



EUROPEAN COMMISSION

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**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 2019/0601**

Dear [REDACTED],

I refer to your email of 7 March 2019, registered on the same day, 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

In your initial application of 31 January 2019, addressed to the Directorate-General for Competition, you requested access to the following documents relating to the State aid Case ‘COMP/SA.46349 (2017/N) - Introduction of a system of tradable phosphate rights for dairy cattle’:

- ‘1. the notification dated 27 October 2017;

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

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

- 2. letters from the Commission dated 9, 21 and 23 November and 4 December 2017;
- 3. answers from the Dutch government dated 14, 22 and 23 November and 4 December 2017, and
- 4. a letter from the Dutch government, dated April 2018, stating that the Netherlands is working on a solution regarding the correct allocation of phosphate rights, following an unclear definition of young stock in Dutch legislation.'

In its initial reply of 18 February 2019, the Directorate-General for Competition refused access to the documents based on the exception protecting the purpose of inspections, investigation and audits provided for in the third indent of Article 4(2) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. In particular, you question the applicability of the exception invoked by the Directorate-General for Competition to refuse access to the documents falling under the scope of your application. You put forward detailed arguments, which I will address 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 exception relating to the protection of the purpose of inspections, investigations and audits, provided for in Article 4(2), third indent of Regulation (EC) No 1049/2001.

The detailed reasons are set out below.

2.1 Protection of the purpose of inspections, investigations and audits

In its initial reply of 18 February 2019, the Directorate-General for Competition based its refusal to grant access to the documents on Article 4(2), third indent of Regulation (EC) No 1049/2001 (protection of the purpose of inspections, investigations and audits).

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 decision the Directorate-General for Competition referred to the mutual trust existing between the European Commission and Member States that underlies the State aid procedure and argued that the disclosure of the documents forming part of a State aid file, risks jeopardising the willingness of Member States in general to cooperate with the European Commission in the context of a State aid investigation.

In order to support its position in this respect, the Directorate-General for Competition relied on Cases C-139/07 (*Commission v TGI*)³, T-456/13 (*Sea Handling*)⁴ and T-375/15 (*Germanwings*)⁵.

In its judgment in *Commission v TGI*⁶, 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 the disclosure of documents in the file would undermine the purpose of State aid investigations. The Court reasoned that such disclosure would call into question the State aid procedural system. 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 European Commission’s administrative file. If those interested parties were able to obtain access, on the basis of Regulation (EC) No 1049/2001, to the documents in the European Commission’s administrative file, the system for the review of state aid would be called into question. From a practical point of view, 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 European 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

This reasoning was further confirmed by the Court of Justice in Case C-271/15 P (*Sea Handling*).⁸ The General Court recently confirmed in Case T-39/17 (*Port de Brest*) that interested parties in State aid investigations cannot rebut the general presumption with reference to an alleged special right to obtain access to the documents in the file.⁹ Furthermore, recently the Court of Justice held in Case C- 666/17 P (*AlzChem*) that the general presumption of confidentiality of State aid files applies regardless whether the documents targeted by the application for access were specifically identified and few in number.¹⁰

The State aid review procedure is strictly bilateral between the European Commission and the concerned Member State. This often involves a lengthy dialogue in which

³ Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau GmbH*, C-139/07 P, EU:C:2010:376, (hereafter ‘*Commission v TGI*’).

⁴ Judgment of the General Court of 25 March 2015, *Sea Handling SPA v Commission*, T-456/13, EU:T:2015:185, (hereafter ‘*Sea Handling*’).

⁵ Judgment of the General Court of 27 April 2017 *Germanwings*, T-375/15, EU:T:2017:289, (hereafter, ‘*Germanwings*’).

⁶ Judgment in *Commission v TGI*, cited above, paragraphs 52 to 61.

⁷ Judgment in *Commission v TGI*, cited above, paragraphs 58, 59 and 61.

⁸ Judgment of 14 July 2016, *Sea Handling v Commission*, C-271/15 P, EU:C:2016:557, paragraphs 36 to 47, (hereafter ‘*Sea Handling*’).

⁹ Judgment of the General Court of 19 September 2018, *Port de Brest v Commission*, T-39/17, EU:T:2018:560, paragraph 58, (hereafter ‘*Port de Brest*’)

¹⁰ Judgment of the Court of Justice of 13 March 2019, *AlzChem AG v European Commission*, C- 666/17 P, EU:C:2019:196, paragraph 32.

sensitive information is exchanged, under the understanding that it will remain confidential. The 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.

You argue that the general presumption of non-disclosure does not apply in this case. You point out that the European Commission rendered its decision concerning State aid Case SA.46349 on 19 December 2017 and that no objection was made, which, in your opinion, effectively closed the procedure. Furthermore, you argue that the general presumption only applies if the proceedings relating to a specific State aid case are still ongoing. Hence, you argue that since the State aid review procedure is no longer ongoing in Case SA.46349, the general presumption of non-disclosure no longer applies.

I note that in the judgments you refer to in your application, the proceedings were indeed ongoing or under appeal. Such was the situation in Case C-562/14 (*Spirlea*)¹¹ which relates to an infringement file, Joined Cases C-514/07, C-528/07 and C-532/07 (*Sweden and API*)¹² relating to ongoing Court proceedings and *Commission v TGI*¹³, *Sea Handling*¹⁴ and *Germanwings*¹⁵ relating to competition files.

However, please note that the aim of the exception in Article 4(2), third indent of Regulation (EC) No 1049/2001, as is clear from its wording, is not to protect the investigations as such, but rather their purpose, which is to ensure the cooperation of the Member States and other requested third parties to provide all necessary documents and clarifications to the European Commission, even if they contain confidential information, to ensure a proper assessment. It is for that reason, considering the strong professional secrecy obligations on the European Commission, that various acts of investigation may remain covered by the exception in question, even if the particular investigation or inspection, which gave rise to the documents to which access is sought, has been completed.¹⁶

The above-mentioned exemption equally applies to correspondence between the European Commission and Member States and between the European Commission and third parties in closed cases. As explained in Case C-477/10 P (*Agrofert*)¹⁷ and confirmed

¹¹ Judgment of the Court of Justice of 11 May 2017, *Kingdom of Sweden v European Commission*, C-562/14, EU:C:2017:356.

¹² Judgment of the Court of Justice of 21 September 2010, *Kingdom of Sweden v Association de la presse internationale ASBL (API) and European Commission*, Joined Cases C-514/07 P, C-528/07 P, and C-532/07 P, EU:C:2010:541.

¹³ Judgment in *Commission v TGI*, cited-above.

¹⁴ Judgment in *Sea Handling* T-456/13, cited above.

¹⁵ Judgment in *Germanwings*, cited above.

¹⁶ Judgment of 12 September 2007, *Association de la presse internationale ASBL (API) v European Commission*, T-36/04, EU:T:2007:258, paragraph 133.

¹⁷ Judgment of the Court of Justice of 28 June 2012, *European Commission v Agrofert*, C-477/10 P, EU:C:2012:394, paragraph 66.

in Case T-210/15 (*Deutsche Telekom AG*)¹⁸ and in Case T-451/15 (*AlzChem*)¹⁹ which relates in particular to State aid investigations, the disclosure of such information in State aid investigations would risk jeopardising the willingness of the Member State to cooperate with the European Commission in the framework of State aid investigations, even after the definitive closure of the case.

In addition, in the present case, the European Commission is still in close contact and cooperation with the Dutch authorities in order to ensure the correct implementation of the decision for this State aid file. Any public disclosure of the information at issue on the basis of Regulation (EC) No 1049/2001 would, in principle, jeopardise such cooperation.

Moreover, as the Directorate-General for Competition rightly pointed out, State aid procedural regulations, especially Regulation (EU) 2015/1589²⁰, contain specific rules regarding the treatment of information obtained in the context of such proceedings. The State aid procedural regulations and Regulation (EC) No 1049/2001 have different aims but must be interpreted and applied in a consistent manner. The rules on access to files in the above-mentioned regulations are also designed to ensure the observance of professional secrecy and are of the same hierarchical order as Regulation (EC) No 1049/2001.

Against this background, I confirm that the documents falling under the scope of your application need to be protected based on the exception provided for in the third indent of Article 4(2) (protection of the purpose of investigations) of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4(2) third indent of Regulation (EC) No 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 argue that ‘[...] it is not clear at all which kind of cattle farmer can be considered a beneficiary under the Dutch System of tradable phosphate rights which was the subject of the Commission’s decision in state aid case SA 46349’. Furthermore, you argue that the requested documents must be disclosed because ‘[t]here is no other way of establishing the scope of application of the Commission’s decision in state [aid] case SA.46349’ and that ‘[w]ithout access to the requested documents, the Dutch government cannot be subject to “*public scrutiny*” [...]’.

¹⁸ Judgment of the General Court of 28 March 2017, *Deutsche Telekom AG*, T-210/15, EU:T:2017:224, paragraph 45.

¹⁹ Judgment of the General Court of 7 September 2017, *AlzChem AG v European Commission*, T-451/15, EU:T:2017:588, paragraphs 53-57.

²⁰ 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), Official Journal L 248 of 24.9.2015, p. 9.

You also point out that ‘[...] several beef farmers will challenge the revocation of the phosphate rights they were granted or, in case they sold these rights, the claim for reimbursement. These cases will add up to the almost 1.200 cases already pending before the Trade and Industry Appeals Tribunal [...] this will seriously aggravate the huge congestion at the Trade and Industry Appeals Tribunal already caused by the mentioned 1.200 cases. This will naturally have a negative effect on other matters, which must be dealt with by the Trade and Industry Appeals Tribunal. Consequently the general public must wait longer for a verdict in their case. This will adversely affect the confidence of the general public in the judiciary, which will be detrimental to one of the goals of Regulation 1049/2001: increasing citizens’ confidence in its public institutions’.

First, I would like to underline that the current situation presents some similarities with Case T-380/08 (*Netherlands v Commission*)²¹. The public version of the decision in State aid case SA.46349 makes it possible to identify the subject-matter, the nature of the problem, as well as a number of elements which allow to understand the different steps of the procedure in a transparent manner, starting from the notification of the State aid measure up until the adoption of the decision finding that the measure is compatible with Article 107, paragraph 3 of the Treaty on the Functioning of the European Union. Hence, I consider the motivation of the European Commission provided in the public version of the above-mentioned decision to be sufficiently clear to allow the interested parties to exercise effectively their rights.

Furthermore, I note that the considerations that you put forward in order to establish an overriding public interest are rather of a general nature as they relate to the public’s trust in the judiciary, which might be undermined as a result of the extended waiting period for a verdict. These general considerations would not outweigh the interests protected under Article 4(2) of Regulation (EC) No 1049/2001. In the *Port de Brest* judgment²², 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.²³

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 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

²¹ Judgment of the General Court of 13 September 2013, *Kingdom of Netherlands v Commission*, Case T-380/08, EU:T:2013:480, paragraph 55.

²² Judgment in *Port de Brest*, cited above, paragraph 104.

²³ *Ibid*, paragraph 112.

acknowledged the existence of wider openness²⁴, 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 documents requested.

However, as stated by the Court of Justice²⁵, 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. 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 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



For the Commission
Martin SELMAYR
Secretary-General

²⁴ Judgment in *Commission v TGI*, cited above, paragraphs 53-55 and 60.

²⁵ Judgment of the Court of Justice of 28 June 2012, *European Commission v Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 133.