Subject: Gestdem 2016/6556 - Application for access to documents according to Regulation 1049/2001 regarding documents related to the Commission's communication with the Irish authorities in the area of media

Dear Sir,

Thank you for your e-mail dated 21 November 2016 in which you make a request for access to documents, registered under the above mentioned reference number. You request access to the "communications between the Commission or its branches and the Irish Department of Communications in relation to the subject of media ownership, plurality and public service funding such as the licence fee for RTÉ, funding for commercial TV and radio and possible subvention for the newspaper industry in Ireland."

Such a request has to be assessed under Regulation No 1049/2001\(^1\) regarding public access to European Parliament, Council and Commission documents (hereinafter 'Regulation 1049/2001').

1. DOCUMENTS CONCERNED

Your application concerns access to various files of the Commission. You list communications between the Commission and the Irish Department of Communications in relation to

1. plurality and public service funding such as the licence fee for RTÉ,
2. the subject of media ownership,
3. funding for commercial TV and radio,
4. and possible subvention for the newspaper industry in Ireland.

\(^1\) OJ L145, 31.05.2001, page 43.
Concerning the first point, the Commission took a decision on the funding of public broadcasters in Ireland on 27 February 2008. I enclose a link to that decision.


Concerning the third point on funding commercial TV and radio, the Commission adopted in 2005 and in 2009 decisions on an Irish Broadcasting Funding Scheme. The decisions can be found under the following links.


I also attach the correspondence with the Irish Department of Communications in that matter. These documents contain personal data of the officials involved. Therefore the enclosed documents have the personal data expunged.

I furthermore regret to inform you that concerning the second and fourth points, after having performed a search of our databases and the documents in the archive our services were unable to find the documents you request. As specified in Article 2(3) of Regulation 1049/2001, the right of access as defined in that regulation applies only to existing documents in the possession of the institution. The Commission is therefore unable to satisfy that part of your application.

Finally, as far as the documents are concerned, which the Commission exchanged with the Irish authorities in the course of the procedure which led to the adoption of the Commission decision of 27 February 2008 on the funding of public broadcasters in Ireland and thereafter in the context of monitoring the correct implementation of that decision, I have come to the conclusion that these documents, which concern a State aid investigation with regard to an individual undertaking and not an abstract general scheme, fall under the exceptions of Article 4 of Regulation 1049/2001.

2. APPLICABLE EXCEPTIONS

2.1. Personal data

Regarding the expunged personal data, pursuant to Article 4(1) (b) of Regulation (EC) No 1049/2001, access to a document or sections of it has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data. The applicable legislation in this field is Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

When access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable. According to Article 8(b) of this Regulation, personal

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2 OJ L 8 of 12.1.2001, p. 1
data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced.

We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. Therefore, we are disclosing the documents requested expunged from this personal data.

2.2. Documents exchanged with the Irish authorities in the context of the Commission decision of 27 February 2008

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(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.

These exceptions aim at protecting the Commission's capacity to ensure that Member States and other third parties comply with their obligations under Union law.

As the Court of Justice has ruled in case Commission v TGI, 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 was likely to be modified and thus the system for review of State aid would be called into question.

As regards public access to documents under Regulation 1049/2001, in the context of a merger investigation, the Court of Justice clarified in the Agrofert case, when it comes to documents exchanged with third parties to a procedure, that the general presumption that disclosure of documents in the administrative files in competition procedures undermines the protection of the purpose of investigations and commercial interests applies regardless of whether a request for access concerns proceedings which have already been closed or proceedings which are pending. In this regard it has to be noted that in State aid procedures concerning individual aid measures the Commission relies on submissions by the Member State concerned which invariably 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 concerning individual undertakings would negatively affect commercial interests and 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 prospect of such

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4 Case C-139/07 P, Commission v TGI, at paragraph. 61.
5 Case C-404/10 P, Commission v Agrofert, paragraph. 66.
publication after a control procedure is closed runs the risk of adversely affecting the willingness of parties to cooperate when such a procedure is pending.\(^6\)

By its nature, the assessment of the State aid measure in the case concerning the funding of public broadcasters in Ireland contains commercial and market-sensitive information about the activities of the involved undertakings, whose public disclosure would undermine the protection of the latter’s commercial interests. The type of commercial information collected in this instance by the Commission is in fact similar in nature to the information collected during other State aid investigations related to an individual undertaking.

It is also worth noting that the State Aid Procedural Regulation 2015/1589 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.

The documents to which you request access have been exchanged with the Member State during the instruction of a State aid investigation. Thus, in accordance with the Commission v TGI and Agrofert case law and the above considerations, the requested documents are covered by the above presumption unless the applicant demonstrates otherwise.

In view of the above, I consider that the documents requested are manifestly covered by the exceptions related to the protection of the purpose of investigations and commercial interests.

### 3. Overriding Public Interest in Disclosure

Pursuant to Article 4(2) of Regulation 1049/2001, the exception to the right of access must be waived if there is an overriding public interest in disclosing the document 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) of Regulation 1049/2001.

In your application you have not established arguments, apart from your personal interests in the matter, which would present an overriding public interest in disclosure. The Commission has not itself identified such overriding public interest. Consequently, the prevailing interest in this case rather lies in protecting the Commission’s state aid investigations and the commercial interests of the undertakings concerned, as well as the decision-making process.

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\(^6\) Judgement of the Court of Justice of 28 June 2012 in Case C-404/10 P, Editions Odile Jacob v. Commission, at para 124,
4. **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 15 working days in which to do so from receipt of this letter, 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 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  
Secretary-General  
Transparency unit  
BERL 5/327  
B-1049 Bruxelles  
or by email to: sg-acc-doc@ec.europa.eu.

Yours faithfully,

[Signature]

Johannes LAITENBERGER

Annex attached