



EUROPEAN COMMISSION
Competition DG

The Director General

Brussels, 14/05/2018
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Subject: Your application for access to documents – Ref No GestDem 2018/1919

Dear Madam,

Thank you for your e-mail dated 03 April 2018 in which you make a request for access to documents in accordance with Regulation (EC) No. 1049/2001¹ ("Regulation 1049/2001"), registered on the same day under the above mentioned reference number.

1. DOCUMENTS CONCERNED

In your message you request access to the following documents:

- 1) a list of meetings between DG Competition officials and/or representatives (including the Commissioner and the Cabinet) and representatives of companies (including law firms) and business associations, in which the Energy Charter Treaty (ECT) and ECT-based investment arbitrations were discussed (since January 2017);*
- 2) minutes and other reports of these meetings;*
- 3) all correspondence (including emails) between DG Competition officials and/or representatives (including the Commissioner and the Cabinet) and representatives of companies (including law firms) and business associations, in which the Energy Charter Treaty (ECT) and ECT-based investment arbitrations were discussed (since January 2017). Energy Charter Treaty (ECT) and ECT-based investment arbitrations.*

¹ Regulation (EC) N° 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ L145 of 31.5.2001, p. 43

The Commission has identified the following documents as falling under the scope of your request:

- 1) Letter addressed to Commissioner Vestager by Obton A/S dated 07 June 2017 and its annex titled Update on the Italian "*Spalma Incentivi*" Decree
- 2) Reply letter from the Commission to Obton A/S dated 19 July 2017
- 3) Documents which are part of the administrative file of DG Competition concerning State aid case COMP/SA.40348(2015/NN) – Spain – Support for electricity generation from renewable energy sources, cogeneration and waste².

We enclose a copy of the documents identified under points 1) and 2) above. Please note that one of the documents was received by the Commission from Obton A/S. It is disclosed for information only and cannot be re-used without the agreement of the originator, who holds a copyright on it. It does not reflect the position of the Commission and cannot be quoted as such. As regards the other document originating from the Commission, I would like to inform you that you may reuse this document requested free of charge for non-commercial and commercial purposes provided that the source is acknowledged, that you do not distort the original meaning or message of the document/documents. Please note that the Commission does not assume liability stemming from the reuse.

Furthermore, we have identified documents which are part of the administrative file of DG Competition concerning State aid case COMP/SA.40348(2015/NN) – Spain – Support for electricity generation from renewable energy sources, cogeneration and waste, and correspond to the third group of your request.

These documents form part of the case file in a pending State aid investigation under Article 108 of the TFEU in which the procedure may not be considered finalized yet, as long as the decision adopted by the Commission is still subject to appeal which might prompt the Commission to reconsider its decision and reopen the case.

Having carefully examined your request in the light of Regulation 1049/2001, I have come to the conclusion that these documents which your request covers fall under the exceptions of Article 4 of Regulation 1049/2001. Access to these documents, therefore, has to be refused. Please find below the detailed assessment as regards the application of the exceptions of Article 4 of Regulation 1049/2001.

2. APPLICABLE EXCEPTIONS

As the effects of granting access to documents under Regulation 1049/2001 are *erga omnes*, in the sense that such documents become public, the disclosure of the requested documents at this stage might hurt the protection of lawful interests, as set forth in Article 4 of Regulation 1049/2001. Once access is granted, any potential requester receives access to the document(s) in question, irrespective of its legal standing, involvement in the competition case or not or other specific interests it may have, as "*the purpose of the regulation is to*

² Decision C(2017) 7348 final on 10.11.2017, *JOCE C/442/2017*

guarantee access for everyone to public documents and not just access for the requesting party to documents concerning it".³

Article 4(2), third indent, protection of the purpose of investigations and Article 4(3) protection of the institution's decision making process

Pursuant to Article 4(2), third indent of Regulation 1049/2001 the Commission shall refuse access to a document where its disclosure would undermine the protection of the purpose of inspections, investigations and audits.

Pursuant to Article 4(3), access to the documents drawn by the Commission or received by the Commission shall be refused if the disclosure of the documents would seriously undermine the Commission's decision making process.

These exceptions aim at protecting the Commission's capacity to ensure that Member States and undertakings comply with their obligation under European Union law. For the effective conduct of pending investigations it is of utmost importance that the Commission's investigative strategy, preliminary assessments of the case and planning of procedural steps remain confidential.

Although the time-limit to bring proceedings before the General Court has expired, the presumption in *TGI*⁴ applies to cases pending before the EU courts⁵.

In *TGI*⁶, a case which concerned an access to documents request to all documents in two State aid cases, the Court of Justice upheld the Commission's refusal and 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. The Court reasoned that this follows from the fact that under the State aid procedural rules the interested parties, other than the Member State concerned, have no right to consult the documents in the administrative file and should such access be granted under Regulation 1049/2001 the nature of the procedure is likely to be modified and thus the system for review of State aid would be called into question⁷. This line of reasoning was upheld by the Court in *Sea Handling* even when it comes to a reduced number of documents pertaining to a State aid file⁸.

It is noteworthy that in State aid procedures the Commission relies on submissions by the Member State concerned which typically contain sensitive data, including information related to the economic activities of undertakings. It therefore follows that, similarly to *Agrofert*⁹, disclosure of this information in State aid investigations would risk

³ See Joined Cases T-110/03, T-150/03 and T-405/03, *Sison v Council*, paragraph 50; Case T-181/10, *Reagens SpA v Commission*, paragraph 143

⁴ See Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau GmbH*

⁵ This follows from the fact that in the *TGI* case some of the documents to which access was refused were part of a State aid case pending before the General Court. The applicability of the presumption was further confirmed in Case C-404/10 P *Commission v Odile Jacob* not only in respect of merger proceedings but also State aid cases pending before the EU courts. See in that sense paragraph 128 of the judgment

⁶ See Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau GmbH*

⁷ See Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau GmbH*, paragraphs 58-59

⁸ See Case T-456/13, *Sea Handling SPA v Commission*, paragraphs 55-58 and 61

⁹ See Case C-477/10 P, *Commission v Agrofert*, paragraph 66

jeopardising the willingness of the Member State to cooperate with the Commission's State aid investigations even after the definitive closure of the case.

The State aid procedural regulations, especially Regulation 2015/1589¹⁰, contains specific rules regarding treatment of information obtained in the context of such proceedings and allowing public access to it on the basis of Regulation 1049/2001 would, in principle, jeopardise the balance which the Union legislature wished to ensure in State aid procedures between the obligation on Member States to communicate possibly sensitive information (including sensitive commercial information related to undertakings) to the Commission and the guarantee of increased protection in accordance with the State aid procedural regulations. In essence, the State aid procedural regulations and Regulation 1049/2001 have different aims but must be interpreted and applied in a consistent manner. The rules on access to file in the above-mentioned regulations are also designed to ensure observance of professional secrecy and are of the same hierarchical order as Regulation 1049/2001 (so that neither of the two sets of rules prevails over the other).

Moreover, as the General Court has ruled in the *Bitumen*¹¹ case, certain sections of the final decisions may be covered by the exceptions from public access and an investigation of the Commission cannot be considered as closed if there might be circumstances which might prompt the Commission to reopen the case.

In view of the foregoing, the requested documents are manifestly covered in their entirety by the exception related to the protection of the purpose of the Commission's State aid investigations set out in Article 4(2), third indent of Regulation 1049/2001. Moreover, the internal Commission documents and documents received by the Commission in the file are also covered by the exception related to the protection of the Commission's decision-making process, set out in Article 4(3) of Regulation 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Pursuant to Article 4(2) and (3) of Regulation 1049/2001, the exception to the right of access contained in that Article must be waived if there is an overriding public interest in disclosing the documents requested. In order for an overriding public interest in disclosure to exist, this interest, firstly, has to be public (as opposed to private interests of the applicant) and secondly, overriding, i.e. in this case it must outweigh the interest protected under Article 4(2), third indent, and 4(3) of Regulation 1049/2001.

In your application you have not established arguments that would present an overriding public interest to disclose the documents to which access has been hereby denied. Consequently, the prevailing interest in this case lies in protecting the effectiveness of the Commission's investigations and its decision-making process.

¹⁰ 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 (Text with EEA relevance) OJ L 248 of 24.9.2015, p. 9–29

¹¹ See Case T-380/08, *The Netherlands v Commission*

4. MEANS OF REDRESS

If you want this position to be reviewed you should write to the Commission's Secretary-General at the address below, confirming your initial request. You have fifteen (15) working days in which to do so from receipt of this reply after which your initial request will be deemed to have been withdrawn.

The Secretary-General will inform you of the result of this review within fifteen (15) working days from the registration of your request, either granting you access to the documents or confirming the refusal. In the latter case, you will be informed of how you can take further action.

All correspondence should be sent to the following address:

European Commission
Secretary-General
Transparency unit SG-B-4
BERL 5/282
B-1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu.

Yours faithfully,


Johannes LAITENBERGER

