



EUROPEAN COMMISSION  
Competition DG

The Director General

Brussels, 04.09.2014  
COMP/F2/VR/tt\*D-2014/086058

2014/3708

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By e-mail and registered mail

**Subject: GESTDEM 2014/3708 – Your request of 12 August 2014 for access to documents pursuant to Regulation (EC) No. 1049/2001 relating to airlines marketing agreements**

Dear Sir,

Thank you for your message of 12 August 2014, registered on 13 August 2014 under GESTDEM number 2014/3708, concerning airlines marketing agreements, in which you request access to documents in accordance with Regulation (EC) No. 1049/2001<sup>1</sup> ("Regulation 1049/2001").

## **1. DOCUMENTS CONCERNED**

In your message, you request access to documents regarding marketing agreements concluded between public authorities and airlines in Europe. In particular, you ask for "a list of all the investigated marketing agreements between European states' public authorities and airlines" and, for each such agreement, you would like to know "its date and economic amount".

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

I regret to inform you that no such general list containing the investigated marketing agreements, their dates and economic amounts, exists that would correspond to the description given in your application.

The other documents you request access to form part of the case files in several pending State aid investigations under Article 107/108 of the TFEU in which no final decision has yet been adopted by the Commission, or 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. Such documents are part of the administrative files, either in certain confidential cases, or in the following cases of the Commission: SA 33961 - Plainte Air France – Aéroport de Nîmes; SA 33909 - Girona and Reus Airports – Aid to Ryanair; SA 26500 - Aéroport d'Altenburg Nobitz; SA.33962 - Aéroport de Carcassonne; SA.33963 - Aéroport d'Angoulême; SA.23098 - Aeroporto di Alghero; SA.22614 - Aéroport Pau Pyrénées; SA.31149, SA.27585 and SA.21877 - Flughafen Lübeck-Blankensee; SA.22030, SA.29404 and SA.32091 - Financing arrangements regarding Flughafen Dortmund GmbH and the schedules of airport charges NERES and NEO; SA.22932 – Aides d'Etat à l'aéroport de Marseille-Provence et aux compagnies aériennes utilisant l'aéroport et bénéficiant d'aides au démarrage; SA.24221 - Flughafen Klagenuft, and SA.26494 – Aéroport de La Rochelle.

Having carefully examined your request in the light of Regulation 1049/2001, I have come to the conclusion that the documents you have requested access to fall under the exceptions of Article 4 of Regulation 1049/2001. Access to such 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 guarantee access for everyone to public documents and not just access for the requesting party to documents concerning it*".<sup>2</sup>

*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.

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<sup>2</sup> 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

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.

As already stated, the time-limit to bring proceedings before the Court of Justice has not expired. The presumption in *Commission v TGI*<sup>3</sup> applies to cases pending before the EU courts and therefore also to investigations where the time-limit for bringing court proceedings is running.

In *Commission v TGI*<sup>4</sup>, 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 question<sup>5</sup>.

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*<sup>6</sup>, disclosure of this information in State aid investigations would risk 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 659/1999<sup>7</sup> as amended to date, 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

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<sup>3</sup> See case C-139/07 P *Commission v Technische Glaswerke Ilmenau GmbH (TGI)*

<sup>4</sup> See *TGI*

<sup>5</sup> See *TGI*, paragraphs 58-59.

<sup>6</sup> See Case C-477/10 P, *Commission v Agrofert*, paragraph 66.

<sup>7</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83 of 27.3.1999, p. 1-9

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 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 respect for 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).

As mentioned above, the requested documents relate to pending State aid investigations and contain preliminary assessments of facts and other information from which the direction of the investigation, the future procedural steps which the Commission may take, as well as its investigative strategy may be revealed to the public. This information could easily be misinterpreted or misrepresented as indications of the Commission's possible final assessment in this case. Such misinterpretations and misrepresentations may cause damage to the reputation and standing of the beneficiaries investigated, in particular if no decision is adopted establishing a violation of the competition rules.

The requested documents would reveal the Commission's investigation strategy and its disclosure would therefore undermine the protection of the purpose of the investigation and would also seriously undermine the Commission's decision making process, especially in case the final decision of the Court would prompt the Commission to resume the investigation. The Commission's services must be free to explore all possible options in preparation of a decision free from external pressure.

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 files 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.

*Article 4(2), first indent, protection of commercial interests*

Pursuant to Article 4(2), first indent of Regulation 1049/2001 the Commission shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person.

Economic entities have a legitimate commercial interest in preventing third parties from obtaining strategic information on their essential, particularly economic interests and on the operation or development of their business. Moreover, the assessments made by the Commission and contained in Commission's documents are commercially sensitive, particularly at a stage where an investigation has not been finally concluded yet.

The documents requested by you, as specified above, are part of files in competition cases, have not been brought into the public domain and are known only to a limited number of persons. In particular, the documents you request access to contain commercial and market-

sensitive information regarding the activities of the beneficiaries and other third parties, whose public disclosure would undermine the latter's commercial interests. This information concerns in particular commercial strategies in the aviation sector. Disclosure of these documents could bring serious harm to the undertakings' commercial interests.

In view of the foregoing the requested documents are covered by the exception set out in Article 4(2), first indent of Regulation 1049/2001.

The presumption recognised in the *Agrofert* judgment does not exclude the possibility of demonstrating that certain documents, of which disclosure is sought, are not covered by the presumption. However, you have not demonstrated this in your application.

In accordance with Article 4(5) of Regulation 1049/2001, I therefore have to refuse access to the requested documents.<sup>8</sup>

### **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, protection of the purpose of investigations, Article 4(2), first indent, protection of commercial interests, and Article 4(3), protection of the institution's decision making process, 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.

### **4. PARTIAL ACCESS**

I have also considered the possibility of granting partial access to the documents for which access has been denied in accordance with Article 4 (6) of Regulation 1049/2001. However, the general presumption of non-disclosure invoked above also applies to partial disclosure for all the documents concerned and, consequently, no partial access can be granted.

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<sup>8</sup> Case C-64/05P *Sweden v Commission*.

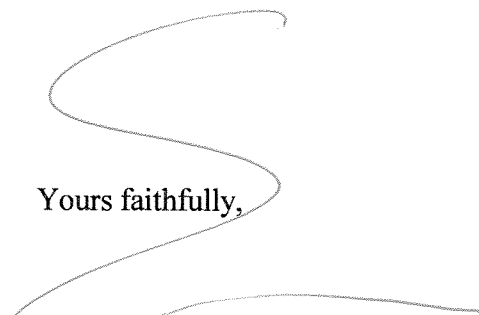
## 5. MEANS OF REDRESS

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  
BERL 5/327  
B-1049 Bruxelles  
or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu).



Yours faithfully,

Alexander ITALIANER