EUROPEAN COMMISSION

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[redacted]
3080 Tervuren
Belgium

DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001[1]

Subject: **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2018/3889**

Dear [redacted],

I refer to your e-mail of 15 August 2018, registered on the next day, 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 documents[2] (hereafter 'Regulation (EC) No 1049/2001').

Please accept my apologies for the delay in replying to your confirmatory application.

1. SCOPE OF YOUR REQUEST

In your initial application of 18 July 2018, dealt with by the Directorate-General for Health and Food Safety, you requested access to documents related to the following points on the agenda of the meeting of the Standing Committee on Plants, Animals, Food and Feed, Section Phytopharmaceuticals - legislation of 19 - 20 July 2018[3]:

- '[…] Exchange of views of the Committee on the Commission Draft Review Report and Regulation renewing the approval of mepanipyrim in accordance with

[1] Official Journal L 345 of 29.12.2001, p. 94.
[2] Official Journal L 145 of 31.5.2001, p. 43.
[3] https://ec.europa.eu/food/sites/food/files/plant/docs/sc_phyto_20180719_ppl_agenda.pdf.

Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending the Annex to Commission Implementing Regulation (EU) No 540/2011 (Draft Review Report SANTE/11620/2017 rev 5). […]'.

- '[…] Exchange of views of the Committee on the Commission Draft Implementing Regulation (EU) concerning the non-renewal of approval of the active substance chlorothalonil, in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending Commission Implementing Regulation (EU) No 540/2011 (Draft Review Report SANTE/10186/2018 Rev. 0) […]'.

- '[…] Exchange of views of the Committee on the Commission Draft Implementing Regulation (EU) amending Commission Implementing Regulation (EU) No 844/2012 in view of the implementation of Commission Regulation (EU) 2018/605 setting out scientific criteria for the determination of endocrine disrupting properties (SANTE/11120/2017) […]'.

- '[…] Exchange of views of the Committee on the Commission Draft Implementing Regulation (EU) amending Implementing Regulation (EU) No 686/2012 as regards the rapporteur Member State and co-rapporteur Member State for the active substances glyphosate, lambda-cyhalothrin, imazamox and pendimethalin (SANTE/10421/2018) […]'.

You specified that in 'the particular case of item C.09 [you] wish[ed] to add an additional request for copies of the position papers and written interventions made by and on behalf of the chlorothalonil renewal of approval applicants and their representatives addressing the basis in the proposed non-renewal decision of chlorothalonil'.

In its initial reply of 10 August 2018, the Directorate-General for Health and Food Safety informed you that it had identified 14 documents and their annexes[4] as falling within the scope of your request and granted full access to one of them (document 12). However, it refused access to the remaining 13 documents on the basis of Article 4(3), first subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. You support your application with several arguments that have been taken into account in my review, the results of which are set out below.

[4] The detailed list of documents and their annexes was enclosed to the initial reply of the Directorate-General for Health and Food Safety of 10 August 2018. Please note that documents 6.1-6.7, 7.1-7.7, 8.1-8.4 and 9.1 as numbered in this confirmatory decision contain annexes to documents 6, 7, 8 and 9, respectively.

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 relevant Directorate-General at the initial stage.

Having examined your confirmatory application, and taking into account the opinion of the consulted third parties, I can inform you that:

- full access is granted to documents 1, 2, 3, 4, 5, 6.1, 6.2, 6.3, 7.1[5], 7.2, 7.4, 7.5, 8.1, 8.2, 8.3, 8.4, 9.1, 13 and 14, as their content does not to fall under any of the exceptions to the right of access provided in Article 4 of Regulation (EC) No 1049/2001;

- wide partial access is granted to documents 6, 6.5, 6.6, 6.7, 7, 7.3, 7.6, 7.7, 8 and 9, subject to the redaction of personal data only on the basis of the exception of Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001;

- document 6.4 is partially withheld, pursuant to Article 4(2), first indent (protection of commercial interests of a natural or legal person) of Regulation (EC) No 1049/2001.

Please find a copy of each of the documents enclosed with this decision.

Moreover, I confirm the initial decision of the Directorate-General for Health and Food Safety to refuse access to documents 10 and 11, pursuant to Article 4(3), first subparagraph (protection of the decision-making process) 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)*[6], 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

[5] Document 6.1 is identical with document 7.1.

[6] Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd*, C-28/08 P, (hereafter referred to as '*European Commission v The Bavarian Lager'* judgment), EU:C:2010:378, paragraph 59.

Community institutions and bodies and on the free movement of such data[7] (hereafter 'Regulation (EC) No 45/2001') becomes fully applicable.

Please note that, as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC[8] (hereafter 'Regulation (EU) 2018/1725').

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'.[9]

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'.[10]

Documents 6, 6.5, 6.6, 6.7, 7, 7.3, 7.6, 7.7, 8 and 9 contain personal data such as the names, functions, e-mail addresses and telephone numbers of persons who do not form part of the senior management of the European Commission as well as of individuals who are representatives of third parties.

The names[11] 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'.

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7 Official Journal L 8 of 12.1.2001, p. 1.

8 Official Journal L 205 of 21.11.2018, p. 39.

9 *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

10 Judgment of the Court of Justice of 20 May 2003, *Rechnungshof and Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

11 *European Commission v The Bavarian Lager* judgment, cited above, paragraph 68.

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.[12] 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.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data, 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 (EC) No 1049/2001 provides that '[a]ccess 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'.

Documents 10 and 11 contain e-mail messages with individual positions of Spain and Bulgaria, expressed in the context of the comitology procedure concerning the non-renewal of approval of the active substance chlorothalonil.

[12] Judgment of the Court of Justice of 16 July 2015, *ClientEarth v European Food Safety Agency*, C-615/13 P, EU:C:2015:489, paragraph 47.

The rules applicable to so-called 'comitology' procedures preserve the confidentiality of the individual positions of the Member States. Therefore, the standard rules of procedure adopted by the European Commission pursuant to Article 9 of 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[13] (hereafter 'Regulation (EU) No 182/2011') 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 of comitology committees 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 Regulation (EU) No 182/2011 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 the positions of individual Member States in the context of the comitology procedure and relating to 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 the mutual trust between the European Commission and the Member States and would therefore be at odds with the principle of sincere cooperation.

Indeed, the public disclosure of the individual positions of Member States contained in documents 10 and 11, against the explicit rules on confidentiality, would certainly undermine the trust between the Member States and the European Commission. This, in turn, would seriously undermine the decision-making process of the European Commission, as the capacity of the latter to conduct efficiently the preparatory phases of the adoption of the implementing act at stake would be seriously undermined if that confidentiality were not protected.

Therefore, I conclude that the refusal of access to documents 10 and 11 is justified, based on Article 4(3), first subparagraph of Regulation (EC) No 1049/2001.

2.3. Protection of commercial interests

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 found 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

[13] Official Journal L 55 of 28.2.2011, p. 13.

concerned or their commercial relations or where those documents contain information particular to that undertaking which reveal its expertise'.[14]

Document 6.4 originates from the company [redacted] and is entitled 'Benefit case chlorothalonil France'. It contains figures that indicate the cost of protection per hectare of wheat with the use of chlorothalonil or figures from which this cost within the relevant market in France can be deduced. These figures are not publicly available and relate to the business strategy of [redacted]. The public disclosure of these figures would enable [redacted]'s competitors to align their economic action, in particular in pricing negotiations, thereby gaining a commercial advantage that they would otherwise not have had and undermining in this way the commercial interests of the company concerned.

On this basis, 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 concerned, in particular in the existing competitive context, thereby seriously undermining the latter's commercial interests.

Therefore, I conclude that access to the relevant parts in document 6.4 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

Wide partial access is hereby granted to documents 6, 6.5, 6.6, 6.7, 7, 7.3, 7.6, 7.7, 8 and 9 as well as partial access to document 6.4, as set out above.

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have also considered the possibility of granting partial access to documents 10 and 11. Nonetheless, no meaningful partial access to these documents is possible pursuant to Article 4(3), first subparagraph of Regulation (EC) No 1049/2001.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions provided in Article 4(2), first indent and Article 4(3), first subparagraph 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 refer to, among other things, 'separate access to environmental information rules (Aarhus Convention/Regulation (EC) No 1367/2006) where such requests […] do not require any explanation or justification concerning an overriding public interest as the overriding public interest is deemed to be automatic'.

Indeed, pursuant to Article 6(1) of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions

[14] Judgments of the General Court of 5 February 2018, *PTC Therapeutics Ltd v. European Medicines Agency*, T-718/15, EU:T:2018:66, paragraphs 84-85 and *MSD Animal Health Innovation GmbH v European Medicines Agency*, T-729/15, EU:T:2018:67, paragraphs 67– 68.

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[15] (hereafter 'Regulation (EC) No 1367/2006'), as regards, among others, Article 4(2), first indent of Regulation (EC) No 1049/2001 and thus the exception pertaining to the protection of commercial interests, 'an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment'. This provision further states that the other exceptions set out in Article 4 of Regulation (EC) No 1049/2001 'shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information relates to emissions into the environment'.

The General Court has recently confirmed the settled case law of the European Courts, according to which the concept of information relating to emissions into the environment '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.'[16] The Court further held that that concept 'may not, in any event, include information containing any kind of link, even direct, to emissions into the environment.'[17]

Against this background, the commercially sensitive information on the cost of chlorothalonil protected by Article 4(2), first indent of Regulation (EC) No 1049/2001 (protection of commercial interests of a natural or legal person) is clearly not to be qualified as information relating to emissions into the environment.

Independently from that, I would like to point out for the sake of completeness that, with regard to documents containing information on the characteristics of the active substance glyphosate created in the context of the relating authorisation procedure at EU level, the General Court also ruled that such information is not to be qualified as information on emissions into the environment in the sense of Article 6(1) of Regulation (EC) No 1367/2006, as use is made of the active substance only in a plant protection product to be authorised at Member State level. Indeed, the Court held that the 'it is only at the stage of the national authorisations procedure […] that the Member State assesses any emissions into the environment'.[18] The same applies to the documents with information on the characteristics of the active substance chlorotalonil.

As a consequence, no overriding public interest is deemed to exist in the case at stake concerning the disclosure of commercially sensitive information protected by the

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15 Official Journal L 264 of 6.9.2006, p. 13.

16 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.

17 *Ibid*, paragraph 58.

18 *Ibid*, paragraph 88.

exception provided in Article 4(2), first indent of Regulation (EC) No 1049/2001, but the exceptions set out in Article 4 of Regulation (EC) No 1049/2001 should be interpreted in a restrictive way, as also provided in recital 15 of Regulation (EC) No 1376/2006 for environmental information. Such a strict interpretation and application of the exceptions to the right of public access is required by the case law of the European Courts in general[19], i.e. independently from the question of whether the information concerned is to be qualified as environmental information or not.

In line with these requirements, the relevant exceptions provided in Article 4(2), first indent (protection of commercial interests of a natural or legal person) and Article 4(3), first subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001 have been interpreted and applied in a restrictive way, as set out in sections 2.2 and 2.3 above.

Against this background, I consider that the arguments put forward in your confirmatory application are not capable of demonstrating the existence of an overriding public interest in the disclosure of the information on the cost of chlorothalonil protected by Article 4(2), first indent of Regulation (EC) No 1049/2001.

The same applies with regard to documents 10 and 11 containing the individual positions of Member States in the context of the procedure in the comitology committee and protected by Article 4(3), first subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001.

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 company concerned as well as the decision-making process of the European Commission concerning the relevant draft implementing act on chlorothalonil. With regard to the latter, I consider that in this specific case, the public interest is better served by protecting the atmosphere of mutual trust between the European Commission and the Member States concerned and thus the European Commission's decision-making process.

Please note that Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001 is an absolute exception and does not need to be balanced against any possible overriding public interest in disclosure. Moreover, as specified under point 2.1 above, you did not put forward any arguments to establish the necessity to have the personal data transmitted for a specific purpose in the public interest, and the absence of prejudice to the legitimate interests of the data subjects concerned could not be established in this context either. The fact that this data is reflected in documents partly containing environmental information does not change this assessment.

In conclusion, I am of the view that the public interest is fully served in the present case by (wide partial) disclosure of the other requested documents.

[19] *Ibid*, paragraph 97.

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

Enclosures: (30)