EUROPEAN COMMISSION

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Mr Peter Teffer
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DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001 [1]

Subject: **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2021/207**

Dear Mr Teffer,

I refer to your email of 29 March 2021, registered on 30 March 2021, in which you submitted a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents [2] (hereafter 'Regulation (EC) No 1049/2001').

Please accept our apologies for the delay in replying to your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 13 January 2021, addressed to the Directorate-General for Trade of the European Commission, you requested access to, I quote:

> 'documents which contain the following information related to articles from Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union:
>
> - (Article 5) All annual reports already submitted to the Commission on foreign direct investments and if applicable the application of their screening mechanisms

[1] OJ L 345, 29.12.2001, p. 94.

[2] OJ L 145, 31.5.2001, p. 43.

- (Article 6.1) All Member States' notifications of any foreign direct investment in their territory that has undergone screening

- (Article 6.2) All comments from one Member State to another about screenings

- (Article 6.3) All Commission opinions about screenings

- (Article 6.4) All Member State requests to the Commission or other Member States to provide comments/opinions

- (Article 6.6) All requests for information and replies

- (Article 6.8) All notifications of Member States of its intention to issue a screening decision before the timeframes referred to in paragraph 7; and justifications for immediate action

- (Article 7.1) All comments from Member States about a foreign direct investment planned or completed in another Member State which is not undergoing screening in that Member State

- (Article 7.2) All Commission opinions on foreign direct investments planned or completed in a Member State which is not undergoing screening in that Member State

- (Article 7.3) All Member States requests to issue an opinion on a foreign direct investment in its territory, and requests to other Member States to provide comments

- (Article 7.5) All requests for information and replies on a foreign direct investments not undergoing screening considered likely to affect security or public order

- (Article 8.1) All Commission opinions on a foreign direct investment considered likely to affect projects or programmes of Union interest on grounds of security or public order

- A list of the documents that fit the above descriptions with their metadata (i.e. author, date, subject'.

In its initial reply of 2 March 2021, the Directorate-General for Trade refused access to the documents in question, based on the exception of the first indent of Article 4(1)(a) (protection of public interest as regards public security), the third indent of Article 4(1)(a) (protection of the public interest as regards international relations), Article 4(1)(b) (protection of the privacy and the integrity of the individual) and the first indent of Article 4(2) (protection of commercial interests) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. You underpin your request with arguments, which I will address in the corresponding sections 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 review of the reply given by the Directorate-General concerned at the initial stage.

Given the different type of documents requested, the Commission has identified approximately 250 documents (including various annexes) that fall within the scope of your request. All the documents originate either from Commission services or from the competent authorities of Member States. They are part of the administrative files of the Directorate-General for Trade for the assessment of foreign direct investment cases notified by Member States and/or opened ex officio under Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union[3] (hereinafter 'the FDI Screening Regulation').

The Commission received about 70 Member State notifications between 13 October 2020 and 13 January 2021, the date of your initial application. Among these 70 notifications, about 50 were closed while the Commission had not reserved its right to issue an opinion nor requested additional information. The remaining other cases were closed after the Commission had reserved its right to issue an opinion and asked additional information. In the same period, the cooperation mechanism was notified by Member States about 20 times of their intention to issue a comment, and of a handful requests for additional information by Member States. The cooperation mechanism ultimately received about 10 Member States' comments in the period concerned.

As regards these documents, I have to confirm the initial decision of Directorate-General for Trade to refuse access to the requested documents, based on the exceptions of the first indent of Article 4(2) (protection of commercial interests) and the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001, for the reasons set out below.

For the sake of transparency and in accordance with Article 5 of the FDI screening Regulation, please note that the Commission published the First annual report (COM(2021)714 final) [4].

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

The first indent of Article 4(2) 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'.

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[3] OJ L 99 I/1 of 21.3.2019 (hereafter 'FDI Screening Regulation').

[4] Available on the Register of Commission Documents at https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2021)714&lang=en.

The third indent of Article 4(2) of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of […] the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.'

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 No 1049/2001' and two different exceptions can, as in the present case, be 'closely connected' [5].

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

In *Commission v TGI* [6], a case which concerned an access to documents request to all documents held by the Commission in two State aid cases, the Court of Justice upheld the Commission's refusal to provide such access. 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 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 (EC) No 1049/2001, the nature of the State aid procedure is likely to be modified and thus the system for review of State aid would be called into question[7]. This line of reasoning was upheld in a more recent judgement in *Muka* [8] concerning State aid investigations, both ongoing and closed.

In addition, the Court of Justice held in its judgment in *AlzChem* that the general presumption of confidentiality applies regardless of whether the documents targeted by the application for access were specifically identified and few in number [9]. In addition, in the *Sea Handling* [10] judgment, the Court recognised that the general presumption applies irrespective of the number of documents requested by the applicant, which also excludes

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

6 Judgment of the Court of Justice of 29 June 2010, *Commission* v *Technische Glaswerke Ilmenau Gmbh*, C-139/07 P, EU:C:2010:376)

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

8 Judgment of the General Court of 5 October 2022, *Ondřej Múka* v *European Commission*, T-214/21, EU:T:2022:607, paragraphs 53-55.

9 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.

10 Judgment of the Court of Justice of 14 July 2015, *Sea Handling SPA* v *Commission,* C-271/15 P, EU:C:2016:557, paragraph 41.

the possibility of partial access. Moreover, when applying the general presumption, the Court [11] also recognised that an institution does not have to show how specifically and effectively disclosure of the documents would undermine the interests protected in Article 4 of Regulation (EC) No 1049/2001.

As recognised by the Court of Justice of the European Union, the Commission may thus rely on a general presumption of non-disclosure when confronted with requests for access to documents in certain investigation procedures.

The documents to which you request access concern the Member States' notifications of foreign direct investments on their territories, exchanges between the Member States and the Commission on foreign direct investments on their territories – irrespective of whether they have undergone screening at national level, the comments of one Member State to another regarding the direct investments that are likely to affect their public order or security, the requests for additional information and their replies gathered in the context of the FDI Screening Regulation, Commission opinions issued in the context of the FDI Screening Regulation, as well as metadata relating to the above.

The FDI Screening Regulation, in particular its Article 10 [12], contains specific rules regarding treatment of information obtained in the context of such proceedings. Allowing public access to it on the basis of Regulation (EC) No 1049/2001 would, in principle, jeopardise the balance which the Union legislature wished to ensure in FDI procedures between the obligation on Member States to communicate possibly very sensitive information (including information pertaining to its public order or security) to the Commission and the other Member States, and the guarantee of protection via the confidential handling of any information exchanged under the FDI Screening Regulation. In essence, the FDI Screening Regulation and Regulation (EC) No 1049/2001 have different aims but must be interpreted and applied in a consistent manner. The rules on the confidential handling of information in the FDI Screening Regulation are of the same hierarchical order as Regulation (EC) No 1049/2001 (so that neither of the two sets of rules prevails over the other).

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[11] See Judgment of the General Court of 29 January 2013, *Cosepuri* v *EFSA*, Joined cases T-339/10 and T-532/10, EU:T:2013:38, paragraphs 96-101; Judgment in *Commission* v *TGI*, cited above, paragraphs 53-54.

[12] Article 10- Confidentiality of information transmitted

1. Information received as a result of the application of this Regulation shall be used only for the purpose for which it was requested.

2. Member States and the Commission shall ensure the protection of confidential information acquired in application of this Regulation in accordance with Union and the respective national law.

3. Member States and the Commission shall ensure that classified information provided or exchanged under this Regulation is not downgraded or declassified without the prior written consent of the originator.

The FDI Screening Regulation has set up a system for Member States and the Commission to cooperate and exchange – through secured channels – information on investments by investors from non-EU countries, and to assess whether they are likely to affect the EU's security or public order. Each Member State remains competent to assess whether a given foreign direct investment is likely to impact its own public order or security. The Member State hosting the investment ultimately decides whether to approve, ban or unwind the transaction. Other Member States can express a concern for their own public order or security by means of a comment to the Member State hosting the investment. In the context of the FDI Screening Regulation, the Commission may issue an opinion when (i) an investment poses a threat to the security or public order of more than one Member State, (ii) an investment could undermine a project or programme of Union interest on grounds of public order or security or when (iii) the Commission has relevant information to share with Member States in relation with individual transactions, in relation with public order or security. Public order and security restrictions are, among other things, exceptions to the principle of free trade in services. They are therefore to be interpreted strictly by the Commission and the Member States, in compliance with their international commitments, notably under article XIV(a) and XIV bis of the General Agreement on Trade in Services (GATS). They may pertain, for instance, to supplies of services to the military, relate to nuclear fission or fusion, to measures necessary to protect public morals or maintain public order, to protect human, animal or plant life or health. Because the assessment of individual transactions by the Commission and the Member States in the cooperation mechanism set out by the FDI Screening Regulation relates to these public interests, all information exchanged between the Commission and the Member States in this context are subject to the strict confidentiality requirements set out in Article 10 of the FDI Screening Regulation.

The Commission's investigation under the FDI Screening Regulation is similar to the investigations conducted by the Commission under the State aid procedure established in Article 108 of the Treaty on the Functioning of the European Union, where a general presumption of confidentiality applies to the documents part of State aid files.

Like the State aid procedure, the procedure under the FDI Screening Regulation is a bilateral procedure between the Member State hosting the investment and the Commission. Like in State aid matters, the procedure under the FDI Screening Regulation starts with a notification by the Member State or an *ex officio* procedure, continues with an investigation by the Commission services which may require the request of additional information to the Member State, and ends with an assessment by the Commission. Like in State aid, the procedure under the FDI Screening Regulation does not grant third parties a right of access to the documents in the file. Like in State aid, these exchanges rely on sincere cooperation and on the mutual trust that the information disclosed to the other party will not be made available to the public. If that were not the case, such disclosure would not only seriously undermine the confidence of the party (Member State or Commission) which shared information with the other, and hence its willingness to cooperate in the future; it could also could seriously put at risk the public order and security interests that the FDI Screening Regulation precisely aims at protecting.

In fact, as regards the concept of 'investigations', case-law of the Court of Justice of the European Union defines it as 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 framework of its functions established by the Treaties [13]. This procedure does not necessarily have to have the purpose of detecting or pursuing an offence or irregularity nor does it necessarily have to lead to a formal Commission decision [14].

On several occasions [15], the Court of Justice of the European Union has stated that the general presumption of confidentiality, when it applies, applies even after the closure of the relevant investigation. Recently again, in the above mentioned *Muka* judgment [16], which concerned the Commission's refusal to grant access to documents in two closed State aid investigations based on the exception related to the protection of the purpose of Commission investigations, the General Court unequivocally stated that 'the general presumption of non-disclosure concerning the documents relating to the Commission's administrative file […] applies regardless of whether the request for access concerns a control procedure which has already been closed or one which is pending'. That logic applies *a fortiori* in FDI investigations, where the disclosure of sensitive information concerning the public order or security of the EU Member States, is likely to harm their essential interests, regardless of whether an investigation is pending. Furthermore, the prospect of such disclosure after a procedure is closed runs the risk of adversely affecting the willingness of Member States to cooperate when such a procedure is pending.

Consequently, we consider that the documents that form part of a FDI investigation files are covered by a general presumption of confidentiality based on the exception laid down in the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001.

Moreover, the documents of a FDI investigation generally contain sensitive information regarding the undertakings involved, the public disclosure of which would harm their commercial interests, and it might notably lead to a reputational damage and to various speculations regarding the financial stability of these undertakings.

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[13] Judgement of the General Court of 4 October 2018, *Daimler AG v Commission*, T-128/14, EU:T:2018:643, paragraph 131.

[14] Judgement of the General Court of 4 October 2018, *Daimler AG v Commission*, T-128/14, EU:T:2018:643, paragraph 132; Judgment of the Court of Justice of 7 September 2017, *Schlyter v Commission*, C-331/15 P, EU:C:2017:639, paragraph 48.

[15] Judgment of the Court of Justice of 28 June 2012, *Commission* v *Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 66; judgment of the General Court of 28 March 2017, Deutsche Telekom AG v Commission, T-210/15, ECLI:EU:T:2017:224, paragraph 45; and Judgment of the General Court of 28 March 2017, *Deutsche Telekom* v *Commission*, T-210/15, EU:T:2017:224, paragraph 45.

[16] Judgment of the General Court of 5 October 2022, *Ondřej Múka* v *Commission*, T-214/21, ECLI:EU:T:2022:607, paragraph 55.

The requested documents have not been brought into the public domain and are known only to a limited number of persons. Some of the requested documents contain information provided by parties to an FDI transaction planned in the Member State where the target undertaking is domiciled. The information to be provided by the Member State is set out in Article 9 and the notification shall include, *i.a*, the ownership structure of the foreign investor and of the undertaking, the approximate value of the foreign direct investment, the products, services and business operations of the foreign investor and of the undertaking, the funding of the investment and its source etc. In order to comply with these requirements, the respective Member State needs to share with the Commission and the Member States in the cooperation mechanism commercially sensitive information for the parties to the transaction, relating to the terms of the planned transaction, the pre- and post-transaction business strategy of the companies.

Moreover, the material assessment of individual FDI transactions is based on commercially sensitive information made available by the parties (foreign investor and/or the undertaking to which the capital is made available) to the transaction to the Member State undertaking the screening on a confidential basis and with a legitimate expectation that the information will be protected not only by the recipient Member State but by other Member States and the Commission who receive this information pursuant to the cooperation mechanism.

Consequently, there is a real and non-hypothetical risk that public access to the above-mentioned information would undermine the commercial interests of the economic operators in question.

While some of the investigations are now closed and the screenings approved or rejected, the Court considered in the judgment in *Deutsche Telekom* [17] that the general presumption of non-accessibility continues to apply even after the closure of the investigation to documents containing commercially sensitive information, as is the case in the above-mentioned investigation. In fact, Article 4(7) of Regulation (EC) No 1049/2001 states that '[t]the exceptions may apply for a maximum period of 30 years'. The Court held in the *Agrofert* judgment that the exceptions concerning commercial interests or sensitive documents may apply for a period of 30 years and possibly beyond [18].

In your confirmatory application you argue that you have not received a list of documents falling within the scope of your request. However, as mentioned above, given the fact that you are seeking access to documents that are all part of FDI investigation files, they are covered by a general presumption of confidentiality. Moreover, for the same reasons of confidentiality, it is not possible to provide a detailed list of the documents identified as this would make publicly available information concerning the FDI investigation files.

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

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

Against this background, I confirm that the documents falling under the scope of your application need to be protected based on the exceptions provided for in the first indent of Article 4(2) (protection of commercial interests) and 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 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.

According to the case-law, the applicant must, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of access to the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal [19].

In your confirmatory application, you consider that 'it is in the public interest to know if this Regulation is being put to good use. […] It would not be the first time that EU legislation offers member states the potential to work together in the common interest of EU citizens, but that they neglect to use that potential to the fullest extent. EU citizens of the different member states therefore have an interest in knowing whether, and if so how often, their member state have used the potential of the regulation.'

However, these general considerations or references to transparency do not demonstrate a pressing need for the disclosure of the documents requested and cannot provide an appropriate basis for establishing that a public interest prevails over the reasons justifying the refusal to disclose the documents in question [20]. You do not provide any concrete elements to show why, having regard the specific facts of the case, a public interest is so pressing that it overrides the need to protect the Commission's investigations.

To further reinforce this conclusion, as an example, the Court has recognised that an overriding public interest cannot be derived from the wish to institute a public debate about the interpretation of EU law, the harmonisation of legal concepts or about the

[19] Judgment of the General Court of 9 October 2018, *Anikó Pint* v *European Commission*, T-634/17, EU:T:2018:662, paragraph 48; Judgment of the General Court of 23 January 2017, *Association Justice & Environment, z.s* v *European Commission*, EU:T:2017:18, paragraph 53; Judgment of the General Court of 5 December 2018, *Falcon Technologies International LLC* v *European Commission*, T-875/16, EU:T:2018:877, paragraph 84.

[20] Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland* v *European Commission*, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 9.

citizen's right to be informed about the compatibility of national laws with EU law and to participate in decision-making [21].

Moreover, please note that in order to provide transparency about the activities in relation to the FDI screening, an annual report on FDI screening has been published, which shows how the Commission and the Member States implement the FDI Screening Regulation, without disclosing any sensitive information about the individual transactions and their assessments [22].

Finally, I have not been able to identify any public interest capable of overriding the public and private interests protected by the first and third indents of Article 4(2) of Regulation (EC) No 1049/2001.

Please note that, in non-legislative cases, transparency can only constitute an overriding public interest only if it is especially pressing and based on a concrete element [23].

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 acknowledged the existence of wider openness [24], 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.

As per settled case-law, where the document requested is covered by a general presumption of non-disclosure, such document does not fall within an obligation of disclosure, in full, or in part [25].

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[21] Judgment of the General Court of 9 October 2018, *Anikó Pint* v *European Commission*, T-634/17, EU:T:2018:662, paragraphs 56 and 62; Judgment of the Court of Justice of 16 July 2015, *ClientEarth* v *Commission* C-612/13 P, EU:C:2015:486, paragraphs 91-93.

[22] https://trade.ec.europa.eu/doclib/docs/2021/november/tradoc_159935.pdf.

[23] Judgment of the Court of Justice of 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07P and C-532/07 P, EU:C:2010:541, paragraphs 156-158.

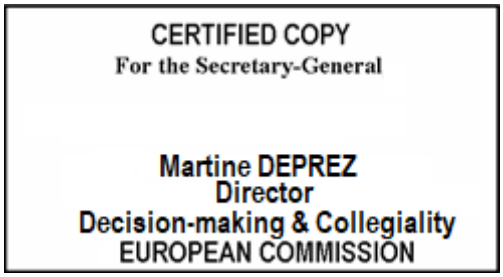
[24] Judgment in *Commission* v *TGI*, cited above, paragraphs 53-55 and 60; judgment of 29 June 2010, *European Commission* v *Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraphs 56-57 and 63.

[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.

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 Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



For the Commission
Ilze JUHANSONE
Secretary-General