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SECRETARIAT-GENERAL

The Secretary General

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Mr Philippe Dusser
Secretary General
European Oil Seeds Alliance

By email only:
p.dusser@prolea.com

Subject: Confirmatory application for access to documents under Regulation 1049/2001 - Gestdem 2013/3371

Dear Mr Dusser,

I refer to your letter of 6 August 2013, registered on the same day, in which you lodge a confirmatory application, pursuant to Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents¹ (hereinafter: Regulation 1049/2001), for a review of a reply from the Directorate-General for Climate Action sent to you on 18 July 2013.

I also refer to our holding replies dated 9 September 2013 and 20 September 2013.

1. SCOPE OF YOUR REQUEST

a) Initial request

Your initial request of 6 August 2013 referred to:

“- Any intermediate versions of the IFPRI/ATLASS report between the March 2010 version “Global Trade and Environmental Impact Study of the EU Biofuels Mandate Final Report March 2010” of the IFPRI/ATLASS Consortium and the October 2011 version “Assessing the Land Use Change Consequences of European Biofuel Policies” of the IFPRI/ATLASS Consortium;

- Any exchanges within the European Commission on the results of the different versions of the IFPRI/ATLASS report since March 2011; - The relevant emails exchanged between the European Commission and the members of the ATLASS Consortium, in particular with

¹ OJ L145, 31.05.2001, p.43.

David Laborde, one of the author of the IFPRI report, in the preparation of the IFPRI/ATLASS report; - Any email communications between the European Commission and the JEC

- Joint Research Centre-EUCAR-CONCAWE collaboration with regard to the various versions of the IFPRI/ATLASS report that have been produced.

- SEC(2012) 579/1 - 10/10/2012: Avis du comité d'analyse d'impact Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 98/70/EC relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EC on the promotion of the use of energy from renewable sources."

The Directorate-General Climate Action (hereinafter: DG CLIMA) answered the fifth part of this request, registered under Gestdem 2013/3164, by its letter of 28 June 2013, in which it provided access to the document SEC(2012) 579/1.

The first four parts of this request were attributed to the Directorate-General Trade (hereinafter: DG TRADE) under the reference Gestdem 2013/3371. DG TRADE provided you with two lists of documents concerned ("Table 1" listing drafts of the IFPRI study and related documents and "Table 2" listing electronic mails related to the preparation of the above-mentioned IFPRI study) and gave its reply concerning those documents.

The remaining part of this initial request registered under Gestdem 2013/3371 was re-attributed DG CLIMA. DG CLIMA replied to your request by its letter of 19 July 2013. It listed documents "*concerning the draft impact assessment on ILUC and related documents*" in a table ("Table 3"), and not the drafts of the IFPRI report underpinning the analysis included in such document which have already been released, and gave its reply concerning those documents.

Access was granted to documents 6 and 6.1 from Table 3, and to all correspondence with third parties (documents 7-12 from Table 3).

Access to the following documents was refused: 1, 1.1, 2, 2.1, 2.2, 2.3, 3, 3.1, 4, 5, 5.1, 5.2, 5.3, 5.4 and 5.5 from Table 3.

DG CLIMA based this decision on the exception in Article 4(3), first subparagraph, of Regulation 1049/2001, because the documents you requested concern an on-going decision-making process.

b) Confirmatory request

By your confirmatory request you ask the Commission to review the initial decision and you "*confirm [your] initial request for access to the documents which the Commission has refused to grant access to*".

2. DOCUMENTS CONCERNED

The following documents are subject to the present decision:

1. Submission of the draft Impact Assessment on indirect land-use change related to biofuels (ILUC) – Cover e-mail by DG ENER and DG CLIMA to IAS Board - Meeting of 18 March 2011
 - 1.1. Draft Impact Assessment on indirect land-use change related to biofuels (ILUC)
2. Re-submission of the draft Impact Assessment on indirect land-use change related to biofuels (ILUC) - Note by DG ENER and DG CLIMA to IAS Board (draft version of 4 April 2011) - cover note
 - 2.1. Commission Staff Working Document - Draft IA (draft version of 4 April 2011) - Annex 1
 - 2.2. Commission Staff Working Document Impact Assessment Executive summary (draft version of 4 April 2011) - Annex 2
 - 2.3. Minutes of the ISG meeting of 18 March 2011 at which the draft IA was discussed - Internal note of 31 March 2011- Annex 3
3. Note of the IAS Board on the draft Impact Assessment for indirect land-use change related to biofuels (draft version of 4 April 2011) to DG ENER - Opinion of the IAS Board on the Draft Impact Assessment -cover note
 - 3.1. First opinion of the IAS Board on the Draft Impact Assessment (draft version of 4 April 2011) - Annex
4. Extract of IA draft in an internal e-mail exchange between DG ENER and DG TRADE
5. Re-submission of the draft Impact Assessment by DG ENER and DG CLIMA on indirect land-use change related to biofuels (ILUC) Note by DG ENER and DG CLIMA to IAS Board (draft version of 26 July 2011) - cover note
 - 5.1. Commission Staff Working Document Draft IA (draft version of 26 July 2011) - Annex 1
 - 5.2. Commission Staff Working Document Impact Assessment Executive summary (draft version of 26 July 2011) -Annex 2
 - 5.3. Minutes of ILUC/ IAS-group meeting of 16 May 2011 at which the draft IA was discussed – Internal note of 17 May 2011- Annex 3
 - 5.4. Overview of changes made to the draft Impact Assessment following the submission to the Impact Assessment Board of 16 May 2011 - Annex 4
 - 5.5. A "compare version" of the current version of the Impact Assessment (draft version of 26 July 2011) with the previously submitted one.

3. EXAMINATION AND CONCLUSION

Having examined your request and the documents at issue, I am pleased to inform that:

1. Full access is given to documents 1, 2, 2.3, 3, 3.1, 5, 5.3;
2. No access is given to documents 1.1, 2.1, 2.2, 4, 5.1, 5.2, 5.4 and 5.5.

The reasons for the above decision are set out below.

4. ANALYSIS

The Commission published on 22 December 2010 a report on indirect land use change related to biofuels and bioliquids. The report announces that the Commission would conduct an Impact Assessment on the four options identified in the report as a basis for a legislative proposal to amend, if appropriate, the Renewable Energy and Fuel Quality Directives, thereby taking into consideration potential changes to the existing legislation.² Both Directives³ include clauses requiring the Commission to review the greenhouse gas impacts from indirect land use change and if appropriate, propose ways for addressing them by 31 December 2010.

The final version of the Impact Assessment report, its executive summary and the relevant annexes were published after the adoption by the College on 17 October 2012 of the draft legislative proposal for amending the existing Renewable Energy and Fuel Quality Directives.⁴ All drafts of the IFPRI report underpinning the analysis included in the impact assessment have also been released to you.

Following examination of your request, access is now being granted to documents 1, 2, 2.3, 3, 3.1, 5 and 5.3.

The documents for which access is being refused are drafts of this final Impact Assessment Report, of its annexes and associated correspondence (documents 1.1, 2.1, 4, 5.1, 5.4, 5.5), and summaries of these Draft Impact Assessments (2.2, 5.2). They reflect the discussions on the changes introduced to the draft impact assessment underpinning the draft legislative proposal. The draft impact assessments reflect exchanges of views as well as the evolution of political discussions among the Commission's services on the choice and evaluation of the policy options for mitigating Indirect Land Use Change (ILUC). They are therefore part of the internal deliberations and consultations within the Commission on the text to be adopted.

² IP/10/1772 of 22 December 2010.

³ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC OJ L 140 of 5.6.2009, p.16-62 Pages: 0016-0058 and Directive 98/70/CE of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC OJ L 350, of 28.12.1998, p.58-68.

⁴ http://ec.europa.eu/energy/renewables/biofuels/land_use_change_en.htm.

a) On-going decision-making process

The exception under Article 4(3), first subparagraph, of Regulation 1049/2001, on the grounds of protecting the decision-making process 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.”*

In your confirmatory application, you argue that the decision-making process is no longer on-going in the sense of Article 4 (3) first subparagraph because the Commission has already adopted its legislative proposal by its decision of 17 October 2012.

You argue that the Commission's Rules of Procedure *“acknowledge that the decision taken by the College of Commissioners prior to the publication of any legislative proposal constitutes a “Commission decision””, and that “[t]he fact that the legislative proposal adopted by the Commission was then passed on to the other institutions for them to decide on it, is without prejudice to the finding that a “decision” has been taken by the former - sole institution concerned by the access to documents request.”*

Even if the proposal for amending the existing Renewable Energy and Fuel Quality Directives has been adopted by the Commission on 17 October 2012 and submitted to the European Parliament and the Council, the decision-making process of the Union and that of the Commission are still on-going. The proposal is currently being discussed with the Council and the European Parliament.

As long as the proposal is being considered by the two branches of the EU legislator and until it is finally adopted, the Commission, which is closely associated to the legislative procedure as a whole (e.g. by participating in Conciliation proceedings or by taking part in the informal “trilogues” between the institutions), may amend its proposal, or even withdraw it. It is therefore not unlikely impossible that the Commission will amend its proposal, e.g. when taking into account amendments of the European Parliament. Therefore, as long as the adoption of the amendments to the existing Renewable Energy and Fuel Quality Directive, is still outstanding the Commission's decision-making process with regard to this Directive is not closed. At the same time, the legislative procedure (which is a specific decision making process of the Union) ends only with the final adoption of the text.

b) Documents for internal use whose publication would seriously undermine the Union's and the Commission's decision-making process

As indicated by DG CLIMA, the documents 1.1, 2.1, 2.2, 4, 5.1, 5.2, 5.4 and 5.5 contain internal considerations and opinions for the internal use of the Commission.

You argue that the *“Commission has failed to establish to the requisite legal and factual standard that disclosure of the requested documents would seriously undermine the institution's decision-making process as required by the above-mentioned Article. [...]*

The Commission's response of 18th July fails to meet the burden of proof required by the above-mentioned case-law, as it relies on mere (general and abstract) assertions that are in no way substantiated by detailed arguments."

Before taking a decision on a proposal to be sent to the co-legislators, the Commission consults stakeholders and gives due consideration to all the views collected during such consultations. When drafting legislative proposals, the Commission takes into account all conflicting interests with a view to adopt a balanced proposal in the public interest. In this regard it is to be noted that, according to Article 17(1) TEU, '[t]he Commission shall promote the general interest of the Union and take appropriate initiatives to that end'. In addition, according to Article 17(3) TEU, '[i]n carrying out its responsibilities, the Commission shall be completely independent'.

Disclosing intermediate versions of an Impact Assessment accompanying a proposal, which is still being considered by the EU legislator, would seriously undermine this process of balancing conflicting interests and finding the general interest, insofar as those versions reflect changes in the policy options considered and finally adopted by the Commission.

It would put in the public domain documents reflecting internal exchanges in preparation of the adoption of the proposal and thus unduly expose the Commission's deliberative process including policy options that were considered but not retained in the proposal as it was adopted.

Such disclosure would therefore severely reduce the Commission's room for manoeuvre in the on-going discussions with the European Parliament and the Council and thus seriously undermine the Commission's decision-making process. Premature disclosure, before the legislative procedure is concluded, would seriously compromise the ability of the Commission to defend its proposal, remain independent and promote the general interest throughout the on-going legislative procedure. As DG CLIMA explained, the issues at stake have particularly long-term and wide-ranging implications and are of a highly sensitive nature.

It would, in addition, affect the institutional balance established by the Treaty between the Parliament, the Council and the Commission. Indeed, internal opinions within the Commission would very likely be used to compromise the Commission's position in defending its proposal throughout the legislative procedure. Its disclosure at this time would, therefore also undermine the Union's on-going decision making process.

Disclosure of the documents in question would therefore have a substantial impact on the decision-making process of the Commission and of the Union. In order to ensure the independence of this procedure which aims at ensuring the quality of legislation and requires a frank discourse among the services of the Commission before a proposal is issued, I am convinced that the interest of the decision-making process is best served by protecting these internal views.

c) Subsidiary reason: protection of the decision-making process after the decision has been taken

If the Commission decision-making process was however deemed to be closed, I consider, in the alternative, that the second subparagraph of Article 4(3) of Regulation 1049/2001 would be applicable: *“Access 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 would seriously undermine institution's decision-making process, unless there is an overriding public interest in disclosure.”*

Indeed, the documents requested contain opinions for internal use as part of deliberations and preliminary consultations, since the different versions of the Impact Assessment directly reflect those deliberations, consultations and internal opinions, and the policy choices considered throughout that preparatory work. For the same reasons as explained above under b), their disclosure would seriously undermine the Commission's position in the pending legislative procedure.

5. PARTIAL ACCESS

I have also considered whether you can be granted partial access to documents 1.1, 2.1, 2.2, 4, 5.1, 5.2, 5.4 and 5.5, pursuant to Article 4(6) of Regulation 1049/2001. However, after careful consideration, I have to conclude that all the modifications brought to the Impact Assessment Report reflect changes in the Commission's thinking to justify or adapt certain policy orientations, including different policy choices. Therefore partial access to the drafts would be meaningless as it would correspond to disclosing only those parts that are included in the final version of the Impact Assessment which has been published.

At this stage of the legislative procedure, the requested documents fall therefore entirely under the aforementioned exception under Regulation 1049/2001 as it is impossible to disclose any part without undermining the on-going decision-making process of the Commission or the Union. Partial access therefore cannot be granted.

6. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(3), first and second subparagraph of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest, firstly, has to be public and, secondly, has to outweigh the damage caused by the release, i.e. it must outweigh the interest protected by virtue of Article 4(3), first or second subparagraph of Regulation 1049/2001.

In your opinion, *“the Commission has not correctly interpreted the first indent of Article 4(3) [...] that according to the applicable regulation and case-law the Commission has not sufficiently met its burden to analyze possible overriding public interest issues in relation to this request for public access to documents.”*

You quote case law on the need to demonstrate an overriding public interest and a stronger burden of transparency in legislative matters.⁵

You argue that “[i]t is even more legitimate in the context of a legislative proposal which i) is radically modifying previous EU policy regarding biofuels thus potentially affecting legitimate expectations and ii) is relying on a limited number of scientific sources which are still being debated among the relevant academic and scientific institutions. Thus any lack of transparency in this respect can only affect the capability of both the European Parliament and the Council to take the appropriate decision, i.e. a decision which would serve EU general interest and be legally sustainable.”

I acknowledge that transparency of legislation in climate and energy policy is of public interest. In this context, I would like to note that all drafts of the IFPRI report underpinning the analysis included in the impact assessment have also been released to you. The interest must however be overriding if the exception is to be waived.

The final Impact Assessment, I recall to you, is published, to serve the interest of transparency. What is at issue here is the drafting process of this assessment.

Since the legislative procedure is on-going and disclosure of the draft versions would affect the Commission's ability to act within this procedure, I consider that such disclosure would be contrary to the public interest, as it could have the effect of slowing down the legislative process and distorting its results.

The Commission's interest in drafting a sound legislative proposal requires an independent assessment of the facts which is ensured by an independent Impact Assessment Board. The protection a frank exchange between board members and Commission services would be curtailed, as explained above, if opinions and drafts of an intermediate stage were rendered public. If changes to the final result were to be traced back to each author, the independence of the Impact Assessment would be called into question. I therefore consider that the public interest is best served by protecting the documents at issue of public access.

7. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may, under the conditions of Article 263 TFEU, bring proceedings before the General Court or, under the conditions of Article 228 TFEU, file a complaint with the European Ombudsman.

Yours sincerely,



Catherine Day

Enclosures (7)

⁵ You quote Joined Cases C-39/05 P and C-52-05 P, *Sweden and Turco v. Council*, paragraphs 44-46.