



**EUROPEAN COMMISSION**  
DG Competition

The Director-General

Brussels, 25 / 01 / 2013  
COMP/D3/ABC/kkat – D2013/001983

Mr David CABO

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**Subject: Your application for access to documents according to Regulation 1049/2001 – Ref GestDem No 2013/40**

Dear Sir,

We refer to e-mail dated 11/12/2012 in which you make a request for access to documents, registered on 07/01/2013 under the above mentioned reference number.

**1. DOCUMENTS CONCERNED**

Your application concerns the following documents:

- Restructuring plan submitted by the FROB to the European Commission for Bankia,
- Restructuring plan submitted by the FROB to the European Commission for Catalunya Bank,
- Restructuring plan submitted by the FROB to the European Commission for Nova Caixa Galicia (NCG); and
- Restructuring plan submitted by the FROB to the European Commission for Banco de Valencia

**2. BACKGROUND**

The documents you request access to are part of the state aid file in cases SA.35253, 33735, S33734 and 34053, concerning an investigation under Article 107 of the Treaty. In this case the Commission has adopted a final decision and the case is closed. However, the Commission is currently conducting a monitoring procedure, in which the Trustee must ensure that the commitments taken in the context of the Decision and in the Restructuring plan are carried out, and the documents you request are of direct relevance to the on-going monitoring case. The disclosure of information enclosed in the Restructuring plan such as divestitures of businesses, dates, forecasts, etc. would undermine the implementation of such commitments.

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents<sup>1</sup>, I regret to inform you that your application cannot be granted, as disclosure is prevented by exception to the right of access laid down in Article 4 of this Regulation.

### **3. APPLICABLE EXCEPTIONS**

#### **3.1 Article 4 (2), first indent, protection of commercial interests of undertakings**

The documents which you seek to obtain contain commercially sensitive and forward looking business information of the companies that submitted them such as business strategy, balance sheet and profit and loss forecasts and divestitures of businesses.

Disclosure of the documents requested would undermine the protection of the commercial interests of the companies that submitted them, as putting this information in the public domain would affect their competitive position on the market.

Please note that I cannot be more specific with regard to the content of the document as this would have the effect of partly revealing its content and, thereby, deprive the exception of its purpose.<sup>2</sup>

Therefore the exception laid down in Article 4(2) first indent of Regulation (EC) No 1049/2001 applies to the documents requested.

#### **3.2 Article 4 (2), third indent, protection of the purpose of investigations**

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.

This exception aims at protecting the Commission's capacity to ensure that Member States and other third parties comply with their obligations under Community law.

As the Court of Justice has ruled in case *Commission v TGP*<sup>3</sup> there exists, with regard to Article 4(2), third indent, of Regulation 1049/2001, a general presumption that disclosure of documents in the administrative files in State aid procedures in principle undermines the protection of the purpose of 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.

As has been clarified by the Court of Justice in the *Agrofert*<sup>4</sup> case, in the context of a merger investigation, the general presumption applies regardless of whether a request for access concerns

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<sup>1</sup> Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ L145, 31.05.2001, page 43

<sup>2</sup> See settled case law, in particular case T-204/99, *Olli Mattila v. Council and Commission*, [(2001) ECR page II-2265, para. 87; case T-105/95, *WWF UK v. Commission*, [1997] ECR II-313, para. 65 and case T-84/03 *Turco v Council* [2004] ECR p. II-4061, para 74.

<sup>3</sup> Case C-139/07 P, *Commission v TGI*, para. 61.

<sup>4</sup> Case C-404/10 P, *Commission v Agrofert*, para. 66.

proceedings which have already been closed or proceedings which are pending. In this regard it has to be noted 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*, 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<sup>5</sup>.

In this regard it is also worth noting that the State Aid Procedural Regulation contains specific rules regarding treatment of information obtained in the context of such proceedings and that 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 Regulation<sup>6</sup>.

The documents to which you request access is part of the State aid file in the State aid procedure SA35253, 33735, S33734 and 34053 and directly relevant to an on-going monitoring procedure, in which the Trustee must ensure that the commitments taken in the context of the Decision and in the Restructuring plan are carried out. The disclosure of information enclosed in the Restructuring plan such as divestitures of businesses, dates, forecasts, etc. would undermine the implementation of such commitments. Thus, in accordance with the *Commission v TGI* case law and the above considerations, the requested documents are covered by the above presumption unless the applicant demonstrates otherwise. In your letter you have not demonstrated that these documents are not covered by the general presumption.

Moreover, pursuant to Article 4(2), first indent of Regulation 1049/2001, access to a document, where disclosure would undermine the protection of commercial interests of a natural or legal person, shall be refused. In the case at hand the requested documents contain information, whose public disclosure would undermine the protection of the commercial interests of the companies which submitted them.

In view of the above I consider that the documents requested are manifestly covered by the exception related to the protection of the purpose of investigations.

#### **4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

The exceptions laid down in Article 4(2) and 4(3) of Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the documents.

In the interest of transparency, it has to be noted that the Commission publishes non-confidential versions of its decisions wherein the full reasoning behind the legal act is made public and thus available for public scrutiny. The parts of the confidential decision withheld from public disclosure are those containing commercially sensitive information of the entities involved in the proceedings.

In view of the above, I consider that in your application you have not put forward sufficient arguments leading to identify an overriding public interest in disclosure capable of rebutting the above general

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<sup>5</sup> Ibid.

<sup>6</sup> By analogy to *Commission v Agrofert*, para. 62.

presumption. Consequently, the prevailing interest in this case rather lies in protecting the effectiveness of the Commission's State aid investigation.

## **5. PARTIAL ACCESS**

We have considered whether partial access could be granted to the documents requested. However, the documents are manifestly covered in their entirety by the exceptions mentioned above.

## **6. MEANS OF REDRESS**

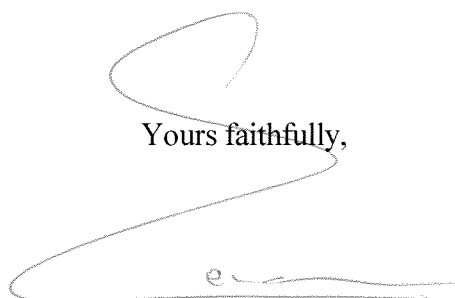
In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission  
Secretary-General  
Transparency unit SG-B-5  
BERL 5/327  
B-1049 Bruxelles

or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

Yours faithfully,

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a horizontal line and a small flourish.

Alexander ITALIANER  
Director-General