



EUROPEAN COMMISSION

Competition DG

The Director General

Brussels, 29.11.2022
COMP/H.5/GK/2022/6559

Moritz Neujeffski

Subject: EASE 2022/6559 – Your request of 11 November 2022 for access to documents pursuant to Regulation (EC) No. 1049/2001 relating to a complaint by the Estonian Soft Drinks Producers' Union regarding the Estonian sugar-sweetened beverage tax

Dear Mr. Neujeffski,

Thank you for your message of 11 November 2022, registered on 14 November 2022 under EASE number 2022/6559, concerning a complaint by the Estonian Soft Drinks Producers Union regarding the Estonian sugar-sweetened beverage tax, 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 which are part of the administrative file of DG Competition concerning a complaint by the Estonian Soft Drinks Producers Union regarding the Estonian sugar-sweetened beverage tax:

1. Complaints by the (Estonian) "Soft Drink Producers' Union" to the European Commission regarding the introduction of a national sugar-sweetened beverage tax in Estonia in 2017;
2. A list of further correspondence between the Soft Drink Producers' Union and the European Commission regarding the Sugar-sweetened beverage tax in Estonia, and
3. Letters of formal notice or draft letters of formal notification by the European Commission or any other communication between the European Commission and the Estonian government regarding the sugar-sweetened beverage tax.

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

The documents you request access to form part of the case file in a State aid investigation under Article 108 of the TFEU in which the investigation has been closed.

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.

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

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.

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*³, 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 2015/1589⁴, 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).

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

³ See Case C-477/10 P, *Commission v Agrofert*, paragraph 66

⁴ 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

Furthermore, in the *Muka*⁵ case, the General Court confirmed that “*the general presumption of non-disclosure concerning the documents relating to the Commission’s administrative file resulting from a State aid control procedure applies regardless of whether the request for access concerns a control procedure which has already been closed or one which is pending*”⁶.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Pursuant to Article 4(2) 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), third indent of Regulation 1049/2001.

Furthermore, the General Court explained in *Muka*⁷ that the applicant must “*demonstrate precisely that, in the particular case, disclosure of the documents concerned would contribute specifically to ensuring the protection of that public interest to such an extent that the principle of transparency takes precedence over the protection of the interests underpinning the refusal of disclosure*”⁸. Considerations of a purely general nature cannot be such as to establish that the public interest is especially pressing and capable of prevailing over the reasons justifying the refusal to disclose the documents⁹.

In your request, you argue that there is a public interest in the disclosure of the information requested because public health initiatives such as sugar-sweetened beverage taxes represent a key interest of Estonian citizens. The Commission understands that public health is a key interest for Estonian citizens. However, this is a general consideration and you have not explained precisely why the disclosure of the information requested would contribute specifically to ensuring the protection of that interest. Therefore, no sufficient grounds have been put forward to demonstrate an overriding interest for the disclosure of the requested documents in the context of this case to which access has been hereby denied. Consequently, the prevailing interest in this case lies in protecting the effectiveness of the Commission’s investigations.

4. PARTIAL ACCESS

I have also considered the possibility of granting partial access to the documents for which access has been denied 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 the documents concerned and, consequently, no partial access can be granted.

⁵ See case T-214/21, *Ondrej Muka v Commission*

⁶ See case T-214/21, *Ondrej Muka v Commission*, paragraph 55. See also, by analogy, the *Agrofert* and *Deutsche Telekom* judgments cited therein

⁷ See case T-214/21, *Ondrej Muka v Commission*

⁸ See case T-214/21, *Ondrej Muka v Commission*, paragraph 68 and judgments cited therein.

⁹ See case T-214/21, *Ondrej Muka v Commission*, paragraph 69 and judgments cited therein.

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** from receipt of this reply to do so; after this period 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-acc-doc@ec.europa.eu.

Yours faithfully,

e-signed

Linsey MCCALLUM

p.o. Olivier GUERSENT