



EUROPEAN COMMISSION

Brussels, 26.8.2016
C(2016) 5584 final

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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 2016/3140**

Dear Mr Dehayé,

I refer to your e-mail of 11 July 2016, registered on 12 July 2016, 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 June 2016, addressed to the Directorate-General for Climate Action (DG CLIMA), you requested access to:

- *a copy of the full database behind the EU Transaction Log (on Carbon trading) (EUTL), listed at <http://ec.europa.eu/environment/ets/welcome.do?languageCode=en>;*
- *a copy of the full database behind the Union Registry;*
- *a copy of the full database behind the Community Independent Transaction Log (CITL);*
- *a copy of the full database behind the Effort Sharing Decision instrument (ESD).*

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

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

As the data from the CITL database are included in the EUTL database, this decision refers to EUTL as encompassing the content of both databases. Consequently, the scope of your request concerns the EUTL, Union Registry and ESD databases (hereinafter, 'the databases').

In its initial reply of 4 July 2016, DG CLIMA provided references to extensive information which is publicly available and partially reproduces the content of the databases mentioned above.³ As regards all those parts of the databases which are not publicly accessible, DG CLIMA refused access based on:

- the confidentiality clauses of sectorial legislation, i.e. Articles 109(1) and 110(1) of the Commission Regulation (EU) No 389/2013 of 2 May 2013 establishing a Union Registry⁴ (in relation to the accounting of transactions under the Union emissions trading scheme (ETS)) (hereinafter, the Registry Regulation);
- Article 4(2), first indent (protection of commercial interests) of Regulation 1049/2001;
- Article 4(1)(b) (protection of the privacy and integrity of the individual) of Regulation 1049/2001.

Through your confirmatory application you request a review of this position. While you *agree*, in reply to the application of Article 4(1)(b) of Regulation 1049/2001, *that there are* [in case of disclosure] *indeed concerns with respect to privacy*, and do not contest the application of the exception regarding the protection of commercial interests, you strive to prove the existence of an overriding public interest in disclosure *of a partial dump of the database[s]*.

Please note that I consider your confirmatory application limited to those parts of the databases which are not already publicly available⁵.

As regards your wish to receive the parts which are already public in a standalone dataset, i.e. all publicly available data in a format other than the format already available to the public via the EUTL website, this request cannot be granted. According to Article 10(2) of Regulation 1049/2001: "*If a document has already been released by the institution concerned and is easily accessible to the applicant, the institution may fulfil its obligation of granting access to documents by informing the applicant how to obtain the requested document*". As already mentioned above, in its initial reply of 4 July 2016, DG CLIMA provided the references from where the data in question are publicly retrievable.

³ On the EUTL public website (<http://ec.europa.eu/environment/ets/>), the national inventory submissions section of the United Nations Framework Convention on Climate Change (UNFCCC) website (http://unfccc.int/national_reports/annex_i_ghg_inventories/national_inventories_submissions/items/9492.php); the European Environmental Agency's website (<http://www.eea.europa.eu/data-and-maps/data/data-viewers/emissions-trading-viewer> and <http://www.eea.europa.eu/data-and-maps/data/euOpean-union-emissions-trading-scheme-eu-ets-data-from-citl-4>), and DG CLIMA's website (http://ec.europa.eu/clima/policies/ets/registry/faq_en.htm).

⁴ Official Journal L 122, 3.5.2013, p. 1 to 59.

⁵ Cf. footnote 3.

I consider, therefore, that the Commission has no obligation under the Regulation 1049/2001 to provide you the same data under a different format.

Moreover, such a standalone dataset would contain all data, both those already publicly available and personal data/commercially sensitive data (for the latter two types of data, please see explanations in sections 2.2 and 2.3 below). As there is no existing tool (apart from the public EUTL website), for the databases concerned, to anonymise the data and/or redact the commercially sensitive information falling under the scope of Article 4 of Regulation 1049/2001 (which would be contained in such a standalone dataset), your request could be interpreted as requiring the Commission to create a new document. However, according to the General Court's case-law⁶, it is not permissible to compel the Commission, in the context of an application for access to documents made under Regulation No 1049/2001, to communicate to the applicant part or all of the data contained in one of its databases — or in several of them — organised according to a classification scheme not supported by that database. This also follows from Article 10(3) of Regulation 1049/2001 which stipulates that documents shall be supplied in an existing version and format. .

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 or service concerned at the initial stage.

Following this review, I regret to inform you that I have to confirm the conclusions of the initial reply provided by DG CLIMA. The disclosure of the non-public parts of the databases has to be refused on the basis of:

- the confidentiality clauses of sectorial legislation, i.e. Articles 109(1) and 110(1) of the Registry Regulation⁷;
- Article 4(2), first indent (protection of commercial interests) of Regulation 1049/2001;
- Article 4(1)(b) (protection of the privacy and integrity of the individual) of Regulation 1049/2001.

The reasons for refusal are set out below.

⁶ See Case T-214/13, *Typke v Commission*, paragraph 58.

⁷ Official Journal L 122, 3.5.2013, p. 1 to 59.

2.1. Special provisions in the Registry Regulation

Article 110(1) of the Registry Regulation provides that *[i]nformation, including the holdings of all accounts, all transactions made, the unique unit identification code of the allowances and the unique numeric value of the unit serial number of the Kyoto units held or affected by a transaction, held in the EUTL, the Union Registry and any other KP registry shall be considered confidential except as otherwise required by Union law [...]*.

Furthermore, Articles 109, 110 and Annexes III, VI, VII, VIII and XIV of the Registry Regulation provide detailed information on which information contained in the databases, to which you request access, shall be made public, and which information shall be withheld, and is considered confidential.

As DG CLIMA explained in its initial reply, the latter provisions apply to the Union Registry, the EUTL and the reported data under the ESD.

Considering the above provisions, it is reasonable to assume that for all data not proactively published in accordance with the Registry Regulation, and in particular its Annexes III, VI, VII, VIII and XIV, it was the legislator's intention to protect it from public disclosure.

2.2. 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, [...], unless there is an overriding public interest in disclosure.*

The Union Registry is an online database that holds accounts for stationary installations and for aircraft operators. It keeps track of the ownership of emission allowances held in these electronic accounts. It records, and displays, the emission allowances of all account holders at a given moment in time.

The EUTL checks, records and authorises all transactions of emission allowances between accounts registered in the Union Registry.

Emission allowances represent a monetary value as they have a price and can be traded. Therefore, I consider them to constitute commercially sensitive information. Indeed, if the non-public data of the Union Registry and the EUTL, on the accounts of the companies or individuals participating in the EU ETS, were to be disclosed, the public would obtain unequivocal information about their position on the market, likely business practices and strategies as well as about their commercial value. Disclosing such information to the public would undermine the commercial position of the companies concerned vis-à-vis their competitors.

The Commission publishes each year in April the verified emission data representing the actual emissions into the environment of the installations of the preceding year. Premature disclosure of these data, even after redacting the account holders' identities⁸, would undermine the whole ETS as it would provide comprehensive information on demands in allowances and trading patterns and strategies during the actual trading year, giving rise to speculations and destabilising the emission trading market. Equally, the disclosure of non-public, anonymised⁹ data of the EUTL database would provide information on paid prices and trading intensity at certain moments of the year, fuelling speculations and price volatility on the market. I consider such effects as affecting negatively the commercial interests of account holders which participate on the emission allowances trading market.

In consequence, there is a real and non-hypothetical risk that public access to the above-mentioned data would undermine the commercial interests of account holders. I conclude, therefore, that access to the non-public parts of the databases must be denied on the basis of the exception laid down in the first indent of Article 4(2) of Regulation 1049/2001.

2.3. Protection of the 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.*

The databases contain names, identification numbers, addresses and other personal information of account holders. These data constitute personal data within the meaning of Article 2(a) of Regulation 45/2001¹⁰, which defines personal data as *any information relating to an identified or identifiable natural person [...]; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity.*

In consequence, the public disclosure of these data in the requested documents would constitute processing (transfer) of personal data within the meaning of Article 8(b) of Regulation 45/2001.

⁸ Without prejudice to the question whether such an anonymisation would be technically feasible or administratively practicable (quod non, given the magnitude of the data, i.e. around 13.000 installations and 20.000 open and closed accounts. As already explained in Section 1, for the databases concerned, there is no existing tool to anonymise the data falling under the scope of Article 4(1)(b) of Regulation 1049/2001. Case-by-case assessments and manually operated redactions would be necessary).

⁹ Cf. footnote 7.

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.

In accordance with the *Bavarian Lager* ruling¹¹, when a request is made for access to documents containing personal data, Regulation 45/2001 becomes fully applicable. According to Article 8(b) of that Regulation, personal data shall only be transferred to recipients 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 cumulative.¹² Only if both conditions are fulfilled and the processing is lawful in accordance with the requirements of Article 5 of Regulation 45/2001, can the processing (transfer) of personal data occur.

I would also like to bring to your attention the recent judgment in the *ClientEarth* case, where the Court of Justice ruled that *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. 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 access.*¹³ I refer also to the *Strack* case, where the Court of Justice ruled that the Institution does not have to examine by itself the existence of a need for transferring personal data¹⁴.

Neither in your initial, nor in your confirmatory application, have you established the necessity of, nor any interest in, disclosing any of the above-mentioned personal data. Therefore, I have to conclude that the transfer of personal data through the disclosure of the requested databases cannot be considered as fulfilling the requirement of Regulation 45/2001. Consequently, 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 included therein and it cannot be assumed that the legitimate rights of the data subjects concerned would not be prejudiced by such disclosure.

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

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

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.

¹¹ Judgment in *Commission v Bavarian Lager*, case C-28/08 P, EU:C:2010:378.

¹² *Ibid.*, paragraphs 77 to 78.

¹³ Judgment in *ClientEarth and PAN Europe v EFSA*, case C-615/13 P, EU:C:2015:489, paragraph 47.

¹⁴ Judgment in *Strack v Commission*, case C-127/13 P, EU:C:2014:2250, paragraph 106.

In your confirmatory application, you make reference to the Aarhus Regulation¹⁵ in relation to your attempt to demonstrate the existence of an overriding public interest in disclosure of the databases.

The first sentence of Article 6(1) of the Aarhus Regulation lays down a legal presumption pursuant to which an overriding public interest in disclosure exists as regards the exception of Article 4(2), first and third indents, where the information requested concerns 'emissions into the environment', except where that information concerns an investigation, in particular one concerning possible infringements of European Union law. That legal presumption relates to the last clause of Article 4(2) of Regulation 1049/2001, excluding the possibility of refusing access to a document if a public interest overriding the protected interests justifies the disclosure of the document concerned.

The second sentence of Article 6(1) of the Aarhus Regulation reaffirms and reinforces the obligation to interpret the exceptions laid down by Regulation 1049/2001 strictly. This obligation requires the institution concerned to take into account the public interest in disclosure of the requested environmental information and whether that information concerns information on 'emissions into the environment'.

In this respect, I would like to point out that the interpretation of the notion of 'emissions into the environment' within the meaning of the above mentioned Article 6(1) is currently the subject matter of a pending case before the European Court of Justice, namely case C-673/13¹⁶P. In the Commission's view, Article 6(1) of the Aarhus Regulation refers to information on emissions which fulfils two cumulative conditions: (i) it must emanate from installations such as factories and power stations and (ii) the information must concern actual, not hypothetical emission.

Consequently, while the data requested concern ETS emission allowances and the way they are traded, it is not sufficient to qualify these data as 'emissions into the environment' as they constitute potential, hypothetical emissions. The only type of data falling under the scope of both your confirmatory request and Article 6 of the Aarhus Regulation are the verified emissions data. As explained already by DG CLIMA in their initial reply and above, these are made public on 1 April of the following year (year n+1).

¹⁵ 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.

¹⁶ This case is the result from an appeal brought by the European Commission against the judgment of the General Court in case *Stichting Greenpeace Nederland and Pan Europe*, T-545/11 of 8 October 2013, ECLI:EU:T:2013:523.

Furthermore, in your confirmatory application, you provide a reasoning on why, in your view, there is an overriding public interest in disclosure of the databases. You argue that you need access to the content of the databases as you *would be interested in applying techniques of Topological Data Analysis to this dataset, in order to find topological features in data, such as a loop, potentially a telltale of VAT carousel fraud* [sic]. You state that [s]uch analysis could already be conducted on anonymised data, [...] but would be exceedingly difficult through the web interface currently available. Releasing this very interesting data as a standalone dataset would help attract the attention of researchers, and, [i]f successful would help in [cases of] carbon emissions VAT fraud.

Please note that your motivation of carrying out analyses and studies on the data contained in the databases in question seem to be rather of a private, professional nature than constituting an overriding public interest. Please note that if access is granted to a document under Regulation 1049/2001, this document becomes accessible to the public at large (*erga omnes*). As confirmed by the Court of First Instance in its *Sison*¹⁷ and *Franchet and Byk*¹⁸ judgments, *the purpose of the regulation is to guarantee access for everyone to public documents and not only access for the requesting party to documents concerning him and it follows that the applicants' application must be examined in the same way as an application from any other person.*

In any event, notwithstanding the public interest which may exist in conducting the analyses you propose, I do not consider that it outweighs the public and private interests protected by the exception laid down in Article 4(2), first indent. Furthermore, I consider that the public interest in transparency is being satisfied by the proactive publication of extensive data of the databases, as explained by DG CLIMA in their initial reply¹⁹.

The fact that the databases relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness,²⁰ 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 (further) partial access to the databases requested. However, for the reasons explained above, no meaningful partial access is possible without undermining the interests described above.

Consequently, I have come to the conclusion that the withheld data are covered in their entirety by the invoked exceptions to the right of public access.

¹⁷ Judgement in *Sison v Council*, Joined Cases T-110/03, T-150/03 and T-405/03, EU:T:2005:143, paragraphs 50 to 55. See also Judgement in *P Sison*, Case C-266/05 EU:C:2007:75 paragraphs 43 to 48; and judgment in *MyTravel v Commission*, Case T-403/05, EU:T:2008:316, paragraph 66.

¹⁸ Judgement in *Franchet and Byk v Commission*, Joined Cases T-391/03 and T-70/04, EU:T:2006:190, paragraph 82.

¹⁹ Cf. footnote 3.

²⁰ Judgment of the Court (Grand Chamber) of 29 June 2010 in case C-139/07 P, *Commission v Technische Glaswerke Ilmenau GmbH*, paragraphs 53-55 and 60; Judgment of the Court (Grand Chamber) of 29 June 2010, *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*