EUROPEAN COMMISSION
Competition DG

The Director General

Brussels, 20/01/2021
COMP/H2/MKP/ss - GESTDEM
2020/7623

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By e-mail: ask+request-8846-1b0c1579@asktheeu.org

Subject: GESTDEM 2020/7623– Your request of 8 December 2020 for access to documents pursuant to Regulation (EC) No. 1049/2001 relating to exchanges of the gas industry and the Commission about Important Projects of Common European Interest (IPCEIs) in relation with hydrogen

Dear Madam,

Thank you for your message of 8 December 2020, registered on 8 December 2020 under GESTDEM number 2020/7623, in which you request access to documents in the Commission's case file in accordance with Regulation (EC) No. 1049/2001[1] ("Regulation 1049/2001").

1. DOCUMENTS CONCERNED

In your message, you request access to the following documents:

- Correspondence (including email) since 1st December 2019 between Commissioner Breton and/or Commissioner Vestager and/or their cabinet and/or officials from DG GROW and or DG Competition on one hand and representatives from the gas industry on the other in which the issue of Important Projects of Common European Interest (IPCEIs) in relation with hydrogen was addressed.
- List of meetings since 1st December 2019 between Commissioner Breton and/or Commissioner Vestager and/or their cabinet and/or officials from DG GROW and or DG Competition on one hand and representatives from the gas industry on the

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

other in which the issue of Important Projects of Common European Interest (IPCEIs) in relation with hydrogen was addressed

- Minutes of the meetings mentioned above.

This reply concerns only the documents exchanged by DG Competition, including the Cabinet of EVP Vestager and the gas industry about Important Projects of Common European Interest (IPCEIs) in relation with hydrogen[2].

We identified the following documents:

1) Position paper of Iberdrola submitted on 12 March 2020

2) Presentation by the association Hydrogen Europe made on 12 November 2020

3) Minutes of the meeting of Members of the Cabinet of EVP Vestager and the association Hydrogen Europe on 12 November 2020.

Please find attached to this letter a copy of the 3 documents. Full access can be given to documents 1 and 2, while document 3 can be only partially disclosed. The third document (minutes) has two parts: one which is not case-related (you will find a copy of this part in the annexes to the present letter) and a second part which is related to the administrative file of DG Competition concerning Case COMP/SA.54048 – Preliminary contacts for potential IPCEI(s) on Hydrogen Technologies and Systems. Therefore, the second part of the document you request access to is part of the case file in a pending State aid case under Article 107 of the TFEU in which no final decision has yet been adopted by the Commission.

Having carefully examined your request in the light of Regulation 1049/2001, I have come to the conclusion that part of the document 3 falls under the exceptions of Article 4 of Regulation 1049/2001. 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*".[3]

[2] A separate request was registered in relation to the documents exchanged by the Cabinet of Commissioner Breton, under the reference GESTDEM 2020/7636 and you received a reply from DG GROW.

[3] 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

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*[4], 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[5]. 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 file[6].

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*[7], 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 2015/1589[8], 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 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

4 See Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau GmbH*

5 See Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau GmbH*, paragraphs 58-59

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

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

8 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

procedural regulations. In essence, the State aid procedural regulation 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 observance 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).

As mentioned above, one of the requested documents relates to a pending State aid investigation and contains a preliminary assessment of the 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 potential beneficiaries investigated, in particular if no decision is adopted establishing a violation of the competition rules.

The requested document 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 document mentioned under point 3 as far as it concerns Case COMP/SA.54048 – Preliminary contacts for potential IPCEI(s) on Hydrogen Technologies and Systems, is manifestly covered 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 file 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 document are commercially sensitive, particularly at a stage where an investigation has not been finally concluded yet.

One of the documents requested by you, as specified above, is part of the file in a competition case, has not been brought into the public domain and is known only to a limited number of persons. In particular, this document contains commercial and market-sensitive information regarding the activities of the potential beneficiaries and other third parties, whose public disclosure would undermine the latters' commercial interests. This information concerns in particular commercial strategies with regard to hydrogen.

Disclosure of this document could bring serious harm to the undertakings' commercial interests.

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

Article 4(1)(b), protection of privacy and the integrity of the individual, protection of personal data

One of the documents to which you have requested access, document 3, contains personal data (names of individuals).

Pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access to a document (or sections of it) has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with European Union legislation regarding the protection of personal data. The applicable legislation in this field is Regulation (EC) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC ('Regulation 2018/1725')[9].

Pursuant to Article 9(1)(b) of Regulation 2018/1725, 'personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if '[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject's legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests'.

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of Regulation 2018/1725, the European Commission has to examine the further conditions for a lawful processing of personal data only if the first condition is fulfilled, namely if the recipient has established that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your request, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, the European

[9] OJ L 295 of 21.11.2018, p. 39.

Commission does not have to examine whether there is a reason to assume that the data subject's legitimate interests might be prejudiced.

Notwithstanding the above, please note that there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation 1049/2001, access cannot be granted to the personal data, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

Therefore, we are disclosing the document 3 expunged from personal data.

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 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 one of the documents for which access has been denied in accordance with Article 4(6) of Regulation 1049/2001.

Partial access is granted to document 3, as set above. However, as regards the part of that document which concerns Case COMP/SA.54048 – Preliminary contacts for potential IPCEI(s) on Hydrogen Technologies and Systems, the general presumption of non-disclosure invoked above also applies to partial disclosure for the document 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, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles

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

Yours faithfully,

E-signed

Olivier GUERSENT

Enclosed documents:

Copies of 3 documents