



EUROPEAN COMMISSION

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Belgium

**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 2019/2311**

Dear [REDACTED]

I refer to your letter of 15 May 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’).

Please accept our apologies for this late reply.

1. SCOPE OF YOUR REQUEST

In your initial application of 12 April 2019, you requested access, on behalf of AlzChem Group AG, to the:

‘[...] relevant Commission documents (including but not limited to Excel spreadsheets, Word documents or internal databases) which contain information on the status of recovery and the amount of the State aid recovered by Slovakia further to Commission Decision of 15 October 2014 on State aid SA.33797 – (2013/C) (ex 2013/NN) (ex 2011/CP) implemented by Slovakia’.

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 24 April 2019, the Directorate-General for Competition refused access to the documents in question based on the exceptions of Article 4(2), first indent (protection of the commercial interests of a natural or legal person) and third indent (protection of the purpose of inspections, investigations and audits) and Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001.

In your confirmatory application, you requested a review of the position of the Directorate-General for Competition. 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 I confirm the initial decision of Directorate-General for Competition to refuse access, based on the exceptions of Article 4(2), first indent (protection of the commercial interests) and third indent (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001, for the reasons set out below.

2.1. Protection of the purpose of investigations and of commercial interests

Article 4(2), first indent of Regulation (EC) No 1049/2001 provides that ‘[t]he 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, [...], unless there is an overriding public interest in disclosure’.

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 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 In your confirmatory application, you argue that the Directorate-General for Competition committed an error in refusing access to the requested documents, because your request ‘does not concern any document or information contained in the Commission’s case file regarding the State aid implemented by Slovakia’. In particular, you argue that your request:

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

- '[...] does not concern documents and information collected or received further to the opening and in the course of an investigation against a Member State or a third-party, but rather *after the Decision had been issued*.
- It concerns documents and information that are *not substantive*, and will not affect the outcome of any further State aid investigation or proceedings by the Commission or by the EU Courts.
- It concerns *specific factual information*, traced by the Commission, regarding the status of implementation of the Decision'.

Furthermore, you argue that, I quote, '[t]he Request does not concern any substantive submission of the Member State, for example, containing sensitive data including information related to the economic activities of undertakings. Therefore, the fulfilment of the Request cannot be perceived to jeopardise the willingness of the Member States to cooperate with the Commission's investigations'.

As a preliminary point, I would like to point out that in its judgment in *Commission v TGI*⁴, 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.⁵ This reasoning was further confirmed in the *Sea Handling* judgment.⁶ Recently, in the *Arca Capital Bohemia* judgment, the General Court held that the general presumption also applies to State aid procedures that are already closed.⁷ Hence, the general presumption continues to apply even if the European Commission has already rendered its decision in a specific State aid case.

You are requesting access to documents, which contain information on the status of recovery and the amount of the State aid recovered by Slovakia further to Commission Decision of 15 October 2014 in State aid case SA.33797. The documents to which you request access form part of the Commission's administrative file of the State aid investigation. Although the European Commission has indeed taken a decision regarding the State aid on 15 October 2015⁸, the recovery of the unlawful State aid has not been completed yet. The purpose of the State aid investigation is to ensure that the competition is not distorted through an unlawful State aid, thus making it necessary to recover any

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

⁵ 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 the Court of Justice of 28 June 2012, *Commission v Odile Jacob*, (hereafter '*Commission v Odile Jacob*'), C-404/10P, EU:C:2012:393, paragraphs 108 to 126, where the Court of Justice applied *Commission v TGI* by analogy to merger proceedings.

⁶ See also judgment of the Court of Justice 14 July 2016, *Sea Handling v Commission*, (hereafter '*Sea Handling v Commission*'), C-271/15 P, EU:C:2016:557, paragraphs 36 to 47.

⁷ Judgment of the General Court of 11 December 2018, *Arca Capital Bohemia v Commission*, T-440/17, EU:T:2018:898, paragraphs 56 to 58.

⁸ http://ec.europa.eu/competition/eojade/isef/case_details.cfm?proc_code=3_SA_33797.

such aid. It is in this context that the procedure of determining a State aid as not compatible with the internal market is followed by a decision to abolish or alter such aid within a period of time to be determined by the Commission, as stipulated in Article 108, paragraph 2 of the Treaty on the Functioning of the European Union. A failure of the Member State concerned to comply with this decision may lead to the opening of an infringement procedure.

Consequently, documents pertaining to recovery of a State aid continue to form part of the administrative file of the State aid investigation, even after the decision about the unlawful character of the State aid has been taken. Contrary to what you argue in this case, the documents you request are part of the administrative file of the European Commission in State aid case SA.33797. These documents contain details on the state of play of the recovery process and the aid amounts to be recovered by the Slovak authorities.

I would also like to point out that the Member State concerned has to comply with the Commission decision declaring a State aid as unlawful. In this phase of the procedure, the European Commission continues to have a constructive dialogue with the Member State concerned in order to ensure an optimal compliance with the decision taken. Indeed, this is a procedural phase whereby the European Commission verifies, with the active cooperation of the Member State concerned, the correct implementation of the State aid decision. Its purpose is to make sure that the concerned Member State complies with the decision and it takes place in a structured and formalised Commission procedure, which is an investigation in the meaning of Article 4(2) third indent of Regulation (EC) No 1049/2001. In case the Member State concerned does not comply with the Commission decision, an infringement procedure may be initiated.

In this context, the Court of Justice ruled in *France v Schlyter* that '[w]ithout there being any need to identify an exhaustive definition of 'investigation', within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001, a structured and formalised Commission procedure that has the purpose of collecting and analysing information in order to enable the institution to take a position in the context of its functions provided for by the EU and FEU Treaties must be considered to be an investigation'.⁹

Furthermore, the Court stressed that '[t]hose procedures do not necessarily have to have the purpose of detecting or pursuing an offence or irregularity. The concept of 'investigation' could also cover a Commission activity intended to establish facts in order to assess a given situation'.¹⁰

Regarding State aid proceedings, as stated by the General Court in the *Port de Brest* judgment, the concept of 'investigation' does not only aim to protect the investigation proceedings targeting specific companies.¹¹ In contrast, as specified in the *France v*

⁹ 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 46.

¹⁰ *Ibid*, paragraph 47.

¹¹ Judgment of the General Court of 19 September 2018, *Port de Brest v Commission*, T-39/17, (hereafter *Port de Brest v Commission*), EU:T:2018:560, paragraph 70.

Schlyter judgment, the concept of investigation, appearing in the third indent of Article 4(2) of Regulation (EC) No 1049/2001, is an autonomous concept of EU law which must be interpreted taking into account, inter alia, its usual meaning as well as the context in which it occurs.¹²

It follows from this reasoning and from Article 108 (2) of the Treaty on the Functioning of the EU itself, that there exists a procedural continuity between the phase of adoption of the final State aid decision, and the phase of its execution, as both are interlinked. Furthermore, taking into account the wide definition of the concept of investigation provided by the *France v Schlyter* judgment, and confirmed by the *Port De Brest* judgment¹³, the measures and actions taken by the European Commission at the stage of the implementation of a Commission decision regarding the unlawfulness of a State aid are also investigation activities.

Consequently, the documents you request do not only form part of the administrative file relating to the State aid investigation, but are also part of an investigation concerning the implementation of the Commission decision relating to an unlawful State aid.

As the Directorate-General for Competition rightly pointed out, the State aid review procedure is strictly bilateral between the European Commission and the Member State. This often involves a lengthy dialogue in which very sensitive information is exchanged, under the understanding that it will remain confidential. 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. 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. If other 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, including in the phase of the implementation of a Commission decision relating to an unlawful State aid, the system for the review of State aid and the nature of the procedure would be called into question.¹⁴

Therefore, the actions and measures undertaken by the European Commission during this phase are intrinsically related with the Commission State aid investigation within the meaning of Article 4, paragraph 2, third indent of Regulation (EC) No 1049/2001, for which the Court has recognised the existence of a general presumption in competition files.

The bilateral nature of the State aid procedure confirms this finding. The protection of the purpose of the investigation is fundamental, in particular in cases where the correct

¹² *Ibid*, paragraph 71.

¹³ *Ibid*, paragraph 73.

¹⁴ *Commission v Technische Glaswerke Ilmenau*, paragraphs 58 to 61.

implementation of the Commission decision and the recovery of an unlawful State aid require to preserve the principle of confidentiality and mutual trust at any stage of the procedure, including at the implementation stage.

In particular, this implementation phase is to be considered as a pre-litigation procedure, similar to the procedure laid down in Article 258 of the Treaty on the Functioning of the European Union or to the EU-Pilot procedure and for which the Court has recognised a general presumption. The purpose of the pre-litigation procedure is to allow the Member State to put an end to any alleged infringement, to enable it to exercise its rights of defence and to define the subject-matter of the dispute with a view to bringing an action before the Court.¹⁵

The Court has interpreted Article 4(2), third indent of Regulation (EC) No 1049/2001, among others, in its *LPN* judgment, in which it underlined that in ongoing infringement cases, the institution may base itself on a general presumption of non-disclosure applied to the documents concerned in their entirety.¹⁶ This confirmed the Court's earlier *Petrie* judgment, in which it ruled that '[...] the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure. This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgment of the Court of Justice'.¹⁷ Also, in the *ClientEarth* judgment, the General Court stated that 'the exception relating to the protection of the purpose of investigations does not apply solely to documents relating to infringement proceedings which have been commenced but also to documents concerning investigations the outcome of which might be such proceedings'.¹⁸

This applies *mutatis mutandis* to the documents you request, as, failure to implement the Commission decision concerning the unlawful State aid may lead to opening of an infringement procedure.

Public disclosure of the requested documents, at this stage, would negatively influence the dialogue between the European Commission and the Slovak Republic, for which a climate of trust is essential. This climate of mutual trust between the European Commission and the Slovak Republic must be ensured throughout the different stages of the procedure concerned, at least until the investigation is definitively closed. Disclosure of the requested documents at this stage would be incompatible with that aim.

¹⁵ Judgment of the Court of Justice of 10 December 2002, *Commission v Ireland*, C-362/01, EU:C:2002:739, paragraphs 15 and 16.

¹⁶ Judgment of the Court of Justice of 14 November 2013, *LPN and Finland v Commission*, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraphs 55, 65-68.

¹⁷ Judgment of the General Court of 11 December 2001, *Petrie and Others v Commission*, T-191/99, EU:T:2001:284, paragraph 68.

¹⁸ Judgment of the General Court of 13 September 2013, *ClientEarth v European Commission*, T-111/11, EU:T:2013:482, paragraph 80.

Consequently, the requested documents are covered by a general presumption of non-accessibility based on the exception of Article 4(2), third indent (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001.

In its initial reply, the Directorate-General for Competition also referred to Article 4(2) first indent of Regulation (EC) No 1049/2001, which provides that ‘[t]he 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, [...], unless there is an overriding public interest in disclosure’.

In your confirmatory application, you argue that ‘[i]t is clear that precise information on the status of recovery and amounts recovered by the Commission further to a State aid Decision are *not* strategic, and do *not* concern the operation or development of a business’.

In the *Odile Jacob*¹⁹ judgment, 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 that have already been closed or proceedings that are pending.

The documents in question, which are part of a State aid investigation file, have not yet been made available to the public and contain sensitive information regarding the undertakings involved, the public disclosure of which at this stage would harm their commercial interests, as it might lead to a reputational damage and to various speculations regarding the financial stability of these undertakings. Hence, I do not share the view that the information is not strategic, and does not concern the operation or development of a business.

As already mentioned, the requested documents would reveal detailed information on the state of play and different stages of the recovery process by the undertakings concerned. Such information is undoubtedly commercially sensitive, as it would reveal to current and potential competitors how, from a strategical and organisational point of view, the undertakings in question proceed in such cases and would reveal details on the different steps they undertake in order to reimburse the illegal State aid.

Please note also that the European Commission is largely reliant on the cooperation of third parties in order to collect the necessary evidence and to issue a final decision. The European Commission relies on Member States' contributions, which typically also contain commercially sensitive information relating to companies, and access to such documents would also, as already mentioned, undermine the Member States' willingness to cooperate. This, in turn, would jeopardise the European Commission's authority and

¹⁹ *Commission v Editions Odile Jacob*, paragraphs 123 and 124.

lead to a situation where the latter would be unable to carry out properly its task of enforcing EU competition law.

Please note that, once the State aid procedure is definitely closed including the execution phase, the European Commission will publish the amounts of aid recovered, together with the amount of the recovery interest. However, I note that, due to the bilateral nature of the execution phase of the procedure, the premature disclosure of the progress of the undertakings in recovering the amounts, before the actual recovery of the state aid decision takes place, would harm the undertakings involved and would ultimately have the effect of undermining the purpose of the State aid procedure, rather than it would contribute to transparency.

Consequently, I conclude that access to the requested documents would undermine the interests protected under Article 4(2) first and third indents (protection of the commercial interests and the purpose of the investigations) of Regulation (EC) No 1049/2001.

3. PARTIAL ACCESS

I have also examined the possibility of granting partial access to the documents concerned, in accordance with Article 4(6) of Regulation (EC) No 1049/2001.

However, it follows from the assessment made above that the documents requested are covered by a general presumption of non-disclosure based on the exceptions laid down in Article 4(2), first and third indents (protection of the commercial interests and the purpose of the investigations) of Regulation (EC) No 1049/2001.

The Court of Justice confirmed that a presumption of non-disclosure excludes the possibility to grant partial access to the file.²⁰

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) 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 and, secondly, outweigh the harm caused by disclosure. As a preliminary remark, it must be noted that the General Court recently confirmed again that the right of access to documents does not depend on the nature of the particular interest that the applicant for access may or may not have in obtaining the information requested.²¹

In your confirmatory application you argue the following, I quote:

‘[...] is a superior public interest and not AlzChem’s particular interest that Commission State aid Decisions should be implemented and put into effect’.

²⁰ *Sea Handling v Commission*, cited above, paragraph 93.

²¹ Judgment of the General Court of 27 November 2018, *VG v Commission*, Joined Cases T-314/16 and T-435/16, EU:T:2018:841, paragraph 55.

‘[...] it is a superior public interest and not AlzChem’s particular interest that the budget of the Member States is protected against the devastating effects of a State aid race between Member States and that the unlawful and incompatible State aid is returned to the budget of the Member State concerned by a State aid Decision’.

In its decision of 15 October 2014, the European Commission held that the State aid was unlawfully put into effect by Slovakia in breach of Article 108(3) of the Treaty on the Functioning of the European Union and is incompatible with the internal market.

I consider that the release of the non-confidential version of the above-mentioned decision²² has brought the requested transparency and availability of information to the public and control over the actions of the European Commission required.

Furthermore, I note that the considerations that you put forward in order to establish an overriding public interest are rather of a general nature. You do not explain, in a concrete manner, why and how it is in the public interest to disclose 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* judgment²³, 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 that 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.²⁴

In addition, I have not been able to identify any public interest that would outweigh the interests protected in Article 4(2), first and third indents and Article (3) of Regulation (EC) No 1049/2001.

The fact that the investigations to which the document relates are of an administrative nature and do not relate to any legislative acts, for which the Court of Justice has acknowledged the existence of wider openness²⁵ as well as the fact that the European Commission will publish recovery information after the definite closure of the recovery procedure, including the aid amount repaid, the amount of recovery interest and the aid amount lost on the website of the Directorate-General for Competition, provides further support to the conclusion that there is no overriding public interest in this case.

²² http://europa.eu/rapid/press-release_IP-14-1155_en.htm.

²³ Judgment in *Port de Brest v Commission*, cited above, paragraph 104.

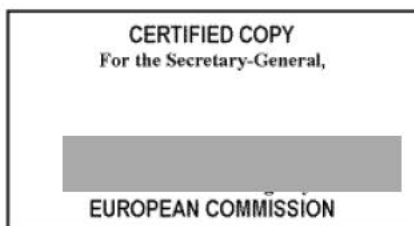
²⁴ *Ibid*, paragraph 112.

²⁵ 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 to 57 and 63.

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 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

