



EUROPEAN COMMISSION

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**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2019/5627**

Dear ██████████,

I refer to your letter 13 November 2019, registered on the same day, by which you request, pursuant to Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents², a review of the position taken by the Directorate-General for Competition in reply to your initial application of 12 April 2019.

1. SCOPE OF YOUR REQUEST

In your initial application of 3 October 2019, submitted on behalf of your client ██████████ Sarl, you referred to, I quote, ‘[...] a decision opening a formal investigation under Article 108(2) [of the] T[reaty on the] F[unctioning of the] EU with respect to the alleged favourable tax treatment granted by the Luxembourg tax administration to ██████████ (the “Opening decision”)’. In this context, you requested access to, I quote, ‘[...] the non-confidential versions of:

- The document listing the beneficiaries of tax rulings submitted by Luxembourg on 22 December 2014 in response to the Commission’s letter of 19 June 2013, which is referred to in paragraph 4 of the Opening decision; and

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.05.2001, p.43.

- The tax rulings issued by the tax administration of Luxembourg referred to by the Commission, inter alia, at paragraphs 4 and 7 of the Opening decision.’

In its initial reply dated 24 October 2019, the Directorate-General for Competition refused access to the requested documents based on the exceptions protecting the commercial interests, the purpose of inspections, investigations and audits and the decision-making process, provided for, respectively, in the first and third indents of Article 4(2) of Regulation (EC) No 1049/2001 and Article 4(3) of that regulation.

In your confirmatory application, you request a review of the position of the Directorate-General for Competition. You put forward a number of arguments to support your request. These have been taken (where relevant) into account in our assessment, of which the results are described below.

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.

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, the protection of the purpose of inspections, investigations and audits, provided for in Article 4(2), third indent of Regulation (EC) No 1049/2001 and the protection of the commercial interests of a natural or legal person, provided for in the first indent of Article 4(2) of that regulation.

The detailed reasons are set out below.

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’.

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.’³

³ Judgment of the General Court of 13 September 2013, *Netherlands v Commission*, T-380/08, EU:T:2013:480, paragraph 34.

I note that in the confirmatory application you contest the applicability of the exception protecting the purpose of the ongoing investigation to the documents concerned, only as far as the decision-making process linked to that investigation is concerned. Indeed, the majority of your detailed argumentation relates to the exception in Article 4(3) of Regulation (EC) No 1049/2001. You do not question, however, the relevance of the case law of the EU Court invoked by the Directorate-General for Competition in its initial reply, which confirms the existence of a general presumption of non-disclosure applicable to the documents such as those requested in your initial application.

In its initial reply, the Directorate-General for Competition concluded that the documents in question, which are part of the ongoing State aid investigation COMP/SA [REDACTED], fell under the general presumption that the disclosure of the requested documents would undermine the commercial interests of the economic operators concerned involved as well as the purpose of investigations. In this regard, I have to confirm that the documents concerned are covered by that presumption, based on the exceptions of Article 4(2), first and third indents of Regulation (EC) No 1049/2001.

Indeed, in its *Commission v Technische Glaswerke Ilmenau* Judgment⁴, which concerned a request for access to 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 documents in the file would undermine the purpose of State aid investigations⁵. The Court reasoned that such disclosure would call into question the State aid procedural system⁶.

With regard to documents forming part of procedures for reviewing State aid, the Court of Justice held 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'.⁷

⁴ Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07, EU:C:2010:376, paragraphs 52 to 61 (hereafter referred to as: *Commission v Technische Glaswerke Ilmenau* judgment).

⁵ See also judgment of the Court of Justice of 14 July 2016, *Sea Handling v Commission*, C-271/15 P, EU:C:2016:557, paragraphs 36 to 47 (hereafter referred to as: *Sea Handling v Commission* judgment).

⁶ 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 28 June 2012, *Commission v Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraphs 108-126, where the Court of Justice applied *Commission v TGI* by analogy to merger proceedings.

⁷ *Commission v Technische Glaswerke Ilmenau*, cited above, EU:C:2010:376, paragraphs 58 and 59.

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 Union 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.⁸

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 this context, in your confirmatory application you argue that, I quote, ‘[t]his claim is based both on the (undemonstrated) assumption that Member States would be less willing to share information, if this were to be communicated to the alleged recipient of a State aid investigation, and on a misrepresentation of the applicable procedural rules’. In your view, I quote, ‘[...] in State aid procedures, the target Member State enjoys no discretion as to the amount of information it wishes to share with the [European] Commission. The procedural rules provide the [European] Commission with an arsenal of legal weapons to choose from (requests for information/decisions/information injunctions) in order to make the Member State provide all necessary information. In addition, Member States are obliged under Article 4(3) [of the] TEU to cooperate with the [European] Commission in good faith.’

The European Commission may indeed make use of the means such as those mentioned in the confirmatory application. Nonetheless, the fact that disclosure of the documents in question would put the European Commission in the situation when retorting to them becomes necessary, is in itself a risk of seriously jeopardizing the purpose of the investigation. Indeed, the information injunctions mentioned in the confirmatory application are measures of last resort, which are time-consuming and contentious and are used in exceptional circumstances.

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.

In the case at hand, the documents concerned contain details on the tax structures and activities of the beneficiary companies of the tax rulings. Their public disclosure would undermine the protection of the commercial interests of those companies.

⁸ Judgment of the General Court of 12 September 2007, *API v Commission*, T-36/04, EU:T:2007:258, paragraph 133.

In the *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. 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 ⁹.

I also refer to the *Agrofert* judgement where the Court ruled that this general presumption of non-disclosure can apply up to 30 years and possibly beyond ¹⁰.

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.

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 cases ¹¹.

The similarity between State aid control procedures with other types of competition investigations was also reinforced by Council Regulation (EU) No 2015/1589 ¹².

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.

For these reasons, the requested documents are covered in their entirety by the 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. This general presumption means that the European Commission is not obliged to examine specifically and individually the documents to which access has been requested.

⁹ *Commission v Editions Odile Jacob*, cited above, EU:C:2012:393, paragraphs 123 and 124.

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

¹¹ *Sea Handling v Commission*, cited above, paragraph 45.

¹² 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, p. 9.

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) and Article 4(2), first indent (protection of commercial interests) of Regulation (EC) No 1049/2001 is justified, and that access to the documents must be refused on that basis.

3. NO PARTIAL ACCESS

In your confirmatory application you argue that the full refusal of access to the requested documents is, I quote, ‘[...] not proportionate for the attainment of the objectives pursued by Article 4(2), first indent, of Regulation [(EC) No] 1049/2001’. Indeed, you underline that, I quote, ‘[...] the [European] Commission could easily redact these documents and hide any commercial and market-sensitive information related to third parties’ and, I quote, ‘[t]he [European] Commission’s task is to properly redact the documents in order to avoid any concerns for third parties’.

Please note, however, that the Court of Justice confirmed that a presumption of non-disclosure excludes the possibility to grant partial access to the file.¹³

In addition, it follows from the assessment made above that the document which fall within the scope of your request is manifestly and entirely covered by the exceptions laid down in Article 4(2), first and third indents of Regulation (EC) No 1049/2001.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) 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 underline that, I quote, ‘the disclosure of the Identified documents is essential to protect [REDACTED]’s right of defence in the context of investigation SA. [REDACTED]’. In this context you also refer to the explanations included in your initial application of 3 October 2019, according to which, I quote, ‘[...] access [to the documents concerned] is necessary to allow [REDACTED] to effectively comment on the [European] Commission’s position with regard to the existence of a “selective advantage” within the meaning of Article 107(1) [of the] T[reaty on] F[unctioning of the] EU’.

Therefore, you argue that the public disclosure of the documents concerned would allow you to carry out a substantive assessment under Article 107(1) of the Treaty on the Functioning of the EU, with a view to coming to a final decision and intervening in the European Commission’s investigation procedure. As emphasised in point 2.1 of this decision, both the Member State (the only interlocutor of the European Commission in a State aid procedures) and any interested third party (including the aid beneficiary) have the possibility to submit comments following the opening decision, which already

¹³ Judgment of 25 March 2015, *Sea Handling v Commission*, T-456/13, EU:T:2015:185, paragraph 93, confirmed by the Judgment of 14 July 2016, *Sea Handling v Commission*, C-271/15 P, EU:C:2016:557 paragraph 62.

contains the elements on which the European Commission bases its doubts on the existence of a selective advantage. If the applicant wishes to make comments on those doubts it is free to do so in the context of the ongoing formal investigation procedure.

Furthermore, it is the prerogative of the European Commission (not of the alleged aid beneficiary) to apply the conditions pursuant to Article 107(1) of the Treaty on the Functioning of the EU and assess whether a State measure leads to the granting of State aid. The beneficiary has the right to comment on the final assessment of the European Commission in the context of the appeal. Once a final decision has been taken, the applicant will also have access to the non-confidential version of the final decision, including information on the documents concerned, to the extent they are relevant for that decision.

Finally, as explained by the Directorate-General for Competition, individual interest (such as in this case) 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.¹⁴ 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.

The Court of Justice has indeed confirmed that the interest of an applicant to have access to a State aid file in order to prepare better its defence is not a public interest¹⁵.

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 and commercial interests pursuant to the first and third indents of Article 4(2) of Regulation (EC) No 1049/2001.

5. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings before the General Court and complaints to the 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

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¹⁴ Judgment of 20 March 2014, *Reagens v Commission*, T-181/10, EU:T:2014:139, paragraph 144.

¹⁵ Judgment of 14 July 2016, *Sea Handling v Commission*, C-271/15, EU:C:2016:557, paragraph 96.