Brussels, 15.3.2018
C(2018) 1704 final

Ms Vicky CANN
Corporate Europe Observatory
Rue d’Edimbourg 26
1050 Brussels
Belgium

DEcision of the Secretary-General on behalf of the Commission pursuant to Article 4 of the Implementing Rules to Regulation (EC) No 1049/2001

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2017-7634 and 2018-91

Dear Ms Cann,

I refer to your e-mail of 24 January 2018, registered on the next 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 documents (hereafter ‘Regulation 1049/2001’).

1. Scope of your request

In your initial application of 20 December 2017, registered under the reference number GESTDEM 2017/7630, addressed to the Directorate-General for Health and Food Safety, you requested access to the voting list for the 13 December 2017 vote on draft rules for identifying endocrine-disrupting chemicals in pesticides by the Standing Committee on Plants, Animals, Food and Feed (PAFF), and the voting lists for all previous votes during 2016 and 2017 where endocrine-disrupting chemicals were voted upon.

---

In your initial application of 20 December 2017, registered under reference number GESTDEM 2017/7632, addressed to the Directorate-General for Health and Food Safety, you requested access to the minutes/report for the 13 December 2017 meeting on draft rules for identifying endocrine-disrupting chemicals in pesticides by the Standing Committee on Plants, Animals, Food and Feed (PAFF), and the minutes/reports for all previous votes during 2016 and 2017 where endocrine-disrupting chemicals were discussed.

In your initial application of 20 December 2017, registered under reference number GESTDEM 2017/7634, addressed to the Directorate-General for Health and Food Safety, you requested the minutes/reports of all lobby meetings held by DG Sante in 2017 where endocrine-disrupting chemicals were discussed with one or more of the following organisations: European Chemical Industry Council (Cefic), European Crop Protection Association (ECPA), PlasticsEurope, Cosmetics Europe, BASF, Bayer, European Centre for Ecotoxicology and Toxicology of Chemicals (ECETOC), Syngenta, EPPA SA, Croplife, Huggard Consulting, Weber Shandwick, Fleishman-Hillard, Burson-Marsteller, American Chamber of Commerce to the European Union (AmCham EU), US Mission to the EU, or any organisation or consultancy firm representing any of these actors.

On 27 December 2017, the Directorate-General for Health and Food Safety replied to your applications registered under GESTDEM numbers 2017-7630 and 2017-7632 by providing the link to the documents you requested.

You acknowledged receipt of this positive reply of the Directorate-General for Health and Food Safety to your applications registered under reference numbers 2017/7630 and 2017/7632 and requested further information about how each country voted. This request was registered under the registration number GESTDEM 2018/91.

On 12 January 2018, the Directorate-General for Health and Food Safety replied to your initial requests registered under reference numbers GESTDEM 2017-7634 and 2018-91. It had identified the following documents as falling under the scope of your request:

1. E-mail of 30 March 2017 entitled 'Back-to-Office about a meeting of N. Chaze with Bayer, 29 March 2017, Ares(2018)204276 (hereafter 'document 1');


The Directorate-General for Health and Food Safety granted partial access to the parts of document 1 falling within the scope of your request, subject only to the redaction of personal data, in accordance with Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation 1049/2001. It refused access to documents 2 and 3 based on Article 4(3), first subparagraph (protection of the decision-making process) of Regulation 1049/2001.

In your confirmatory application, you state that you are filling a confirmatory application with regard to your access to documents request concerning the voting lists of the Standing Committee of Plants, Animals, Food and Feed, Section Phytopharmaceuticals (Plant Protection Products – Legislation) (GESTDEM 2017-7630), the minutes of this Committee (GESTDEM 2017-7632) and its follow-up request (GESTDEM 2018-91). You refer to the reply of 12 January 2018 by the Directorate-General for Health and Food Safety and provide arguments why, in your view, it is imperative to know the breakdown of the PAFF votes.

In this respect, I would like to clarify that the Commission issued positive replies to your applications registered under reference numbers GESTDEM 2017-7630 and 2017-7632, as full access was granted to all parts of the documents falling under the scope of your requests. Article 7(2) of Regulation 1049/2001 only provides for a confirmatory application in the event of a total or partial refusal, or in case an applicant contests that certain parts of the documents fall outside of the scope of his or her request.

Therefore, a confirmatory application in relation to your initial applications registered under reference numbers GESTDEM 2017-7630 and 2017-7632 is not admissible.

The reply of 12 January 2018 by the Directorate-General for Health and Food Safety concerns your applications registered under reference numbers GESTDEM 2017-7634 and 2018-91. Through your confirmatory application, you request a review of this position as regards the non-disclosure of the voting lists of the meetings held in 2016-2017 by the Standing Committee of Plants, Animals, Food and Feed, Section Phytopharmaceuticals (Plant Protection Products – Legislation). Consequently, the scope of your confirmatory application will be limited to documents 2 and 3.

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 regret to inform you that I have to confirm the initial decision of the Directorate-General for Health and Food Safety to refuse access to documents 2 and 3, based on the exception of Article 4(3), first subparagraph (protection of the decision-making process) of Regulation 1049/2001, for the reasons set out below.
2.1. Protection of the decision-making process

Article 4(3) first subparagraph, of Regulation 1049/2001 provides that access 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.

You request access to the voting lists from 2016-17 of the Standing Committee of Plants, Animals, Food and Feed, Section Phytopharmaceuticals (Plant Protection Products – Legislation) showing how each Member State voted.

I would like to provide some detailed explanations about the related decision-making process, which is still ongoing. Please note that in the present case, the Commission has to respect the regulatory procedure with scrutiny, introduced by the Council Decision of 17 July 2006, which has not been abolished nor modified since the entry into force of the Lisbon Treaty and which is still applicable in many legislative acts. This procedure requires, first, an opinion in a committee of representatives of the Member States, and then, a control by the two branches of the legislative power (the European Parliament and the Council).

At the meeting on the 12/13 of December 2017 of the Standing Committee of Plants, Animals, Food and Feed, Section Phytopharmaceuticals (Plant Protection Products – Legislation), Member States representatives voted in favour of a new draft Regulation for setting criteria for the identification of endocrine disruptors used in pesticides. On 9 January 2018, this draft Regulation was submitted to scrutiny of the European Parliament and the Council. Both institutions have three months to examine it before final adoption by the Commission. It is therefore obvious that the decision-making process is still ongoing in this file, because the scrutiny period for the European Parliament and the Council is still running and the Commission has not yet adopted the final act.

Having regard to the ongoing nature of the decision-making process, I am of the view that disclosure of the requested voting lists would seriously undermine the decision-making within the Commission and at interinstitutional level for the reasons set out below.

The endocrine disruptors file is a very sensitive file. The Commission has been, and still is, the target of external pressure from various stakeholders, representing sometimes conflicting interests. These include the chemical industry both in Europe and abroad, civil society and the non-governmental organisations’ community, consumer groups, Member States, and third countries.

---

Recent experience in the decision-making process at interinstitutional level has shown that the use by the European Parliament or by the Council of their right of scrutiny can block the final adoption of the Regulation. An earlier draft Regulation for setting criteria for the identification of endocrine disruptors used in pesticides, proposed by the Commission in July 2017, was opposed by the European Parliament. In such a case, the Commission is obliged to review its proposed action in the light of this input and has to decide on further steps. It is therefore not to be excluded that the Commission might need to review again its proposed action.

In order to ensure that it can fulfil its obligation to adopt the necessary act in this file, the Commission must protect its decision-making process from any disclosure which could seriously undermine it.

According to the internal rules of procedure of the Standing Committee of Plants, Animals, Food and Feed, Section Phytopharmaceuticals (Plant Protection Products – Legislation), the committee's discussions shall be kept confidential. These rules are reflected in Article 14(2) of the Standard Rules of Procedures for Committees, which the Commission adopted pursuant to Article 7 of the Council Decision 1999/468/EC. They explicitly exclude the positions of individual Member States from public access. In fact, Articles 11(2) and 14(2) of the Standard Rules of Procedure affirm, respectively, that summary records of the meetings shall not mention the position of individual Member States in the Committee's discussions and that those discussions shall remain confidential. In relation to the voting, Article 7(3) of the Council Decision 1999/468/EC and Article 4(2) of the Standard Rules of Procedure, refer to the ‘voting results’, i.e. the total voting results only, not the individual Member States’ votes.

It follows that public access cannot be granted to the requested voting lists showing the vote of each individual Member State in the meetings of the Standing Committee of

---

8 Article 11(2) of the Standard Rules of Procedure for Committees states that [a] summary report for the European Parliament shall be drawn up under the auspices of the Chairman. This report shall briefly describe each agenda point and the result of the vote on the proposed measures submitted to the committee. It shall not mention the individual position of Member States in the committee’s discussions. Article 14(2) of the Standard Rules states that [t]he committee’s discussions shall be kept confidential.
9 Article 7(3) of the Council Decision 1999/468/EC states that [t]he European Parliament shall be regularly kept informed by the Commission of committee proceedings following arrangements which ensure that the transmission system is transparent and that the information forwarded and the various stages of the procedure are identified. To that end, it shall receive agendas for committee meetings, draft measures submitted to the committees for the implementation of instruments adopted by the procedure provided for by Article 251 of the Treaty, and the results of voting and summary records of the meetings and lists of the authorities and organisations to which the persons designated by the Member States to represent them belong. Article 4(2) of the Standard Rules of Procedure states that [t]he Commission shall send the overall result of voting, the attendance list referred to in Article 12 and the summary report of the meetings referred to in Article 11(2) to the European Parliament within 14 calendar days of each committee meeting.
Plants, Animals, Food and Feed, Section Phytopharmaceuticals (Plant Protection Products – Legislation), as this would result in the above-mentioned confidentiality requirement being deprived of its meaningful effect.

In its Corporate Europe Observatory judgment\(^{10}\), the General Court confirmed that minutes circulated to participants in the framework of a meeting, which was not open to the public, are to be considered as internal documents within the meaning of Article 4(3) of Regulation (EC) No 1049/2001 and deserve protection on that basis. The same reasoning applies, a fortiori, to the votes casted by the Member States in the framework of the Standing Committee of Plants, Animals, Food and Feed, Section Phytopharmaceuticals (Plant Protection Products – Legislation).

Public disclosure of the votes casted by the Member States, at this stage, would seriously undermine the ongoing decision-making process at interinstitutional level and within the Commission regarding the adoption of the proposed act. Disclosure of the vote of Member States, against the explicit confidentiality requirements explained above, would seriously undermine the efficient and constructive cooperation between the Commission and Member States in the context of the Standing Committee of Plants, Animals, Food and Feed, Section Phytopharmaceuticals (Plant Protection Products – Legislation). Such public disclosure would seriously undermine the relationship of trust between the Commission and the Member States, as Member States casted their votes in a clear legal framework providing for confidentiality relating to the individual votes expressed.

The particular circumstances of this case, in particular the sensitivity of the endocrine disruptors file, do not allow to exclude that the European Parliament or the Council will exercise again their right of scrutiny. If this is the case, an amended draft Regulation will have to be discussed again in the Standing Committee of Plants, Animals, Food and Feed, Section Phytopharmaceuticals (Plant Protection Products – Legislation), where the Member States would be called upon to vote again. Public disclosure of the requested voting lists showing the individual votes of each Member State, at this stage, would not only go against the explicit provisions of the Standard Rules of Procedures, but it would reduce the margin for manoeuvre of the Member States and reduce their flexibility, thus seriously undermining the decision-making process in the Commission as regards the adoption of the final Regulation.

Indeed, the Member States and the Commission must be free to explore all possible options in preparation of a decision within Standing Committees and Groups of Experts, free from external pressure. Public disclosure of the voting lists showing the votes of each individual Member State, under the current legal framework, would unsettle the functioning of the Standing Committee of Plants, Animals, Food and Feed, Section Phytopharmaceuticals (Plant Protection Products – Legislation), put under strain the relationship of trust between Member States and the Commission, expose a difficult and lengthy decision-making process to further external pressure and jeopardise the serenity of the ongoing period of examination by the European Parliament and the Council. This

---

\(^{10}\) Judgment of the General Court of 7 June 2013 in case T-93/11, Stichting Corporate Europe Observatory v European Commission, EU:T:2013:308, paragraphs 32-33.
would, in turn, seriously undermining the decision-making process of the Commission by reducing the chances to proceed to the adoption of the Regulation.

These risks are reasonably foreseeable and certainly not hypothetical.

I therefore conclude that documents 2 and 3 cannot be disclosed, at this stage, based on the exception of Article 4(3), first subparagraph (protection of the decision-making process) of Regulation 1049/2001.

2.2. No Overriding Public Interest in Disclosure

The exception laid down in Article 4(3), first subparagraph, 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 in the disclosure of the voting lists showing the vote of each Member State in the Standing Committee of Plants, Animals, Food and Feed, Section Phytopharmaceuticals (Plant Protection Products – Legislation). You explain that the issue of endocrine disruptors is an important matter related to public health policy and decision-making and that it concerns many communities in many countries. You state that you are aware that Commission decision-making on endocrine disruptors has been delayed over several years and has been subject to Member State’s legal action. You explain that you are also aware that there has been clear lobbying, over a number of years, by those with financial interests in the issue, to influence the outcome. You conclude that it is imperative to know the breakdown of the PAFF votes, so as to be able to establish the extent of that influence, including on Member States.

Whilst I understand that your organisation is interested in the breakdown of the votes in the Standing Committee of Plants, Animals, Food and Feed, Section Phytopharmaceuticals (Plant Protection Products – Legislation), it is not clear how the breakdown of these votes would enable it to establish the extent of lobbying influence, including on Member States. Nor do you provide any concrete indications of possible influence that could justify such disclosure in contravention of the above-mentioned rules applicable to Committees.

Indeed, as confirmed by the Court of First Instance in its Sison\[^{11}\] and Franchet and Byk\[^{12}\] 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


\[^{12}\] Judgment of the Court of First Instance of 6 July 2006 in joined cases T-391/03 and T-70/04, Yves Franchet and Daniel Byk v Commission, EU:T:2006:190, paragraph 82.
and it follows that the applicants’ application must be examined in the same way as an application from any other person.

Although I share the view that endocrine disruptors is an important issue, I consider that, in this case, the public interest is better served by protecting the ongoing decision-making process, in accordance with Article 4(3), first subparagraph of Regulation 1049/2001.

The fact that the Commission has made many documents relating to this issue publicly available via a dedicated webpage: http://ec.europa.eu/environment/chemicals/endocrine/index_en.htm, including the voting result, only reinforces this conclusion.

3. PARTIAL ACCESS

I have also examined the possibility of granting partial access to documents 2 and 3 in accordance with Article 4(6) of Regulation (EC) No 1049/2001.

However, meaningful partial access for these documents is not possible, as they are fully covered by the exception relating to the protection of decision-making process, provided for in Article 4(3), first subparagraph of Regulation 1049/2001.

4. 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 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

For the Commission
Martin SELMAYR
Secretary-General

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION