



EUROPEAN COMMISSION

Directorate-General for Trade

The Director General

Brussels,
trade.dga2.f.1(2017)2685725

By registered letter with acknowledgment of receipt

Mr Akos Eger
1091 Budapest
Üllői út 91/b
Budapest
Hungary

Advance copy by email:
ask+request-4191-f510b839@asktheeu.org

Subject: Your application for access to documents - Ref Gest Dem No 2017/2326

Dear Mr Eger,

I refer to your e-mail dated 18 April 2017 in which you make a request for access to documents under Regulation (EC) No 1049/2001¹ ("Regulation 1049/2001"), registered under the above mentioned reference number.

1. SCOPE OF YOUR REQUEST

You request access to "*the CHECKLIST for reporting according to Regulation (EU) 1233/2011 of EximBank the Hungarian export-credit agency for last three years*".

We have identified the following documents that fall under the scope of your request:

- The Annual Activity Report 2014 according to Regulation 1233/2011 for Hungary (Ares(2017)850494) ("**document 1**");

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 20 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43.

- The Annual Activity Report 2015 according to Regulation 1233/2011 for Hungary ("**document 2**");

Please note that an Annual Activity Report for 2016 according to Regulation 1233/2011 for Hungary has not yet been received by the European Commission.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law², when an institution is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents set out in Article 4 of Regulation 1049/2001. Such assessment is carried out in a multi-step approach: first, the institution must satisfy itself that the document relates to one of the exceptions, and if so, decide which parts of it are covered by that exception; second, it must examine whether disclosure of the parts of the document in question pose a "*reasonably foreseeable and not purely hypothetical*" risk of undermining the protection of the interest covered by the exception; third, if it takes the view that disclosure would undermine the protection of any of the interests defined under *Articles 4(2) and 4(3) of Regulation 1049/2001*, the institution is required "to ascertain whether there is any overriding public interest justifying disclosure"³. In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents⁴, "*the exceptions to that right [...] must be interpreted and applied strictly*"⁵.

Having examined the document in light of the applicable legal framework, I am pleased to release **document 1**, which concerns the Annual Activity Report for 2014 submitted by Hungary. A copy of the document is enclosed.

I regret to inform you that unfortunately access cannot be granted to **document 2**, as it falls entirely under the exception set out in article 4(3) first subparagraph of Regulation 1049/2001.

Article 4(3) first subparagraph of Regulation 1049/2001 provides that "[a]ccess 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".

Annex I of Regulation (EU) No 1233/2011⁶ stipulates that "[...] each Member State shall

² Judgment in *Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 35.

³ *Id.*, paragraphs 37-43. See also judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraphs 52 and 64.

⁴ Regulation (EC) No 1049/2001, recital (4).

⁵ Judgment in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66.

⁶ Regulation (EU) No 1233/2011 of the European Parliament and of the Council of 16 November 2011 on the application of certain guidelines in the field of officially supported export credits and repealing Council Decisions 2001/76/EC and 2001/77/EC, OJ 2011, L326, p. 45.

make available to the Commission an Annual Activity Report in order to step up transparency at Union level” and that “[t]he Commission shall produce an annual review for the European Parliament based on this information, including an evaluation regarding the compliance of ECAs with Union objectives and obligations”.

Neither Regulation 1049/2001 nor Regulation 1233/2011 contains any provision expressly giving one regulation primacy over the other. Therefore, it is appropriate in these circumstances to ensure that each of those regulations is applied in a manner which is compatible with the other, and which enables a coherent application of them⁷.

The Annual Activity Reports for 2015 have been submitted by the Member States concerned to the Commission in the course of 2016. They have not yet been shared, however, by the Commission with the European Parliament. The Commission is currently in the process of preparing the annual review of these reports to the European Parliament, which, in accordance with Annex I of Regulation 1233/2011, will contain the Commission’s evaluation regarding the compliance of the export credit agencies with the Union objectives and obligations. Therefore, the reports are currently the subject of an ongoing analysis by the Commission.

It would be inconsistent with the purpose of Regulation 1233/2011 if reports that have not yet been transmitted to the European Parliament would at this stage be disclosed to the public. Such disclosure would seriously undermine the inter-institutional decision-making process established in Regulation 1233/2011 by straining the relationship with the European Parliament at this early stage where the Commission review has not yet been finalized, nor presented to and discussed with its institutional partner. With reference to Article 4(3) first subparagraph of Regulation 1049/2001 it would also undermine the ongoing decision-making process for the adoption of the Commission’s annual review by disclosing the input which forms the basis of the Commission’s review and exposing the Commission to the risk of external pressure to adopt one conclusion or the other in its evaluation, while the Commission must be placed in a position to explore different options and act in a fully independent manner and in the service of the general interest⁸.

In conclusion, this means that document 2 cannot at this stage be shared. It is only after the Commission has concluded the review of the reports and transmitted its evaluation report to the European Parliament that access to the requested 2015 report might be considered. For this purpose, I invite you to renew your request for this report at the beginning of 2018.

⁷ See by analogy, judgment of the Court of Justice of 28 June 2012 in case C-404/10 P *Commission v. Éditions Odile Jacob SAS*, EU:C:2012:393, paragraph 110.

⁸ Judgment of the General Court of 13 November 2015 in joined cases T-424/14 and T-425/14, *ClientEarth v Commission*, EU:T:2015:848, paragraph 84.

3. OVERRIDING PUBLIC INTEREST

The exception laid down in Article 4(3) of Regulation 1049/2001 applies unless there is an overriding public interest in disclosure of the documents. Such an interest must, first, be public and, secondly, outweigh the harm caused by disclosure. The Court of Justice has acknowledged that it is for institution concerned by the request for access to balance the particular interest to be protected by non-disclosure of the document against the public interest. In this respect, the public interest is of particular relevance where the institution "*is acting in its legislative capacity*"⁹ as transparency and openness of the legislative process strengthen the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act¹⁰.

Document 2 pertains to the domain of the executive functions of the EU as it concerns reporting and evaluation activities of national export credit agencies.

After careful assessment, we have concluded that on balance, preserving the Commission's decision-making prevails over transparency in this specific case. In particular, disclosure at this stage of document 2 would undermine the relationship of the Commission with the European Parliament and its ongoing analysis and evaluation activities. Therefore, on the basis of the considerations made above, we have not been able to identify a public interest capable of overriding the Commission's decision making process.

4. PARTIAL ACCESS

In accordance with Article 4(6) of the Regulation, we have also examined the possibility of granting partial access to document 2. However, it follows from the assessment made above that this document is manifestly and entirely covered by the exception set out in Article 4(3) first subparagraph of Regulation 1049/2001. As a consequence, no such access can be granted.

Please note that document 1 was received by the Commission from the Hungarian competent authority. It is disclosed for information only. It does not reflect the position of the Commission and cannot be quoted as such.

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

⁹ Judgment in *Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 46.

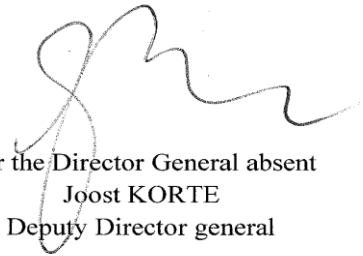
¹⁰ *Id.*, paragraph 67.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission
Secretary-General
Transparency unit SG-B-4
BERL 5/282
1049 Bruxelles
sg-acc-doc@ec.europa.eu

Yours sincerely,

Jean-Luc DEMARTY



For the Director General absent
Joost KORTE
Deputy Director general

Encl.: document 1 as released