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OUT OF SCOPE


France

**DECISION OF THE SECRETARY GENERAL ON BEHALF OF THE 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 2018/5758**

Dear ,

I refer to your letter of 14 December 2018, registered on the same day, in which you requested, pursuant to Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereafter, ‘Regulation (EC) No 1049/2001’), a review of the position taken by the Directorate-General for Competition in reply to your initial application of 5 November 2018.

1. SCOPE OF YOUR REQUEST

In your initial application of 5 November 2018, you requested access to the following documents in the European Commission’s administrative file concerning State aid procedure SA.38945 – Alleged aid to McDonald’s Luxembourg:

- ‘any written answer(s) given by Luxembourg to the letter sent by the European Commission on 3 December 2015 [C(2015) 8343 final];

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

² Official Journal L 145 of 31.05.2001, p. 43.

- any written document sent by the European Commission to Luxembourg other than the letter sent dated 3 December 2015 [C(2015) 8343 final] that is already public;
- any written document sent by the European Commission to McDonald's Corporation or any McDonald's subsidiaries including McD Europe Franchising Sarl;
- any written document sent by the European Commission to third parties in relation with the case (other than Luxembourg and McDonald's Corporation or subsidiaries including McD Europe Franchising Sarl);
- any observation(s) or written answer(s) filed by Luxembourg, including without limitation any observations made in response to EPSU, EFFAT and SEIU's observations dated 5 August 2016;
- any observation(s) or written answer(s) filed by McDonald's Corporation or any McDonald's subsidiaries including McD Europe Franchising Sarl;
- any observation(s) or written answer(s) filed by any third parties (other than EPSU/EFFAT/SEIU) in relation with the case'.

In its initial reply of 23 November 2018, the Directorate-General for Competition refused access to the documents in question, based on the exceptions of Article 4(2), first indent (protection of the commercial interests of a natural or legal person) and third indent (protection of the purpose of inspections, investigations and audits), and Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001.

In your confirmatory application, you requested a review of the position of the Directorate-General for Competition. You put forward detailed arguments, which I address below. You also requested access to the non-confidential version of the decision of the European Commission of 19 September 2018 on tax rulings granted to McDonald's Europe by Luxembourg.

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 wish to inform you that I confirm the initial decision of Directorate-General for Competition to refuse access, based on the exceptions of Article 4(2), first indent (protection of commercial interests), Article 4(2), third indent (protection of the purpose of inspections, investigations and audits), and Article 4(3), first subparagraph (protection of the decision-making process), for the reasons set out below.

2.1. Protection of the purpose of investigations and of commercial interests

In accordance with the case law of the Court of Justice, the European Commission, 'when assessing a request for access to documents held by it, may take into account more than one of the grounds for refusal provided for in Article 4 of Regulation (EC) No

1049/2001 and two different exceptions can, as in the present case, be closely connected'.³

Article 4(2), first indent of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, [...], unless there is an overriding public interest in disclosure'.

Article 4(2), third indent of Regulation (EC) No 1049/2001 provides that the '[i]nstitutions shall refuse access to a document where disclosure would undermine the protection of [...] the purpose of inspections, investigations and audits'.

As a preliminary remark, please note that the European Commission's decision of 19 September 2018 on tax rulings granted to McDonald's Europe (SA.38945) was published on 17 December 2018 and is available at the following address:

http://ec.europa.eu/competition/state_aid/cases/261647/261647_2033697_264_2.pdf

In your confirmatory application, you argued that your request 'does not aim at accessing internal notes, briefings or memoranda from the Commission but essentially at analysing the legal and technical arguments raised by Luxembourg and McDonald's to support their interpretation and application of the US-Luxembourg Double tax treaty and their conclusion that Luxembourg did not provide state aid to McDonald's in breach of EU rules [...]'.

Please note that the non-confidential version of the above-mentioned European Commission decision, which was published on 17 December 2018, already provides a comprehensive and sufficiently understandable summary of all arguments raised by Luxembourg and McDonald's and their reasoning. Furthermore, the latter decision provides information about the European Commission's own reasoning in reaching its conclusion that no state aid has been granted to McDonald's Europe by Luxembourg.

Regarding the remaining documents forming part of your request, I would like to point out that in its judgment in *Commission v TGI*⁴, which concerned a request for documents in two state aid cases, the Court of Justice held that there exists, with regard to the exception related to the protection of the purpose of investigations, a general presumption that the disclosure of documents in the file would undermine the purpose of state aid investigations.⁵ The Court reasoned that such disclosure would call into question the state aid procedural system.⁶ This reasoning was further confirmed in the *Sea Handling*

³ Judgment of 13 September 2013, *Netherlands v European Commission*, T-380/08, EU:T:2013:480, paragraph 34.

⁴ Judgment of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07, EU:C:2010:376, paragraphs 52 to 61.

⁵ See also judgment of 14 July 2016, *Sea Handling v Commission*, C-271/15 P, EU:C:2016:557, paragraphs 36 to 47.

⁶ See also judgment of 21 September 2010, *Sweden and Others v API and Commission*, C-514/07 P, EU:C:2010:376, paragraphs 99 and 100, as well as judgment of 28 June 2012, *Commission v Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraphs 108-126, where the Court of Justice applied *Commission v TGI* by analogy to merger proceedings.

judgment.⁷ Recently, in the *Arca Capital Bohemia* judgment, the General Court held that the general presumption also applies to state aid procedures that are already closed.⁸

Please be informed that the state aid review procedure is strictly bilateral between the European Commission and the Member State. This often involves a lengthy dialogue in which very sensitive information is exchanged, under the understanding that it will remain confidential. The disclosure of the documents pertaining to the state aid investigation file would thus jeopardise the willingness of Member States to cooperate in future state aid investigations. Therefore, confidentiality must be guaranteed at all times to create and maintain a climate of mutual trust between the European Commission and the Member States.

Furthermore, the Court of Justice pointed out that interested parties other than the Member State concerned do not have the right to consult the documents in the European Commission's administrative file. The Court held that 'the interested parties, except for the Member State responsible for granting the aid, do not have a right under the procedure for reviewing state aid to consult the documents on the European Commission's administrative file. If those interested parties were able to obtain access, on the basis of Regulation (EC) No 1049/2001, to the documents in the European Commission's administrative file, the system for the review of state aid would be called into question. From a practical point of view, whatever the legal basis on which it is granted, access to the file enables the interested parties to obtain all the observations and documents submitted to the European Commission, and, where appropriate, adopt a position on those matters in their own observations, which is likely to modify the nature of such a procedure'.⁹

As the Directorate-General for Competition has rightly pointed out, the time limit to bring proceedings before the General Court has not yet expired. Contrary to what you argue in your confirmatory application, the fact that the factual situation in the *TGI*¹⁰ and *Odile Jacob*¹¹ judgments relied upon by the Directorate-General for Competition might have been different than the present one is irrelevant for the current analysis.

Indeed, the general presumption continues to apply even if the European Commission has already rendered its decision about the alleged state aid to McDonald's Europe in the present case for the reasons explained above.

Furthermore, in your confirmatory application you requested access to 'any written document sent by the European Commission to Luxembourg other than the letter sent dated 3 December 2015 [C(2015) 8343 final] that is already public', 'any written documents sent by the European Commission to McDonald's Corporation or any

⁷ Judgment of 14 July 2016, *Sea Handling v Commission*, C-271/15 P, EU:C:2016:557, paragraphs 36 to 47.

⁸ Judgment of the General Court of 11 December 2018 in Case T-440/17, *Arca Capital Bohemia v Commission*, paragraphs 56-58.

⁹ Judgment in *Commission v Technische Glaswerke Ilmenau*, cited above, paragraphs 58, 59 and 61.

¹⁰ Judgment of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, cited above.

¹¹ Judgment of 28 November 2013 *Commission v Odile Jacob*, cited above.

McDonald's subsidiaries including McD Europe Franchising Sarl' and 'any written documents sent by the European Commission to third parties in relation with the case (other than Luxembourg and McDonald's Corporation or subsidiaries including McD Europe Franchising Sarl)'.

Please be informed that all these documents, to the extent that they exist and are in the possession of the European Commission, would not only provide information about the legal and technical arguments raised by Luxembourg and McDonald's, but would also undoubtedly reveal the European Commission's strategy and its preliminary assessment of the case.

Furthermore, in its initial reply, the Directorate-General for Competition also referred to Article 4(2) first indent, which provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, [...], unless there is an overriding public interest in disclosure'.

However, in your confirmatory application, you argued that your request '[...] does not aim at accessing sensitive information relating to undertakings but at having full knowledge mainly of Luxembourg and McDonald's legal and technical arguments [...]'. Furthermore, you argued that the Directorate-General for Competition '[...] does not state the type of "commercial and market-sensitive information regarding the activities of the potential beneficiaries whose public disclosure would undermine the latter's commercial interests"' and '[...] does not provide information about how it assesses that information is "commercial and market-sensitive"'.

I am unable to agree with these statements.

As a preliminary point, please be informed that, for the specific cases where a general presumption of non-accessibility applies, all documents in the file are covered by that presumption. Contrary to what you state in your confirmatory application, the institution is, therefore, not required to carry out a specific and individual assessment of the content of each requested document. Consequently, there is no obligation to explain what type of commercially and market-sensitive information is contained in the requested documents.

Furthermore, I note that natural and legal persons submitting information to the European Commission have a legitimate right to expect that the information they supply on an obligatory or voluntary basis will not be disclosed to the public. This legitimate right arises from the specific provisions concerning the professional secrecy obligation, which provides for documents to be used only for the purposes for which they have been gathered, and the special conditions governing access to the European Commission's file.

In the *Odile Jacob*¹² judgment, the Court of Justice held that the publication of sensitive information concerning the economic activities of undertakings subject to a control procedure by the European Commission is likely to harm their commercial interests even

¹² Judgment in *Commission v Editions Odile Jacob*, cited above, paragraphs 123 and 124.

after the control procedure has been concluded. Therefore, the Court of Justice held that a general presumption of non-disclosure of the documents in the European Commission's case file applies, irrespective of whether a request for access concerns proceedings that have already been closed or proceedings that are pending. The Court specifically recognised that granting access to such documents would undermine the protection of the objectives of the investigation activities and also of the commercial interests of the undertakings involved.¹³ Although the *Odile Jacob* judgment concerned a merger control investigation, this reasoning applies by analogy to state aid proceedings.

The documents in question, which are part of a state aid investigation file, have not been made available to the public and contain business and market-sensitive information regarding the undertakings involved, the public disclosure of which would significantly harm the commercial interests of these companies. In this respect, please note that the European Commission is largely reliant on the cooperation of third parties in order to collect the necessary evidence and to issue a final decision. Careful respect by the European Commission of its obligations regarding professional secrecy has so far created a climate of mutual confidence between the European Commission and undertakings, under which the latter have cooperated by providing the former with the information necessary for its investigations. Indeed, if this kind of sensitive information were disclosed to the public, this would lead to a situation where undertakings subject to investigations and potential informants and complainants would lose their trust in the European Commission's reliability and would become reluctant to cooperate with the institution. Moreover, the European Commission relies on Member States' contributions, which typically also contain commercially sensitive information relating to companies, and access to such documents would thus also, as already mentioned, undermine the Member States' willingness to cooperate.

This, in turn, would jeopardise the European Commission's authority and lead to a situation where the latter would be unable to carry out properly its task of enforcing EU competition law.

2.2. Protection of the decision-making process

Article 4(3), first subparagraph of Regulation (EC) No 1049/2001 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 its initial reply, the Directorate-General for Competition informed you that the documents to which you request access, to the extent that they exist, form part of the case file in a state aid investigation under Article 107 of the Treaty on the Functioning of the EU in which the procedure may not be considered finalised yet, as long as the European Commission's decision of 19 September 2018 on tax rulings granted to McDonald's Europe is still subject to appeal.

¹³ *Ibid.*

As already mentioned, revealing the European Commission's strategy and its preliminary assessment of the case by disclosing the requested documents to the extent that they exist would undermine the protection of the purpose of the investigation. Please note that it would also seriously undermine the European Commission's decision-making process, especially in case an appeal is filed and a decision of the Court is adopted that would prompt the European Commission to resume the investigation. As the Directorate-General for Competition has rightly pointed out, the European Commission's services must be free to explore all possible options in the preparation of a decision free from external pressure, in case the investigation is reopened. The disclosure to the public of the documents in question would thus seriously undermine the effective enforcement of Article 107 of the Treaty on the Functioning of the European Union.

Against this background, I confirm that the documents falling under the scope of your application with the reference number Gestdem 2018/5758 need to be protected against the risks associated with their public disclosure under the exceptions provided for in the first and third indents of Article 4(2) and Article 4(3) first subparagraph of Regulation (EC) No 1049/2001.

3. NO PARTIAL ACCESS

I have also examined the possibility of granting partial access to the documents concerned, in accordance with Article 4(6) of Regulation (EC) No 1049/2001.

However, it follows from the assessment made above that the documents that fall within the scope of your request are manifestly and entirely covered by the exceptions laid down in Article 4(2), first and third indents of Regulation (EC) No 1049/2001.

It must also be underlined that the Court of Justice confirmed that a presumption of non-disclosure excludes the possibility to grant partial access to the file.¹⁴

4. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) and Article 4(3), second subparagraph 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.

¹⁴ Judgment of 25 March 2015, *Sea Handling v Commission*, cited above, paragraph 93.

As a preliminary remark, it must be noted that the General Court recently confirmed again that the right of access to documents does not depend on the nature of the particular interest that the applicant for access may or may not have in obtaining the information requested.¹⁵

In your confirmatory application, you argued that McDonald's is not like any other company as '[i]ts business practices touch every corner of the world and reverberate throughout the global economy' and '[it] has a track record of low-wage jobs, tax avoidance and conflicts with its workers [...]'. You provide a series of reports to support your claim.

Irrespective of the question of whether these allegations are correct (which is not the subject matter of this decision), I consider that these arguments are not relevant for the current assessment.

As already mentioned, in its decision of 19 September 2018, the European Commission held that the tax rulings granted to McDonald's Europe by the Luxembourgish authorities did not result in state aid. I consider that the release of the non-confidential version of the above-mentioned decision has brought the requested transparency and availability of information to the public required to 'enhance the quality of the public debate on tax planning practices' and also to 'contribute to the public debate about the relationship and actions that companies apply with tax authorities'. It also brings clarity on the interpretation and application of the US-Luxembourg Double Tax Treaty.

Finally, please be informed that the draft bill that will amend the relevant provisions in Luxembourg's tax legislation to which you referred to in your confirmatory application has now been adopted by the Luxembourgish parliament. The non-confidential version of the European Commission's decision of 19 September 2018, which is now published, will in my view allow you to assess whether the bill 'close[s] the loophole in Luxembourg's legislation'.

Therefore, following this analysis, I have not been able to establish the existence of any overriding public interest in the disclosure of the document in question. Consequently, I consider that in this case there is no overriding public interest that would outweigh the public interest in safeguarding the protection of the purpose of investigations, commercial interests and the decision-making process protected by the first and third indents of Article 4(2) as well as by Article 4(3), second subparagraph, of Regulation (EC) No 1049/2001.

¹⁵ Judgment of 27 November 2018, *VG v Commission*, joined Cases T-314/16 and T-435/16, EU:T:2018:841, paragraph 55.

5. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the 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 European Commission
Martin SELMAYR
Secretary-General