



EUROPEAN COMMISSION

Brussels, 28.10.2020
C(2020) 7590 final

[REDACTED]
[REDACTED],
05-530 Gora Kalwaria
Poland

**DECISION OF THE EUROPEAN 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 2020/4953**

Dear [REDACTED],

I refer to your letter of 15 September 2020, registered on 16 September 2020, in which you submitted a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereafter ‘Regulation (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 21 August 2020, addressed to the Directorate-General for Competition of the European Commission, you requested access to, I quote: ‘[the] notification form submitted by Poland on 23 April 2020 regarding scheme on the basis of Article 107(2)(b) [of the Treaty on the Functioning of the EU] which gives grounds for Commission decision dated 29.5.2020 C(2020)3656 final - State Aid SA.57054 (2020/N)–Poland COVID-19: The Polish anticrisis measures – aid for damage compensation and to improve the liquidity of undertakings affected by the COVID-19 outbreak’.

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

In its initial reply of 31 August 2020, the Directorate-General for Competition refused access to the document concerned, based on the exceptions provided for in Article 4(2), third indent, of Regulation (EC) No 1049/2001 (protection of the purpose of inspections, investigations and audits) and the first subparagraph of Article 4(3) of the said regulation (protection of the ongoing decision-making process).

In your confirmatory application, you request a review of this position.

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 regret to inform you that access to the requested document has to be refused, based on the exception in the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001.

The detailed reasons are set out below.

2.1. Protection of the purpose of investigations

The third indent of Article 4(2) 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'.

In your confirmatory application, you ask that the European Commission, I quote, '[...] provide[s] the requested documents after the time-limit to bring proceedings before the General Court expired'.

As a preliminary point and as referred to by the Directorate-General for Competition in its initial reply, in its judgment in *Commission v TGI*³, 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.

³ Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, (hereafter '*Commission v Technische Glaswerke Ilmenau*'), C-139/07, EU:C:2010:376, paragraphs 52 to 61.

The Court reasoned that such disclosure would call into question the State aid procedural system.⁴ This reasoning was further confirmed in the *Sea Handling* judgment.⁵ 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.⁶ Hence, the general presumption continues to apply even if the European Commission has already rendered its decision in a specific State aid case.

The document to which you requested access forms part of the administrative file of case SA.57054 concerning an investigation into the alleged State aid granted by the Polish authorities in the context of the damage compensation scheme to improve the liquidity of undertakings affected by the COVID-19 outbreak. The investigation led to the conclusion that the notified aid scheme is compatible with the internal market in accordance with Article 107(2)(b) and Article 107(3)(b) of the Treaty on the Functioning of the European Union.

Although the European Commission has indeed taken a decision regarding the State aid on 29 May 2020⁷, the requested document forms part of the state aid investigation and the general presumption of confidentiality continues to apply despite the closure of the preliminary investigation phase⁸.

As the Directorate-General for Competition rightly pointed out, 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. 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. 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.

⁴ See also judgment of the Court of Justice 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 the Court of Justice of 28 June 2012, *Commission v Odile Jacob*, (hereafter '*Commission v Odile Jacob*'), C-404/10P, EU:C:2012:393, paragraphs 108 to 126, where the Court of Justice applied *Commission v TGI* by analogy to merger proceedings.

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

⁶ Judgment of the General Court of 11 December 2018, *Arca Capital Bohemia v Commission*, T-440/17, EU:T:2018:898, paragraphs 56 to 58.

⁷ https://ec.europa.eu/competition/state_aid/cases1/202023/285705_2161296_70_2.pdf

⁸ Judgment in '*Sea Handling v Commission*', referred to above, paragraph 43.

If other 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, including in the phase of the implementation of a Commission decision relating to an unlawful State aid, the system for the review of State aid and the nature of the procedure would be called into question.⁹

Consequently, the requested document is covered by a general presumption of non-accessibility based on the exception of Article 4(2), third indent (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in the first and third indents of Article 4(2) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public (as opposed to any possible private interests of the applicant) and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application, you do not refer to any particular public interest that could counter-weigh the need to protect the interests in Article 4(2), first and third indents of Regulation (EC) No 1049/2001. Instead, you underlined that, I quote, '[...] that the purpose of the Regulation 1049/2001 is to ensure the widest possible access to documents'.

In this context, please note, that general considerations cannot provide an appropriate basis for establishing that the principle of transparency was in this case especially pressing and capable, therefore, of prevailing over the reasons justifying the refusal to disclose the documents in question¹⁰.

Nor have I been able to identify any public interest capable of overriding the public and private interests protected by the third indent of Article 4(2) of Regulation (EC) No 1049/2001.

Moreover, the fact that the documents relate to an administrative procedure and not to any legislative act, for which the Court of Justice has acknowledged the existence of wider openness¹¹, provides further support to this conclusion.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the documents requested.

⁹ *Commission v Technische Glaswerke Ilmenau*, paragraphs 58 to 61.

¹⁰ Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission*, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93.

¹¹ Judgment in *Commission v TGI*, cited above, paragraphs 53-55 and 60; *Commission v Bavarian Lager* judgment, cited above, paragraphs 56-57 and 63.

In your confirmatory application, you ask that the European Commission provides the document, I quote, '[...] without sensitive data or confidential information if such were indicated in the notification by the Member State'

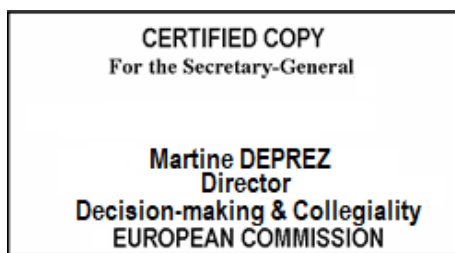
However, as stated by the Court of Justice¹², where the documents requested are covered by a general presumption of non-disclosure, such documents do not fall within an obligation of disclosure, in full, or in part.

Consequently, I have come to the conclusion that the documents requested are covered in their entirety by the invoked exceptions to the right of public access.

5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European 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 Commission
Ilze JUHANSONE
Secretary-General

¹² Judgment of the Court of Justice of 28 June 2012, *European Commission v Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 133.