EUROPEAN COMMISSION

Brussels, 26.9.2019
C(2019) 7093 final

[redacted]
1050 Ixelles,
Belgium

DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001[1]

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2019/3192

Dear [redacted],

I refer to your email of 20 July 2019, registered on 22 July 2019, 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 documents[2] (hereafter: 'Regulation (EC) No 1049/2001').

Please accept our apologies for this late reply.

1. SCOPE OF YOUR REQUEST

In your initial application of 3 June 2019, addressed to Directorate-General for Competition, you requested access to, I quote:

- '[…] all the documents (letters, memo, staff documents, emails) regarding the Competition department assessment of the Central European Press and Media Foundation (Közép- Európai Sajtó és Média Alapítvány, or KESMA)'.

You further explain that '[you are] particularly interested on any exchanges with DG COMP officials on whether this foundation is complying with E.U. rules on mergers and antitrust'.

[1] Official Journal L 345 of 29.12.2001, p. 94.
[2] Official Journal L 145 of 31.5.2001, p. 43.

In its initial reply of 11 July 2019, the Directorate-General for Competition identified the following documents as falling within the scope of your request:

1) a set of replies to parliamentary questions under reference numbers P-6152/18, P-6172/18 and P-235/19;
2) a reply to a citizen who contacted Commissioner Vestager, in the form of two annexes, under reference number Ares(2019)4462839;
3) a set of internal e-mails and briefings.

The Directorate-General for Competition granted full access to the replies to parliamentary questions and provided you with the corresponding Internet links. Furthermore, it granted wide partial access to the two annexes, reference number Ares(2019)4462839, subject to the redaction of personal data in accordance with Article 4(1)(b) of Regulation (EC) No 1049/2001.

Finally, the Directorate-General for Competition refused access to point 3) 'a set of internal e-mails and briefings', based on the exception protecting the purpose of inspections, investigations and audits provided for in the third indent of Article 4(2) of Regulation (EC) No 1049/2001 and the exception protecting the decision-making process provided for in Article 4(3) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position, as far as point 3) 'a set of internal e-mails and briefings' is concerned. In particular, you argue that there is an overriding public interests in the disclosure of the documents. You put forward detailed arguments, which I will address below.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 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.

Following this review, I regret to inform you that the refusal to grant access to the documents requested has to be confirmed based on the exceptions relating to, respectively, Article 4(2), third indent (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001 and the protection of the decision-making process provided for in Article 4(3) first subparagraph of Regulation (EC) No 1049/2001.

The detailed reasons are set out below.

2.1 Protection of the purpose of investigations

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

In its initial reply of 11 July 2019, the Directorate-General for Competition underlined that even if the European Commission has not opened a formal investigation under EU competition law in relation to the creation or the conduct of KESMA, the requested documents under point 3 relate to the assessment of the facts and other information from which the direction of any potential formal investigation, the future procedural steps which the European Commission may consider, as well as its investigative strategy would become clear. Furthermore, the Directorate-General for Competition stressed that this information could easily be misinterpreted or misrepresented as indications of the European Commission's possible final assessment, which in turn may cause damage to the reputation and standing of KESMA.

In its judgment in *Commission v TGI*[3], which concerned a request for documents in two State aid cases, the Court of Justice 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. This reasoning was further confirmed in the *Sea Handling* judgment.[4] This presumption applies regardless of whether an application for access to documents concerns an investigation which has already been closed or an investigation which is pending.[5]

In the *Deutsche Telekom AG v Commission* judgement, the General Court expressly acknowledged the existence of a general presumption of non-disclosure as regards procedures for the application of Article 102 of the Treaty on the Functioning of the EU, concerning the right to consult documents in the European Commission's file relating to those procedures, without there being any need to distinguish between internal documents and documents exchanged with third parties, since the general presumption applies to the whole case file in the administrative procedure.[6]

I would like to point out, on the subject of 'pre-existing documents', in the recent *AlzChem v Commission* judgment, which concerned a State aid investigation, the Court of Justice found that '[…] it follows from the very nature of a State aid investigation that information about what may have taken place before the investigation was opened is collected, and that, secondly, it certainly does not follow from the Court's case-law that such documents must be distinguished from the rest of the Commission's administrative file'[7]. Hence, the Court affirmed that the case law pertaining to the general presumption of confidentiality does not distinguish between pre-existing documents and the rest of the documents forming part of a State aid file.

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

4 Judgment of the Court of Justice of 14 July 2016, *Sea Handling v Commission*, C-271/15 P, (hereafter *Sea Handling v Commission*) EU:C:2016:557, paragraphs 36 to 47.

5 Judgment of the General Court of 7 October 2014, *Schenker v Commission*, T-534/11, EU:T:2014:854, paragraphs 57 and 58.

6 Judgment of the General Court of 28 March 2017, *Deutsche Telekom AG v Commission*, T-210/15, EU:T:2017:22, paragraph 43.

7 Judgment of the Court of Justice of 13 March 2019, *AlzChem AG v European Commission*, C-666/17 P, (hereafter *AlzChem AG v European Commission*), EU:C:2019:196, paragraph 33.

I note that for the specific cases where a general presumption of non-accessibility applies, all documents in the file are covered by that presumption. In the *AlzChem v Commission* judgment, the Court of Justice held that the general presumption continues to apply regardless of whether the documents targeted by the application for access were specifically identified and few in number.[8]

Moreover, in the recent *Fessenheim v Commission* judgment, which concerned the question of the applicability of the general presumption to documents forming part of the pre-notification exchanges not governed by Regulation 2015/1589[9], and which take place before the formal notification by a Member State of a State aid measure, the General court ruled that, I quote, '[…] the application of that general presumption of confidentiality cannot be restricted to the procedure following the notification by the Member State concerned of a measure which may constitute State aid, but that, in pursuit of the same objective, namely to maintain the trust of the Member State concerned, it must also apply to documents exchanged in the context of pre-notification'[10].

The General Court ruled that pre-notification exchanges may be followed by a preliminary investigation or even a formal investigation procedure and if documents exchanged during pre-notification could be disclosed, the presumption of confidentiality applicable to documents relating to the review procedure governed by Regulation 2015/1589 would lose its effectiveness, since the documents to which it relates could have been disclosed beforehand[11]. Therefore, the General court ruled that the application of the general presumption of confidentiality to documents exchanged in the context of pre-notification is necessary in order to safeguard the effectiveness of that presumption[12].

The same reasoning applies, *mutadis mutandis*, in the present case, which related to the pre-assessment of a potential competition law breach, where the European Commission had to investigate on the matter and to collect market information. Market information is considered sensitive, as it provides details on the activities of various economic operators and on the particular market's situation in general. I would like to underline that the collection and subsequent assessment of market information is of central importance for any antitrust enforcement or merger control proceedings, and is part of the European Commission's investigative activities conducted in relation to those proceedings. Indeed, the European Commission conducts an investigation during this phase, as it must assess the collected market information in order to decide whether a formal procedure should follow. In this context, I would like to refer to the *France v Schlyter* case law, where the Court of Justice ruled, regarding the concept of 'investigations' in EU law, that '[t]hose procedures do not necessarily have to have the purpose of detecting or pursuing an

8 *AlzChem v Commission*, cited above, paragraphs 31-32.

9 Council Regulation (EU) 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 (codification), O.J L 248 of 24.9.2015, p.9.

10 Judgment of the General Court of 14 May 2019, *Commune de Fessenheim v European Commission*, T-751/17, EU:T:2019:330 , paragraph 49.

11 *Ibid*, paragraph 50.

12 *Ibid*.

offence or irregularity. The concept of 'investigation' could also cover a Commission activity intended to establish facts in order to assess a given situation'.[13]

Consequently, as the General Court recognised for State aid pre-notification exchanges, I note that there is also undoubtedly a risk that if market information, collected by the European Commission in the context of a preliminary investigation, is disclosed to the public under Regulation (EC) No 1049/2001, this would have a negative effect on stakeholders' future cooperation and, consequently, on enforcement of European competition law in general. Furthermore, as the Directorate-General for Competition rightly pointed out, the requested documents would reveal the European Commission's investigation strategy, including its strategy prior to formal investigations, as these documents pertain to the preliminary assessments of the European Commission of the Hungarian media market in order to establish whether there has been a violation of the European competition law.

I note that the European Commission's services must be free to explore all possible options in their enforcement activities free from external pressure. Disclosure of the documents would have a negative impact on the European Commission's ability to detect infringements to competition law and, hence, undermine the protection of the purpose of competition investigations. Moreover, there is a risk of jeopardising the willingness of undertakings to cooperate with the European Commission in the context of future proceedings. This, in turn, would jeopardise the European Commission's authority and lead to a situation where the latter would be unable to properly carry out its task of enforcing competition law.

Finally, I note that natural and legal persons submitting information to the European Commission have a legitimate right to expect that the information they supply on an obligatory or voluntary basis will not be disclosed to the public. This legitimate right arises from the specific provisions concerning the professional secrecy obligation - which provides for documents to be used only for the purposes for which they have been gathered - and the special conditions governing access to the European Commission's file.

In your application you refer to a study commissioned by the Member of the European Parliament [redacted], in relation to the advertising coming from the Hungarian government, public bodies and other national authorities and to posts and documents originating from the Mertek Media Monitor organisation in relation to the '[…] overwhelming presence of Hungarian public funds could be understood as illegal state aid'.

Please note that these observations relate to separate subject matters and do not concern the 'competition department assessment of the Central European Press and Media Foundation (Közép- Európai Sajtó és Média Alapítvány, or KESMA'. Therefore, they exceed the scope of the current confirmatory decision. Nonetheless, please note that there

[13] Judgment of the Court of Justice of 7 September 2017, *France v Schlyter*, C-331/15 P, (hereafter *France v Schlyter*), EU:C:2017:639,, paragraph 47.

are two separate State aid complaints in relation to an alleged unlawful State aid to the Hungarian media, which complaints are currently under assessment. These complaints were registered by Directorate General for Competition under case numbers SA.45463 (a complaint related to the Hungarian public service broadcasting system) and SA.53108 (a complaint related to government spending on advertisements in media).

Against this background, I confirm that the documents falling under the scope of your application need to be protected against the risks associated with their public disclosure under the exceptions provided for in the third indent of Article 4(2) of Regulation (EC) No 1049/2001.

2.1. Protection of the 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 already explained above, the requested documents indeed contain information that could reveal the course of any future formal investigation, procedural steps and the investigation strategy followed by the European Commission. Disclosure of the documents would thus undermine the purpose of the investigation and seriously undermine any future decision-making process with regard to the future procedural steps, which the European Commission might have to take, such as, for instance, the decision to send a request for information in accordance with Article 18(3) of Regulation 1/2003[14] or not. Furthermore, as already stressed above, the European Commission's services must indeed be able to explore all possible options free from external pressure.

I conclude, therefore, that access to the documents must also be denied on the basis of the exception laid down in Articles 4(3), first subparagraph, of Regulation (EC) No 049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Articles 4(2) and 4(3) of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public (as opposed to any possible private interests of the applicant) and, secondly, overriding, it must outweigh the harm caused by disclosure.

In your application, you explain the general media environment in Hungary and refer to national measures, which have been taken in relation to KESMA.

[14] Council Regulation (EC) No 1/2003of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J L 1 of 4 January 2003, p.1.

You express your concerns in relation to media concentration in Hungary and refer to several reports from third parties and organisations to support your claim. You argue that, I quote, '[…] it will not undermine the reputation of KESMA, nor unveiling the Commission's investigation strategy, to know how the European Commission is monitoring competition law in Hungary! It sounds a reasonable request to ask more details on this monitoring like, internal emails, memos, or other documents on how the Commission's viewed the creation of KESMA. Disclosing details will not undermine the reputation of KESMA since you have not opened a "formal investigation under EU competition law in relation to the creation or the conduct" of this organization. They have therefore nothing to fear for their reputation if there is no problem'.

I do not agree with these allegations. As mentioned above, the documents under point 3 relate to the assessment of the facts and other information from which the direction of a formal investigation would become clear. As the Directorate-General for Competition rightly pointed out, this information could easily be misrepresented as indications of the European Commission's possible final assessment, which in turn may cause damage to the reputation and standing of KESMA.

Furthermore, I note that the considerations you put forward in order to establish an overriding public interest are rather of a general nature.

You do not explain why and how it is in the public interest to discuss and incorporate the European Commission's findings contained in the documents.

These general considerations would not outweigh the interests protected under Article 4(2) of Regulation (EC) No 1049/2001.

In the *Port de Brest v Commission* judgment[15], the General Court confirmed once again that the applicant must rely on specific circumstances to show that there is an overriding public interest, which is able to justify the disclosure of the documents. Moreover, in this judgment, the General Court held that among the limits with regard to the right of access to documents held by the European Commission, is the exception referred to in the third indent of Article 4(2) of Regulation (EC) No 1049/2001, protecting the purpose of inspections, investigations and audits of the institutions.[16]

In addition, I have not been able to identify any public interest that would outweigh the protection of the purpose of the investigations pursuant to Article 4(2) third indent and the protection of the decision-making process pursuant to Article 4(3) first subparagraph of Regulation (EC) No 1049/2001.

The fact that the investigations to which the documents relate are of an administrative nature and do not relate to any legislative acts, for which the Court of Justice has

[15] Judgment of the General Court of 19 September 2018, *Port de Brest v Commission*, T-39/17, EU:T:2018:560, paragraph 104.

[16] *Ibid*, paragraph 112.

acknowledged the existence of wider openness[17], provides further support to the conclusion that there is no overriding public interest in this case.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the document requested. However, as pronounced by the Court of Justice,[18] where the documents requested are covered by a general presumption of non-disclosure, such documents do not fall within an obligation of disclosure, in full, or in part.

5. 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,

CERTIFIED COPY
For the Secretary-General,

[redacted]

EUROPEAN COMMISSION

For the Commission

[redacted]

[17] Judgment of the Court of Justice of 29 June 2010, *European Commission* v *Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraphs 56-57 and 63.

[18] *Commission v Éditions Odile Jacob*, paragraph 133.