



EUROPEAN COMMISSION

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**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2018/4341**

Dear ██████████,

I refer to the e-mail of 16 October, registered on 18 October 2018, in which you submitted a confirmatory application, on behalf of ClientEarth, in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereafter 'Regulation (EC) No 1049/2001').

1. SCOPE OF THE REQUEST

In the initial application of 8 August 2018, registered under the reference number GESTDEM 2018/4341 and dealt with by the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, ClientEarth requested access to the report submitted by the authorisation holder to the European Commission, in accordance with Article 1(3)(e) of the Commission Implementing Decision C(2016)5644 of 7 June 2016 granting an authorisation for some uses of two lead chromate pigments, i.e. *lead*

¹ Official Journal L 345 of 29 December 2001, p. 94.

² Official Journal L 145 of 31 May 2001, p. 43.

sulfochromate yellow and *lead chromate molybdate sulfate red*, under Regulation (EC) No 1907/2006³ of the European Parliament and of the Council.

Taking into account the opinion of the authorisation holder DCC Maastricht B.V., from which the requested document originates, the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs refused access in its initial reply dated 25 September 2018. This refusal was based on the exceptions of Article 4(2), first indent (protection of commercial interests of a legal person) and of Article 4(2), third indent (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001.

In the confirmatory application, ClientEarth requested a review of the position of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs. The request was supported with detailed arguments that I have taken into account in my review, the results of which are set out below.

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 review of the reply given by the relevant Directorate-General at the initial stage.

Following the confirmatory review and taking into account the opinion of DCC Maastricht B.V., which had been re-consulted and agreed to partial disclosure, I can inform you that partial access is granted to the document requested.

The partial refusal is based on the exception of Article 4(2), first indent (protection of commercial interests of a natural or legal person, including intellectual property) of Regulation (EC) No 1049/2001.

2.1. Protection of the commercial interests of a natural or legal person, including intellectual property

Article 4(2), first indent of Regulation (EC) No 1049/2001 stipulates 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 General Court clarified that documents, the disclosure of which would seriously undermine the commercial interests of a legal person, ‘contain commercially sensitive information relating, in particular, to the business strategies of the undertakings

³ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, Official Journal L 39 of 30.12.2006, p.1; a consolidated version is published as 2006R1907 — EN — 10.04.2014 — 018.001.

concerned or their commercial relations or where those documents contain information particular to that undertaking which reveal its expertise'.⁴

The redacted parts on numerous pages of the requested document contain the names of the downstream users of the authorisation holder.

Moreover, the redacted parts contain absolute and percentage figures on the number of downstream users who indicated alternative uses as well as on the sectors where these users committed to continuing the use of the two pigments.

Furthermore, they contain pie charts with percentage figures that show precise shares of end uses of the two pigments concerned for different (sub-)sectors within the relevant market segment. In addition, the redacted parts of the bar charts on pages 19 and 82 of the document contain absolute figures indicating exactly for how many downstream users each key technical property of the pigments is important.

All of this information clearly pertains to the commercial relations and the business strategy of DCC Maastricht B.V.

Indeed, the public disclosure of this specific information would not only reveal the commercial relations of DCC Maastricht B.V. with its downstream users, but also the overall importance as well as the specific segmentation of its customer base concerning the two pigments, thus showing how important the use of the two pigments is for the company, in general, and which sectors within the market segment concerned are the most important for the company, in particular.

Furthermore, the disclosure of the exact figures concerning the key properties of the two pigments would put in the public domain detailed information on the preferences of the downstream users and the resulting importance for the economic activities and the business strategy of DCC Maastricht B.V.

On the basis of this information, the competitors of DCC Maastricht B.V. would be able to align their economic action and to target specifically the latter's customers, thereby gaining a commercial advantage that they would otherwise not have had, undermining in this way the commercial interests of the company.

With regard to the names of the downstream users, I also refer to Article 118(2), point (d) of Regulation (EC) No 1907/2006, according to which information on 'links between a manufacturer or importer and his distributors or downstream users' is to be considered as information the disclosure of which 'shall normally be deemed to undermine the protection of the commercial interests of the concerned person'.

This kind of information is therefore presumed to be covered by the exception referred to in Article 4(2), first indent, of Regulation (EC) No 1049/2001. There is no element, in the

⁴ Judgments of the General Court of 5 February 2018, *PTC Therapeutics Ltd v. European Medicines Agency*, Case T-718/15 EU:T:2018:66, paragraph 85 and *MSD Animal Health Innovation GmbH v European Medicines Agency*, Case T-729/15, EU:T:2018:67, paragraph 68.

present case, that could be seen as capable of rebutting this presumption. In addition, the conditions under which such information may be disclosed, in accordance with Article 118(2), last paragraph of Regulation (EC) No 1907/2006, are not met in the case at hand.

Following the same considerations, in the context of the indications on potential alternative uses of downstream users, the names of a brand and of a customer of downstream users have been redacted (pages 55, 56, 62), as their disclosure would reveal the commercial relations between the different commercial organisations involved.

Furthermore, information concerning the composition of mixtures of pigments evaluated by downstream users as potential alternatives to the two pigments concerned has also been redacted (on pages 31, 59, 62 and 69). These issues relate to the know-how of each downstream user concerned and thus constitute – in line with the above-mentioned case law – elements of information ‘particular to that undertaking which reveal its expertise’.⁵

Based on the foregoing analysis, I consider that there is a real and non-hypothetical risk that public access to the above-mentioned information would negatively affect the commercial activities of the company DCC Maastricht B.V. as well as those of its downstream users and the latter’s customers, in particular in the existing competitive context, thereby seriously undermining their commercial interests.

Therefore, I conclude that access to the relevant parts in the requested document has to be refused, on the basis of the exception laid down in the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

3. PARTIAL ACCESS

Partial access is hereby granted to the requested document, as set out above.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(2), first indent 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.

ClientEarth claims that it is in the public interest to have access to the specific information in the context of the authorisation of certain uses of the two pigments, in particular ‘on the status of the suitability and availability of alternatives, providing a detailed justification of the need to use *lead sulfochromate yellow* or *lead chromate molybdate sulfate red*’ as well as ‘why the performance criteria [...] are technically achievable only by using that substance and that such performance is necessary for the intended use’.

The redacted parts do not contain any relevant information in this context.

⁵ *Ibid.*

Moreover, I consider that the argument contained in the confirmatory application, according to which the ‘identity and location⁶’ of downstream users fall within the scope of the concept of information on emissions into the environment and that an overriding public interest deems to exist in accordance with Article 6(1) of Regulation (EC) No 1367/2006⁷, does not hold.

Indeed, the General Court has recently confirmed the settled case law of the European Courts on the concept of information relating to emissions into the environment as follows. The latter ‘must be understood to include, inter alia, data that will allow the public to know what is actually released into the environment or what, it may be foreseen, will be released into the environment under normal or realistic conditions of use of the product or substance in question, namely those under which the authorisation to place that product or substance on the market was granted and which prevail in the area where that product or substance is intended to be used. Consequently, that concept must be interpreted as covering, inter alia, information concerning the nature, composition, quantity, date and place of the actual or foreseeable emissions, under such conditions, from that product or substance.’⁸ The Court also held that that concept ‘may not, in any event, include information containing any kind of link, even direct, to emissions into the environment.’⁹

Against this background, neither the names of the downstream users nor the other protected commercially sensitive information relate to emissions into the environment, as this kind of information does not provide any indications concerning the nature, composition, quantity, date and place of actual or foreseeable emissions under normal or realistic conditions of use of a concrete product containing the two pigments concerned. Consequently, no overriding public interest seems to exist.

Nor have I, based on the elements at my disposal, been able to identify any elements capable of demonstrating the existence of a public interest that would override the need to protect the commercial interests of the companies concerned.

The fact that the document relates to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness,¹⁰ provides further support to this conclusion.

⁶ The requested document does not contain information on the location of downstream users.

⁷ 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.

⁸ Judgment of the General Court of 21 November 2018, *Stichting Greenpeace Nederland and Pesticide Action Network Europe v European Commission*, T-545/11 RENV, EU:T:2013:523, paragraph 56.

⁹ *Ibid.*, paragraph 58.

¹⁰ Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau GmbH*, C-139/07 P, EU:C:2010:376, *Commission v Bavarian Lager* judgment, cited above, paragraphs 56-57 and 63.

5. MEANS OF REDRESS

I would like to draw your attention to the means of redress that are available against this decision concerning public access to the requested documents, 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
Martin SELMAYR
Secretary-General*

Enclosure: (1)