EUROPEAN COMMISSION

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Mr Gligor Radecic
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DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001 [1]

Subject: **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2021/8142**

Dear Mr Radecic,

I refer to your email of 15 February 2022, registered on 16 February 2022, in which you submitted 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').

Please accept our apologies for the delay in the handling of your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 16 December 2021 addressed to the Directorate-General for Energy you requested access to, I quote:

'In accordance with Regulation 1049/2001 and Regulation 1367/2006 as amended by Regulation 2021/1767, we hereby request the following documents related to the of the so-called Delegated Act with the 5th PCI list (COMMISSION DELEGATED REGULATION (EU) …/... of 19.11.2021 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest):

[1] OJ L 345, 29.12.2001, p. 94.
[2] OJ L 145, 31.5.2001, p. 43.

- Project specific cost-benefit analysis for the draft lists of gas projects per priority corridors (NSI West, NSI East, SGC and BEMIP).

- Additionally, we request access to any other document in your possession, which records the sustainability assessment, emissions calculations (also emissions that are foreseeable) and the evaluation of flows in the infrastructure carried out for the draft list of gas projects.'

In relation to your request for 'project specific cost-benefit analysis for the draft lists of gas projects per priority corridors (NSI West, NSI East, SGC and BEMIP)', in its initial reply of 21 January 2022, the Directorate-General for Energy informed you that the relevant documents and information which are part of the European Network of Transmission System Operators for Gas (ENTSOG)'s Ten-year Network Development Plan (TYNDP) 2020 are public and can be consulted in the TYNDP section on the website of ENTSOG. It provided you with the relevant link.

Concerning your request for 'any other document in European Commission possession, which records the sustainability assessment, emissions calculations (also emissions that are foreseeable) and the evaluation of flows in the infrastructure carried out for the draft list of gas projects', the Directorate-General for Energy informed you that the sustainability data on CO2 and non-CO2 impacts are part of the public ENTSOG TYNDP 2020 and referred you to the same link. As far as the methane emission data is concerned, as delivered by the project promoters, you were informed that it can be consulted on the CIRCABC platform on 13 TEN-E Regional Group Meetings.

Regarding the evaluation of flows in the infrastructure, the Directorate-General for Energy informed you that it does not hold documents.

Finally, regarding the sustainability assessment, the Directorate-General for Energy informed you that it had identified 'a series of documents developed by the TEN-E gas regional groups for the purposes of the ranking of the gas projects'.

I would like to clarify that the 'series' of documents as identified at the initial stage include in fact: the assessment methodology which was made available to you on the CircaBC platform, the sustainability data filtered and processed as used to apply the methodology and the results of the application of this methodology for the sustainability criterion.

The Directorate-General for Energy has fully refused access to the sustainability data and the results of the application of this methodology under the basis of the exception provided for in the second subparagraph of Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of the initial position regarding the refusal to disclose the documents which record the sustainability assessment for the draft list of gas projects ("requested documents").

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.

The Secretariat-General has identified the following documents, which record the sustainability assessment:

- Sustainability input data and Sustainability assessment results, reference Ares(2022)1437345.

Following the review conducted at the confirmatory stage by the Secretariat-General, I regret to inform you that access to these documents has to be refused on the basis of the exception provided for in Article 4(3) first subparagraph of Regulation (EC) No 1049/2001.

The reasons are set out below.

2.1. Protection of the decision-making process

Article 4(3) first subparagraph of Regulation (EC) No 1049/2001 provides that '[a]ccess to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure'.

In your confirmatory application, you argue that, I quote, '[t]he requested documents constitute "legislative documents" within the meaning of Regulation 1049/2001. Furthermore, all of them contain "environmental information" within the meaning of Article 2(1)(d), point (v) in relation to point (iii) of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 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 Union institutions and bodies (the "Aarhus Regulation")'.

Furthermore, you argue that the requested documents are not covered by the exception of Article 4(3) of Regulation (EC) No 1049/2001. You specify, I quote: '[i]t is clear that the ranking of projects is for the internal use of the Gas Regional Groups and that the ranking is used to assist members of the Group to make a decision about the manageable number of projects according to Article 4(4) in connection with the Annex III.2(14) of the Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 ("TEN-E regulation"). However, this doesn't mean that the information on which the ranking is based cannot be made public. Furthermore, we argue that the provision "nor shall the ranking be used for any subsequent purpose except as described in Annex III.2(14)" doesn't mean that these documents, including ranking,

cannot be made public. In our view, this provision only provides an explanation on how the ranking can be used in the process of the adoption of the list of Projects of Common Interest.'

You also argue that '[t]here is already broad access to the requested documents, and only members of the public are excluded from accessing them. To recall the Commission's response: "only representatives of the Member States, national regulatory authorities, TSOs, as well as the Commission, the Agency and the relevant ENTSO…, are therefore, entitled access to the ranking". It is important to emphasize that some of these entities that have access to rankings are privately controlled or only partially state-owned.'

The first part of the document concerns the input data which has been transmitted to the Commission by ENTSO-G or by project promoters while the second one relates to the Sustainability assessment results.

First, I would like to clarify that the 5th list of Projects of Common Interest (PCIs) is published as a delegated act. The delegated regulation was published on 19 November 2021[3]. It was submitted by the Commission to the European Parliament and Council, who benefit from a two months scrutiny period, which can be prolonged by another two months. The scrutiny period has elapsed on 19 March 2022 with no objection being raised by either the Council or the European Parliament.

The 5th PCIs list was adopted under the 2013 Regulation (EU) No 347/2013 on guidelines for trans-European energy infrastructure (the 'TEN-E Regulation')[4].

The risks to the ongoing decision-making process stemming from disclosure of the concerned documents are two-fold.

Firstly, disclosure of documents would undermine the decision-making process for establishing the RePower plan[5], which sets out new actions to ramp up the production of green energy, diversify supplies and reduce demand, focusing primarily on gas, should additional needs as regards gas infrastructure be established in line with the assessment provided by the RePower Communication of 8 March 2022.

Secondly, disclosure would undermine the decision-making process for establishing subsequent PCI lists. In this context, I would like to stress that disclosure of the documents would also undermine the implementation of the projects in the 5th list.

The Communication establishes the goal of reaching independence from Russian gas before the end of the current decade. In this respect, a key role is played by projects completing the internal market in energy and those with a strong cross-border dimension

[3] https://energy.ec.europa.eu/system/files/2021-11/fifth_pci_list_19_november_2021.pdf .

[4] Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009, OJ L 115, 25.4.2013, p. 39–75.

[5] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A108%3AFIN.

which would be privileged. Infrastructure on the 5th PCI list will be, thus, essential in delivering the REPower Plan, and additional cross-border projects may be assessed as necessary.

The disclosure of any elements related to the sustainability assessment or the ranking of PCI projects will affect the decision making process and the implementation of the REPower Plan as the decisions are taken by the Member States in configurations similar to the organisation of the PCI process.

As regards subsequent PCI lists, the disclosure of the documents would seriously undermine the decision-making process, as the same regional group members as for the 5th PCI list will be required to decide for subsequent lists.

The possibility of expressing views independently within an institution helps to encourage internal discussions with a view to improving the functioning of that institution and contributing to the smooth running of the decision-making process[6]. The disclosure of elements linked to the PCI ranking, after a long practice where the ranking was kept confidential, will undermine the decision making process, by removing the discretion and confidence in the deliberations of the regional group for future lists.

Sustainability was assessed by the regional groups as a criterion in the PCI selection process as part of the ranking of gas projects. This assessment, as well as the assessment of the other criteria listed by the TEN-E Regulation applicable to gas projects, has allowed the regional groups to put together the ranking of the candidate projects. The ranking contains the results of the assessment of the candidate projects of common interest which is the basis for the decisions to be taken by the regional groups and the decision-making bodies of the regional groups for the elaboration of the regional lists of proposed projects of common interest.

For the elaboration of the PCI lists every two years, the assessments, considerations, arguments and deliberations of the regional groups are held in a strictly confidential spirit in order to enable a space of free exchange of preliminary views and policy options among the participants concerning candidate projects for the Union list of common interest. It is of utmost importance to keep this information confidential and free from external pressure within the internal decision making process. Moreover, the same applies to the upcoming elaboration of the REPower EU Plan.

I would like to underline that the work on the 6th list is fully ongoing. The revised TEN-E Regulation will be the legal base for the adoption of the sixth Union list of PCIs, which is planned to take place by the end of 2023[7].

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6 Judgment of the General Court of 15 September 2016, *Philip Morris* v *Commission*, T-18/15, EU:T:2016:487, paragraph 87.

7 On 15 December 2020 the European Commission adopted a proposal COM(2020) 824 final to revise the 2013 Regulation to better support the modernisation of Europe's cross-border energy infrastructure and achieve the objectives of the European Green Deal.

In accordance with Article 4(4) of Regulation (EU) No 347/2013, the assessment and rankings are strictly for internal use of the group : "[e]ach Group shall determine its assessment method on the basis of the aggregated contribution (…) this assessment shall lead to a ranking of projects for internal use of the Group. Neither the regional list nor the Union list shall contain any ranking, nor shall the ranking be used for any subsequent purpose except as described in Annex III.2(14).".

I would like to underline that the documents were at the disposal of a restricted and specific group of persons only. Nevertheless, even if information contained in a document has already been transmitted to a large number of people, this does not make it publicly accessible[8].

Furthermore, the disclosure of an element pertaining to the ranking would give the impression to the public that the ranking automatically reflects the PCI list, whereas this is not the case as the ranking has a very specific purpose restricted to ensuring a manageable number of projects. Therefore, this ranking does not lead in any manner to an automatic decision on the regional lists of projects of common interest, but serves to inform regional group members and facilitate their discussions, deliberations and decision-making.

In this sense, the disclosure of this non-conclusive document will not provide any relevant additional insight into the PCI selection process, but will negatively impact the serenity of the decision making process by the regional groups. Indeed, any disclosure of elements pertaining of the ranking of PCIs risks giving the impression to the public that the PCI list should be a direct result of the ranking which is not the case as per the provisions of Regulation 347/2013. However, the deliberations of the regional groups, while being informed by the ranking, are much more complex and take into account multiple factors and political priorities, including the additional criteria laid down by Article 4(4) of Regulation 347/2013.

If the public has access to the ranking, they will exert pressure on regional group members by expecting that the decision on the final list of projects of common interest to be a direct result of the ranking. Moreover, once the members of the regional groups know the ranking is no longer confidential, their deliberations and their freedom to exchange views in the selection process will be greatly affected.

The possibility that various stakeholders influence the decision process regarding the PCI lists should the documents become publicly available is concrete, serious and not hypothetical. Over time, various groups have financed studies and reports against PCI projects, particularly against natural gas PCI projects, aiming to prove that these projects were not correctly selected as PCIs and should not be implemented. The various stakeholders in the process, including Member States and MEPs, are constantly being lobbied, influencing their considerations and decisions.

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[8] Judgement of the General Court of 7 June 2013, *Stichting Corporate Europe Observatory*, T-93/11, EU:T:2013:308, paragraphs 70 and 71.

Therefore, the risk exists that, if disclosure takes place, the decisions and considerations in the PCI process would face an increasing influence from outside factors, with the result that they are no longer based on the actual data and information made available in the process.

I would like to recall that Regulation (EC) No 1049/2001 applies to any request by an applicant for access to environmental information held by the institutions and bodies. Indeed, as far as requests for environmental information are concerned, in accordance with Article 6(1) of 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 ('the Aarhus Regulation')[9], the grounds for refusal provided for in Article 4 of Regulation (EC) No 1049/2001 shall be interpreted in a restrictive way and public interest in disclosure shall be taken into account as regards all the exceptions.

However, nether Regulation (EC) No 1367/2006, nor Regulation (EC) No 1049/2001 provide for an automatic disclosure of any type of environmental information.

Furthermore, Regulation (EC) No 1049/2001 and Regulation (EU) No 347/2013 belong to the same hierarchical level in the European Union legislative order and no provision expressly gives one regulation priority over the other. In such cases, as confirmed on many occasions by the case-law of the European Union Courts, both pieces of legislation should be applied in the way ensuring conformity with each other[10].

The Commission and the other members of the regional groups have maintained consistently, throughout time, ever since the enactment of the TEN-E Regulation, the confidentiality of the ranking of the candidate projects of common interest.

In light of the above, the disclosure of the sustainability assessment and results requested would negatively affect regional group members and Member States' willingness to cooperate and express their views freely in subsequent PCI processes as well as harm the trust established between the participants in these meetings.

The disclosure of these documents would also affect current and future project promoters that wish to submit candidate projects of common interest. Indeed, the disclosure of elements pertaining to the ranking in the decision-making process can influence how project promoters see the PCI selection process, namely regarding the way they perceive the process of submitting their application to the groups. This in turn may influence how they produce their project assessment, analysis of the fulfilment of the relevant criteria and cost benefit analysis.

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9 Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 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, OJ L 264, 25.9.2006, p. 13–19.

10 In this regard, see judgment of the Court of Justice of 29 June 2010, *European Commission* v *The Bavarian Lager Co. Ltd*, C-28/08 P, EU:C:2010:378, paragraph 56.

Consequently, this would have serious consequences for the discussions in the context of the adoption of the subsequent Union lists of projects of common interest, which are established every two years in line with Article 3(4) of the TEN-E Regulation and would seriously undermine the decision-making process related to the recurrent adoption of the Union list of projects of common interests in a reasonably foreseeable and non-purely hypothetical way.

Therefore, I conclude that the refusal of access to the documents in question is justified based on the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(3) 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 and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application, you argue that, I quote, 'Bankwatch is a non-profit organisation whose aim is the protection of the environment. In that regard, one of its tasks is to promote increased transparency and public involvement in decision-making processes. The so-called PCI list is an issue of particular public interest, as is evident by the increased media coverage of the PCI process, broad involvement of the EU public and NGOs in the consultation processes leading up to the establishment of the PCI list and the opposing views from Member States concerning the future framework for the PCI process. Potential impacts on the environment and the sound management of public funds are also issues of public interest. Legislative documents—such as the one in question—are subject to a wider concept of public access. The institutions of the EU can only be held accountable and demonstrate the legitimacy of their decisions through citizens being able to understand the context behind the making of those decisions.'

Firstly, as described in the section 2.1 above, there is a public interest in guaranteeing the serenity of the procedures for the adoption of subsequent PCI lists and of the REPowerEU Plan.

While I appreciate that there is public interest regarding the modalities of the adoption of PCI lists, I consider that the need for transparency of preparatory works relevant for the preparation of those lists does not outweigh in this case the need to protect the documents concerned, pursuant to the exception relating the protection of decision-making process.

As already mentioned in the section above, the fact that certain documents contain environmental information does not amount to their automatic disclosure. The same reasoning applies as far as 'legislative' documents in the sense of the case law on access to documents are concerned. In that sense, it cannot be expected that internal documents used in the decision making process of regional groups will be automatically disclosed by the simple fact that they contain environmental information without balancing the impact that the disclosure has on the current EU REPower process and future PCI decision making processes.

PCI projects need to comply in full with national and Union environmental law and thus the requirement to obtain all the relevant environmental permits and authorisations. Therefore, it could not be argued that the environmental information that were the basis for the sustainability assessment of the PCI candidates is not known or properly assessed by the competent environmental authorities and cannot be scrutinised by the public in the context of these procedures. In this context, the potential impacts of the projects on the environment can be scrutinised fully by the public.

In addition, while PCIs are eligible to apply for Union funding, this is not an automatic process and, therefore, the elaboration of the PCI list itself is not linked to the management of public funds.

Secondly, the elaboration of the delegated regulations enshrining the PCI lists is already subject to a very transparent process including meetings open to stakeholders, public methodologies, detailed information regarding the candidate projects and an extensive public consultation of the PCI candidates. When a PCI list is published, an additional technical document containing detailed information on the projects is also published. Data on the PCIs and their implementation plan are always available on the Commission's Transparency Platform and all PCIs need to have an updated website. Therefore, the wider concept of public access to legislative documents by ensuring increased transparency is fully met.

Indeed, the European Commission already publishes a lot of information concerning PCI lists and procedures. The process leading to a PCI list selection is transcribed not only in the TEN-E Regulation, but also simplified on the website of the Directorate-General for Energy, which identifies and explains the key projects, their benefits, the role of regional groups, and funding mechanisms available. Stakeholders are invited to the majority of the meetings of the regional groups which are also web-streamed, recorded and published on the website of the Directorate-General for Energy.

All the documents and methodologies, save for the ranking documents, are saved in a public group on CircaBC where members of the public can request access. In addition to this, information on the PCIs themselves is widely available. All PCI have to take into account additional specific transparency requirements by comparison to other infrastructure projects. Information such as the geographic location, technical description, implementation plan and development stage, the benefits they bring to Member States, and the local communities and the Union financial support, are available on the website of each project and on the Commission held PCI Transparency Platform[11].

General considerations as mentioned in your confirmatory application cannot provide an appropriate basis for establishing that the principle of transparency is in this case especially pressing and capable, therefore, of prevailing over the reasons justifying the

[11] https://ec.europa.eu/energy/infrastructure/transparency_platform/map-viewer/main.html.

refusal to disclose the documents in question[12]. Nor can general considerations such as the need for and NGO to fulfil its statutory aims[13].

Nor have I been able to identify any public interest capable of overriding the public interest protected by Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001, namely preserving the serenity of the procedures for the adoption of subsequent PCI lists and of the REPowerEU Plan.

In consequence, I consider that in this case there is no overriding public interest that would outweigh the public interest in safeguarding the decision-making process protected by the Article 4(3) first subparagraph of Regulation (EC) No 1049/2001.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the documents requested.

However, for the reasons explained above, no meaningful partial access is possible to documents requested without undermining the interests described above.

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

Martine DEPREZ
Director
Decision-making & Collegiality
EUROPEAN COMMISSION

For the Commission
Ilze JUHANSONE
Secretary-General

[12] Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland* v *European Commission*, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93.

[13] Judgment of the Court of Justice of 14 November 2013, *LPN and Finland* v *Commission*, C-514/11 P and C-605/11, EU:C:2013:738, paragraphs 93-95.