

Addressed to:
European Commission
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles

By email:
sg-acc-doc@ec.europa.eu

16 March 2021

Dear Madam or Sir,

Confirmatory Application in respect of the Commission's refusal to provide access to documents containing information in relation to beneficial ownership information regarding BALTREIDS company (Ref GestDem request 2020/7441)

In accordance with Article 7(2) of Regulation 1049/2001, the Coalition for Fair Fisheries Arrangements (CFFA), ClientEarth, and Oceana ("the Applicants") hereby submit this confirmatory application in respect of the Commission's decision of 22 February 2021 (the "Decision") to refuse access to the documents request submitted on 30 November 2020 (Ref GestDem 2020/7441). (the "Request").

On 30 November 2020 the Applicants submitted a request for the following documents:

- Documents containing the name, city, country of residence of the owner of the KAPITAN MORGUN (LVA000005026);
- Documents containing the name, city, country of residence of the owner of the FISHING SUCCESS (LVA000005014);
- Documents containing the name, city, country of residence of the owner and of the five main beneficial owners, as well as the nature and extent of the beneficial interest held, of the Latvian company Baltreids.

Initially, the Applicants requested access to two other additional documents, namely the fishing authorisations granted to the KAPITAN MORGUN (LVA000005026) and the FISHING SUCCESS (LVA000005014) fishing vessels in the framework of the current Mauritania Sustainable Fisheries Partnership Agreement protocol. However, as the Applicants identified

these two documents in other public sources the Applicants withdrew these documents from the Request by letter dated 11 February 2021, which acted as a provisory confirmatory application in response to Commission's lack of response to the Request. Considering that on 23 February 2021 the Commission provided us with the Decision, the Applicants are thus entitled to submit a confirmatory application, as also noted by the Commission in the Decision, following the explicit refusal to provide access to documents.

In the Decision, the Commission identified three documents, which fall under the Request, namely:

“(3) Extract from the non-public part of Union fishing authorisations database held by virtue of Article 39 of the so-called SMEFF Regulation¹ (document 3).

(4) Fishing license application form for the vessel Fishing Success, submitted by the owner of the vessel on 9/11/2020 (document 4).

(5) Fishing license application form for the vessel Kapitan Morgun, submitted by the owner of the vessel on 9/11/2020 (document 5)”.

Furthermore, the Commission stated that: *“[a]s regards the last point of your request, in particular as regards the beneficial owners of the company and the interest held, no documents corresponding to the description given in your application have been identified. Please note that in any case the exception provided for in Article 4(2) third indent of Regulation (EC) No 1049/2001 would apply.”*

We hereby request a reconsideration of the Decision, in the sense of providing us access to the identified documents, for the following reasons:

I. Information on the beneficial ownership must be made public

The Requested Documents relate to basic information in relation to the beneficial owners of the Baltreids company, and such information must be accessible to the public according to the Anti-Money Laundering Directive¹.

Article 30 of the Anti-Money Laundering Directive provides that the beneficial ownership information for companies such as Baltreids must be mandatorily collected and kept by the Member States as part of a special register: *“Member States shall ensure that corporate and other legal entities incorporated within their territory are required to obtain and hold adequate, accurate and current information on their beneficial ownership, including the details of the beneficial interests held.”*

Furthermore, according to Article 30(4) letter c): *“the information on the beneficial ownership is accessible in all cases to: c). any member of the general public. [...] The persons referred to in point (c) (any member of the general public) shall be permitted to access at least the name, the month and year of birth and the country of residence and nationality of the beneficial owner as well as the nature and extent of the beneficial interest held.”*

¹ Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012, and repealing Directive 2005/60/EC and Commission Directive 2006/70/EC.

The co-legislators made a normative choice to ensure that information related to the beneficial ownership of companies must be publicly available. Therefore, the Commission cannot seek to withhold this factual information on the basis of the legal provisions it has invoked, namely Article 4(2), first and third indents, of Regulation 1049/2001 and Articles 112 and 113 of the Control Regulation (Regulation 1224/2009).

In addition, in respect of the Commission's statement that "*as regards the beneficial owners of the company and the interest held, no documents corresponding to the description given in your application have been identified*" we understand that the Commission did not identify the actual interest held in the Baltreids company by each beneficial owner but that the beneficial owners are known and can be identified from Documents numbered 3 to 5.

In this context we respectfully request the Commission to reconsider the Decision and further assess whether the information related to the beneficial owners' interests held in Baltreids Company are in the Commission's possession in connection with the Anti-Money Laundering Directive database. Should such information be identified, we kindly request access to it.

In summary, the Commission cannot refuse access to information that should already be in the public domain on the basis of the exceptions in Article 4(2), first and third indents of Regulation 1049/2001 and Article 112 and 113 of Control Regulation (Regulation 1224/2009). , as the information contained in the Requested Documents represent public information which may be accessed by any member of the public.

II. Misapplication of Article 4(2) third indent of Regulation 1049/2001 and failure to state reasons under Article 296 TFEU

In the specific context of a request for access to documents, the duty to state reasons in Article 296 TFEU entails that if an institution decides to refuse access to a document which it has been asked to disclose, it must provide a statement of reasons "*from which it is possible to understand and ascertain, first, whether the requested document does in fact fall within the sphere covered by the exception relied on and, second, whether the need of protection relating to that exception is genuine.*"²

In addition to this, the CJEU has made clear that there is a high threshold to justify the application of Article 4 of Regulation 1049/2001 as the application of the exceptions from disclosures "*must be interpreted and applied strictly*" because they "*depart from the principle of the widest possible public access to documents.*"³

Therefore, according to the Court, "*if an EU institution hearing a request for access to a document decides to refuse to grant that request on the basis of one of the exceptions laid down in Article 4 of Regulation No 1049/2001, it must, in principle, explain how access to that document could specifically and actually undermine the interest protected by that*

² Case T-796/14, Philip Morris Ltd v Commission, para. 31, and the case law cited.

³ See *inter alia*, C-64/05 P Sweden v Commission, para. 66, C-506/08 P Sweden v MyTravel and Commission, para. 75 and C-60/15 P Saint-Gobain Glass v Commission, para. 63.

exception. Moreover, the risk of the interest being so undermined must be reasonably foreseeable and must not be purely hypothetical.”⁴

The Decision fulfils none of these legal standards.

The Commission’s justification for not providing access to the Requested documents is very general, relying mostly on the fact that the Requested Documents are part of a national investigation and as such, in principle, their disclosure would undermine the ongoing investigation. The Decision was clearly taken without making a specific and concrete assessment of the Requested Documents. Also, the Decision does not show in an actual and specific manner how disclosure of the Requested Documents would undermine the protection of the ongoing national and EU investigations.

The Commission’s justification on the application of Article 4(2) third indent of Regulation 1049/2001 consists of the fact that national authorities have an ongoing investigation regarding the Baltreids company, which has the general objective of establishing facts. The Commission further explains that such disclosure would undermine the mutual trust between itself and the Member States necessary to the investigation.

The Decision does not expressly mention the investigation that is ongoing regarding the Baltreids company (e.g. the legal basis, the actual scope), the purpose of which could be seriously undermined by the disclosure of the Requested Documents. The Commission quoted two CJEU cases⁵ in order to demonstrate that national investigations are eligible to be protected under Article 4(2) third indent of Regulation 1049/2001 and that the investigation does not have to have a concrete outcome, it being enough to protect the mutual trust between the Commission and the Member States.

Importantly, there is no established official definition under CJEU case-law of the concept of investigations under Regulation 1049/2001⁶. As the Commission stated in the Decision, national based investigations may fall under the scope of Article 4(2) third indent, but not all procedures performed at national level are eligible for protection on the basis of this exception.

Contrary to the Commission’s statements, the facts of the cases cited in the Decision, namely C-331/15 *Carl Schylter v European Commission* and T-623/13 *Unión de Almacenistas de Hierros de España v. European Commission*, can be distinguished from the current request. Specifically, in both of the cited cases, the scope of the investigations and the legal basis for initiating them was very clear, as opposed to the present investigation invoked by the Commission in the Decision. For the sake of clarity, the investigation subject to case C-331/15 was performed under Directive 98/34⁷, whereas the national investigation subject to case T-623/13 was performed under Article 101 TFEU.⁸ Returning to the

⁴ C 280/11 P Council v Access Info Europe, paras 30 and 31 and the case-law cited.

⁵ C-331/15 *Carl Schylter v European Commission* and T-623/13 *Unión de Almacenistas de Hierros de España v. European Commission*.

⁶ C-331/15 *Carl Schylter v European Commission*, para 42.

⁷ C-331/15 *Carl Schylter v European Commission*, para. 34-35.

⁸ T-623/13 *Unión de Almacenistas de Hierros de España v. European Commission*, para. 43.

reasoning of the Commission in the Decision, the ongoing national investigation has not been identified, the legal basis is unknown and the actual scope of it is unclear.

This makes it impossible for the Applicants to ascertain whether the Requested Documents, which contain factual information rather than exchanges of correspondence between national investigating authorities and the Commission, are covered by the exception in Article 4(2), third indent, and whether the need for protection is genuine. This amounts to a failure to state reasons, in breach of Article 296 TFEU and Article 41 CFR. It also constitutes a misapplication of the exception in Regulation 1049/2001 since the Commission has failed to demonstrate that disclosure would actually and specifically undermine the purpose of an investigation, and that the risk is reasonably foreseeable and not purely hypothetical.

The Decision further states that “*the issue under investigation is closely connected to an ongoing EU Pilot (n. 9561-19) regarding the control of the Latvian external fleet and will be assessed in that framework*”.

Nevertheless, the fact that an unidentified issue, which constitutes the basis of the “national investigation”, is connected to an EU Pilot procedure does not lead to the automatic application of the general presumption of confidentiality covering documents exchanged in the context of EU Pilot Procedures. According to consistent case-law⁹, this general presumption applies solely in relation to the documents exchanged between the Commission and the Member States concerned during EU Pilot Procedures. As the general presumption constitutes a derogation from the wide public access to documents this must be applied restrictively. However, even if a less restrictive application of the general presumption were to be applied, it would certainly be limited to documents that are in the EU pilot file. It cannot be applied generally to any documents connected to an issue under investigation in an EU Pilot, particularly when the issue at hand has not been identified in the Decision.

Therefore, in the absence of a general presumption of confidentiality, the Commission must base its decision on a concrete examination of the documents concerned, and must demonstrate that disclosure would actually and specifically undermine the purpose of the EU pilot procedure in question and that the risk is reasonably foreseeable and not purely hypothetical.

On the contrary, the Decision fails to establish that the Requested Documents are covered by the exception in Article 4(2), third indent, nor that the need for protection is genuine. This is a breach of the duty to state reasons in Article 296 TFEU and Article 41 CFR and a misapplication of the exception.

III. Misapplication of Article 4(2) first indent of Regulation 1049/2001 and failure to state reasons under Article 296 TFEU

The Commission stated in the Decision that: “[i]n addition, since the vessels to which you refer are the subject of ongoing investigations which have not yet been concluded, we

⁹ C-57/16 P ClientEarth v. European Commission, para. 81 and the case-law cited.

consider that there are reasons to assume that disclosure of the requested documents could affect the reputation of their owners and their commercial interests could be affected. Therefore, the exception under Article 4(2), first indent of Regulation (EC) No 1049/2001 also applies to the documents requested. “

This is the only reasoning provided by the Commission relating to its application of Article 4(2) first indent of Regulation 1049/2001.

It is important to note that each exception from disclosure that is applied according to Article 4 of Regulation 1049/2001 to withhold the Requested Documents must have an underlying, separate assessment, fulfilling the threshold indicated above under section II.1 and II.2.

However, in justifying the application of the commercial interests exception from disclosure, the Commission relied again on the ongoing investigation. More specifically, in order to show the need to protect the commercial interests of the Baltreids company, the Commission invoked the potential negative outcome of the investigation.

Indeed these two exceptions from disclosure may be connected and applied simultaneously (provided that each of them fulfils all mandatory criteria on the basis of a separate assessment). However, the custom of applying them in a connected manner is in relation to cartel/ merger controls¹⁰, performed by a competition authority. On the contrary, the present situation does not involve merger/ cartel schemes and actions, but relates to very specific information: who are the beneficial owners of a fishing company and its vessels.

Furthermore, regarding the potential damage to the owner's reputation, this argumentation has no legal basis and thus cannot be sustained. As the CJEU has already established: “[t]he possibility of harming the reputation of the holder of documents is not a criterion capable of identifying whether or not an item of information is confidential.”¹¹

In this context, the Commission misapplied Article 4(2) first indent and failed to state reasons under 296 TFEU, as firstly, it did not make an actual and specific assessment regarding whether disclosure of the Requested Documents would seriously undermine the commercial interest of the company and whether that risk is reasonably foreseeable and not purely hypothetical.

IV. Misapplication of Articles 112 and 113 of the Control Regulation

Finally, the Commission rejected the Applicants request for access to documents because: *“the data you are interested in obtaining are not among the data that have to be made publicly available under Article 39(2) of that Regulation (SMEFF Regulation). Article 42 thereof provides that the data obtained under that Regulation shall be handled in accordance with Articles 112 and 113 of the Control Regulation, which include rules on the protection of personal data and on the confidentiality of certain data.”*

¹⁰ T-623/13 Unión de Almacenistas de Hierros de España v. European Commission.

¹¹ T-729/15 MSD Animal Health Innovation GmbH & Intervet international BV v. European Medicines Agency para. 91.

This statement fails to identify which information is being withheld on the basis of Article 112 on the one hand and Article 113 on the other and for what reason. This clearly breaches the duty to state reasons in Article 296 TFEU and Article 41 CFR.

V. Overriding public interest

Without prejudice to the foregoing, the information would also need to have been disclosed based on an overriding public interest in disclosure.

The Court of Justice has confirmed the General Court's approach in the case *Sweden v API and Commission*, according to which the invocation of the principle of transparency “*may, in the light of the particular circumstances of the case, be so pressing that it overrides the need to protect the documents in question*”.¹² In addition, the Court of Justice has also held that the specific circumstances justifying the disclosure of documents must be set out, and that purely general considerations are not an appropriate basis for establishing that an overriding public interest prevails.¹³

The particular circumstances of the activities of the Kapitan Morgun and Fishing Success vessels are so pressing that disclosure of the Requested Documents outweighs the need to protect any ongoing investigations and the commercial interests of the Baltreids company.

Firstly, these vessels have fishing authorisations under an EU Sustainable Fisheries Partnership Agreement (SFPA), namely the one with Mauritania from January to end of March 2021 (see annex 1). Catches made in non-EU waters under SFPAs are “EU-caught” under the EU rules of origin, and it is therefore key to ensure that these catches meet the sustainability standards that apply to catches made in EU waters. The Baltreids vessels are able to perform fishing activities under an SFPA because the European Union paid the Mauritanian governments part of Baltreids' permit to fish in SFPA waters. In this context, as these vessels are supported by EU tax payers' money, civil society should be able to scrutinize this EU company's fishing activities in African waters. Moreover, the Commission has recently launched an evaluation and fitness check of the EU's sustainable fisheries partnership agreements, which includes public consultation periods. In order to participate meaningfully in these consultations, the Applicants need to be able to access the information necessary to substantiate our experiences in working with partners and in third countries.

Secondly, providing us access to the Requested Documents is essential for the effective participation of the Applicants in the different EU fisheries bodies, such as in the Long Distance Fleet Advisory Council, of which CFFA and Oceana are members. The consultation processes organized by the EU cannot have the expected best outcome unless stakeholders have access to all the necessary information to conduct our fact-finding work and analyses.

Thirdly, it is worth reiterating that access to the Requested documents is essential in the fight against money laundering as well as the fight against Illegal, Unreported, and Unregulated (IUU) fishing.

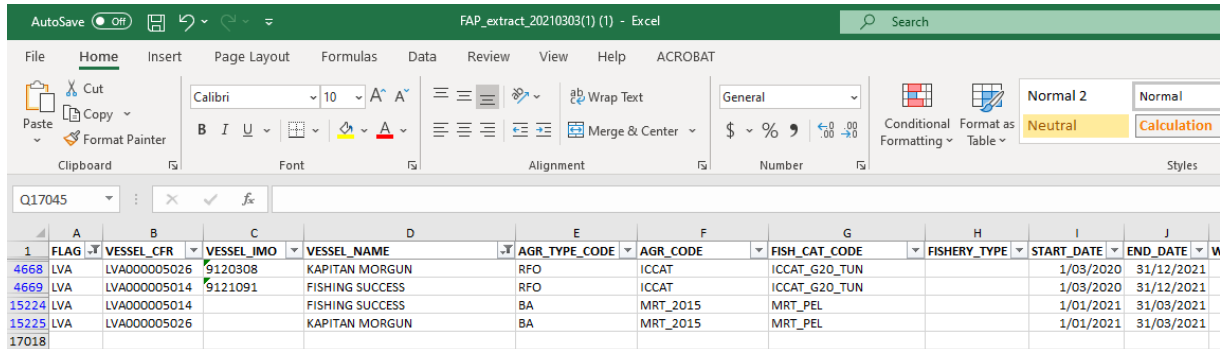
¹² Joined cases C-514/07 P, *Sweden and others v API and Commission*, ECLI:EU:C:2010:541, paragraphs 152-153.

¹³ Joined cases C-514/11 and C-605/11, *LPN and Finland v Commission*, ECLI:EU:C:2013:738, paragraphs 93 and 94.

For all the above-mentioned reasons we respectfully request the Commission to reconsider its Decision in the sense of providing access to the Requested Documents.

We look forward to receiving your response promptly and in any event within 15 working days, in accordance with Article 8 of Regulation 1049/2001.

Annex 1



	A	B	C	D	E	F	G	H	I	J
1	FLAG	VESSEL_CFR	VESSEL_IMO	VESSEL_NAME	AGR_TYPE_CODE	AGR_CODE	FISH_CAT_CODE	FISHERY_TYPE	START_DATE	END_DATE
4668	LVA	LVA000005026	9120308	KAPITAN MORGUN	RFO	ICCAT	ICCAT_G20_TUN		1/03/2020	31/12/2021
4669	LVA	LVA000005014	9121091	FISHING SUCCESS	RFO	ICCAT	ICCAT_G20_TUN		1/03/2020	31/12/2021
15224	LVA	LVA000005014		FISHING SUCCESS	BA	MRT_2015	MRT_PEL		1/01/2021	31/03/2021
15225	LVA	LVA000005026		KAPITAN MORGUN	BA	MRT_2015	MRT_PEL		1/01/2021	31/03/2021
17018										

Screenshot of the EU list of authorisations version 1.70 from March 3 2021 that can be accessed through: https://ec.europa.eu/fisheries/cfp/international_en

Yours faithfully,

Béatrice Gorez
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