



EUROPEAN COMMISSION
Competition DG

The Director General

Brussels,
COMP/H.5/SH-ir-2016/ 092301

Luisa Izuzquiza
Access Info Europe
Calle Cava de San Miguel 8,4ºcentro
28005 Madrid
Spain

ask+request-3289-7ba40c63@asktheeu.org

Subject: Your application for access to documents – Ref GestDem No 2016/4933

Dear Madam,

I refer to your email dated 2 September 2016, registered on 5 September 2016 under GESTDEM number 2016/4933, requesting access to documents under Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents.

1. DOCUMENTS CONCERNED

In your email you request access to the following documents which, should they exist, would be part of the administrative file of DG Competition concerning Case COMP/SA. 38373 – State aid implemented by Ireland to Apple:

1. a list of all meetings held between European Commissioner Margrethe Vestager and Apple Inc. CEO Tim Cook that have taken place between the 1 January 2016 and today.
2. any record of the aforementioned meeting(s). This may include, but not necessarily limited to, minutes of the meeting(s), verbatim reports of the meeting(s), transcripts etc that would provide a record of the proceedings of the meetings(s).
3. any other document where the aforementioned meeting(s) and its proceedings are discussed or mentioned. This may include, but not necessarily limited to, any kind of report or briefing, or e-mails and other correspondence exchanged between European Commission officials.

I regret to inform you that the document you request under number 1. does not exist, as DG COMP has no list of meetings held between Commissioner Vestager and Apple Inc. CEO Tim Cook. As specified in Article 2(3) of Regulation 1049/2001, the right of access as defined in that regulation applies only to existing documents in the possession of the institution. The Commission is therefore unable to satisfy your application.

The documents you request access to under number 2 and 3 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 the documents you have requested access to under number 2 and 3 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 guarantee access for everyone to public documents and not just access for the requesting party to documents concerning it*".¹

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.

In *TGI*, 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

¹ 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.

procedure is likely to be modified and thus the system for review of State aid would be called into question². 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 file³.

It is noteworthy that in State aid procedures the Commission relies on submissions which typically contain sensitive data, including information related to the economic activities of undertakings. It therefore follows that, similarly to *Agrofert*⁴, 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 2015/1589⁵ 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 and undertakings 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 respect 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* case⁶ 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.

The requested documents would reveal the Commission's investigation strategy and their 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.

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.

² See C-139/07 P *TGI*, paragraphs 58-59.

³ See Case T-465/13, *Sea Handling SPA v Commission* paragraphs 55-58 and 61.

⁴ See Case C-477/10 P, *Commission v Agrofert*, paragraph 66.

⁵ 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.

⁶ See Case C-603/13 P, *Bitumen*.

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 as they refer to the submissions received from the undertaking and Member States.

The documents requested by you, as specified above, are part of the file in a competition case, 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, whose public disclosure would undermine the latter's commercial interests. This information concerns in particular commercial strategies.

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 documents 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 and the protection of commercial interests set out in Article 4(2), first indent 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), first and 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, its decision-making process and the commercial interests of the undertakings concerned.

4. PARTIAL ACCESS

I have also considered the possibility of granting partial access to the document 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.

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.

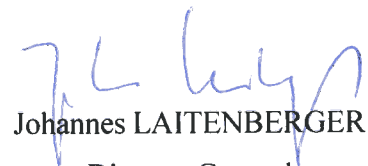
The Secretary-General will inform you of the result of this review within fifteen (15) working days from the registration of your request, either granting you access to the documents or confirming the refusal. In the latter case, you will be informed of how you can take further action.

All correspondence should be sent to the following address:

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

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

Yours faithfully,



Johannes LAITENBERGER
Director General