



EUROPEAN COMMISSION

Competition DG

The Director General

Brussels, 28/07/2020
COMP/ H5/MA-ir-2020/4364

Mr. Emmet Oliver

1 Dalkey Court
Barnhill Road
Co Dublin
Ireland

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xxxxxxxx@xxxxxxxx.xxx

Subject: GESTDEM 2020/4364 – Your request of 16 July 2020 for access to documents pursuant to Regulation (EC) No. 1049/2001 relating to Case COMP/SA.38373 – Aid to Apple

Dear Sir,

Thank you for your message of 16 July 2020, registered on 17 July 2020 under GESTDEM number 2020/4364, concerning Case COMP/SA.38373 – Aid to Apple, in which you request access to documents in the Commission's case file in accordance with Regulation (EC) No. 1049/2001¹ ("Regulation 1049/2001").

1. DOCUMENTS CONCERNED

In your message, you request access to the following documents that, in so far they exist, are part of the administrative file of DG Competition concerning Case COMP/ SA.38373 – Aid to Apple:

- *“The total legal costs to date of the enforcement action, taken under community State Aid legislation, against Apple Inc, in relation to tax rulings granted by the Irish tax authorities. These legal costs should cover from the inception of the case until the judgement in the General Court.*
- *A breakdown of these legal costs, as per law firm or legal representative, used by the Commission during the case. If in-house counsel were used, could I please have a summary of the hours deployed by the counsel on this particular case since its inception and the monetary value of these hours.*
- *Could I have a list of the Irish-based companies that the Commission asked for information about from Ireland in the early phase of the investigation into Apple.*

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

- *Could I have copies of all letters, emails, correspondence from Commissioner Vestager specifically, or her officials, about the case in the last 12 months, sent to Ireland's Department of Finance, Ireland's Tax Authority (the Revenue Commissioners), Department of Foreign Affairs or Irish EU representative offices in Brussels.*
- *Copies of all minutes of any meetings held with Irish Government officials about the Apple tax case that have taken place over the last 12 months.*
- *Copies of all preparatory material, speaking points or emails or other documentation, utilised for Ms Vestager's press conference on the day after the Apple tax judgement was released (July 16th)"*

The documents you request access to, in so far they exist, form part of the case file in a pending State aid investigation under Article 107/108 of the TFEU in which the procedure may not be considered finalized yet, as long as the decision adopted by the Commission is still subject to appeal which might prompt the Commission to reconsider its decision and reopen the case.

Having carefully examined your request in the light of Regulation 1049/2001, I have come to the conclusion that the documents you have requested access to fall under the exceptions of Article 4 of Regulation 1049/2001. Access to these documents, therefore, has to be refused. Please find below the detailed assessment as regards the application of the exceptions of Article 4 of Regulation 1049/2001.

Furthermore, please be informed that the Legal Service of the Commission will provide you with an answer on your question regarding the legal costs incurred by the Commission, as far as those costs relate to the litigation phase.

Please find attached the statement by Commissioner Vestager on the judgment of the General Court in cases T-778/16 and T-892/16 dated 15 July 2020.

2. APPLICABLE EXCEPTIONS

As the effects of granting access to documents under Regulation 1049/2001 are *erga omnes*, in the sense that such documents become public, the disclosure of the requested documents at this stage might hurt the protection of lawful interests, as set forth in Article 4 of Regulation 1049/2001. Once access is granted, any potential requester receives access to the documents in question, irrespective of its legal standing, involvement in the competition case or not or other specific interests it may have, as "*the purpose of the regulation is to guarantee access for everyone to public documents and not just access for the requesting party to documents concerning it*".²

Article 4(2), third indent, protection of the purpose of investigations and Article 4(3) protection of the institution's decision making process

² See Joined Cases T-110/03, T-150/03 and T-405/03, *Sison v Council*, paragraph 50; Case T-181/10, *Reagens SpA v Commission*, paragraph 143.

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.

Pursuant to Article 4(3), access to the documents drawn by the Commission or received by the Commission shall be refused if the disclosure of the documents would seriously undermine the Commission's decision making process.

These exceptions aim at protecting the Commission's capacity to ensure that Member States and undertakings comply with their obligation under European Union law. For the effective conduct of pending investigations, it is of utmost importance that the Commission's investigative strategy, preliminary assessments of the case and planning of procedural steps remain confidential.

As already stated, the-limit to bring proceedings before the Court of Justice has not expired. The presumption in *TGI*³ applies to cases pending before the EU courts⁴ and therefore also to investigations where the time-limit for bringing court proceedings is running.

In *TGI*⁵, a case which concerned an access to documents request to all documents in two State aid cases, the Court of Justice upheld the Commission's refusal and held that there exists with regard to the exception related to the protection of the purpose of investigations a general presumption that disclosure of documents in the file would undermine the purpose of State aid 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 and 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 question⁶. This line of reasoning was upheld by the Court in *Sea Handling v Commission* even when it comes to a reduced number of documents pertaining to a State aid file⁷.

It is noteworthy that in State aid procedures the Commission relies on submissions by the Member State concerned which typically contain sensitive data, including information related to the economic activities of undertakings. It therefore follows that, similarly to *Agrofert*⁸, 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.

³ See Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau GmbH*.

⁴ This follows from the fact that in the *TGI* case some of the documents to which access was refused were part of a State aid case pending before the General Court. The applicability of the presumption was further confirmed in Case C-404/10 P *Commission v Odile Jacob* not only in respect of merger proceedings but also State aid cases pending before the EU courts. See in that sense paragraph 128 of the judgment.

⁵ See Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau GmbH*.

⁶ See Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau GmbH*, paragraphs 58-59.

⁷ See Case T-456/13, *Sea Handling SPA v Commission*, paragraphs 55-58 and 61.

⁸ See Case C-477/10 P, *Commission v Agrofert*, paragraph 66.

The State aid procedural regulations, especially Regulation 2015/1589⁹, contain 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 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 regulations. In essence, the State aid procedural regulations and Regulation 1049/2001 have different aims but must be interpreted and applied in a consistent manner. The rules on access to file in the above-mentioned regulations are also designed to ensure observance of professional secrecy and are of the same hierarchical order as Regulation 1049/2001 (so that neither of the two sets of rules prevails over the other).

The requested documents would reveal the Commission's investigation strategy and their disclosure would therefore undermine the protection of the purpose of the investigation and would also seriously undermine the Commission's decision making process, especially in case the final decision of the Court would prompt the Commission to resume the investigation. The Commission's services must be free to explore all possible options in preparation of a decision free from external pressure.

In view of the foregoing, the requested documents are manifestly covered in their entirety by the exception related to the protection of the purpose of the Commission's State aid investigations set out in Article 4(2), third indent of Regulation 1049/2001. Moreover, the internal Commission documents and documents received by the Commission in the file are also covered by the exception related to the protection of the Commission's decision-making process, set out in Article 4(3) of Regulation 1049/2001.

Article 4(2), first indent, protection of commercial interests

Pursuant to Article 4(2), first indent of Regulation 1049/2001 the Commission shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person.

Economic entities have a legitimate commercial interest in preventing third parties from obtaining strategic information on their essential, particularly economic interests and on the operation or development of their business. Moreover, the assessments made by the Commission and contained in Commission's documents are commercially sensitive, particularly at a stage where an investigation has not been finally concluded yet.

The documents requested by you, as specified above, are part of the file in a competition case, have not been brought into the public domain and are known only to a limited number of persons. In particular, the documents you request access to contain commercial and market-sensitive information regarding the activities of the potential beneficiaries and other third parties, as well as intellectual property rights of the beneficiary/third parties, whose public disclosure would undermine the latter's commercial interests. This information

⁹ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (Text with EEA relevance) OJ L 248 of 24.9.2015, p. 9–29.

concerns in particular commercial strategies. Disclosure of these documents could bring serious harm to the undertakings' commercial interests.

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

The general presumption recognized in the case-law cited above does not exclude the possibility of demonstrating that certain documents, of which disclosure is sought, are not covered by the presumption. However, you have not demonstrated this in your application.

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 the applicant) and, secondly, overriding, *i.e.* in this case it must outweigh the interest protected under Article 4(2), first and third indents, and 4(3) 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. PARTIAL ACCESS

I have also considered the possibility of granting partial access to the documents in accordance with Article 4(6) of Regulation 1049/2001. However, the general presumption of non-disclosure invoked above also applies to partial disclosure for all the documents concerned and, consequently, no partial access can be granted.

5. 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
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles

or by email to: sg-xxxxxxx@xx.xxxxxx.xx

Yours faithfully,

e-signed

p.o. Carles ESTEVA MOSSO

Olivier GUERSENT