



EUROPEAN COMMISSION

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Belgium

**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 2021/3532**

Dear Ms Balanya,

I refer to your e-mail of 20 July 2021, registered on 22 July 2021, in which you submitted 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 (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 31 May 2021, addressed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, you requested access to the ‘List of the project submissions via the ECHA for a pipeline of viable investment projects for the large-scale deployment of renewable and low-carbon hydrogen in line with the objectives of the EU Hydrogen Strategy’.

The Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, in its initial reply of 9 July 2021, identified one document as falling under the scope of your request and granted partial access to it based on the first indent of Article 4(2) (protection of commercial interests).

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

In your confirmatory application, you request a review of this position. The arguments that you put forward in your confirmatory request have been taken into account in the assessment and will be addressed in the corresponding sections 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 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 Internal Market, Industry, Entrepreneurship and SMEs to refuse access to the document requested based on the exceptions laid down in the first indent of Article 4(2) (protection of commercial interests) and the first subparagraph (protection of the decision-making process) of Article 4(3) of Regulation (EC) No 1049/2001.

The reasons are explained below.

2.1. Protection of commercial interests of a natural or legal person

Article 4(2), first indent, of Regulation (EC) No 1049/2001 provides 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'.

In its judgment in Case T-516/11, the General Court said that 'in order to apply the exception provided for by the first indent of Article 4(2) of Regulation No 1049/2001, the institution must show that the documents requested contain elements which may, as a result of the disclosure, seriously undermine the commercial interests of a legal person'³.

In your confirmatory application, you argue that the application of this exception may be justified only if access to that document could specifically and effectively undermine the protected interest. Moreover, the risk of the protected interest being undermined must not be purely hypothetical and must be reasonably foreseeable.

The document requested is the full list of projects submitted by members of the European Clean Hydrogen Alliance (hereafter 'ECHA') for renewable and low-carbon hydrogen technologies and solutions.

In a competitive business environment, the mere existence of plans by companies to develop hydrogen projects, and additionally, any information relating to such a project that might be contained in the project's name and its position in the value chain, is valuable information for competitors. Based on such information, competitors or other

³ Judgment of the General Court of 9 September 2014, *MasterCard, Inc. and Others v European Commission* (hereafter referred to as '*MasterCard, Inc. and Others v European Commission*'), T-516/11, EU:T:2014:759, paragraph 82.

actors obtain information on business strategy and activities of their commercial competitors. This can put them in an advantageous competitive position in terms of their own strategic decision, including whether or not to develop similar, rival projects, thus harming the commercial interests of the legal or natural person in question. Unintentional disclosure of project information could also negatively impact ongoing and future negotiations by the stakeholders concerned on financing and/or procurement of various assets. In the present case, the undisclosed parts of the list that the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs shared with you in its initial reply of 9 July 2021 refer to information on projects which have been flagged by Alliance members as confidential for reasons of commercial sensitivity. They contain information on the country, company name, project name and area of activity of submitted projects, which currently represent commercially sensitive business information originating from third parties.

Beyond the public list of projects that is publicly available, the Commission has not shared information from projects collected with other members of the European Clean Hydrogen Alliance, whose round tables generally do not discuss individual projects. Where stakeholders use the match-making platform of the Alliance to discuss individual projects, they are doing so out of their own right. The Commission merely provides the platform for such meetings, but does not share information on projects for the purpose of their discussion in such meetings unless agreed by the concerned stakeholders.

The disclosure of the redacted parts would affect the competitive position of the stakeholders on the market and would undermine the protection of their commercial interests.

Consequently, there is a real and non-hypothetical risk that public access to the above-mentioned information would undermine the commercial interests of the economic operators concerned.

2.2. Protection of the decision-making process

Article 4(3) of Regulation (EC) 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’.

As explained above, the list of projects was drawn up by the European Commission services based on the information submitted by the stakeholders concerning their investment projects.

In organising the European Clean Hydrogen Alliance to deliver on its hydrogen strategy, the Commission relies on the information submitted by the stakeholders, in particular on the foreseen projects, which typically contain sensitive data. Some stakeholders submitted their projects following an explicit assurance by the Commission that the information will not be made public and they asked this information to remain

confidential. Without such confidentiality, the stakeholders concerned would not have submitted their projects. Disclosure of this information would risk jeopardising the willingness of future and current stakeholders to participate to the European Clean Hydrogen Alliance and thus would minimise the impact of this Commission initiative in the field of carbon neutrality.

Moreover, the Commission is in the process of verifying the projects collected against a set of eligibility criteria published on the Commission webpage⁴. This process involves ongoing individual exchanges with the stakeholders that submitted projects. It will result in the publication, scheduled for the end of November 2021, of a public list of projects that meet these eligibility criteria and which individual stakeholders agreed to be made public. This list of viable investment projects of the European Clean Hydrogen Alliance will therefore be a public document.

The decision concerning the eligibility of the projects on the final list has not been taken yet. Disclosure of the redacted parts of the list at this stage could lead to speculations, premature conclusions and interference with the Commission decision-making process.

Consequently, the relevant undisclosed parts are protected under the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

I conclude, therefore, that access to the undisclosed parts of the document requested must be denied based on the exceptions laid down in the first indent of Article 4(2) and the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) 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.

In your confirmatory application, you argue that, I quote, ‘not only is there a public interest in knowing this information, but also assert that it overrides the commercial interests presented in your argument. The European Clean Hydrogen Alliance is presenting a list of viable investment projects. If these projects are promoted by members of the alliance who will also benefit from the regulatory and financial benefits that these projects could enjoy, there is a clear case of public interest to be able to monitor and detect potential cases of conflict of interests.’

Nonetheless, I note that these considerations are rather of a general nature and would not outweigh the interests protected under Article 4(2) and Article 4(3) of Regulation (EC) N1049/2001.

Please also note, 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

⁴ <https://ec.europa.eu/docsroom/documents/45791>

to merely rely on that principle and its importance⁵. 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-disclosure⁶.

As regards the public interest in having access to the whole document, it must be noted that the projects were submitted by members of the European Clean Hydrogen Alliance for their possible inclusion in a pipeline of clean hydrogen investment projects. The European Commission services are screening the projects collected against a set of criteria published on the Commission webpage⁷. Projects not meeting these criteria will not be included in the Alliance project pipeline.

Submitting projects for their possible inclusion in the Alliance pipeline of projects, or even their ultimate inclusion in this pipeline, does not entail any regulatory or financial decisions. The project pipeline aims to provide a list of projects proposed by Alliance members that are in line with the eligibility criteria⁸ and which can serve as orientation and as a source of information about the state of play of the clean hydrogen value chain in Europe. This is independent of all future regulatory or financial decisions since all EU financing programmes maintain their independent selection procedures and all regulatory decisions are taken following the usual open and targeted consultation procedures.

In this context, by relying on general considerations, you have not established a need for members of the public to obtain access to the full list of projects submitted by members of the European Clean Hydrogen Alliance, for the purpose of monitoring and detecting potential cases of conflict of interest. While I appreciate that there is public interest in the subject matter in question, I consider that the need for full transparency does not outweigh in this case the need to protect the withheld information, pursuant to the exceptions relating the protection of commercial interests and the ongoing decision-making process.

Furthermore, you argue that the EU institutions must conduct their work as openly as possible. You also mention the statement of the Court in Case C-280/11 P, in which the Court lays out the “advantage” of increased openness is that it enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.

Transparency is indeed one of the key principles of the European Clean Hydrogen Alliance, as expressed in the European Clean Hydrogen Alliance’s declaration⁹. In line with this principle, an overview and key data from the projects collected (aggregate data on production, consumption, project maturity, number of projects per country and sector,

⁵ Judgment of the Court of Justice of 2 October 2014, *Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 128 (hereafter *Strack v Commission*).

⁶ *Strack v Commission*, cited above, paragraph 129.

⁷ <https://ec.europa.eu/docsroom/documents/45791>

⁸ E.g. start of deployment by 2030, compliance with life-cycle greenhouse gas emissions savings requirement of 73.4% (in line with the EU Taxonomy Climate Delegated Act, available at: https://ec.europa.eu/info/publications/210421-sustainable-finance-communication_en#taxonomy)

⁹ <https://ec.europa.eu/docsroom/documents/43526>

etc.) was published on the Commission website¹⁰. Information and updates are regularly provided to the public about the functioning of the Alliance and milestones of its work¹¹.

4. PARTIAL ACCESS

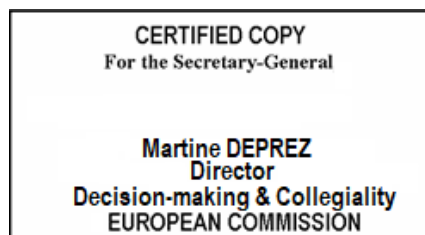
In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting further partial access to the document requested.

However, no meaningful partial access is possible without undermining the interest explained above.

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
Ilze JUHANSONE
Secretary-General

¹⁰ Overview of projects collected by the Clean Hydrogen Alliance by Director-General Kerstin Jorna: https://ec.europa.eu/growth/content/second-european-hydrogen-forum_en

¹¹ Updated list of members of the Alliance is available on the website: https://ec.europa.eu/growth/industry/policy/european-clean-hydrogen-alliance_en; communication of the launch of the project collection survey: https://ec.europa.eu/growth/content/hydrogen-commission-launches-project-collection-european-clean-hydrogen-alliance-investment_en; information about the next steps, including the eligibility criteria to be screened for the projects collected was published on: https://ec.europa.eu/growth/industry/policy/european-clean-hydrogen-alliance_en.