EUROPEAN COMMISSION
Competition DG

The Director-General

Brussels, 1st February 2024
COMP/A.5.TF/MR/(2023)/7392

Mr. Varg Folkman

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By e-mail

Subject: EASE 2023/7392 – Your request of 14 December 2023 for access to documents pursuant to Regulation (EC) No. 1049/2001

Dear Sir,

Thank you for your email of 14 December 2023, registered on the same day under the above-mentioned reference number, in which you request access to certain documents 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:

i. *Documents showing which companies have notified concentrations under the Foreign Subsidies Regulation by December 14.*
ii. *Documents showing which of these notifications have been closed after the 25 days allotted to the Commission to review the notification under the Foreign Subsidies Regulation have run out.*
iii. *Letters sent to notifying companies where the case has been closed detailing why the Commission has chosen to close it.*

The documents referred to under indents (i) and (ii) are internal documents of the Commission which belong to the administrative files of the Commission in investigations, and in particular concerning the cases of transactions notified to the Commission under the Foreign Subsidies Regulation up to 14 December 2023, which concern 8 cases.

The documents referred to under (iii) are also documents which are part of the administrative files of DG Competition in the above referred cases, all of which are already

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

closed. In this respect, the Commission would like to clarify that those letters inform the undertakings of the expiry of the legal deadline but do not, contrary to your assertion, "detail why the Commission has chosen to close" those cases.

The documents you request access to form part of the administrative files of the Commission in closed investigations under Regulation (EU) 2022/2560[2] (the Foreign Subsidies Regulation, hereinafter referred to as the "FSR") and Commission Implementing Regulation (EU) 2023/1441[3] (the Foreign Subsidies Implementing Regulation, hereinafter referred to as the "FSR IR").

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 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

Article 4(2), first indent, protection of commercial interests of Regulation 1049/2001

Article 4(2), third indent, protection of the purpose of investigations of Regulation 1049/2001

Undertakings have a legitimate commercial interest in preventing third parties from obtaining strategic information on their essential interests, in particular economic interests, and on the operation or development of their business. Such legitimate interest is explicitly recognized in the context of the right of access to file.[4]

Similarly, Member States and the Commission engage in mutual and sincere cooperation in carrying out the tasks which flow from the Treaties[5]. Member States have an expectation that this cooperation is performed in confidentiality. The FSR also recognizes the need for a higher protection of information originating from Member States, since access to file does not extend to information provided by Member States.[6]

Finally, third countries may also cooperate with the Commission in the conduct of its investigations under the FSR. Those third countries also have a legitimate reliance on the Commission's confidential treatment of that information.[7] The importance of protecting some categories of information provided by third countries has been explicitly

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2 Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market, OJ L 330 of 23.12.2022, p. 1.

3 Commission Implementing Regulation (EU) 2023/1441 of 10 July 2023 on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market.

4 See, in this regard, Article 42(4) FSR.

5 See article 4(3) TEU.

6 See in this regard Article 42(4) and 43(1) and (2) FSR and article 20(2) FSR IR.

7 See in this regard Article 43(1) FSR.

recognised by excluding that information from the scope of the access to file procedure in an FSR case.[8]

Undertakings, Member States and third countries submitting information in the context of the FSR thus have a legitimate expectation that – apart from the publication of the summary notices and non-confidential versions of final decisions provided for in Article 40 FSR – the information they supply to the Commission on an obligatory or voluntary basis under the FSR will not be publicly disclosed.

These legitimate interests are explicitly protected in the FSR.

Article 43(1) FSR provides that information acquired under the FSR shall be used only for the purposes for which it was acquired, namely the administrative proceedings carried out under its provisions.

Article 43(2) FSR provides that the Commission shall ensure the protection of confidential information acquired in application of the FSR in accordance with the relevant applicable rules, i.e., with respect to access to documents, the rules laid down in Regulation 1049/2001, and in particular the exceptions laid down in that Regulation.

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.

This exception aims at protecting the legitimate interest of undertakings to protect their business secrets and other confidential information.

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.

In this respect, it has been clarified in the case law of the Court of Justice of the European Union that 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]. As such, cases under the FSR constitute investigations for the purposes of Article 4(2), third indent of Regulation 1049/2001. This exception aims at protecting the Commission's capacity to ensure that undertakings comply with their obligations under European Union law. For the effective conduct of investigations, it is of utmost importance that the Commission's investigative strategy, preliminary assessments of the case and planning of procedural steps remain confidential. Further, careful respect by the Commission of its obligations regarding professional secrecy creates a climate of mutual confidence between the Commission, undertakings, Member States and third countries under which the latter cooperate by providing the Commission with the information necessary for its investigations.

In these circumstances, disclosure of documents could lead to a situation where undertakings subject to investigations and potential informants, Member States and third

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8 See Article 20(2) FSR IR.

9 Case C-331/15P, *Schlyter v. France*, ECLI:EU:C:2017:639.

countries would lose their trust in the Commission's reliability and in the sound administration of FSR files. These parties would then become reluctant to cooperate with the Commission and would reduce their cooperation to a minimum. This, in turn, would jeopardise the Commission's authority and lead to a situation where the Commission would be unable to properly carry out its task of enforcing the FSR. Consequently, the effective enforcement of the FSR would be undermined.

General presumption applicable to under Article 4(2), first indent, protection of commercial interests and Article 4(2), third indent, protection of the purpose of investigations for documents which are part of an administrative investigation

In its judgment in Case C-404/10 P *Commission v Odile Jacob*[10], the Court of Justice held that for the purposes of interpretation of the exceptions in Article 4(2), first and third indent of Regulation 1049/2001, there is a general presumption that disclosure of documents exchanged between the Commission and notifying and other (third) parties in merger procedures in principle undermines the protection of the commercial interests of the undertakings involved and also the protection of the purpose of investigations related to the merger control proceedings.

The Court ruled that, by analogy to the case law in cases *TGI*[11], *Bavarian Lager*[12] and *API*[13], Regulation 1049/2001 has to be interpreted and applied in a manner which is compatible and coherent with other specific rules on access to information. The Court referred in particular to the Merger Regulation[14] and emphasised that that Regulation not only governs a specific area of European Union law, but is also designed to ensure respect for professional secrecy and is, moreover, of the same hierarchical order as Regulation 1049/2001 (so that neither of the two set of rules prevails over the other). The Court stated that, if documents in the merger case-files were to be disclosed under Regulation 1049/2001 to persons other than those authorised to have access to the Commission's file according to the merger control legislation, the scheme instituted by the Merger Regulation would be undermined. In that regard, the Court ruled that this presumption applies regardless of whether the request for access concerns merger control proceedings which have already been closed or proceedings which are pending.

Based on the same reasoning, the Court recognized in *Agrofert*[15] that general presumptions of non-disclosure are applicable to merger control proceedings, because the legislation which governs those proceedings also provides for strict rules regarding the treatment of information obtained or established in the context of such proceedings. The disclosure of such documents would undermine the procedural rules system set up by the Merger Regulation, and in particular the rules on professional secrecy and access to the file. The Court ruled that if a document is not accessible under the "access to file"

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10 Case C-404/10 P, *Commission v Odile Jacob*, ECLI:EU:C:2012:393.

11 Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau*, ECLI:EU:C:2010:376.

12 Case C-28/08 P, *Commission v Bavarian Lager*, ECLI:EU:C:2010:378.

13 Cases C-514/07 P, C-528/07 P and C-532/07 P, *Sweden and Others v API and Commission*, ECLI:EU:C:2010:541.

14 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) Official Journal L 24, 29.01.2004, p. 1-22

15 Case C-477/10 P, *Commission v Agrofert Holding*, ECLI:EU:C:2012:394, paragraph 59.

procedure, it cannot be made available to the public under Regulation 1049/2001, so that both Regulations are interpreted and applied in a consistent and coherent manner. [16]

Furthermore, in the *Múka* case, the General Court recalled that, as interested parties other than those directly concerned in State aid control procedures (the Member States) do not have the right to consult the documents in the Commission's administrative file, there is a general presumption that disclosure of documents in the administrative file undermines, in principle, the protection of the purpose of investigation activities, and also held that this presumption applies regardless of whether the request for access concerns a control procedure which has already been closed or one which is pending[17].

The same reasoning used in the previously mentioned case law to establish a general presumption of non-disclosure for documents belonging to merger, antitrust and state aid case files is fully applicable to the disclosure of documents exchanged between the Commission and notifying parties, other natural or legal persons, Member States, and third countries in the enforcement of the FSR, given that this Regulation contains very similar provisions as regards both the obligation of professional secrecy and the access to file procedure[18]. If documents in the FSR case files were to be disclosed under Regulation 1049/2001 to persons other than those authorised to have access to them according to the FSR, the procedural scheme instituted by the latter would be undermined.

Consequently, and by analogy to what has been repeatedly recognized by the case-law in the context of merger, antitrust and state aid investigations, there is a general presumption that disclosure of documents in FSR case files in principle undermines the protection of the commercial interests of the undertakings involved and also the protection of the purpose of investigations related to the FSR proceedings. This presumption applies regardless of whether the request for access concerns FSR proceedings which have already been closed or proceedings which are pending.

Application in the present case

The documents requested by you, as specified above, are part of the administrative files of the Commission in investigations pertaining to FSR cases. Those documents and the information therein have not been brought into the public domain and are known only to a limited number of persons.

The prospect of publication of information provided by or exchanged with information providers, such as undertakings, Member States or third countries runs the risk of adversely affecting their willingness to cooperate in the present procedure in future

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16 Case C-365/12 P, *Commission v EnBW Energie Baden-Württemberg*, ECLI:EU:C:2014:112, paragraph 88; *Agrofert*, paragraphs 61-63; Case T-380/08, *Netherlands v Commission*, ECLI:EU:T:2013:480, paragraphs 32-40.

17 Case T-214/21, *Múka v Commission*, ECLI:EU:T:2022:607, paragraphs 44 and 55.

18 See, in this regard, Articles 42(4) and 43 FSR and Articles 19 and 20 FSR IR.

procedures.[19] The documents requested by you are therefore subject to a presumption that their disclosure would undermine the purpose of the Commission's investigations.

In addition, the documents you request access to contain commercial and market-sensitive information regarding the activities of the involved undertakings whose public disclosure would undermine the latter's commercial interests. This information may concern in particular non-public financial information, such as the information that those undertakings have received foreign financial contributions from third countries in excess of the notification thresholds set out in the FSR, as well as information on acquisitions and divestments. Disclosure of these documents could bring serious harm to the undertakings' commercial interests.

In this particular case, it should be noted that the investigations have already been closed. Nonetheless, disclosure of these documents could still bring serious harm to the undertakings' commercial interests. Additionally, the prospect of publication of sensitive information after a procedure is closed runs the risk of adversely affecting the willingness of the undertakings, Member States or third countries concerned, or other undertakings, Member States or third countries, to cooperate in future proceedings.[20]

It thus follows that the requested documents are covered by a general presumption of non-disclosure of documents in FSR case files under the exceptions set out in Article 4(2), first indent and third indent of Regulation 1049/2001.

The general presumption recognised in the case-law cited above does not exclude the possibility of demonstrating that certain documents, of which disclosure is sought, are not covered by the presumptions. However, you have not demonstrated this in your application.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Pursuant to Article 4 (2) 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 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 documents for which access has been denied in accordance with Article 4 (6) of Regulation 1049/2001.

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19 See, by analogy, the *Odile Jacob* judgment previously quoted, at paragraph 124

20 See, by analogy, the *Odile Jacob* judgment previously quoted, at paragraph 124.

However, the general presumption of non-disclosure invoked above also applies to partial disclosure for the documents concerned and, consequently, no partial access can be granted.

5. MEANS OF REDRESS

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed to the Secretariat-General of the Commission within 15 working days upon receipt of this letter. You can submit it **via your EASE portal[21] account**.

Yours faithfully,

(e-signed)

Olivier GUERSENT

[21] https://www.ec.europa.eu/transparency/documents-request