



## EUROPEAN COMMISSION

Brussels, 22.1.2019  
C(2019) 635 final

**OUT OF SCOPE**

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Belgium

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE  
IMPLEMENTING RULES TO REGULATION No 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation No 1049/2001 - GESTDEM 2018/2425**

Dear 

I refer to your letter of 27 September 2018, registered on 28 September 2018, 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<sup>2</sup> ('Regulation No 1049/2001').

**1. SCOPE OF YOUR REQUEST**

In your initial application of 27 April 2018, addressed to the Directorate-General for Maritime Affairs and Fisheries, you requested access to 'audit reports DK-E2-2016-02-A, DK-D4-2017-02-A and IT-2017/D4-02-A'.

In its first initial reply of 8 June 2018, the Directorate-General for Maritime Affairs and Fisheries granted full access to audit report DK-D4-2017-02-A. In the additional initial reply of 14 June 2018, the Directorate-General for Maritime Affairs and Fisheries refused access to the other documents, based on the exception protecting the purpose of investigations laid down in the third indent of Article 4(2) of Regulation No 1049/2001.

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<sup>1</sup> Official Journal L 345 of 29.12.2001, p. 94.

<sup>2</sup> Official Journal L 145 of 31.5.2001, p. 43.

In your confirmatory application, you question the applicability of the exception protecting the purpose of investigations to the undisclosed documents and provide a series of arguments in support of this view.

You also claim that there is an overriding public interest in the disclosure of the above-mentioned documents, which is assessed in point 3 of this decision.

I note that in your confirmatory application, you explicitly underline that the reply dated 14 June 2018 was only communicated to you on 7 September 2018. I apologise for this unfortunate administrative error.

## **2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION NO 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 relevant Directorate-General or service at the initial stage.

Following this review, I wish to inform you that I confirm the position of the Directorate-General for Maritime Affairs and Fisheries to refuse access to the relevant documents. The underlying exception is the purpose of inspections, investigations and audits provided for in Article 4(2), third indent of Regulation No 1049/2001.

The detailed reasons are set out below.

### **2.1. Explanation relating to the investigation carried out under Fisheries Control Regulation No 1224/2009<sup>3</sup>**

In order to assess the applicability of the exception invoked above to the requested documents, it is useful to explain the purpose and conduct of investigations under Fisheries Control Regulation No 1224/2009.

According to Articles 96 to 102 of the said Regulation, the task of the European Commission is, among other things, to control and evaluate the application of the rules of the common fisheries policy by the Member States by means of the examination of information and documents and by conducting verifications, autonomous inspections and audits and to facilitate coordination and cooperation between them. For this purpose the European Commission may, of its own accord and by its own means, initiate and carry out inquiries, verifications, inspections and audits.

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<sup>3</sup> Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, Official Journal L 343 of 22.12.2009, p.1.

The documents that you have requested contain data that have been made available to the European Commission by the relevant Member States within the framework of the activities of the Fisheries Control Regulation No 1224/2009. Therefore, the rules on access to documents, particularly those set out in Article 4 of Regulation No 1049/2001, cannot be applied without taking into account the specific rules governing the transmission and use of data contained in those documents, which are laid down in Article 113 of the Fisheries Control Regulation No 1224/2009<sup>4</sup>.

In this respect, the European Commission needs to apply both Regulation No 1049/2001 and the Fisheries Control Regulation No 1224/2009 in a way that allows for the most adequate interpretation of both legal instruments. Regulation No 1049/2001 is a general regime on public access to documents, which must be read in conjunction with other relevant provisions, where applicable.

Consequently, Regulation No 1049/2001 still fully applies to the documents in question, whilst this does not exclude the relevance of Article 113 of the Fisheries Control Regulation No 1224/2009 for the purpose of interpreting the applicability of the exceptions of Regulation No 1049/2001 to the specific data covered by it. In this regard, Member States expect a high level of assurance as regards the confidentiality of data laid down in Article 113 of the Fisheries Control Regulation No 1224/2009<sup>5</sup>.

In the present case, the European Commission has taken into account the consultations of the relevant Member States that provided the data to the European Commission that are contained in these documents. Moreover, with reference to the requested audit reports, the European Commission's investigations have not yet been completed and the action plan and infringement procedures against the Member States concerned will be initiated in the near future. Therefore, there is a continued need for confidentiality. For these reasons, Article 4(2), third indent of Regulation No 1049/2001 (protection of the purpose of inspections, investigations and audits) applies to the documents in question.

## **2.2 Protection of the purpose of inspections, investigations and audits**

Article 4(2), third indent of Regulation No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the purpose of [...] investigations [...] unless there is an overriding public interest in disclosure.'

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<sup>4</sup> Judgment of 3 May 2018, *Republic of Malta v European Commission*, T-653/16, EU:T:2018:241, paragraph 141.

<sup>5</sup> *Ibidem*, para.149.

In your confirmatory application, you argue that ‘there is no presumption of confidentiality covering Commission audits in the context of Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy. Therefore, the Commission has the duty to carry out an individual and concrete examination of each of the remaining requested documents to ascertain whether disclosure would specifically and effectively undermine the purpose of the audit, and establish that the risk is reasonably foreseeable and not purely hypothetical. It should be noted that the documents constitute environmental information in terms of Article 2 of the Aarhus Regulation. Therefore, according to Article 6 thereof, the exceptions must be interpreted strictly’.

The documents requested are the documents forming part of the administrative files covering the audits (and their follow-up) of the national data management and data control systems, with focus on the control of fishing opportunities. They contain information gathered in the context of these audits and inspections.

The aim of the exception in Article 4(2), third indent, of Regulation No 1049/2001, as is clear from its wording, is not to protect the investigations as such, but rather their purpose, which is to ensure the cooperation with the Member States and other third parties to provide all necessary documents and clarifications to the European Commission, even if they contain confidential information, in order to ensure a proper assessment. For these reasons and considering the strong professional secrecy obligations on the European Commission, various acts of investigation may remain covered by the exception in question, even if the particular investigation or inspection that gave rise to the document to which access is sought has been completed.<sup>6</sup>

The European Commission will close the audit after the Member State has accepted and/or implemented all of the recommendation(s)/action(s) proposed in the final reports or in the action plan. Where the Member States have not accepted or implemented the recommendation(s)/action(s) proposed, the European Commission will apply appropriate measures (for example, the launching of infringement procedures). Only when the recommendations and/or (corrective) actions are implemented (i.e. followed up immediately by the Member State or in line with an action plan) or irregularities sanctioned, will the audit be definitely closed and its purpose attained.

It follows from the case law of the General Court that the exception in Article 4(2), third indent of Regulation No 1049/2001 applies ‘if disclosure of the documents in question may endanger the completion of inspections, investigations and audits’.<sup>7</sup> Furthermore, the interest protected by that exception is ‘the interest in allowing audits to be conducted independently and free of pressures, whether these come from the body being audited, from other interested bodies or from the general public.’<sup>8</sup>

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<sup>6</sup> Judgment of 12 September 2007, *Association de la presse internationale ASBL (API) v European Commission*, T-36/04, EU:T:2007:258, paragraph 133.

<sup>7</sup> Judgment of 6 July 2006, *Franchet and Byk v European Commission*, T-391/03 and T-70/04, EU:T:2006:190, paragraphs 109-110.

<sup>8</sup> Judgment of 12 May 2015, *Technion v European Commission*, T-480/11, EU:T:2015:272, paragraph 63.

The purpose of the audits conducted by the European Commission is not only to give opinions and findings and to establish the action plans with the relevant Member States, but also to ensure that all necessary measures to implement them have been taken. The evaluations and follow-ups of the relevant audits are still in progress. In this context, there is a foreseeable risk that the premature public disclosure of the audit reports would undermine the purpose of the audits and would interfere with the effective implementation of the recommendations by the relevant Member States.

Furthermore, their public disclosure would have a negative effect on the extent to which the Member States can implement the appropriate measures, free from external pressure. It would also negatively affect future audits conducted by the European Commission, as the auditees would not be able to trust that the reports become accessible only once they have taken appropriate measures on the findings.

I would also like to draw your attention in this respect to the Court of Justice's judgments in the *Technische Glaswerke Ilmenau*<sup>9</sup> and *Bavarian Lager*<sup>10</sup> cases, in which the Court confirmed that administrative activities are to be clearly distinguished from legislative procedures, for which the Court has acknowledged the existence of wider openness. The General Court confirmed this jurisprudence in its judgment in the *St. Gobain Glass*<sup>11</sup> case, stressing the serenity of administrative proceedings and the need to protect administrative procedures from external pressure.

Finally, the case law of the EU courts does not exclude the right of applicants to demonstrate that a given document, the disclosure of which has been requested, is not covered by that presumption<sup>12</sup>. In this case, however, you do not present any substantial evidence capable of calling into question the finding that the requested documents forming part of the investigation files in question are covered by the exception laid down in Article 4(2), third indent of Regulation No 1049/2001.

Consequently, the evaluations and follow-ups of the relevant audits are fully ongoing. These processes, in the light of the case law of the EU Court<sup>13</sup>, are investigations within the meaning of Article 4(2), third indent of Regulation No 1049/2001, as they are structured and formalised processes that have the purpose of collecting and analysing information in order to enable the European Commission to take further steps, such as an infringement procedure or an action plan adopted pursuant to Article 102(4) of Fisheries Control Regulation No 1224/2009.

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<sup>9</sup> Judgment of 29 June 2010, *European Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraphs 56 and 58.

<sup>10</sup> Judgment of 29 June 2010, *European Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraphs 56-57 and 63.

<sup>11</sup> Judgment of 11 December 2014, *Sait-Gobain Glass Deutschland v European Commission*, T-476/12, EU:T:2014:1059, paragraphs 81-82.

<sup>12</sup> Judgment of 9 September 2011, *Liga para a Protecção da Natureza (LPN) v European Commission*, T-29/08, EU:T:2011:448, paragraph 128.

<sup>13</sup> See judgment of 7 September 2017, *Schlyter v European Commission*, C-331/15 P, EU:C:2017:639, paragraph 46.

I conclude, therefore, that access to the requested documents, which form part of the investigation files under Fisheries Control Regulation No 1224/2009, must be denied on the basis of the exception laid down in the third indent of Article 4(2) of Regulation No 1049/2001.

### **3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exception laid down in Article 4(2), third indent 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 allege that ‘the specific circumstances relating to the implementation of the Fisheries Control Regulation demonstrate the overriding public interest in disclosing documents relating to the audits carried out by the Commission. Many fish stocks in the European Union are overfished. The Common Fisheries Policy aims to ensure that fishing activities are sustainable in the long terms. The Fisheries Control Regulation, which entered into force in 2010, establishes a control system intended to ensure compliance with the rules of the Common Fisheries Policy. In this respect, the Commission audits that evaluate a Member States's quota and effort management system, data validation systems, administrative organisation, operational system, national control action programmes and the national system of sanctions are key factors in ensuring compliance with the rules and, in the end, the sustainable management of fisheries in the EU.’

Furthermore, you argue that ‘the weaknesses in applying sanctions lead to disastrous consequences on marine biodiversity since the effective implementation of the Control Regulation is essential to ensure that fisheries activities are sustainable. It is therefore of public interest that NGOs such as Oceana have access to the Commission's audit reports.’

It is settled case law of the EU Court of Justice that, whereas the overriding public interest capable of justifying the disclosure of a document must not necessarily be distinct from the principles that underlie Regulation No 1049/2001, such general considerations cannot provide an appropriate basis for establishing that, in the present case, the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question<sup>14</sup>.

Having carefully analysed the arguments that you have put forward in your confirmatory application, I understand that they point to the alleged existence of a certain public interest in the effective enforcement of the rules laid down in the Fisheries Control Regulation No 1224/2009.

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<sup>14</sup> See, among other things, judgment of 14 November 2013 in *LPN v European Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraphs 92-93; and judgment of 21 September 2010 in *Sweden and Others v API and European Commission*, T-36/04, EU:T:2007:258, paragraphs 156-158.

Nevertheless, they do not show how there could be a need for the public to obtain access to the (draft) audit reports, or how this public interest would override the public interest in achieving compliance of the Member States concerned with the relevant EU rules as soon as possible.

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), third indent of Regulation No 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 requested relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness<sup>15</sup>, provides further support to this conclusion.

#### **4. NO PARTIAL ACCESS**

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

However, no meaningful partial access is possible, as the whole content of the documents in question is covered by the exception relating to the purpose of ongoing investigations and audits, provided for in Article 4(2), third indent of Regulation No 1049/2001

Consequently, partial access is not possible, considering that the documents requested are covered in their entirety by the invoked exception to the right of public access.

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<sup>15</sup> Judgment of 29 June 2010, *European Commission v Technische Glaswerke Ilmenau GmbH*, C-139/07 P, EU:C:2010:376, paragraphs 53-55 and 60; judgment of 29 June 2010, *European Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraphs 56-57 and 63.

## **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,



*For the Commission  
Martin SELMAYR  
Secretary General*