



EUROPEAN COMMISSION

Brussels, 25.11.2019
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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 2019/4443**

Dear [REDACTED],

I refer to your letter of 18 September 2019, 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 documents² (hereafter ‘Regulation (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 29 July 2019, addressed to the Directorate-General for Health and Food Safety, you requested, on behalf of your client, the company [REDACTED], access to ‘[t]he vote of the Member State France with regard to the approval of the active substance Tri-allate during the Standing Committee on Plants, Animals, Food and Feed having led to the approval of the active substance Tri-allate’.

In its initial reply of 29 July 2019, the Directorate-General for Health and Food Safety refused access to the document containing the requested vote based on the exceptions of Article 4(3), second subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001.

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. You underpin 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.

Following this review, I would like to inform you that the European Commission has identified the following document as falling under the scope of your request:

- Internal voting sheet of 26 February 2009 of the Standing Committee on the Food Chain and Animal Health (now referred to as 'Standing Committee on Plants, Animals, Food and Feed'), registered under reference ADONIS (2009) 410578 (hereafter 'requested document').

Please note that the requested document does not only contain the vote of French delegation on the active substance Tri-allate. These other parts of the document, to which you do not request access, fall outside the scope of your request.

I regret to inform you that I have to confirm the initial decision of Directorate-General for Health and Food Safety based on the exception of Article 4(3), second subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001, for the reasons set out below.

Article 4(3), second subparagraph of Regulation (EC) No 1049/2001 provide 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 document to which you request access contains the individual vote of the French delegation, as expressed in the meeting of 26 February 2009 of the Standing Committee on the Food Chain and Animal Health. The vote concerned the 'Draft Commission Directive amending Council Directive 91/414/EEC to include chlorsulfuron, cyromazine, dimethachlor, etofenprox, lufenuron, penconazole, tri-allate and trifluralin as active substances (SANCO/5039/2009) (ex SANCO/4331/2008)'.

According to the internal rules of procedure of the Standing Committee on the Food Chain and Animal Health, which were applicable at the time the requested document was drawn-up, '[t]he committee's discussions shall be kept confidential.' These rules are reflected in Article 14(2) of the Standard Rules of Procedures for Committees³, which

³ Standard Rules of Procedure for Committees (2001/C 38/03), OJ C 38, 6.02.2001, p. 3.

the Commission adopted pursuant to Article 7 of the Council Decision 1999/468/EC⁴. They explicitly exclude the positions of individual Member States from public access. In fact, Articles 11(2) and 14(2) of the Standard Rules of Procedure⁵ affirm, 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 relation to the voting, Article 7(3) of the Council Decision 1999/468/EC and Article 4(2) of the Standard Rules of Procedure⁶, refer to the 'voting results', i.e. the total voting results only, not the individual Member States' votes.

It follows that public access cannot be granted to the requested document showing the individual vote of France in the meeting of 26 February 2009 in the Standing Committee on the Food Chain and Animal Health, as this would result in the above-mentioned confidentiality requirement being deprived of its meaningful effect.

In its Corporate Europe Observatory judgment⁷, the General Court confirmed that minutes circulated to participants in the framework of a meeting, which was not open to the public, are to be considered as internal documents within the meaning of Article 4(3) of Regulation (EC) No 1049/2001 and deserve protection on that basis. The same reasoning applies to the votes casted by the Member States in the framework of the Standing Committee on the Food Chain and Animal Health.

Public disclosure of the votes casted by France would seriously undermine the decision-making process at inter-institutional level and within the Commission. Disclosure of the individual vote of a Member State against the explicit confidentiality requirements explained above, would seriously undermine the efficient and constructive cooperation between the Commission, the concerned Member State, but also the other Member States working together with the Commission in the context of the Standing Committee on Plants, Animals, Food and Feed.

⁴ Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (1999/468/EC), Official Journal C 255 of 21.10.2006, p. 4.

⁵ Article 11(2) of the Standard Rules of Procedure for Committees states that '[a] summary report for the European Parliament shall be drawn up under the auspices of the Chairman. This report shall briefly describe each agenda point and the result of the vote on the proposed measures submitted to the committee. It shall not mention the individual position of Member States in the committee's discussions.' Article 14(2) of the Standard Rules states that '[t]he committee's discussions shall be kept confidential.'

⁶ Article 7(3) of the Council Decision 1999/468/EC states that '[t]he European Parliament shall be regularly kept informed by the Commission of committee proceedings following arrangements which ensure that the transmission system is transparent and that the information forwarded and the various stages of the procedure are identified. To that end, it shall receive agendas for committee meetings, draft measures submitted to the committees for the implementation of instruments adopted by the procedure provided for by Article 251 of the Treaty, and the results of voting and summary records of the meetings and lists of the authorities and organisations to which the persons designated by the Member States to represent them belong.' Article 4(2) of the Standard Rules of Procedure states that '[t]he Commission shall send the overall result of voting, the attendance list referred to in Article 12 and the summary report of the meetings referred to in Article 11(2) to the European Parliament within 14 calendar days of each committee meeting.'

⁷ 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.

Such public disclosure would seriously undermine the relationship of trust between the Commission and the Member States, as Member States casted their votes in a clear legal framework providing for confidentiality relating to the individual votes expressed.

Indeed, the Member States and the Commission must be free to explore all possible options in preparation of a decision within Standing Committees and Groups of Experts, free from external pressure. Public disclosure of the individual vote of an individual Member State would unsettle the functioning of the Standing Committee, put under strain the relationship of trust between Member States and the Commission by making public internal details of the decision-making, which, based on the applicable rules, should not be publicly available. This would not only jeopardise the serenity of the decision-making process in this Standing Committee, but also alter the nature of the procedure, which is based on the principle that the ‘voting results’, i.e. the total voting results only, not the individual Member States’ vote should be made public.

In your confirmatory application, you state that the European Commission did not ‘provide any evidence on the impact of the disclosure on the decision making process’. Moreover, you consider that the Commission did ‘not establish in what extent the disclosure of one Member State’s vote would likely, specifically and actually undermine the protection of the institution’s decision-making process even though this decision was approved ten years ago. In your view, the European Commission did not ‘establish at all the serious nature of the risk of the disclosure on the decision-making process related to the approval of the substance Tri-allate’. Contrary to your statements, these risks are reasonably foreseeably and certainly not hypothetical. Even considering that the vote has taken place ten years ago, this is not sufficient to demonstrate that there is no justification to protect the interest of the decision-making as laid down in Article 4(3), second subparagraph of Regulation (EC) No 1049/2001. I would like to draw your attention to the provision of Article 4(7) of Regulation (EC) No 1049/2001. This article states that the exceptions shall apply for the period during which protection is justified based on the content of the document. The exceptions may apply for a period of 30 years and even beyond.

Undermining the trust between the Member States and the Commission would negatively impact their cooperation in the framework of the Standing Committee in a foreseeable and not hypothetical way, as it would go against the legitimate expectations of the Member States that confidentiality of the individual votes will be preserved and the relevant legal framework will be respected. Public disclosure of the individual vote of France would undermine the effectiveness of the Commission’ decision-making process, as it would affect mutual trust between the European Commission and the Member States and be seen as an act contrary to the principle of sincere cooperation.

I therefore conclude that the part of the requested document showing the individual vote of France with regard to the approval of the active substance Tri-allate cannot be disclosed based on the exception of Article 4(3), second subparagraph (protection of the decision-making process) of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(3), second 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 argue that ‘the request concerns the vote of Member State France with regard to the approval of the active substance Tri-allate ten years ago. In particular, this request covers information concerning pesticides. As such, it qualifies as “environmental information”. [...] Exceptions to the right of access provided for in Article 4(3) of Regulation 1049/2001 should therefore be waived in the instant case given that the requested information related to environmental matters.’

Such general considerations cannot provide, pursuant to settled case-law, an appropriate basis for substantiating the existence of an overriding public interest in disclosure prevailing over the reasons justifying the refusal to disclose the requested document.

I would like to underline that your application has been assessed under Regulation (EC) No 1049/2001 as well as under the Aarhus Regulation⁸. The Aarhus Regulation does not establish a separate system of public access to documents that would derogate from the general system put in place by Regulation (EC) No 1049/2001. It merely establishes a specific rule of interpretation, which supplements Regulation (EC) No 1049/2001 in cases where certain specific types of information are concerned.

Indeed, according to Article 3 of the Aarhus Regulation, Regulation (EC) No 1049/2001 shall apply to any request by an applicant for access to environmental information held by EU institutions and bodies. The particular provisions regarding the application of exceptions to the requests for access to environmental information are governed by Article 6 of the Aarhus Regulation.

Article 6(1) of the Aarhus Regulation provides as follows:

‘[a]s regards Article 4(2), first and third indents, of Regulation (EC) No. 1049/2001, with the exception of investigations, in particular those concerning possible infringements of Community Law, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emission into the environment.’

As regards the other exceptions set out in Article 4 of Regulation (EC) No. 1049/2001, the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.’

⁸ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions 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, OJ L 264, 25.9.2006, p. 13.

I consider that information about the individual vote of Member States (in this case, France) in the approval of the active substance Tri-allate in accordance with the rules concerning the placing of plant protection products on the market cannot be considered as ‘information relating to emission into the environment’ within the meaning of the case law of the EU Courts.⁹ Indeed, this document relates neither to ‘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’, nor to data on ‘the effects of these emissions’¹⁰.

Furthermore, the document at hand cannot be considered as falling within the category of ‘environmental information’ within the meaning of Article 2(1)(d) of the Aarhus Regulation. In this regard, the individual vote of a Member State on a draft act is not itself a measure affecting or likely to affect the environment, in accordance with point iii) of Article 2(1)(d) of the Aarhus Regulation, but a procedural step in the process relating to the adoption of an act. Accordingly, this document cannot fall within the scope of Article 6 of the Aarhus Regulation.

Therefore, as the Aarhus Regulation only provides that an overriding public interest may be deemed to exist for the disclosure of information relating to emission into the environment with regard to the exceptions of Article 4(2) first and third indent of Regulation (EC) No 1049/2001, no overriding public interest exists in granting access to the document at hand.

Concerning your argument that denying access to the documents ‘would infringe the concept of openness, enshrined in Article 1 TEU, the principle to public access to documents, granted by Regulation No 1049/2001 [and] the transparency and the legitimacy of the decision-making process provided by case law.’ 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 question¹¹.

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.

⁹ Judgment of the General Court of 21 November 2018, *Stichting Greenpeace Nederland and PAN Europe v Commission*, T- 545/11 RENV, EU:T:2018:817 paragraph 90.

¹⁰ Judgment of the Court of Justice of 23 November 2016, *Commission v Stichting Greenpeace Nederland and PAN Europe*, C-673/13 P, EU:C:2016:889, paragraphs 79 and 80, respectively.

¹¹ 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.

4. PARTIAL ACCESS

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

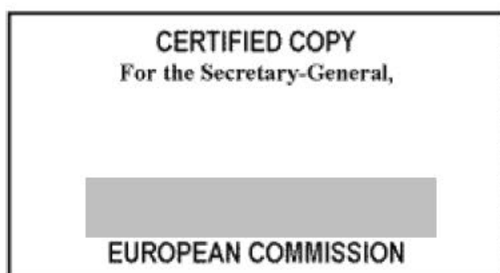
However, for the reasons explained above, no meaningful partial access is possible to the requested document without undermining the interests described above.

Consequently, I have conclude that the document requested is covered in its entirety by the invoked exceptions 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

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