EUROPEAN COMMISSION

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DECISION OF THE EUROPEAN 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 2019/5158

Dear [Your Name],

I refer to your email of 21 October 2019, registered on the following 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 (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 5 September 2019, addressed to the Secretariat-General of the European Commission requested access to, I quote, ‘[…] the following documents:

- E-mail with annex from Portugal to SANTE on Committee Agenda Bee GD_9 Jun 2014_Ares(2014)1886210,
- E-mail from Austria to SANCO on Bee GD_14 Apr 2014_Ares(2019)2167306,
- E-mail from Austria to SANCO with comments on minutes workshop Bee GD_14 Apr 2014_Ares(2019)2167152,
- E-mail from Greece to SANCO with comments on minutes workshop Bee GD_15 Apr 2014_Ares(2019)2154656,

Your initial application was attributed to the Directorate-General for Health and Food Safety, for handling and reply. It identified the following documents, as falling under the scope of your application:

- Position of the authorities of Portugal on the European Food Safety Authority Bee Guidance Roadmap, provided to the Directorate-General for Health and Food Safety, attached to the cover email of 9 June 2014, reference Ares(2014)1886210 (hereafter ‘document 1’);

- Email of 3 April 2014, from the Directorate-General for Health and Food Safety to the Member States and the reply of the Austrian Agency for

- Email of 10 April 2014, from the Directorate-General for Health and Food Safety to the Member States, with the attachment containing the draft minutes of the meeting on the implementation of the Guidance Document on risk assessment to bees and the reply of the Austrian Agency for Health and Food Safety of 14 April 2014, reference Ares(2019)2167152 (hereafter ‘document 3’),

- Email of 3 April 2014, from the Directorate-General for Health and Food Safety to the Member States and the reply of the Laboratory of Pesticides’ Toxicology of Greece of 15 April 2014, reference Ares(2019)2154656 (hereafter ‘document 4’),


- Email form the Austrian Agency for Health and Food Safety of 16 April 2014, reference Ares(2019)2135064 (hereafter ‘document 7’),

- Two emails of 16 April 2014, containing the position of the authorities of Germany on the European Food Safety Authority Bee Guidance Roadmap, reference Ares(2019)2134794 (hereafter ‘document 8’),

- Two emails of 21 and 22 April 2014, containing the position of the authorities of Spain and Poland (respectively) on the European Food Safety Authority Bee Guidance Roadmap, reference Ares(2019)2171243 (hereafter ‘document 9’),

- Email of 28 April 2014 from the Laboratory of Pesticides’ Toxicology of Greece with the attachment containing the annotated minutes of the meeting on the implementation of the Guidance Document on risk assessment to bees, reference Ares(2019)2134474 (hereafter ‘document 10’),

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3 Two emails from the Agricultural Research Council of Italy included in document 5 are also included (as the email chain) in document 6.

Email of 21 July 2015 from the European Food Safety Authority to the Member States concerning Pesticide Steering Network meeting on 27-28 October 2015, with the annex and the comments of the authorities of Germany of 22 October 2015, reference Ares(2019)2132577 (hereafter ‘document 12’),


Email of 7 November 2018 from the Austrian Agency for Health and Food Safety to the Directorate-General for Health and Food Safety, reference Ares(2018)5708939 (hereafter ‘document 14’),

Email of 12 November 2018 from the authorities of Belgium to the Directorate-General for Health and Food Safety, reference Ares(2018)5781181 (hereafter ‘document 15’),

Position of the authorities of Spain on the European Food Safety Authority Bee Guidance Roadmap, provided to the Directorate-General for Health and Food Safety, attached to the cover email of 26 September 2018, reference Ares(2018)573202 (hereafter ‘document 16’),


Position of the authorities of Netherlands on the European Food Safety Authority Bee Guidance Roadmap, provided to the Directorate-General for Health and Food Safety, attached to the cover email of 21 November 2018, reference Ares(2018)5983467 (hereafter ‘document 18’),

Position of the authorities of Poland on the European Food Safety Authority Bee Guidance Roadmap, provided to the Directorate-General for Health and Food Safety, attached to the cover email of 8 December 2018, reference Ares(2018)6305167 (hereafter ‘document 19’),

Email of 12 November 2018 to the Directorate-General for Health and Food Safety, containing the position of the authorities of Slovenia, reference Ares(2018)5794839 (hereafter ‘document 20’),

In the reply of 17 October 2019, the Directorate-General for Health and Food Safety refused access to the above-mentioned documents, based on the exception in Article 4(3), second subparagraph, of Regulation (EC) No 1049/2001 (protection of Institution’s decision-making process) and the confidentiality provisions of the Standard Rules of procedure for Committees, adopted by the European Commission pursuant to Article 9 of Regulation (EU) No 182/2011.4

The Directorate-General for Health and Food Safety also informed you that, certain attachments included in document 12 contain information falling outside the scope of your application. It also informed you that the attachment included in document 10 (containing the annotated minutes of the meeting on the implementation of the Guidance Document on risk assessment to bees), has been already disclosed under Regulation (EC) No 1049/2001 and is publically available.5

You asked for the review of that position by submitting the confirmatory application on 21 October 2019, in which you contest the reasoning employed by the Directorate-General for Health and Food Safety to refuse access to the documents concerned.

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

Following that review, I can inform you that partial access is granted to documents 2, 3, 4, 9, 10 and 11. The relevant undisclosed parts of the documents contain personal data, which was redacted based on the exception in Article 4(1)(b) of Regulation (EC) No 1049/2001 (protection of privacy and the integrity of the individual). The remaining parts contain information that requires protection under the exception in Article 4(3), first and second subparagraphs (protection of the decision-making process) of that regulation.

With regard to the remaining documents (documents 1, 5, 6, 7, 8, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21), I confirm the position of the Directorate-General for Health and Food Safety refusing access to their entirety, based on the exception in in Article 4(3), first and second subparagraphs (protection of the decision-making process) of Regulation (EC) No 1049/2001.

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5 https://webgate.ec.europa.eu/dyna/extdoc/index.cfm
6 As explained by the Directorate-General for Health and Food Safety in its initial reply, the annex included in this document falls outside the scope of your application.

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1049/2001. These documents contain also personal data, which requires protection under the above-mentioned exception in Article 4(1)(b) of Regulation (EC) No 1049/2001.

2.1. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 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’.

In its judgment in Case C-28/08 P (Bavarian Lager)\(^7\), the Court of Justice ruled that when a request is made for access to documents containing personal data, 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\(^8\) (hereafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.


However, the case law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 2018/1725.

In the above-mentioned judgment, the Court stated that Article 4(1)(b) of Regulation (EC) No 1049/2001 ‘requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with […] [the Data Protection] Regulation’ \(^10\).

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person […]’.

As the Court of Justice confirmed in Case C-465/00 (Rechnungshof), ‘there is no reason of principle to justify excluding activities of a professional […] nature from the notion of private life’ \(^11\).

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10 European Commission v The Bavarian Lager judgment, cited above, paragraph 59.
11 Judgment of the Court of Justice of 20 May 2003, Rechnungshof and Others v Österreichischer Rundfunk, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.
Documents 1-21 include the names and contact details (telephone numbers, email and office addresses) of staff members of the European Commission not holding any senior management position. They include also names and contact details of third parties (representatives of the Member States ministries or other organizations).

The names\textsuperscript{12} of the persons concerned as well as other data from which their identity can be deduced undoubtedly constitute personal data in the meaning of Article 3(1) of Regulation (EU) 2018/1725.

Pursuant to Article 9(1)(b) of Regulation (EU) 2018/1725, ‘personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if “[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject’s legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests’.

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation (EU) 2018/1725, can the transmission of personal data occur.

In Case C-615/13 P (ClientEarth), the Court of Justice ruled that the institution does not have to examine by itself the existence of a need for transferring personal data\textsuperscript{13}. This is also clear from Article 9(1)(b) of Regulation (EU) 2018/1725, which requires that the necessity to have the personal data transmitted must be established by the recipient.

According to Article 9(1)(b) of Regulation (EU) 2018/1725, the European Commission has to examine the further conditions for the lawful processing of personal data only if the first condition is fulfilled, namely if the recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject’s legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your confirmatory application, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subjects’ legitimate interests might be prejudiced.

Notwithstanding the above, there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by the disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

\textsuperscript{12} European Commission v The Bavarian Lager judgment, cited above, paragraph 68.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data, included in the relevant undisclosed parts of documents 1-21, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by the disclosure of the personal data concerned.

2.2. 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.

Article 4(3), second subparagraph of Regulation (EC) No 1049/2001 provides that ‘[a]ccess to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure’.

The requested documents reflect the conduct of the consultations concerning the ‘Guidance Document on the risk assessment of plant protection products on bees’ (hereafter ‘Guidance Document’) 14. In line with the provisions of Regulation (EC) No 1107/2009 15, the document was drafted in 2013, upon mandate of the European Commission, by the European Food Safety Authority, with the view to be endorsed by the former, following the positive opinion of the Member States gathered within the Standing Committee on Plants, Animals, Food and Feed, Section Phytopharmaceuticals (hereafter ‘Standing Committee).

The relevant undisclosed parts of documents 2-4, 9, 10 and 11 and the entire content 16 of documents 1, 5-8, 12-21 contain the comments provided by the representatives of the authorities of the Members States (Ministries) or the national agencies competent in the area of agriculture, food and plant protection.

Additionally, documents 6 and 11 include the annotated version of the European Commission Staff Working Document containing the draft of the implementation plan for the above-mentioned Guidance Document. The annotations have the form of the modified text (in ‘track changes’ mode), and/or comments provided at the margins of the documents by the representatives of the Member States.

16 Other than personal data and the part of documents 12 falling outside the scope of the application.
In its Corporate Europe Observatory judgment\textsuperscript{17}, the General Court confirmed that minutes circulated to participants in the framework of an advisory committee meeting which was not open to the public, are to be considered as ‘internal documents’ within the terms of Article 4(3) of Regulation (EC) No 1049/2001, and deserve protection on that basis. The same reasoning applies, \textit{a fortiori}, to the positions of Member States expressed in the framework of such committee meetings.

Public disclosure of such positions would seriously undermine the Commission’s leverage to consult Member States’ representatives, in the framework of its decision-making processes, free from external pressure. Indeed, Member States’ participation in Committees is of crucial importance for the decision-making process as it allows the Commission to take into consideration the opinion of the Member States at an early stage of the decision-making process.

In your confirmatory application, you argue that, I quote, ‘[…] the documents are part of the previous phase of the adoption process of the Bee Guidance Document. The documents date from the phase before the EU member states definitely disapproved the existing document and before the European Commission asked EFSA to start a review process of the document’.

Indeed, as it was not possible to reach agreement between the European Commission and the Member States, the Guidance Document prepared by the European Food Safety Authority in 2013 was not yet endorsed by the Standing Committee. Since then, a stepwise implementation was discussed\textsuperscript{18} and in parallel, a request has been submitted to the European Food Safety Authority to review the Guidance Document until March 2021. The European Commission has sent a mandate to the European Food Safety Authority in March 2019\textsuperscript{19}. The European Food Safety Authority published an outline of the revision\textsuperscript{20} and opened a stakeholder consultation on the current Guidance Document on 26 September 2019\textsuperscript{21}.

However, the endorsement of the step-wise implementation of the current Guidance Document depended on the outcome of the regulatory procedure with the scrutiny process for a Regulation\textsuperscript{22} amending Commission Regulation (EU) No 546/2011, which had received a favourable opinion of the Standing Committee on 17 July 2019. As the European Parliament objected to the adoption of the draft Regulation on 23 of October 2019, the European Commission cannot endorse the regulation and needs to reflect on

\textsuperscript{17} Judgment of the General Court of 7 June 2013, \textit{Stichting Corporate Europe Observatory v European Commission}, T-93/11, EU:T:2013:308, paragraphs 32-33.


the next steps. Consequently, the decision-making process under Regulation (EC) No 1107/2009 is still ongoing and there is a concrete and non-hypothetical risk that the disclosure of the concerned documents would seriously undermine the next steps of the institutional decision-making.

Furthermore, as explained by the Directorate-General for Health and Food Safety in its initial reply, 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 (EU) No 182/2011 23 (‘the Comitology Regulation’) explicitly exclude the positions of individual Member States from public access. Indeed, Articles 10(2) and 13(2) of the Standard Rules of Procedure provide, 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 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 (EC) 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.

Indeed, such public disclosure, against the above-mentioned confidentiality rules, would have an impact on the behaviour of the representatives of the Member States in the Standing Committee and in consequence, would undermine the effectiveness of its decision-making process, jeopardise its sincere cooperation with the Member States, thus seriously undermining its decision-making process in a realistic and non-hypothetical way.

Therefore, I conclude that the refusal of access to documents the relevant undisclosed parts of documents 2-4, 9, 10 and 11 and the entire content of documents 1, 5-8, 12-21 is justified based on Article 4(3), first and second subparagraphs of Regulation (EC) No 1049/2001.

3. **OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exception laid down in Article 4(3), first and second subparagraph, of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure.

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Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application, you underline that, I quote, ‘[t]he protection of the bees is of great importance to the European agriculture and biodiversity’.

Please note however that the Court of Justice, in the Strack case, ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient to merely rely on that principle and its importance 24. Instead, an applicant has to show why in the specific situation the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure 25.

While I appreciate that there is public interest regarding the subject matter in question, I consider that the need for full transparency does not outweigh in this case the need to protect the decision-making process under Regulation (EC) No 1107/2009.

Nor have I been able to identify any other public interest capable of overriding the interest protected by Article 4(3), first and second subparagraphs (protection of decision-making process) of Regulation (EC) No 1049/2001.

Please note also that 4(1)(b) of Regulation (EC) No 1049/2001 do not include the possibility for the exceptions defined therein to be set aside by an overriding public interest.

4. PARTIAL ACCESS

Partial access is hereby granted to documents 2-4, 9, 10 and 11.

No meaningful partial access is possible to documents 1, 5-8, 12-21, as their entire content is covered by the exception in Article 4(3), first and second subparagraphs of Regulation (EC) No 1049/2001.

With regard to the annotated version of the European Commission Staff Working Document containing the draft of the implementation plan for the Guidance Document, included in documents 6 and 11, it is not possible to grant partial access thereto. Indeed, by comparing the information included in the list of documents included in point 1 of this decision (which contains the indication of the Member State from which a given document comes from), it would be possible to ascertain which Member State introduced the change in the text and what that change relate to.

25 Strack v Commission, cited above, paragraph 129.
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,

CERTIFIED COPY
For the Secretary-General,

EUROPEAN COMMISSION

For the Commission