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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 2016/6535**

Dear Mr Jávör,

I refer to your letter of 31 January 2017, registered on 3 February 2017, 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 18 November 2016, addressed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs ('DG GROW'), you requested access to *all documents, correspondence and minutes* in possession of the Commission which concern *the infringement procedure against Hungary concerning the lack of public tendering of the Paks II Nuclear Power plant*.

The Commission has identified 28 documents as falling under the scope of your request. Please find the list in the Appendix to this decision.

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

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

In its initial reply of 11 January 2017, DG GROW refused access to the documents requested based on the exception of Article 4(2), third indent, of Regulation 1049/2001 (protection of the purpose of investigations).

Through your confirmatory application you request a review of this position. You underpin your request with detailed arguments, which I will address in the corresponding sections below.

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 am pleased to inform you that full access is granted to documents 2 and 13, and wide partial access is granted to the remaining 26 documents.

As regards the redacted parts of the above-mentioned 26 documents, I have to confirm the initial decision of DG GROW to refuse access, based on the exceptions of Article 4(1)(a), third indent (protection of the public interest as regards international relations), Article 4(1)(b) (protection of privacy and the integrity of the individual) and Article 4(2), first indent (protection of commercial interests of legal persons), of Regulation 1049/2001, for the reasons set out below.

Preliminary remarks

The documents requested form part of the administrative file in infringement case NIF 2015/4231-32, opened in accordance with the proceedings laid down in Article 258 of the Treaty on the Functioning of the European Union ('TFEU')³.

Infringement case NIF 2015/4231-32 concerned the compatibility of the award of contracts for the refurbishment and extension of the Hungarian Paks Nuclear power plant ('Paks NPP project') with EU public procurement rules (Directive 2004/17/EC, in particular). The purpose of this infringement procedure was to ensure compliance of the Paks NPP project with those rules and the underlying TFEU principles, such as transparency, equal treatment and non-discrimination.

After an in-depth analysis of the information related to the infringement case, the Commission considered that the direct award of the core part of the Paks NPP project was compatible with EU public procurement rules, taking into account the technical exclusivity related to the core part of the project. As regards other parts of the project, the Commission required that Hungary provides appropriate commitments to achieve compliance with the respective TFEU principles.

³ Official Journal C 326, 26.10.2012, p. 1-390.

In order to reach an amicable settlement with the Commission, Hungary committed to ensure that the award of other parts of the Paks NPP project will respect the above-mentioned TFEU principles. Hungary also committed to report regularly to the Commission on the steps taken to fulfil those commitments.

In light of this, the Commission considered that it would not be opportune to pursue infringement procedure NIF 2015/4231-32 any further and closed it on 17 November 2016⁴. The Commission reserved the right to open a new infringement procedure into the same subject matter as a follow-up to NIF 2015/4231-32, should Hungary not honour its commitments. At present, the Commission is monitoring the fulfilment of those commitments in the context of an ongoing dialogue with Hungary.

Documents identified

Documents 1-6, 8-22 and 24-28 are Commission documents, and documents 7 and 23 originate from the Hungarian authorities.

At confirmatory stage, the Secretariat-General consulted the Hungarian authorities in line with Article 4(4) and 4(5) of Regulation 1049/2001, as regards the disclosure of documents 7 and 23, and the disclosure of the opinion of the Hungarian authorities, reflected in documents 6, 9-11 and 13-22.

The Hungarian authorities agreed with the disclosure of document 7 and confirmed that they rely on the Commission's assessment as regards the possibility to disclose document 23.

Furthermore, they agreed with full disclosure of their opinion reflected in documents 6 and 13, and wide partial disclosure of their opinion as reflected in documents 9-11. They also confirmed that they rely on the Commission's assessment as regards the possibility to disclose their opinion as reflected in documents 14-22.

2.1. Protection of the public interest as regards 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 protection of [...] the public interest as regards [...] international relations.*

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*⁵.

⁴ See document 28.

⁵ Judgment of 1 February 2007 in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 46.

According to the General Court, *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*⁶.

Documents 16⁷-22 contain detailed information on the negotiations between Hungary and the Russian Federation as regards the Paks NPP project. They contain the interim results of negotiations between Hungary and the Russian Federation, different proposals of the parties in respect of tender procedures and respective commitments.

They also contain the negotiating positions of both parties, their margin of manoeuvre, their reasoning and tactical considerations in those negotiations, in general, and in the light of Hungary's commitments required by the Commission (in order to achieve compliance with the relevant TFEU principles), in particular.

Against this background, full public disclosure of the respective documents would have a negative effect on the ongoing international negotiations between Hungary and the Russian Federation as regards the implementation of their intergovernmental agreement ('IGA')⁸. Such disclosure would limit the parties' room of manoeuvre in the negotiations and undermine the atmosphere of mutual trust, essential to the effectiveness of the international negotiations.

As any form of negotiation necessarily entails a number of tactical considerations of the negotiators, the necessary cooperation between the parties depends to a large extent on the existence of a climate of mutual trust.

Therefore, I conclude that access to the redacted parts of documents 16-22 cannot be granted because their disclosure would undermine the protection of the international relations of a Member State with a third country, as laid down in Article 4(1)(a), third indent, of Regulation 1049/2001.

⁶ Judgment of 25 April 2007 in *WWF European Policy Programme v Council*, T-264/04, EU:T:2007:114, paragraph 40.

⁷ When consulted on potential disclosure of document 16, the Hungarian authorities stated that the fifth indent of Section 1 of that document (p.2) was inaccurate and does not represent the opinion of Hungary. As that paragraph refers to the negotiations between Hungary and the Russian Federation, its disclosure could undermine their international relations, in particular their mutual trust, as explained in Section 2.1 of this Decision.

⁸ Agreement between the Government of Hungary and the Government of the Russian Federation on cooperation on peaceful use of nuclear energy, concluded on 14 January 2014 and ratified in Hungary by Act II of 2014 of the Hungarian Parliament (2014. évi II. törvény a Magyarország Kormánya és az Oroszországi Föderáció Kormánya közötti nukleáris energia békés célú felhasználása terén folytatandó együttműködésről szóló Egyezmény kihirdetéséről).

2.2. Protection of commercial interests

Article 4(2), first indent, of Regulation 1049/2001 provides that the *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.*

Documents 7, 8, 14-18 and 20-22 contain commercially sensitive information exchanged between Hungary and the Russian Federation as regards the specific requirements which the contractors Rosatom (the Russian State Atomic Energy Corporation) and Joint-Stock Company Nizhny Novgorod Engineering Company ('NIAEP JSC') have to follow for the delivery of the Paks NPP project.

This information concerns, *inter alia*, the negotiation on the percentages of the contract value to be reached through subcontracting, and on the conditions concerning the possible participation of the subsidiaries of Rosatom and NIAEP JSC in the project. The disclosure of this information would undermine the protection of the commercial interests of the contractors, as follows.

First, as a result of disclosure, Rosatom's and NIAEP JSC's competitors would be able to use the information to gain a commercial advantage which they would otherwise not have had, in this way undermining the contractors' commercial interests, specifically their market position.

Secondly, disclosure of that information would also undermine Rosatom's and NIAEP JSC's future prospects in participating in similar projects. It would give undue economic advantage to other clients of those contractors, by exposing their margin of manoeuvre in the negotiations concerning specific requirements they had to follow for the delivery of the Paks NPP project.

Consequently, Rosatom and NIAEP JSC would not be able to conduct business with their future clients starting from a neutral position, but would suffer from disadvantages resulting from their commitments taken in the Paks case. Their other clients could anticipate their position and negotiate with them on the basis of the different values that were raised throughout the discussions in the Paks case.

All this would expose the commercial interests of Rosatom and NIAEP JSC to significant risks, in particular damage their competitive position on the market and thus undermine their commercial interests.

In addition, documents 7, 8, 14 and 15 also contain information concerning the financial situation and comparative competitiveness of other companies which are the suppliers of nuclear energy technology in EU and third countries. This information concerns the perceived weaknesses of those other companies and estimates of their competitiveness in comparison to their Russian counterparts as regards the Paks NPP project.

As Hungary held that the core part of the project could only be executed by one particular economic operator, the project was awarded directly without tendering.

Consequently, the assessment as to which companies were not able to execute the project and why not, would negatively impact their reputation and influence their commercial prospects in the nuclear market in comparison to their Russian (and other international) counterparts. Consequently, their names and other information from which their identity can be deduced cannot be publicly disclosed.

Finally, the exception of Article 4(2), first indent, of Regulation 1049/2001 has to be read in light of Article 339 of TFEU, which requires that staff members of the EU institutions refrain from disclosing *information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components*.

I take the view that applying Regulation 1049/2001 cannot have the effect of rendering the above-mentioned provision, over which it does not have precedence, ineffective.

Against this background, there is a real and non-hypothetical risk that public access to the above-mentioned information would undermine the commercial interests of the respective economic operators. I conclude that the redacted parts of documents 7, 8, 14-18 and 20-22 are manifestly covered also by the exception protecting the commercial interests as laid down in Article 4(2), first indent, of Regulation 1049/2001, and that access to them has to be refused.

2.3. 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*.

In accordance with the *Bavarian Lager* ruling⁹, when a request is made for access to documents containing personal data, Regulation 45/2001¹⁰ becomes fully applicable.

Article 2(a) of Regulation 45/2001 defines personal data as *any information relating to an identified or identifiable natural person*.

In this instance, documents 1, 3-12 and 14-28 contain information related to identified or identifiable individuals, in particular their names, functions, contact information and signatures.

In addition, documents 9, 11, 14-16 and 18-21 also contain the official titles of legal persons which consist of personal names that way directly identifying natural persons who are their partners.

⁹ Judgment of 29 June 2010 in *Bavarian Lager*, C-28/08 P, EU:C:2010:378.

¹⁰ 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 (Official Journal L 8 of 12.1.2001, p. 1) – hereinafter referred to as ‘Regulation 45/2001’.

As adjudicated by the EU Court of Justice in its *Schecke* judgment, *legal persons can claim the protection of Articles 7 and 8 of the Charter [of Fundamental Rights of the European Union]¹¹ in relation to such identification only in so far as the official title of the legal person identifies one or more natural persons¹².*

Pursuant to settled case law, *the concept of 'private life' must not be interpreted restrictively and [...] there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of 'private life'¹³.*

The names of individuals and other data from which their identity can be deduced clearly constitute personal data within the meaning of Article 2(a) of Regulation 45/2001. Their public disclosure would therefore constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

Pursuant to Article 8(b) of Regulation 45/2001, personal data shall only be transferred to recipients in EU/EEA if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced.

Those two conditions are cumulative¹⁴ and only the fulfilment of both conditions and the lawfulness of processing in accordance with the requirements of Article 5 of Regulation 45/2001 enables one to consider the processing (transfer) of personal data as compliant with the requirement of Regulation 45/2001.

In the *ClientEarth* case, the Court of Justice ruled that the institution does not have to examine *ex officio* the existence of a need for transferring personal data. In the same ruling, the Court stated that if the applicant has not established a need to obtain the personal data requested, the institution does not have to examine the absence of prejudice to the person's legitimate interests¹⁵.

In that context, whoever requests such a transfer must first establish that it is necessary. If it is demonstrated to be necessary, it is then for the institution concerned to determine that there is no reason to assume that that transfer might prejudice the legitimate interests of the data subject(s). If there is no such reason, the transfer requested must be made, whereas, if there is such a reason, the institution concerned must weigh the various competing interests in order to decide on the request for access¹⁶.

¹¹ Charter of Fundamental Rights of the European Union (Official Journal C 326, 26.10.2012, p. 391–407). Article 7 of the Charter regulates the respect for private and family life, and Article 8 of the Charter regulates the protection of personal data.

¹² Judgment of 9 November 2010 in *Schecke & Eifert v Hessen*, joined cases C–92/09 and C–93/09, EU:C:2010:662, paragraph 53.

¹³ See, *inter alia*, judgment of 20 May 2003 in *Österreichischer Rundfunk*, C-465/00, EU:C:2003:294, paragraph 73.

¹⁴ Judgment of 29 June 2010 in *Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraphs 77-78.

¹⁵ Judgment of 16 July 2015 in *ClientEarth v EFSA*, C-615/13P, EU:C:2015:489, paragraph 47-48.

¹⁶ Judgments in *Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraphs 77-78; *Strack*, C-127/13 P, EU:C:2014:2250, paragraphs 107-108; and also *Schecke and Eifert*, C-92/09 and C-93/09, EU:C:2010:662, paragraph 85.

In the above-mentioned *Bavarian Lager* ruling, the Court of Justice has clarified that the necessity of transfer must be demonstrated *by express and legitimate justifications or convincing arguments*¹⁷.

Neither in your initial nor confirmatory application have you stated any grounds to substantiate the necessity of transfer of personal data contained in the documents requested. Consequently, the personal data in the documents requested may not be disclosed as the need to obtain those personal data has not been substantiated, and there is reason to assume that the data subjects' legitimate interests might be prejudiced.

Against this background, I must conclude that the transfer of personal data contained in the documents requested cannot be considered as fulfilling the requirement of Regulation 45/2001 and that such transfer is consequently also prohibited under Article 4(1)(b) of Regulation 1049/2001.

Therefore, the use of the exception under Article 4(1)(b) of Regulation 1049/2001 is justified, as there is no need to publicly disclose the personal data in question, and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

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

The exceptions laid down in Article 4(2) 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 *the public has the right to have access to documents which made the Commission accept the arguments of the Hungarian government why not to apply the public procurement directives on a project which has a value more than 12,5 bn. euro.*

You claim that *[t]he secrecy not only undermines the credibility of the European institutions but the belief in rule of law itself.* Furthermore, you argue that the disclosure of documents *cannot have a detrimental effect on the monitoring task of the Commission, since public awareness and public monitoring can only reinforce this endeavour.*

Having carefully analysed the arguments you have put forward in your confirmatory application, I understand that they point to the existence of a certain public interest in the subject matter at hand.

¹⁷ Judgment of 29 June 2010 in *Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 78.

As indicated in Section 2, full access is granted to documents 2 and 13, and wide partial access is granted to the remaining 26 documents requested. Therefore, it cannot be argued anymore that the Commission's approach with regard to your request is based on 'secrecy', quite the contrary. It shows that the Commission is transparent about both the conduct of the respective infringement procedure and the grounds it relied upon when deciding to close it.

Your arguments, however, do not show how there could be a need for the public to obtain access to the minimal redacted parts of ten documents (7, 8, 14-18 and 20-22) which contain commercially sensitive information.

In light of the above, I have come to the conclusion that the public interest you invoke is not capable of overriding the public interests protected by Article 4(2), first indent, of Regulation 1049/2001. I have also not been able to identify any other public interest that could override the public interests protected.

The fact that the documents relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness,¹⁸ provides further support to this conclusion.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting partial access to the documents requested.

As indicated, full access is provided to documents 2 and 13, and wide partial access is provided to the remaining 26 documents. For the reasons explained above, no meaningful further partial access is possible to the latter without undermining the interests described.

You may reuse the Commission documents 1-6, 8-22 and 24-28 (as (partially) disclosed) free of charge for non-commercial and commercial purposes provided that the source is acknowledged, and that you do not distort the original meaning or message of the documents. Please note that the Commission does not assume liability stemming from the reuse.

As regards documents 7 and 23, they originate from Hungarian authorities and are partially disclosed for information only. They do not reflect the position of the Commission and cannot be quoted as such.

¹⁸ Judgment of the Court (Grand Chamber) of 29 June 2010 in *Commission v Technische Glaswerke Ilmenau GmbH*, C-139/07 P, paragraphs 53-55 and 60; judgment of 29 June 2010 in *Commission v Bavarian Lager*, paragraphs 56-57 and 63.

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*



Appendix 1: The list of documents identified