements concluded by institutions or bodies acting in a banking capacity.*

⁸ Regulation (EC) No 45/2001 of the European Parliament and of the Council 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, OJ L 8 of 12.1.2001, p. 1.

⁹ Judgment of the Court of Justice in Case C-28/08P, *European Commission v The Bavarian Lager Co. Ltd.*

transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced. Those two conditions are cumulative.

I note that you have not put forward any specific interest in, nor demonstrated any necessity for, obtaining access to these personal data.

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 data¹⁰. 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 interests¹¹.

Moreover, even if one were to assume that the objective of obtaining environmental information met the requirement to establish a necessity for a transfer,¹² the second condition, namely, relating to the absence of prejudice on the data subject's legitimate interests cannot be established in this case. Indeed, based on the information available, it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned.

Therefore, I confirm that access to these personal data shall be refused pursuant to Article 4(1)(b) of Regulation 1049/2001.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Based on Regulation 1049/2001, the exception laid down in Article 4(2), first 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 argue that there is an overriding public interest as the requested information allegedly relates to the emissions into the environment as well as deals with nuclear energy. In your view, it would be ungrounded to claim that the economic and financial aspects of the financed safety upgrades are not in the public interests.

Whilst concerns about nuclear energy are clearly in the public interest, I consider that protecting the objective pursued for making the loan facility available to Energoatom, namely updating the nuclear safety of the power plants in an EU neighbouring country, is

¹⁰ See Case C-615/13P, Judgment of the Court of Justice *ClientEarth v EFSA*, paragraph 47.

¹¹ *Ibid.*, paragraphs 47-48.

¹² See to that effect the judgment of the General Court in Case T-115/13, *Gert-Jan Dennekamp v European Parliament*, paragraph 55:
Accordingly, to apply the condition as to the necessity of the transfer of personal data set out in Article 8(b) of Regulation No 45/2001 is to recognise the existence of an exception to the rule laid down by Article 6(1) of Regulation No 1049/2001. That consequence is justified by the effet utile that must be conferred on the provisions of Regulation No 45/2001, since any solution other than that of having the necessity of the transfer of personal data examined in the light of the objective of the applicant for access to documents would necessarily result in Article 8(b) of that regulation being disapplied (underlining added).

an even more important public interest. Indeed, preserving the constructive relationship and progress for the benefit of a safer nuclear energy production in neighbouring EU countries is more important than the public interests you invoked – even under a restrictive interpretation of the grounds for refusal.

In any event, it may be useful to add that the information to which access was refused does not concern emissions into the environment, but rather information relating to contractual obligations linked to the granting of a loan.

Nor have I been able to identify any other public interest capable of overriding the interests protected by 4(2), first indent of Regulation 1049/2001.

Please note also that Article 4(1)(a) and 4(1)(b) of Regulation 1049/2001 do not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

It follows that no wider access to the LFA and the EIB recommendation can be granted.

4. PARTIAL ACCESS

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

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,



*For the Commission
Alexander ITALIANER
Secretary General*

Enclosures (3)