Subject: EASE 2023/4153 – Your request of 10 July 2023 for access to documents pursuant to Regulation (EC) No. 1049/2001 relating to Ireland Forestry Programme 2023-2027

Dear Mr. Glover,

The Commission services have received your request for access to documents of 10 July 2023 registered under EASE number 2023/4153, in which you request access to documents relating to Ireland Forestry Programme pursuant to Regulation (EC) 1049/2001 ("Regulation 1049/2001").

Your requests concern the period of 1 January 2023 until today. We have been informed that you introduced similar request to access to documents that are held by DG Environment.

The present letter addresses your request for access to documents held by DG Competition in relation to the two planned and notified State aid schemes registered under SA.104922 (2023/N) and SA.107220 (2023/N) Ireland Forestry Programme 2023-2027.

1. DOCUMENTS CONCERNED

In your letter you request access to documents which contain the following information:

- Details of records where EU Commission raised environmental concerns raised in relation to Ireland's proposed forestry programme, in particular any records mentioning the following issues:
  
  a) the percentage of broadleaf trees planted  
  b) the impact on farmland birds  
  c) the impact of planting on peatlands  
  d) the impact on Annex 1 habitats

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e) the impact on high-value farmland

- Records of EU Commission letters to the Irish Dept of Agriculture on June 6, and June 21, relating to its review of Ireland’s application for proposed forestry programme for 2023 to 2027.

- Records of Irish Dept of Agriculture (DAFM) letters in response the correspondence received from EU Commission on June 6 and June 21

- Agenda, minutes, notes or other records relating to in-person bilateral discussions between the EU commission and Irish Minister for the Environment, Climate and Communications, Eamon Ryan and Irish Minister of State, Pippa Hackett that took place on June 20, 2023 in relation to the proposed forestry programme.

The documents you request access to form part of the case files in pending State aid investigations under Article 107 TFEU in which no final decisions have yet been adopted by the Commission.

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".  

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

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

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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
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.

In TGI\(^3\), 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 question\(^4\). This line of reasoning was upheld by the Courts in *Sea Handling v Commission* even when it comes to a reduced number of documents pertaining to a State aid file\(^5\). The general presumption continues to apply even after the closure of the investigation, as confirmed by the General Court in *Muka v. Commission*\(^6\).

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*\(^7\), 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 2015/1589\(^8\), 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).

As mentioned above, the requested documents relate to two pending State aid investigations and contain a preliminary assessment of the facts and other information from which the direction of the investigation, the future procedural steps which the Commission may take,

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\(^3\) See Case C-139/07 P, Commission v Technische Glaswerke Ilmenau GmbH, ECLI:EU:C:2010:376.


\(^7\) See Case C-477/10 P, Commission v Agrofert, paragraph 66, ECLI:EU:C:2012:394.

as well as its investigative strategy may be revealed to the public. This information could easily be misinterpreted or misrepresented as indications of the Commission's possible final assessment in these cases.

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. 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.

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), third indent, 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 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 all 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-acc-doc@ec.europa.eu.

Yours faithfully,

Olivier GUERSENT
p.o. Guillaume LORIOT