



EUROPEAN COMMISSION

Brussels, 26.9.2019  
C(2019) 7049 final

European Chemical Industry  
Council- Cefic aisbl  
Belliard 40  
1040 Brussels  
Belgium

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE  
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001<sup>1</sup>**

**Subject: Your confirmatory application for access to documents under  
Regulation (EC) No 1049/2001 - GESTDEM 2019/1481**

Dear [REDACTED],

I refer to your letter of 9 May 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<sup>2</sup> (hereafter 'Regulation (EC) No 1049/2001').

**1. SCOPE OF YOUR REQUEST**

In your initial application of 7 March 2019, addressed to the Directorate-General for Energy, you referred to the 'Meeting on 19 December 2018 of the Ecodesign and Energy Labelling Committee' and the 'vote on the Draft implementing measure/act) - COMMISSION REGULATION (EU) .../... of XXX laying down ecodesign requirements for electronic displays pursuant to Directive 2009/125/EC of the European Parliament and of the Council, amending Commission Regulation (EC) No 1275/2008 and repealing Commission Regulation (EC) 642/2009' and requested:

‘1. Minutes of the meeting on the above vote;

2. The voting summary for the vote;

---

<sup>1</sup> Official Journal L 345 of 29.12.2001, p. 94.

<sup>2</sup> Official Journal L 145 of 31.5.2001, p. 43.

3. The Member States who asked for the tabling of an amendment to the Commission's proposal on halogenated flame-retardants;

4. The Impact Assessment and the Opinion of the Regulatory Scrutiny Board mentioned on page 9 of the Explanatory Memorandum to the proposal. In light of the judgement of the European Court, Case C-57/16, Client Earth v. European Commission, these two documents can be disclosed.'

In its initial reply of 23 April 2019, Directorate-General for Energy informed you that it held the following documents corresponding to points 1, 2 and 4 of your request:

- Summary record of the meeting of the Regulatory Committee on the Ecodesign of Energy of 19 December 2018, reference Ares(2019)2742819 (hereafter 'document 1');
- Overall voting result on a formal opinion of 19 December 2018, reference Ares(2019)2742819 (hereafter 'document 2');
- Impact assessment accompanying the document COMMISSION REGULATION (EU) .../... laying down ecodesign requirements for electronic displays pursuant to Directive 2009/125/EC of the European Parliament and of the Council, amending Commission Regulation (EC) No 1275/2008 and repealing Commission Regulation (EC) 642/2009, reference Ares(2019)2742819 (hereafter 'document 3');
- Opinion of the Regulatory Scrutiny Board of 28 July 2018 concerning the Ecodesign and energy labelling: Displays and televisions, reference Ares(2019)2742819 (hereafter 'document 4').

As regards point 3 of your request, namely 'the Member States who asked for the tabling of an amendment to the Commission's proposal on halogenated flame-retardants', the Directorate-General for Energy considered that this request for information should be dealt in the context of Regulation (EC) No 1049/2001. Without identifying any particular documents falling within the scope of point 3 of your request, it refused access to comments provided by Member States based on Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request the European Commission to 'review its position and provide access to the information on "the Member States who ask for the tabling of an amendment to the Commission's proposal on halogenated flame retardants" (i.e. document numbered 3)'. Although at first sight your request seems to be a request for 'information' on the identity of the Member States 'who ask[ed] for the tabling of an amendment to the Commission's proposal on halogenated flame retardants', you also request 'full access to the remaining undisclosed document'. Consequently, I conclude that your request is indeed a request of documents containing information on 'the Member States who ask for the tabling of an amendment to the Commission's proposal on halogenated flame retardants'.

## **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 can inform you that the European Commission identified the following documents as falling within the scope of your request:

- Audio recordings of the Regulatory Committee meeting under Directive 125/2009/EC of 19 December 2018, reference CCAB\_2C\_2-11\_EN\_19122018\_1000\_cBwzNBxGSJ2 (hereafter ‘document 5’);
- Audio recordings of the Regulatory Committee meeting under Directive 125/2009/EC of 19 December 2018, reference CCAB\_2C\_2-11\_EN\_19122018\_1430\_UyhdcPdeiA2 (hereafter ‘document 6’);
- Audio recordings of the Regulatory Committee meeting under Directive 125/2009/EC of 19 December 2018, reference CCAB\_2C\_2-11\_EN\_19122018\_1650\_thjgTGaMli2 (hereafter ‘document 7’);
- Preliminary comment on the proposals for Light sources and Display Regulations of 13 December 2018, reference Ares(2019)4090864 (hereafter ‘document 8’), which includes the following annexes:
  - Comments of 21 November 2018 on the COMMISSION REGULATION (EU) .../...of XXX laying down ecodesign requirements for electronic displays pursuant to Directive 2009/125/EC of the European Parliament and of the Council, amending Commission Regulation (EC) No 1275/2008 and repealing Commission Regulation (EC) 642/2009 (hereafter ‘document 8.1’);
  - Comments of 21 November 2018 on the ANNEXES to the Commission Delegated Regulation supplementing Regulation (EU) 2017/1369 of the European Parliament and of the Council with regard to energy labelling of electronic displays and repealing Commission Delegated Regulation (EU) No 1062/2010 (hereafter ‘document 8.2’);
  - Comments of 30 November 2018 on the proposals for revised energy labelling and eco-design regulations for various products, (hereafter ‘document 8.3’);
  - Comments of 6 December 2018 on COMMISSION DELEGATED REGULATION (EU) .../...of XXX supplementing Regulation (EU) 2017/1369 of the European Parliament and of the Council as regards energy labelling of electronic displays and repealing Commission Delegated Regulation (EU) No 1062/2010 (hereafter ‘document 8.4’);

- Comments of 13 December 2018 on the COMMISSION REGULATION (EU) .../...of XXX laying down ecodesign requirements for light sources and separate control gears pursuant to Directive 2009/125/EC of the European Parliament and of the Council and repealing Commission Regulations (EC) No 244/2009, (EC) No 245/2009 and (EU) No 1194/2012 (hereafter 'document 8.5');
- Comments of 21 November 2018 on the COMMISSION DELEGATED REGULATION (EU) .../...of XXX supplementing Regulation (EU) 2017/1369 of the European Parliament and of the Council with regard to energy labelling of light sources and repealing Commission Delegated Regulation (EU) No 874/2012 (hereafter 'document 8.6');
- Comments of 21 November 2018 on the ANNEXES to the Commission Delegated Regulation supplementing Regulation (EU) 2017/1369 of the European Parliament and of the Council with regard to energy labelling of light sources and repealing Commission Delegated Regulation (EU) No 874/2012 (hereafter 'document 8.7');
- Comments of 21 November 2018 on the ANNEXES to the Commission Regulation laying down ecodesign requirements for light sources and separate control gears pursuant to Directive 2009/125/EC of the European Parliament and of the Council and repealing Commission Regulations (EC) No 244/2009, (EC) No 245/2009 and (EU) No 1194/2012 (hereafter 'document 8.8'); and
- Comments of 6 December 2018 on the ANNEXES to the Commission Regulation laying down ecodesign requirements for electronic displays pursuant to Directive 2009/125/EC of the European Parliament and of the Council, amending Commission Regulation (EC) No 1275/2008 and repealing Commission Regulation (EC) 642/2009 (hereafter 'document 8.9').

Please note that parts of the documents 5-7, as well as parts of the annexes 8.1-8.9 fall outside the scope of your request, as they do not contain information on ‘the Member States who ask[ed] for the tabling of an amendment to the Commission’s proposal on halogenated flame retardants’.

Following this review, I regret to inform you that I have to confirm the initial decision of Directorate-General for Energy to refuse access to the above documents, based on the exceptions of Article 4(1)(b) (protection of privacy and the integrity of the individual) and 4(3), first subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001, for the reasons set out below.

## 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*)<sup>3</sup>, 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<sup>4</sup> (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<sup>5</sup> (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'.<sup>6</sup>

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person [...]'.<sup>7</sup>

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'.<sup>7</sup>

Documents 5-7 are audio recordings from the meeting on 19 December 2018 of the Ecodesign Committee. The purpose of such recordings is to enable Commission staff to go back to them, in case of need, in order to refine the report of the meeting.

---

<sup>3</sup> Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd* (hereafter referred to as '*European Commission v The Bavarian Lager* judgment') C-28/08 P, EU:C:2010:378, paragraph 59.

<sup>4</sup> Official Journal L 8 of 12.1.2001, page 1.

<sup>5</sup> Official Journal L 205 of 21.11.2018, p. 39.

<sup>6</sup> *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

<sup>7</sup> 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.

These recordings are not available to the general public, but only to the European Commission staff for a limited period of time, after which they are deleted.

The audio recordings consist of interventions of individuals, for example representatives of the Member States and Commission staff, not forming part of senior management, made during the meeting of Ecodesign Committee which took place on 19 December 2018. The captured information relates to identified or identifiable natural persons, namely to the intervening participants and to the positions they expressed, on behalf of the authorities they represented. This information clearly constitutes personal data in the sense of Article 3(1) of Regulation (EU) 2018/1725.

The captured information has been collected in the framework of the discussions in the Ecodesign Committee with the purpose of allowing *ex-post* verification of the positions expressed in the meeting, in case of need. Article 13(2) of the Standard Rules of Procedure for Standing Committees stipulate that the Committee's discussions shall be confidential<sup>8</sup>. These rules were adopted on the basis of Article 9 of Regulation 182/2011<sup>9</sup>. These provisions will be explained in detail below.

Public disclosure of audio-visual recordings which were collected for specified explicit and legitimate purposes in the context of confidential discussions would constitute a further processing in a way incompatible with those purposes. Such further processing would not be a fair and lawful processing according to Article 4(1) of Regulation (EU) 2018/1725.

As to document 8, including its annexes, it contains personal data such as the names and initials of persons who do not form part of the senior management of Member States or of the European Commission, their contact details or job titles.

The names<sup>10</sup> 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’.

---

<sup>8</sup> Standard rules of procedure for committees — Rules of procedure for the [name of the committee] committee, OJ C 206 of 12.7.2011, p. 11–13.

<sup>9</sup> 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.

<sup>10</sup> *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.<sup>11</sup> 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, included in the parts of documents 5-7, which fall within the scope of your request and document 8, 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.

## **2.1. 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.

The decision-making process of the European Commission is not yet finalised, because the act is not yet adopted by the College.

---

<sup>11</sup> 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.

Documents 5 to 8 contain comments submitted by individual Member States during the meeting of 19 December 2018 of the Ecodesign and Energy Labelling Committee. This information is protected as it has been gathered in the framework of the standing committees where the guidance document has been discussed on several occasions.

In its Corporate Europe Observatory judgment<sup>12</sup>, 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, *a fortiori*, to the positions of Member States expressed in the framework of such committee meetings.

Premature disclosure of such positions, before the College of Commissioners had the opportunity to pronounce itself on it, 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.

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<sup>13</sup> (‘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.

---

<sup>12</sup> Judgment of the General Court of 7 June 2013, *Stichting Corporate Europe Observatory v European Commission*, T-93/11, EU:T:2013:308, paragraphs 32-33.

<sup>13</sup> 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, Official Journal L 55 of 28.2.2011, p. 13–18.



In your confirmatory application, you refer to recital 6 of Regulation (EC) No 1049/2001 and draw attention to the phrase stating that ‘wider access should be granted to documents held by EU institutions, especially when those institutions are acting in their legislative capacity, including under delegating powers’. In the case at hand, full access was granted to four documents, including the impact assessment and the opinion of the Regulatory Scrutiny Board. I would also like to underline that the same recital stipulates a condition to the access reserved to legislative documents, by indicating that such access should be granted ‘while at the same time preserving the effectiveness of the institutions’ decision-making process’. As explained above, there is a concrete and realistic risk, that public disclosure of the individual positions of Member States against the explicit rules on confidentiality, would certainly undermine the trust between the Member States and the European Commission and the effectiveness of the decision-making process of the European Commission.

Further, you disagree with the interpretation of Article 9 of the Comitology Regulation and the interpretation of Article 10 of the Standard Rules of Procedure. Article 9 of the Comitology Regulation provides the legal basis for the adoption of the Standard Rules of Procedure and states that ‘[t]he principles and conditions on public access to documents and the rules on data protection applicable to the Commission shall apply to the committees’. By explicitly mentioning the documents, which should be made public, Article 10 of the Standard Rules of Procedure implicitly determines which documents should not be subject to publication. Based on this reading, the European Commission concludes that the individual positions of the Member States are excluded from publication.

In addition to the above, the European Commission has explained in detail why it considers that disclosure of documents containing the individual positions of Member States 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 5-8 is justified based on Article 4(3), first subparagraph of Regulation (EC) No 1049/2001.

### **3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exception laid down in Article 4(3), first subparagraph, of Regulation 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 ‘the public interest in disclosure in this case is justified by need to enable interested parties to understand why and how the Commission integrated the amendment on halogenated flame retardants in the said implementing measure adopted under the Ecodesign Directive’.

Whilst I understand that you are interested in the positions and the identity of the Member States which made comments on this issue, I do not consider that this interest is a public interest which is capable of overriding the public interest protected by Article 4(3), first subparagraph of Regulation (EC) No 1049/2001. Indeed a summary record allowing to obtain a very concrete picture of the discussions in the Committee has been made public in full, as the impact assessment and the opinion of the Regulatory Scrutiny Board. In light of the above, I consider that, in this case, the public interest is better served by protecting the ongoing decision-making process, in accordance with Article 4(3), first subparagraph of Regulation (EC) No 1049/2001.

The General Court acknowledged that ‘the individual interest which may be asserted by a requesting party in obtaining access to documents concerning him personally cannot generally be decisive for the purposes both of the assessment of the existence of an overriding public interest and of the weighing up of interests under [...] Article 4(2) of Regulation No 1049/2001.’<sup>14</sup>

Nor have I been able to identify any public interest capable of overriding the public and private interests protected by Article 4(3), first subparagraph of Regulation (EC) No 1049/2001.

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

#### **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 to documents 5-8 without undermining the interests described above.

In this context, please note, that general considerations cannot provide an appropriate basis for establishing that the principle of transparency was in this case especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question.<sup>15</sup>

Consequently, I have conclude that the documents requested are covered in their entirety by the invoked exceptions to the right of public access.

---

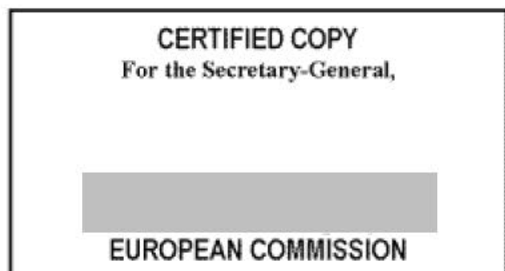
<sup>14</sup> Judgment of the General Court of 26 May 2016, *International Management Group v European Commission*, T-110/15, EU:T:2016:322, paragraph 56.

<sup>15</sup> Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission*, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93.

## 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*

