



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 2019/0564**

Dear [REDACTED],

I refer to your e-mail of 19 February 2019, registered on 20 February 2019, 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 documents² (hereafter 'Regulation (EC) No 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 29 January 2019, addressed to the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs. You requested access to 'a report by the European Commission into an investigation on Ireland's system of controlling tuna, particularly bluefin tuna, caught by both commercial and recreational or sea angling vessels'. Your request was attributed to the Directorate-General for Maritime Affairs and Fisheries because it fell within its remit.

The European Commission has identified the following document as falling under the scope of your request:

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, p. 43.

- Final Audit Report IE-D4-2018-01-A of 10 January 2019, carried out by the Directorate-General for Maritime Affairs and Fisheries in Ireland from 12 to 16 March 2018, to assess the system in place to control the weighing of fish up to the first sale - pelagic fisheries, and to assess the system in place to control catches of tuna, in particular bluefin tuna (reference Ares(2019)142662), (hereafter ‘document 1’), which includes the following annexes:
 - Annex I – Reference material (hereafter ‘document 1.1’);
 - Annex II – List of Meeting attendees (hereafter ‘document 1.2’); and
 - Annex III – Data analyses (hereafter ‘document 1.3’).

In its initial reply of 12 February 2019, the Directorate-General for Maritime Affairs and Fisheries refused access to this document based on the exceptions of Article 4(2), the second and third indent, (protection of court proceedings and legal advice and protection of the purpose of inspections, investigations and audits, respectively) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. You support your request with detailed arguments, which I will address 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.

As regards document 1 and its annexes (documents 1.1 to 1.3), I regret to inform you that I have to confirm the initial decision of the Directorate-General for Maritime Affairs and Fisheries to refuse access, based on the exception of Article 4(2), third indent, (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001, for the reasons set out below.

2.1. Protection of the purpose of inspections, investigations and audits

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

As it is mentioned above, document 1 is a report of an audit mission that was carried out between 12 and 16 March 2018. However, document 1 had been finalised by 10 January 2019, which is the date from which the European Commission is in the position to decide on any follow-up measure. This audit took place in the context of the Regulation (EC) No 1224/2009 of 20 November 2009³ establishing a Community control system for ensuring

³ Official Journal L 354, 28.12.2013, p. 22.

compliance with the rules of the common fisheries policy (hereafter ‘Fisheries Control Regulation’)

Article 96(1) of the ‘Fisheries Control Regulation’ states that, ‘[t]he Commission shall control and evaluate the application of the rules of the common fisheries policy by the Member States [...] For this purpose the Commission may [...] initiate and carry out inquiries, verifications, inspections and audits [...]’ Thus, the purpose of the European Commission’s audit is ultimately to ensure the proper application of the common fisheries policy.

In this framework, the audit mission and the resulting audit report are key instruments of the European Commission; however, they are not necessarily sufficient tools, in themselves, to guarantee a Member State’s compliance with the common fisheries policy. Therefore, the completion of the audit report does not mean that the purpose of the audit has been achieved. Indeed, an audit report may serve as a starting point for the launching of further investigations. In the present case, the findings in the audit report might lead to, for example, an administrative enquiry or the establishment of an action plan under paragraphs (2) and (4) of Article 102 of the Control Regulation or to the opening of an EU Pilot procedure or an infringement procedure under Article 258 of the Treaty on the Functioning of the European Union, if the European Commission decides so. Thus, the European Commission considers that the investigation on the subject-matter – the compliance with the Irish authorities with rules of the Control Regulation – is still on-going, irrespective of the finalisation of the audit report. As the Court of Justice established, ‘[...] it is apparent from the case-law that various acts of investigation or inspection may remain covered by the exception based on the protection of inspections, investigations and audits as long as the investigations or inspections continue, even if the particular investigation or inspection which gave rise to the report to which access is sought is completed [...]’⁴

In addition, public access to documents forming part of on-going investigations can be refused under the third indent of Article 4(2) of Regulation (EC) No 1049/2001 based on a general presumption. The Court of Justice ruled that, ‘documents relating to an infringement procedure during the pre-litigation stage may be covered by the general presumption of confidentiality [because] “it can be presumed that the disclosure of the documents concerning an infringement procedure during its pre-litigation stage risks altering the nature of that procedure and changing the way it proceeds and, accordingly, that disclosure would in principle undermine the protection of the purpose of investigations, within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001”’.⁵

⁴ Judgment of the Court of Justice of 6 July 2006, *Yves Franchet and Daniel Byk v European Commission*, T-391/03, EU:T:2006:190, paragraph 110.

⁵ Judgment of the Court of Justice of 14 November 2013, *LPN and Finland v Commission*, C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 40.

The Court of Justice specified that this general presumption covered all documents relating to the infringement procedure under Article 258 Treaty on the Functioning of the European Union: ‘[c]onsequently, [...] all the documents, irrespective of whether they had been drawn up during the informal stage of that procedure, that is to say *before* the Commission sent the letter of formal notice to the Member State concerned, or during the formal stage thereof, that is to say after that letter was sent, were regarded as being covered by that presumption’ (emphasis added).⁶

At this stage, the European Commission’s internal investigation process is on-going in order to decide whether or not an infringement procedure should be launched in the subject-matter covered by document 1. It is clear that if the conclusions of document 1 led to an opening of an EU Pilot or an infringement procedure, the disclosure of document 1 now would undermine the protection of the investigation. It is settled case-law of the Court of Justice that, ‘[...] the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure. This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter’s voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgment of the Court of Justice. The preservation of that objective, namely an amicable resolution of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, justifies refusal of access [...] on the ground of protection of the public interest relating to inspections, investigations and court proceedings [...]’⁷

Therefore, any disclosure of document 1 at this stage of the procedure would essentially deprive the Irish authorities from their lawful expectation of sincere cooperation on the part of the European Commission in the event that an infringement procedure was launched in relation to the subject-matter of document 1. Refusal of access to document 1 is therefore justified under the third indent of Article 4(2) Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in the third indent of 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 indicate that ‘the public interest in its content is significant due to the fact that the nature of the investigation relates to an industry body which has an extraordinary amount of control over policies made by Ireland’s Department of Agriculture. If the main investigations of the report have been completed, then I would argue there is an urgency to inform the public of at least some of the nature of what they contain or else the public will not be afforded the right to be informed consumers in the

⁶ Ibid, paragraph 41.

⁷ Judgment of the Court of First Instance of 11 December 2001, *Petrie and Others v Commission*, T-191/99, EU:T:2001:284, paragraph 68.

purchase and consumption of fish. This extends not only to consumer protection but also potentially to human health, environmental protection, and welfare of agriculture. While these likely formed part of the reason to undertake the investigation, I would argue that given the length of time the investigations have been conducted, it should be possible to allow the public to at least know 1) whether there investigation has reached conclusions and 2) whether these conclusions involve matters which concern consumer and environmental safety.’

Although I share the view that all the above issues are important, points (a) to (g) of Article 96(1) of the Control Regulation specifies that the audits aim essentially to ensure that national authorities establish and maintain a control, cooperation and enforcement system that is capable of realising the objectives of the common fisheries policy, which represents the public interest in the present case. Ensuring the proper implementation of the common fisheries policy may contribute to the achievement of the objectives mentioned in your confirmatory application. The right of the public to be informed on the content of document 1, at least at this initial stage of the procedure, cannot prevail over the European Commission’s duty to guarantee confidentiality due to its obligation to cooperate sincerely with Member States.

Thus, I could not identify any public interest capable of overriding the public interest protected by the third indent of Article 4(2) of Regulation (EC) No 1049/2001.

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 documents requested.

However, for the reasons explained above, no meaningful partial access is possible without undermining the interests described above.

Thus, I have come to the conclusion that the document requested is covered in its entirety by the invoked exception to the right of public access.

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*