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OUT OF SCOPE

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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 2018/5515**

Dear 

I refer to your e-mail of 3 December 2018, registered on the same day, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereafter 'Regulation No 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 18 October 2018, registered under reference number GestDem 2018/5515 and addressed to the Directorate-General for Health and Food Safety, you requested access to the 'exchanges between the European Commission and the European Food Safety Agency, as well as to the updated version of the European Food Safety Agency report which has been put on CIRCABC³' regarding the renewal process of the active substance chlorpropham.

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

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

³ CIRCABC (Communication and Information Resource Centre for Administrations, Businesses and Citizens) is a web-based service provided by the European Commission used to create collaborative workspaces. It is divided into categories and interest groups, allowing people in those groups to share information and resources.

On 19 November 2018, the Directorate-General for Health and Food Safety replied to your application.

It identified 3 documents and their annexes as falling under the scope of your request:

- (1) email from the European Food Safety Agency to the European Commission on chlopropharm herbicide uses and its annex on residues - 18 July 2018, Ares(2018)5571154 (hereafter 'document 1' and 'annex to document 1');
- (2) email from the European Commission to the European Food Safety Agency and its annex containing the comments of the Rapporteur Member State, the Netherlands – 23 July 2018, Ares(2018)5556920 (hereafter 'document 2' and 'annex to document 2'); and
- (3) email from the European Food Safety Agency to the European Commission on chlopropharm – 29 August 2018, Ares(2018)5571182 (hereafter 'document 3').

Some documents originated from third parties, and the originators have been consulted in accordance with Regulation No 1049/2001 in order to assess whether an exception to the right of access to documents could be applicable. Having examined the documents and considering the opinions of third parties, the Directorate-General for Health and Food Safety decided to grant:

- full access to the annex to document 1;
- partial access to documents 1, 2 and 3, subject to redactions based on Article 4(1)(b) of Regulation No 1049/2001 on the protection of privacy and the integrity of the individual; and
- no access to the annex to document 2, the content of which was protected by the exception of Article 4(3), first subparagraph, of Regulation No 1049/2001 on the protection of the ongoing decision-making process.

You acknowledged receipt of the reply of the Directorate-General for Health and Food Safety to your application and filed a confirmatory application.

In your confirmatory application, you request a review of the position of the Directorate-General for Health and Food Safety as regards the non-disclosure of the annex to document 2, containing the technical comments of the Rapporteur Member State (in this case the Netherlands, the Board for the Authorisation of Plant Protection Products and Biocides) reflecting their position on the European Food Safety Authority document.⁴

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation No 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

⁴ Peer review of the pesticide risk assessment of the active substance chlorpropham, published in the EFSA Journal 2017;15(7):4903.

Following this review, I have to confirm the initial decision of the Directorate-General for Health and Food Safety to refuse access to the annex to document 2, based on the exception of Article 4(3), first subparagraph (protection of the decision-making process) of Regulation No 1049/2001, for the reasons set out below.

2.1. Protection of the decision-making process

Article 4(3) first subparagraph, of Regulation No 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.

The annex to document 2 sets out the position of an individual Member State regarding the discussions in the Standing Committee on Plants, Animals, Food and Feed. It contains technical comments of the Rapporteur Member State authority on the European Food Safety Authority peer-review document on the pesticide risk assessment of the active substance chlorpropham. This information is protected as it has been gathered in the framework of the Standing Committee on Plants, Animals, Food and Feed where the peer-review document has been discussed on several occasions.

The rules applicable to comitology procedures preserve the confidentiality of the individual positions of the Member States. The Standard Rules of Procedure adopted by the European Commission pursuant to Article 9 of Regulation No 182/2011⁵ ('the Comitology Regulation') explicitly exclude the positions of individual Member States from public access. In addition, Article 10 of the Comitology Regulation limits the scope of the documents to be made publicly available via the comitology register. The documents reflecting the individual positions of the Member States are not among the documents to be disclosed.

It follows that the European Commission cannot grant public access under Regulation No 1049/2001 to documents containing references to the individual Member States that expressed opinions in the framework of committee meetings, as this would result in the above-mentioned confidentiality requirements being deprived of their meaningful effect. Such a public disclosure would undoubtedly affect mutual trust between the European Commission and the Member States and would therefore be at odds with the principle of sincere cooperation.

This is a concrete and realistic risk, as the public disclosure of the individual positions of Member States, against the explicit rules on confidentiality, would undermine the trust between the Member States and the European Commission, taking into account also the sensitivity of the subject matter at hand. This would seriously undermine the decision-

⁵ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, Official Journal L 55 of 28.2.2011, p. 13–18.

making process of the European Commission as it would jeopardise the effectiveness of its work.

In your confirmatory application you allege that, since the requester of the documents is [REDACTED], the latter is directly and individually concerned by it, and the disclosure of the document would not seriously undermine the decision-making process.

Please note however that the effects of disclosure of a document under Regulation No 1049/2001 apply *erga omnes* (i.e. if disclosed to one requester, the document becomes accessible to any citizen). Therefore, the question whether the requester is [REDACTED] is irrelevant.⁶

You also allege that the Court recognised in the judgement of 4 September 2018 in Case C-57/16⁷, that impact assessments should be disclosed even though the decision-making process is ongoing.

Please note however that the above-mentioned judgment only dismissed the use of a general presumption of non-disclosure for (documents pertaining to) draft impact assessments, without prejudice to the possibility to refuse access on a case-by-case basis. In any case, the judgment is not applicable to the case at hand, which does not relate to (documents pertaining to) draft impact assessments, but to the position of a Member State in the framework of a comitology procedure.

In view of all the above, I conclude that the refusal of access to documents is justified based on Article 4(3), first subparagraph of Regulation No 1049/2001.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(3), first subparagraph, of Regulation 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 there is an overriding public interest in the disclosure of the comments made by the Rapporteur Member State as information concerning pesticides qualifies as ‘environmental information’, namely it is related to the emission of substances into the environment as described under Article 6(1) of Regulation No 1367/2006.⁸ However, the Court recently ruled that this is the case only

⁶ Judgment of 21 October 2010, *Agapiou Joséphidès v Commission and EACEA*, T-439/08, EU:T:2010:442 paragraph 116; judgment of 27 November 2018, *VG v Commission*, Joined Cases T-314/16 and T-435/16, EU:T:2018:841, paragraph 55 and judgment of 13 November 2015, *ClientEarth v Commission*, Joined Cases T-424/14 and T-425/14, EU:T:2015:848, paragraph 121.

⁷ Judgment of 4 September 2018, *ClientEarth v European Commission*, C-57/16 P, EU:C:2018:660.

⁸ 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, Official Journal L 264 of 25.9.2006, p. 13–19.

via a plant protection product subject to the authorisation procedure, so active substances as such do not constitute emissions into the environment.⁹

In light of the above, 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 No 1049/2001.

The fact that the Commission has made many documents relating to this issue publicly available via the comitology register only reinforces this conclusion.

4. NO PARTIAL ACCESS

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

However, meaningful partial access for this document is not possible, as it is fully covered by the exception relating to the protection of decision-making process, provided for in Article 4(3), first subparagraph of Regulation No 1049/2001.

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

Yours sincerely,



For the Commission
Martin SELMAYR
Secretary-General

⁹ Judgment of 21 November 2018, *Greenpeace and PAN Europe v Commission*, T-545/11 RENV, EU:T:2018:817, paragraphs 82 and 90.