



EUROPEAN COMMISSION

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Sferia S.A.

████████████████████
██████████ Warszawa
Polska

**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 2018/5757**

Dear ██████████

I refer to your letter of 24 December 2018, registered on 27 December 2018, in which you submit 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

On 22 October 2018 you submitted to the Ministry of Digital Affairs of the Republic of Poland a request access to:

‘1) a list of ongoing proceedings of the European Commission concerning Sferia, and in particular the allocation of frequencies from the 800 MHz band, including the reference number, subject and stage of the proceedings as well as the schedule of next steps stemming from agreements or legal provisions, and proceedings which have been concluded and their outcome [and]

2) documents held by the body concerning the proceeding(s) indicated referred to in point 1, in particular all types of correspondence of the European Commission and the

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, p. 43.

Polish authorities, including the Minister for Digital Affairs, especially any kind of complaints, summons, decisions, positions, assessments etc.’

{original quote:

‘1) [...] informacji zawierającej wykaz prowadzonych przez Komisję Europejską postępowań dotyczących Sferii, a w szczególności „rozdysponowania częstotliwości z zakresu 800 MHz”, z podaniem sygnatury, przedmiotu oraz etapu postępowania, jak również dalszego harmonogramu postępowania wynikającego z ustaleń lub przepisów prawa, w tym także postępowań, które zostały zakończone oraz ich rezultatu [oraz]

2) [...] dokumentów postępowania (lub postępowań) wskazanych w punkcie 1, w szczególności wszelkiego rodzaju pism Komisji Europejskiej oraz organów administracji polskiej, w tym Ministra Cyfryzacji, w szczególności wszelkiego rodzaju skarg, wezwań, decyzji, stanowisk, ocen itp.’}.

As your initial application concerned the documents originating from the European Commission, the Ministry of Digital Affairs of the Republic of Poland on 31 October 2018 referred the case, based on the provisions of Article 5, second subparagraph, of Regulation (EC) No 1049/2001, to the European Commission for handling and reply.

Following the initial assessment, it has been established that the subject matter of your initial application falls in the remit of two Directorates-General of the European Commission. Consequently, it has been attributed to the Directorate-General for Competition (Gestdem 2018/5756) and the Directorate-General for Communications Networks, Content and Technology (Gestdem 2018/5757).

Through its initial reply dated 3 December 2018, the Directorate-General for Communications Networks, Content and Technology informed you that, as far as the first point of your initial application is concerned, it does not hold any documents containing ‘a list of ongoing proceedings of the European Commission concerning Sferia [...]’ {original quote: ‘informacji zawierającej wykaz prowadzonych przez Komisję Europejską postępowań dotyczących Sferii [...]’}.

With regard to the second point of your initial application, the Directorate-General for Communications Networks, Content and Technology refused access to the documents concerned, based on the exceptions protecting the purpose of inspections, investigations and audits and the decision-making process, provided for, respectively, in Article 4(2), third indent, of Regulation (EC) No 1049/2001 and in Article 4(3) of the said Regulation³.

Through your confirmatory application, you request a review of the position of the Directorate-General for Communications Networks, Content and Technology.

³ With regard to the documents held by the Directorate-General for Competition, the latter provided its initial reply to the application Gestdem 2018/5756 on 26 November 2018.

Please note that under Article 5 of Regulation (EC) n° 1049/2001, an application for access to documents submitted to the authorities of a Member State may be referred to the European Commission only to the extent that the documents originating from the latter are concerned⁴. Consequently, this decision only relates to the public access to the documents falling under the scope of your initial application and originating from the European Commission.

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.

Having examined your confirmatory application, I have to inform you that the decision of the Directorate-General for Communications Networks, Content and Technology to refuse access to the documents referred to in the first point of your initial application has to be confirmed on the basis of Article 4(2), third indent of Regulation (EC) No 1049/2001 (protection of the purpose of inspections, investigations and audits), for the reasons set out below.

With regard to the document referred to in the first point of your initial application, as explained by the Directorate-General for Competition in its initial reply, no such ‘list of ongoing proceedings concerning Sferia’ {original quote: ‘wykaz prowadzonych przez Komisję Europejską postępowań dotyczących Sferii’}, containing all information listed in your request (‘the reference number, subject and stage of the proceedings as well as the schedule of next steps [...]’ {original quote: ‘sygnatura, przedmiot oraz etap postępowania, jak również dalszy harmonogram postępowania [...]’}), is held by the European Commission.

2.1. Protection of the purpose of investigations

Article 4(2), third indent of Regulation (EC) No 1049/2001 provides that the ‘institutions shall refuse access to a document where disclosure would undermine the protection of [...] the purpose of inspections, investigations and audits’.

Although in your confirmatory application you do not contest the position of the Directorate-General for Communications Networks, Content and Technology as regards the applicability of the above-mentioned exception to the documents concerned, I would like to provide additional explanations on how their public disclosure would undermine the interests protected by this exception.

As a preliminary comment, it needs to be underlined that documents that are disclosed under Regulation (EC) No 1049/2001 become, legally speaking, public documents.

⁴ Judgement of the General Court of 28 April 2017, *Gameart v Commission*, T-264/15, EU:T:2017:290, paragraph 36.

Indeed, a document released following an application for access to documents would have to be provided to any other applicant that would ask for it.

The documents to which you request access form part of the file concerning the procedure laid down in Article 258 of the Treaty on the Functioning of the European Union, which consists of two consecutive stages, the administrative pre-litigation stage and the judicial stage before the Court of Justice. The purpose of the pre-litigation procedure is to allow the Member State to put an end to any alleged infringement, to enable it to exercise its rights of defence and to define the subject-matter of the dispute with a view to bringing an action before the Court.⁵ The procedure in question bears the reference number 2016/2122 and is still ongoing.

The Court has interpreted Article 4(2), third indent, of Regulation (EC) No 1049/2001 among others in its *Liga para a Protecção da Natureza* judgment, in which it underlined that in ongoing infringement cases, the institution may base itself on a general presumption of non-disclosure⁶. This confirmed the Court's earlier *Petrie* judgment, in which it ruled that 'the Member States are entitled to expect the European Commission to guarantee confidentiality during investigations which might lead to an infringement procedure.

This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the European Commission and the Member State in question regarding the latter's voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgment of the Court of Justice.⁷

Consequently, all documents in the file are covered by a general presumption of non-accessibility based on the exception of Article 4(2), third indent, of Regulation (EC) No 1049/2001, as they relate to an infringement procedure that, as mentioned above, is still ongoing.

Against this background, public disclosure of the requested documents would not only negatively influence the dialogue between the European Commission and the Member State, for which a climate of trust is essential, but would also alter the strictly bilateral nature of the infringement procedure as provided for in Article 258 of the Treaty on the Functioning of the European Union.

Such disclosure would consequently adversely affect other investigations of the European Commission, as it would undermine the climate of mutual trust required to resolve disputes between the European Commission and the Member State without having to use the judicial phase of the infringement procedure. It would have a negative

⁵ Judgment of the Court of Justice of 10 December 2002, *European Commission v Ireland*, C-362/01, EU:C:2002:739, paragraphs 15 and 16.

⁶ Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza and Finland v European Commission*, Joint Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraphs 55 and 65-68.

⁷ Judgment of the General Court of 11 December 2001, *Petrie and Others v European Commission*, T-191/99, EU:T:2001:284, paragraph 68.

effect on the extent to which the European Commission can conduct negotiations with the Member State with the objective that the Member State complies voluntarily with European Union law.

Having regard to the above, I consider that the use of the exception under Article 4(2), third indent, of Regulation (EC) No 1049/2001 on the grounds of protecting the purpose of inspections, investigations and audits is justified, and that access to the documents in question must be refused on that basis.

3. NO PARTIAL ACCESS

I have also examined the possibility of granting partial access to the documents concerned, in accordance with Article 4(6) of Regulation (EC) No 1049/2001.

However, it follows from the assessment made above that the documents which fall within the scope of your request are manifestly and entirely covered by the exceptions laid down in Article 4(2), first indent, of Regulation (EC) No 1049/2001.

It must also be underlined that the Court of Justice confirmed that a presumption of non-disclosure excludes the possibility to grant partial access to the file.⁸

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in 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 and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application, you argue that such overriding public interest exists in the case at hand. In this context, you point out that ‘Sferia submitted an application for re-allocation of frequency from 800 Mhz band and the relevant proceedings in this context are ongoing’ {original quote: ‘Sferia złożyła [...] wniosek o udzielenie rezerwacji częstotliwości 800 Mhz na kolejny okres i trwa postępowanie w tym zakresie’}. In this regard, you underline that ‘in the view of Sferia, the correct allocation of the frequencies in question is in the public interest. On the other hand, Sferia should be able to take a reasoned decision concerning the allocation of the frequency in question, with full knowledge regarding the legal status of the proceedings of the European Commission’ {original quote: ‘Sferia uważa, że właściwe zagospodarowanie częstotliwości będącej przedmiotem wniosku leży w interesie publicznym. Sferia natomiast powinna podjąć decyzje w sprawie rezerwacji przedmiotowej częstotliwości posiadając pełnię wiedzy na temat stanu prawnego postępowania jakie toczy się przed Komisją Europejską’}. This, in your view, translates into the overriding public interest that warrants the public disclosure of the documents concerned.

Please note in this respect, however, that the above-mentioned motives constitute a private interest (of Sferia), and can therefore not be considered as an overriding public

⁸ Judgment of the General Court of 25 March 2015, *Sea Handling v Commission*, T-456/13, EU:T:2015:185, paragraph 93.

interest in disclosure. Indeed, as confirmed by the Court of First Instance in its *Sison*⁹ and *Franchet and Byk*¹⁰ judgments, ‘the purpose of the Regulation is to guarantee access for everyone to public documents and not only access for the requesting party to documents concerning him and it follows that the applicants’ application must be examined in the same way as an application from any other person’.

Furthermore, the individual interest that a party may invoke when requesting access to documents cannot be taken into account for the purpose of assessing the possible existence of an overriding public interest.¹¹

Nor have I been able, based on the elements at my disposal, to establish the existence of any overriding public interest in disclosure of the documents in question. In any case, I consider that the public interest is better served in this case by ensuring the conclusion, in all serenity, of the procedure and the related exchanges with the Member State, without jeopardising the dialogue between the European Commission and the Member State for which, as pointed out above, a climate of trust is essential.

In consequence, I consider that in this case there is no overriding public interest that would outweigh the public interest in safeguarding the protection of the purpose of investigations protected by Article 4(2), third indent of Regulation (EC) No 1049/2001.

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 openness¹², provides further support to this conclusion.

⁹ Judgment of the Court of First Instance of 26 April 2005, *Sison v Council* Joint Cases T-110/03, T-150/03 and T-405/03, EU:T:2005:143, paragraphs 50-55, Judgment of the Court of 1 February 2007, *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraphs 43-48 and judgment of the Court of First Instance of 9 September 2008, *MyTravel v Commission*, T-403/05, EU:T:2008:316, paragraph 66.

¹⁰ Judgment of the Court of First Instance of 6 July 2006, *Yves Franchet and Daniel Byk v Commission*, Joint Cases T-391/03 and T-70/04, EU:T:2006:190, paragraph 82.

¹¹ Judgment of the General Court of 20 March 2014, *Reagens v Commission*, T-181/10, EU:T:2014:139, paragraph 144.

¹² Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07, EU:C:2010:376, paragraph 60.

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
Martin SELMAYR
Secretary-General