



EUROPEAN COMMISSION

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[REDACTED]
Sferia S.A.

[REDACTED]
[REDACTED] 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 2018/5756**

Dear [REDACTED],

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 for Digital Affairs of the Republic of Poland a request for 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 Polish authorities, including the Minister for Digital Affairs, especially any kind of complaints, summons, decisions, positions, assessments etc.'

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

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

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

Following the initial assessment, it has been established that the subject matter of your request 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 26 November 2018, the Directorate-General for Competition informed you that, as far as the first point of your 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 application, the Directorate-General for Competition 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), first subparagraph, of the said Regulation³.

Through your confirmatory application, you request a review of the position of the Directorate-General for Competition.

³ With regard to the documents held by the Directorate-General for Communications Networks, Content and Technology, the latter provided its initial reply to the application GESTDEM 2018/5757 on 3 December 2018.

Please note that under Article 5 of Regulation (EC) No 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 Competition to refuse access to the documents in question has to be confirmed on the basis of Article 4(2), third indent (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001, Article 4(2), first indent (protection of commercial interests) of the said Regulation and Article 4(3), first subparagraph (protection of the decision-making process) of the above-mentioned Regulation, for the reasons set out below.

With regard to the document referred to in the first point of your request, 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 and commercial interests

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’.

Article 4(2), first indent, of Regulation (EC) No 1049/2001 provides that the ‘institutions shall refuse access to a document where disclosure would undermine the protection of [...] commercial interests of a natural or legal person, including intellectual property’.

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

In your confirmatory application you do not contest the position of the Directorate-General for Competition as regards the applicability of the above-mentioned exception in Article 4(2), third indent, of Regulation (EC) No 1049/2001, to the documents concerned and you concentrate on the issue of the overriding public interest, which I will address in point 4 of this decision. I would like to, however, provide additional explanations on how the public disclosure of the requested documents would undermine the interests protected by that exception.

In accordance with the case-law of the Court of Justice, the European Commission, ‘when assessing a request for access to documents held by it, may take into account more than one of the grounds for refusal provided for in Article 4 of Regulation (EC) No 1049/2001’ and two different exceptions can, as in the present case, be ‘closely connected’.⁵

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. 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.

As explained by the Directorate-General for Competition in its initial reply, the documents relating to the second point of your request, form part of the State aid investigation file SA.37489. The above-mentioned investigation is still ongoing and the documents in question have not been made available to the public.

These documents contain business and market sensitive information regarding the involved undertakings, the public disclosure of which would significantly harm the commercial interests of the latter.

The European Commission relies in State aid procedures on Member States’ contributions, which typically equally contain commercially sensitive information relating to companies, and access to such documents would therefore also undermine the Member States’ willingness to cooperate. The documents concerned indeed contain such commercially sensitive business information relating to the economic operators. Consequently, as explained above, release of the documents in question under Regulation (EC) No 1049/2001 would bring about the public disclosure of market sensitive information concerning these operators.

In its judgment in *Commission v Technische Glaswerke Ilmenau*⁶, which concerned a request for documents in two State aid cases, the Court of Justice upheld the European Commission's refusal. It held that there exists, with regard to the exception related to the protection of the purpose of investigations, a general presumption that disclosure of

⁵ Judgment of the General Court of 13 September 2013, *Netherlands v Commission*, T-380/08, EU:T:2013:480, paragraph 34.

⁶ Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 (hereafter referred to as ‘*Commission v Technische Glaswerke Ilmenau* judgment’), EU:C:2010:376, paragraphs 52 to 61.

documents in the file would undermine the purpose of State aid investigations.⁷ The Court reasoned that such disclosure would call into question the State aid procedural system.⁸

With regard to documents forming part of procedures for reviewing State aid, the Court of Justice pointed out that even interested parties other than the Member State concerned, i.e. also the beneficiaries of a State aid, do not have the right to consult the documents in the European Commission's administrative file.

The Court held indeed that 'the interested parties, except for the Member State responsible for granting the aid, do not have a right under the procedure for reviewing State aid to consult the documents on the Commission's administrative file. Account must be taken of that fact for the purposes of interpreting the exception laid down by Article 4(2), third indent of Regulation (EC) No 1049/2001. [...] Whatever the legal basis on which it is granted, access to the file enables the interested parties to obtain all the observations and documents submitted to the Commission, and, where appropriate, adopt a position on those matters in their own observations, which is likely to modify the nature of such a procedure'.⁹

It must be recalled that the aim of the exception provided for by Article 4(2), third indent of Regulation (EC) No 1049/2001 is not to protect the investigations as such, but rather their purpose, that is to induce the Member State concerned to comply with EU law. This is so even if the particular investigation or inspection which gave rise to the documents to which access is sought has been completed.¹⁰

The State aid review procedure is strictly bilateral between the European Commission and the Member State concerned. This often involves a lengthy dialogue in which very sensitive information is exchanged, under the understanding that it will remain confidential. Disclosure of the documents pertaining to the State aid investigation file would thus jeopardise the willingness of Member States to cooperate in future State aid investigations. Therefore, confidentiality must be guaranteed at all times to create and maintain a climate of mutual trust between the European Commission and the Member States.

In addition, in the course of investigations in the field of competition, the European Commission invariably collects sensitive commercial information about the undertaking(s) subject to the investigation, in order to evaluate whether there has been a breach of EU competition law.

⁷ See also Judgment of the Court of Justice of 14 July 2016, *Sea Handling v Commission*, C-271/15, (hereafter referred to as '*Sea Handling v Commission* judgment', EU:C:2016:557, paragraphs 36 to 47.

⁸ See also Judgment of the Court of Justice of 21 September 2010, *Sweden and Others v API and Commission*, C-514/07 P, EU:C:2010:376, paragraphs 99 and 100, as well as Judgment of the Court of Justice of 28 June 2012, *Commission v Odile Jacob*, C-404/10 P, (hereafter referred to as '*Commission v Odile Jacob* judgment'), EU:C:2012:393, paragraphs 108-126, where the Court of Justice applied *Commission v Technische Glaswerke Ilmenau*, cited above, by analogy to merger proceedings.

⁹ *Commission v Technische Glaswerke Ilmenau*, cited above, EU:C:2010:376, paragraphs 58 and 59.

¹⁰ Judgment of the Court of Justice of 12 September 2007, *API v Commission*, T-36/04, EU:T:2007:258, paragraph 133.

In the *Commission v Odile Jacob* case, the Court of Justice held that the publication of sensitive information concerning the economic activities of undertakings subject to a control procedure by the European Commission is likely to harm their commercial interests even after the control procedure has been concluded. Therefore, the Court of Justice held that a general presumption of non-disclosure of the documents in the European Commission's case file applies, irrespective of whether a request for access concerns proceedings which have already been closed or proceedings which are pending (as in the case at hand). The Court specifically recognised that granting access to such documents would undermine the protection of the objectives of the investigation activities and also of the commercial interests of the undertakings involved.¹¹

It needs to be emphasised that in the *Agrofert* judgement, the Court ruled that this general presumption of non-disclosure could apply up to 30 years and possibly beyond.¹²

Although the *Odile Jacob* and *Agrofert* judgments concern a merger control investigation, their reasoning applies by analogy to State aid proceedings. While there are certain differences in the conduct of merger control and State aid proceedings, both ultimately have as their goal to ensure that competition in the internal market is not distorted and that economic operators act lawfully.

In this regard, it has to be noted that in State aid procedures the European Commission relies on submissions by the Member State concerned which invariably contain sensitive data, including information related to the economic activities of undertakings.

I also refer to the judgment of the Court of Justice in the *Sea Handling* case where the Court stressed that, from the point of view of access to the administrative file, the State aid and merger control investigations are comparable and a general presumption of confidentiality applies in both cases¹³.

The similarity between State aid control procedures with other types of competition investigations was also reinforced by Council Regulation (EU) No 2015/1589.¹⁴ Therefore, the principles confirmed by the Court of Justice in the two above-mentioned rulings also apply to documents forming part of a State aid file.

It follows that disclosure of this information in State aid investigations would negatively affect commercial interests and also risk jeopardising the willingness of the Member State to cooperate with the European Commission's State aid investigations, even after the definitive closure of the case.

¹¹ *Commission v Editions Odile Jacob*, cited above, EU:C:2012:393, paragraphs 123 and 124.

¹² Judgment of the Court of Justice of 28 June 2012, *Commission v Agrofert Holding*, C-477/10 P EU:C:2012:394, paragraph 67.

¹³ *Sea Handling v Commission*, cited above, paragraph 45.

¹⁴ Council Regulation (EU) No 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, Official Journal L 248 of 24.09.2015, page 9.

Consequently, the requested documents are covered by a general presumption of non-accessibility based on the exceptions of the first and third indents of Article 4(2) of Regulation (EC) No 1049/2001.

Having regard to the above, I consider that the use of the exceptions under Article 4(2), third indent (protection of the purpose of investigations) of Regulation (EC) No 1049/2001 and Article 4(2), first indent (protection of commercial interests) of the said Regulation is justified, and that access to the documents in question must be refused on that basis.

2.2. Protection of the ongoing decision-making process

Article 4(3), first subparagraph of Regulation (EC) No 1049/2001 provides that ‘access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure’.

As explained above, the file SA.37489 is still open, as the European Commission has not yet adopted the decision concluding its investigation.

Releasing the requested documents, at this stage, would seriously undermine the possibility for the European Commission to explore all possible options in this framework free from external pressure.

I conclude, therefore, that access to the documents which form part of the investigation file in question must also be denied on the basis of the exception laid down in Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001.

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 and third indents, of Regulation No (EC) 1049/2001 and Article 4(3), first subparagraph, of the said Regulation.

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.¹⁵

¹⁵ *Sea Handling v Commission* judgement, cited above, paragraph 93.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) of Regulation No (EC) 1049/2001 and Article 4(3) of the said Regulation 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 also 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 interest in disclosure. Indeed, as confirmed by the Court of First Instance in its *Sison*¹⁶ and *Franchet and Byk*¹⁷ 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.¹⁸

¹⁶ Judgment of the Court of First Instance of 26 April 2005, *Sison v Council*, Joined Cases T-110/03, T-150/03 and T-405/03, EU:T:2005:143, paragraphs 50-55, Judgment of the Court of Justice 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.

¹⁷ Judgment of the Court of First Instance of 6 July 2006, *Yves Franchet and Daniel Byk v Commission*, Joined Cases T-391/03 and T-70/04, EU:T:2006:190, paragraph 82.

¹⁸ Judgment of the General Court of 20 March 2014, *Reagens v Commission*, T-181/10, EU:T:2014:139, paragraph 144.

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 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, commercial interests and the decision-making process protected by the first and third indents of Article 4(2) of Regulation (EC) No 1049/2001, as well as by Article 4(3), first subparagraph of the said Regulation.

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