



EUROPEAN COMMISSION  
Competition DG

The Director General

Brussels, 09/01/2015  
COMP/D4/PR/EH/MN/ D - (2015)000823

Jérôme LEGRAS  
Axiom AI  
1 Conduit Street, 4<sup>th</sup> Floor  
London W1S 2XA  
UK

By e-mail: [ask+request-1632-6ffbdcbf@asktheeu.org](mailto:ask+request-1632-6ffbdcbf@asktheeu.org)

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By registered mail with  
acknowledgement of receipt

**Subject: GESTDEM 2014-5999 – Your request of 11 December 2014 for access to documents pursuant to Regulation (EC) No. 1049/2001 relating to State support for Kommunalkredit Austria AG - Case SA.32745 (2011NN, 2011/MC und 2013/MX)**

Dear Mr Legras,

I refer to your e-mail of 11 December 2014, registered on 12 December 2014 under GESTDEM number 2014/5999, by which you requested access to documents under Regulation (EC) No. 1049/2001<sup>1</sup> ("Regulation 1049/2001"). These documents form part of the Commission's case files relating to State support for Kommunalkredit Austria AG.

#### **1. DOCUMENTS CONCERNED**

You request access to the following documents:

- any communication with Austrian officials "regarding the aforementioned issue (for Kommunal Kredit AG)",
- any documents submitted by Austria regarding the different state aid given to Kommunalkredit Austria AG and to KA Finanz AG,
- any capital planning made for Kommunalkredit Austria AG and KA Finanz AG.

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<sup>1</sup> Regulation (EC) N° 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ L145 of 31.5.2001, p. 43.

I regret to inform you that after having carefully examined your request in the light of Regulation 1049/2001, I have come to the conclusion that access to the documents you requested is covered by the exceptions of Article 4 of Regulation 1049/2001 and that, therefore, these documents cannot be disclosed.

## 2. APPLICABLE EXCEPTIONS

Pursuant to Article 4(2), third indent, of Regulation 1049/2001 the Commission shall refuse access to a document where its disclosure would undermine the protection of the purpose of inspections, investigations and audits.

This exception aims at protecting the Commission's capacity to ensure that Member States and undertakings comply with their obligation under European Union law.

In the case *Commission v TGI*<sup>2</sup>, the Court of Justice ruled that there exists, with regard to Article 4(2), third indent, of Regulation 1049/2001, a general presumption that disclosure of documents in the administrative files in State aid procedures would undermine the purpose of respective investigations. The Court reasoned that this follows from the fact that under the State aid procedural rules the interested parties, other than the Member State concerned, have no right to consult the documents in the administrative file. Should such access be granted under Regulation 1049/2001 the nature of the procedure is likely to be modified and thus the system for review of State aid would be called into question<sup>3</sup>.

As has been clarified by the Court of Justice in the *Commission v Agrofert*<sup>4</sup> case in the context of a merger investigation the general assumption applies regardless of whether a request for access concerns proceedings which have already been closed or proceedings which are pending. In this context it is noteworthy that in State aid procedures the Commission relies on submissions by the Member State concerned. These submissions typically contain sensitive data, including information relating to the economic activities of undertakings. It therefore follows that, similarly to *Agrofert*, disclosure of this information in State aid investigations would risk jeopardising the willingness of the Member State to cooperate with the Commission's State aid investigations even after the definitive closure of the case.

The State aid procedural regulations, especially Regulation 659/1999<sup>5</sup> as amended to date, contains specific rules regarding treatment of information obtained in the context of such proceedings and allowing public access to it on the basis of Regulation 1049/2001 would, in principle, jeopardise the balance which the Union legislature wished to ensure in State aid procedures between the obligation on Member States to communicate

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<sup>2</sup> See case C-139/07 P *Commission v Technische Glaswerke Ilmenau GmbH (TGI)*.

<sup>3</sup> See *TGI*, paragraphs 58-59.

<sup>4</sup> See Case C-477/10 P, *Commission v Agrofert*, paragraph 66.

<sup>5</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83 of 27.3.1999, p. 1-9



possibly sensitive information (including sensitive commercial information related to undertakings) to the Commission and the guarantee of increased protection in accordance with the State Aid Procedural Regulation.

The documents to which you request access belong to the administrative file of DG Competition, namely COMP/SA.32745 (2011/NN, 2011/MC und 2013/MX) concerning the State aid procedures on Kommunalkredit Austria AG. In accordance with the *Commission v TGI* case law the requested documents are covered by the general presumption. This would, according to the *Commission v Agrofert* case law, even apply if the case was definitively closed. However, the State aid case of Kommunalkredit Austria has not been closed. Although the Commission has already approved the State support for Kommunalkredit Austria AG by means of a first decision in 2011<sup>6</sup> and a second one in 2013<sup>7</sup>, the case has not been finalised since the decisions including the commitments given by Austria are still subject to monitoring.

Thus, in accordance with the case law, the requested documents are covered by the above explained presumption unless the applicant demonstrates otherwise. In your letter you have not demonstrated that these documents are not covered by the general presumption.

Moreover, pursuant to Article 4(2), first indent of Regulation 1049/2001, access to a document, where disclosure would undermine the protection of commercial interests of a natural or legal person, shall be refused. In the case at hand, the requested documents concern sensitive commercial information about Kommunalkredit Austria AG which has not been brought into the public domain. Disclosure of these documents would undermine the protection of the commercial interests of the company.

In view of the above I consider that the requested documents are also covered by the exception set out in Article 4(2), first indent of Regulation 1049/2001.

In accordance with Article 4(5) of Regulation 1049/2001, I therefore have to refuse access to the requested documents.<sup>8</sup>

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

Pursuant to Article 4 (2) and (3) of Regulation 1049/2001, the exception to the right of access contained in that Article must be waived if there is an overriding public interest in disclosing the documents requested. In order for an overriding public interest in disclosure to exist, this interest, firstly, has to be public (as opposed to private interests of

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<sup>6</sup> SA.32745 (2011/NN) – Restructuring of Kommunalkredit Austria AG; Commission decision of 31.3.2011: [http://ec.europa.eu/competition/state\\_aid/cases/240078/240078\\_1228869\\_42\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/240078/240078_1228869_42_2.pdf).

<sup>7</sup> SA.32745 (2011/MC) – State support for the run-off of Kommunalkredit Austria AG; Commission decision of 19.7.2013: [http://ec.europa.eu/competition/state\\_aid/cases/240180/240180\\_1511668\\_207\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/240180/240180_1511668_207_2.pdf).

<sup>8</sup> Case C-64/05P *Sweden v Commission*.

the applicant) and, secondly, overriding, i.e. in this case it must outweigh the interest protected under Article 4 (2), first and third indent, of Regulation 1049/2001.

In your application you have not established arguments that would present an overriding public interest to disclose the documents to which access has been hereby denied. Consequently, the prevailing interest in this case lies in protecting the effectiveness of the Commission's investigations, its decision-making process and the commercial interests of the undertakings concerned.

#### **4. MEANS OF REDRESS**

If you want this position to be reviewed you should write to the Commission's Secretary-General at the address below, confirming your initial request. You have fifteen (15) working days in which to do so from receipt of this reply after which your initial request will be deemed to have been withdrawn.

The Secretary-General will inform you of the result of this review within fifteen (15) working days from the registration of your request, either granting you access to the documents or confirming the refusal. In the latter case, you will be informed of how you can take further action.

All correspondence should be sent to the following address:

European Commission  
Secretary-General  
Transparency unit  
BERL 5/327  
B-1049 Bruxelles  
or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu).

Yours faithfully,



Alexander ITALIANER