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**DECISION OF THE SECRETARY-GENERAL ON BEHALF OF THE EUROPEAN COMMISSION
PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N°
1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2017/6695**

Dear Mr Teffer,

I refer to your email of 8 January 2018, registered on the same date, 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 ('Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 6 November 2018, addressed to the Directorate-General for Agriculture and Rural Development, you requested access to *[a]ll documents – including but not limited to e-mails, minutes and 4-column tables – related to the trilogue meetings between the Parliament and the Council on the organic farming regulation.*

The European Commission has identified 88 documents as falling under the scope of your request.

These documents were drafted in the framework of 18 trilogues which took place between November 2015 and June 2017 following the European Commission Proposal

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

on organic production and labelling of organic products (2014/0100 (COD))³ which aims to revise the existing legislative framework provided by Regulation (EC) No 834/2007⁴.

The above-mentioned 18 trilogues led to a preliminary agreement between the Maltese Presidency and the European Parliament on the new regulation in the form of a revised text on 28 June 2018, after three years of negotiation.

In its initial reply of 19 December 2017, the Directorate-General for Agriculture and Rural Development fully disclosed three out of the 88 identified documents⁵, and provided the link to one document which was already public⁶. It refused, after consultation of the Parliament and the Council, access to the remaining 84 documents on the basis of the exception for the protection of the ongoing decision-making process which is provided under Article 4(3), first subparagraph of Regulation 1049/2001.

More specifically as regards 34 documents consisting of 'four column documents' or their excerpts⁷, the Directorate-General for Agriculture and Rural Development refused to provide partial access to them, on the ground that the administrative burden generated by their redaction would be disproportionate in light of both the lengthy size of the documents (around 600 pages per trilogue) and the fact that the information proposed for disclosure was already public.

Through your confirmatory application you request a review of this position. You do not contest the particularly heavy workload which would be entailed by a partial disclosure of the above-mentioned 34 documents, you argue that the Directorate-General for Agriculture and Rural Development's refusal to grant access to the 84 documents *poses considerable problems for European democracy [as] it would mean that the decision-making process would only become public after the proposed regulation has already been adopted.*

Consequently the scope of this decision is limited to the 50 fully refused documents (consisting of agendas and non-papers) and the refused parts of the 34 four column tables (namely their fourth column) under the exception of Article 4(3), first subparagraph of Regulation 1049/2001.

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

³ Procedure 2014/0100/COD. COM (2014) 180: *Proposal for a regulation of the European Parliament and of the Council on organic production and labelling of organic products, amending Regulation (EU) No XXX/XXX of the European Parliament and of the Council [Official controls Regulation] and repealing Council Regulation (EC) No 834/2007*, available at: http://eur-lex.europa.eu/procedure/EN/2014_100. Hereafter the 'Commission Proposal on organic production and labelling of organic products'.

⁴ Council Regulation (EC) No 834/2007 of 28 June 2007 *on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91*, Official Journal L 189, 20.7.2007, p. 1–23.

⁵ Namely Documents 1, 2 and 88.

⁶ Namely Document 85.

⁷ Namely Documents 5, 7, 8, 10, 11, 12, 13, 15, 16, 17, 19, 20, 23, 24, 25, 28, 29, 30, 35, 36, 41, 42, 43, 44, 47, 48, 49, 58, 71, 72, 76, 77, 80 and 81.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

The documents to which you request access consist of 18 agendas⁸, 32 informal documents or 'non-papers'⁹ and 34 so-called 'four column documents'¹⁰, all of which are related to recently completed *trilogues* regarding the European Commission Proposal on organic production and labelling of organic products.

Following the review of the assessment of the above-mentioned documents by the Secretariat-General, I am pleased to grant:

- full access to 9 of the requested agendas, namely Agendas 1 to 7, 9 and 14; and
- partial access to the remaining 9 agendas (amongst which, 8 of the requested agendas, namely Agendas 8, 10, 11, 12, 13, 15, 16 and 17, are released, subject to the sole withholding of their attachments).

I regret however to inform you that I have to confirm the initial decision of Directorate-General for Agriculture and Rural Development to refuse access to the remaining 66 documents (consisting of non-papers and four column documents, including annexes of Agendas 8, 10, 11, 12, 13, 15, 16, 17 and 18) on the basis of the exception for the protection of the decision-making process which is provided under Article 4(3), first subparagraph of Regulation 1049/2001, for the reasons set out below.

Article 4(3), first subparagraph of Regulation 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.*

In this instance, all above-mentioned 84 documents relate to the 18 *trilogues* which took place between November 2015 and June 2017.

Trilogues consist of informal meetings between representatives of the three institutions designed to reach an agreement on proposed legislation. In the framework of *trilogues*, representatives of the co-legislators negotiate directly with each other in a spirit of conciliation of different opinions. *Trilogues* can occur at any stage during the legislative procedure following the submission of the European Commission's proposal.

⁸ Namely documents 3, 4, 6, 9, 14, 18, 22, 27, 34, 40, 46, 57, 63, 70, 73, 75, 79 and 84. For simplification purposes, these agendas will be referred to as per the number of the related *trilogue*: *e.g.* Agenda 1, Agenda 2, and so forth.

⁹ Namely documents 21, 26, 31, 32, 33, 37, 38, 39, 45, 50, 51, 52, 53, 54, 55, 56, 59, 60, 61, 62, 64, 65, 66, 67, 68, 69, 74, 78, 82, 83, 86 and 87.

¹⁰ Namely Documents 5, 7, 8, 10, 11, 12, 13, 15, 16, 17, 19, 20, 23, 24, 25, 28, 29, 30, 35, 36, 41, 42, 43, 44, 47, 48, 49, 58, 71, 72, 76, 77, 80 and 81.

Notwithstanding the fact that *trilogues* are not expressly provided for in the Treaties, they have proven to be a very effective means of reaching agreements between co-legislators and, as result, are at the origin of the adoption of most legislation nowadays.

The issue of whether public disclosure of *trilogue*-related documents would seriously undermine the decision-making process within the meaning of Article 4(3), first subparagraph is at the core of the *De Capitani v European Parliament* case¹¹.

Pending the decision of the General Court in this case, in which it supports the Parliament, the European Commission maintains its position, pursuant to which the work of *trilogues* should be surrounded by a minimum level of confidentiality, justifying, as long as the legislative procedure is ongoing, the temporary non-disclosure of *trilogue*-related documents.

In this instance, whereas a preliminary agreement was reached between the Maltese Presidency and the European Parliament on a new regulation on 28 June 2017, after three years of negotiation, this revised text still needs to be formally adopted by both institutions in order to become law.

Both the Court of Justice and the General Court have acknowledged the possibility for the institution to rely on a general presumption against public disclosure, in order to refuse access to documents¹², including those of a legislative nature¹³.

As per the logic of the above-mentioned judgments, the European Commission considers that the fourth column of *trilogue* tables is protected by a general presumption against their public disclosure which is justified by the need to ensure the integrity of the conduct of the procedure. The latter can be best preserved by limiting unsolicited intervention by third parties until formal adoption of the legislative text.

Pursuant to the principle of 'nothing is agreed until everything is agreed', which is of primary importance for the proper functioning of the legislative procedure, disclosure of *trilogue*-related documents before the formal adoption of the new legislation may have irremediable negative consequences on the latter.

This is especially the case since the subject matter at the core of the draft legislation, namely organic production and labelling of organic products, is very sensitive. The new to-be-adopted legislation aims indeed at addressing the concern over the risk of the erosion of consumer confidence due to many exceptions which had the effect of diluting organic production rules, as well as shortcomings in the control system and import regime. Extensive discussions took place during the *trilogue* negotiations and three years were necessary to reach a compromise on this sensitive issue which is directly linked to consumers' awareness and public health.

¹¹ Case T-540/15.

¹² Judgments of the Court of 1 July 2008, *Sweden and Turco v Council*, C-39/05 P and C-52/05 P, paragraph 50 and of 17 October 2013, *Council v Access Info Europe*, C-280/11 P, paragraph 72; see also Judgment of 13 November 2015, *ClientEarth v Commission*, T-424/14 and T-425/14, EU:T:2015:848.

¹³ Judgment of 13 November 2015, *ClientEarth v Commission*, T-424/14 and T-425/14, EU:T:2015:848, paragraph 100.

In light of the sensitivity of the legislative proposal in question, the numerous political interests involved, and the efforts of the institutions to reach a satisfactory compromise, it is of paramount importance to guarantee the conditions required for the final adoption of the draft regulation and to ensure therefore the temporary non-disclosure of the *trilogue*-related documents. The latter should indeed remain protected, at least until the end of the legislative procedure, which will only be completed upon the formal adoption of the draft revised regulation by the co-legislators.

Trilogue-related documents, and in particular the so-called 'four-column documents' are working tools used during the *trilogues* and cannot therefore be considered to be part of the 'formal legislative process' within the meaning of the *Access Info Europe v Council* judgment, which allows to draw a distinction between those informal documents and the documents which chart the formal decision-making process of the co-legislators, makes them subject to a different standard of transparency¹⁴.

The European Commission considers that 'four-column' tables and the non-papers at issue are documents of the same nature which fall within the same category within the meaning of the case law, as explained below.

The 34 so-called 'four-column documents' track the progress of the *trilogues* in question. They combine the initial positions of the three institutions (set out in the first three columns) with a fourth column which reflects the compromise text as it evolved during the discussions. The completed and agreed upon fourth column constitutes the final compromise text which must still be adopted under the formal procedure by each co-legislator in order to become enacted in law.

The 32 informal documents or 'non-papers' (including the annexes to Agendas 8, 10, 11, 12, 13, 15, 16, 17 and 18) were drafted by the European Commission, the Council or the European Parliament in the framework of preliminary discussions and were intended as preparatory documents aimed at clarifying discussion points so as to facilitate reaching a compromise. These documents therefore reflect preliminary views on specific aspects of the above-mentioned Commission proposal.

Consequently, the above-mentioned 34 'four column documents' and 32 'non-papers papers' (including the annexes to Agendas 8, 10, 11, 12, 13, 15, 16, 17 and 18) cannot be released as they are protected under a general presumption pursuant to which their public disclosure, at this stage of the legislative procedure, would seriously undermine the decision-making process within the meaning of Article 4(3), first subparagraph of Regulation 1049/2001.

As far as Agenda 18 is concerned, as stated in the Directorate-General for Agriculture and Rural Development's initial reply, it contains explicit references to the negotiation procedure which has yet to be completed.

¹⁴ Judgment of 22 March 2011, T-233/09, EU:T:2011:105, paragraph 77.

Against this background, I conclude that the premature disclosure of the requested Agenda 18, 32 ‘non-papers’ and the 34 so-called ‘four-column documents’, before the formal adoption of the Regulation on organic production and labelling of organic products, would seriously undermine the decision-making process of the institution within the meaning of Article 4(3), first subparagraph of Regulation 1049/2001, as well as the inter-institutional decision-making process.

3. NO 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 *[i]f citizens, potentially via media, are not able to know the steps leading up to the final compromise text, they are not well-informed enough to tell their MEPs or national governments representing them in the Council whether they would like the legislative proposal to be supported. According to you, [t]his could seriously undermine their potential to influence policy-making.*

The European Commission acknowledges that citizens’ effective participation into the EU legislative decision-making process of the institutions is an essential element of EU law-making legitimacy. As the Court of Justice has held, *[o]penness in [the legislative process] contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights*¹⁵.

In this instance, the European Commission considers nevertheless that citizens’ participation into the legislative process was duly ensured, as evidenced below.

Since the very beginning of the legislative review process, citizens’ involvement has been welcome and solicited. As early as in 2013, the European Commission launched a public consultation on the organic sector which resulted in more than 45,000 answers from citizens. Subsequently, organic stakeholders from all sectors, including producers, the industry and consumers were all invited in the framework of the impact assessment exercise to share their views on the future of organics. This is on the basis of their respective contributions that the Commission drafted its proposal for a revised legislation. This proposal was made public in March 2014.

The general approach and the European Parliament’s amendments were published in 2015. When the *trilogues* started in November 2015, the European Parliament was involved not only at Rapporteur’s but also at Shadow Rapporteurs’ level, thus covering the whole political spectrum. Moreover, the Rapporteur informed regularly other MEPs at the Committee of Agriculture (COMAGRI) which is in principle broadcasted in

¹⁵ Judgment of 1 July 2008, C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 46.

streaming on the European Parliament's website so as to keep citizens duly informed. Furthermore, the Commission received frequent contributions and position papers from the MEPs evidencing regular information and input from the various stakeholders.

The successive Presidencies also represented the 28 Member States and their citizens, including producers, processors and consumers. They kept Member States informed at every Special Committee of Agriculture and requested renewed negotiating mandates whenever necessary to ensure maximal consistency with national positions. Discussion tables were held at Member States' level with the various stakeholders interested in the reform, so as to inform the latter on the outcome of the different steps and progress of the process.

Against this background of (i) the publication of the European Commission's Proposal following a wide public consultation, (ii) regular participation of elected MEPs and (iii) constant reporting of the Presidency of the European Council to the Member States, it must be concluded that the required transparency and regular information of the citizens was sufficiently safeguarded for the latter to meaningfully participate and influence the main steps of the legislative decision-making process.

The three Institutions share a commitment to enhancing the transparency of the legislative process and for this reason are currently developing detailed technical specifications for the concept of a future Joint Legislative Portal. The latter is intended to be a way for a non-specialist audience to find information and documents relating to legislative files, linking up the different sources of information from the Institutions.

Whereas it will continue its engagement with the co-legislators to fulfil the commitments to enhance transparency of the legislative process as set out in the Interinstitutional Agreement on Better Law-making, the European Commission considers that the general principle of the existence of an overriding public interest in the field of the legislative activities of the institutions, based on the transparency requirements stemming from Article 15 TFEU and Regulation 1049/2001, finds its limits in the interest of ensuring the proper functioning of the legislative procedure guaranteed by Article 294 TFEU.

Consequently, the European Commission considers in this instance that documents underlying the *trilogues* should not be prematurely disclosed prior to the formal adoption of the organics review compromise text which, in light of the efforts deployed to ensure citizens' continuous information and effective participation.

Furthermore, it should be stressed that the European Commission does intend to ensure the confidentiality of the requested documents, especially of the 'four column documents', mainly until the adoption of the legislation. Such confidentiality does not mean that the public will never have the opportunity to be informed of and understand the evolution of the respective positions of the institutions during the negotiating process in question. Such access will be duly considered, following future requests thereto under Regulation 1049/2001, once the disclosure of the information concerned will no longer jeopardise the proper functioning of the legislative procedure.

In light of the above, I must conclude that, in this instance, I have not been able to identify any public interest capable of overriding the above-mentioned interest protected by Article 4(3), first subparagraph of Regulation 1049/2001.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting partial access to the documents requested.

Consequently, partial access is provided to Agendas 8, 10, 11, 12, 13, 15, 16 and 17, subject to the sole redaction of their respective annexes (which are covered by a general presumption against public disclosure, as explained above.)

As far as Agenda 18 is concerned, partial access is provided, subject to the redaction of:

- its parts containing explicit references to substantive contents of the negotiation procedure which has yet to be completed; and
- its three annexes which are covered by a general presumption against public disclosure, as explained above.

According to settled case-law, the documents covered by a general presumption, such as the one referred to in section 2 of this decision, do not fall within an obligation of disclosure, in full, or in part¹⁶.

The above-mentioned case law does not, however, exclude the right of applicants to demonstrate that a given document, disclosure of which has been requested, is not covered by that presumption¹⁷.

In this instance, I note that, in the framework of your confirmatory application, you do not contest the particularly heavy workload which would be engendered by partial disclosure of the 34 ‘four column documents’, nor the fact that the information contained in their three columns would not be of any substantial value as it is already publicly known.

Moreover, for the reasons explained above, no meaningful partial access is possible without undermining the interest described above or creating a disproportionate administrative burden in light of the fact that the documents to be redacted are very voluminous and the to-be released information contained therein would be of no substantial value as it is already of public knowledge.

¹⁶ Judgment of 28 June 2012, *Editions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 133.

¹⁷ Judgment of 29 June 2010, *Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 103.

The fact that a document contains information which is already of public domain, far from being capable of justifying a refusal of partial access, requires in principle its partial disclosure¹⁸. However, pursuant to settled case-law, in exceptional circumstances:

[A] derogation from the obligation to grant partial access might be permissible where the administrative burden of blanking out the parts that may not be disclosed proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required¹⁹.

The General Court has further held that:

[...] The principle of sound administration requires that the duty to grant partial access should not result in an administrative burden which is disproportionate to the applicant's interest in obtaining that information²⁰.

Furthermore, detailed information pertaining to the legislative procedure in question, including concerning the respective positions of the institutions is available, *inter alia*, via the following link:

http://eur-lex.europa.eu/procedure/EN/2014_100

Consequently, I have come to the conclusion that the 32 ‘non-papers’ above-mentioned and the 34 ‘four column documents’ cannot be publicly disclosed under Regulation 1049/2001. As far as the latter documents are concerned, the administrative burden engendered by implementing such partial access would indeed not weigh up against your possible interest in obtaining the (already public) information contained in the parts that would remain unredacted.

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

¹⁸ Judgment of 30 January 2008, *Terezakis v Commission*, T-380/04, EU:T:2008:19, paragraph 101.

¹⁹ Judgment of 7 February 2002, *Kuijter v Council*, T-211/00, EU:T:2002:30, paragraph 57.

²⁰ Judgement of 12 July 2001, *Mattila v Council and Commission*, T-204/99, EU:T:2001:190, paragraph 69.

European Ombudsman under the conditions specified respectively in 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



*For the Commission
Martin Selmayr
Secretary-General*

Annexes: 18 (including 9 partially and 9 fully disclosed agendas)