



EUROPEAN COMMISSION

Competition DG

The Director General

Brussels, **14 NOV. 2017**
COMP/H4/MM/as-D*2017/104714

Mr. Ken Foxe



ken.foxe@gmail.com

By e-mail and registered mail

Subject: GESTDEM 2017/6297 – Your request of 31 October 2017 for access to documents pursuant to Regulation (EC) No. 1049/2001 relating to Case COMP/SA. 38373 – Aid to Apple

Dear Mr. Foxe,

Thank you for your message of 31 October 2017, registered on 31 October 2017 under GESTDEM number 2017/6297 concerning "**Case COMP/SA. 38373 – Aid to Apple**", in which you request access to documents in the Commission's case file in accordance with Regulation (EC) No. 1049/2001¹ ("Regulation 1049/2001").

1. DOCUMENTS CONCERNED

In your message you request access to "*copies of any correspondence between your directorate and any government department or state agency in Ireland with regard to delays in collecting €13 billion in tax from Apple*".

The documents you request access to form part of the case file in which the procedure may not be considered finalized yet, as long as the decision adopted by the Commission on 30 August 2016 is still subject to ongoing court proceedings and there is an ongoing State aid recovery procedure in relation to the case file, including a decision from the Commission to take Ireland to the Court of Justice, pursuant to Article 108(2) TFEU for failure to implement the recovery order established in the Commission decision.

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

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

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*".²

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.

This exception aims 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, in the present case there is a pending State aid recovery procedure as well as a pending set of proceedings before the General Court (cases T-778/16, *Ireland v Commission* and T-892/16, *ASI and AOE v Commission*).

In addition, on 4 October 2017, the Commission has decided to refer Ireland to the Court of Justice, pursuant to Article 108(2) TFEU, because of its failure to implement the recovery order within the set 4 month deadline.

In this scenario, it is of particular importance that the exchanges between the Member State and the Commission remain confidential. It therefore follows that, similarly to *Agrofert*³, 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 procedures, in particular, the recovery procedure.

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

² 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.

³ See Case C-477/10 P, *Commission v Agrofert*, paragraph 66.

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

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 question⁵. 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 file⁶.

It is noteworthy that in State aid procedures, including the recovery procedure, the Commission relies on submissions by the Member State concerned which typically contain sensitive data, including information related to the economic activities of undertakings.

The State aid procedural regulations, especially Regulation 2015/1589⁷, contain 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 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 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).

The presumption in *TGI*⁸ applies also to cases pending before the EU courts⁹ and is therefore applicable to this case for which proceedings are pending before the EU courts. It must also be underlined that the Commission has decided on 4 October 2017 to refer Ireland to the Court of Justice, pursuant Article 108(2) TFEU, because of its failure to implement the recovery order within the set 4 months deadline.

The presumption recognised in *Agrofert* 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 which refers in general terms to any correspondence exchanged between DG COMP and the Irish authorities with regard to delays in recovery.

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.

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 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.

⁸ See Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau GmbH*.

⁹ This follows from the fact that in the *TGI* case some of the documents to which access was refused were part of a State aid case pending before the General Court. The applicability of the presumption was further confirmed in Case C-404/10 P *Commission v Odile Jacob* not only in respect of merger proceedings but also State aid cases pending before the EU courts. See in that sense paragraph 128 of the judgment.

Article 4(2), second indent, protection of court proceedings and legal advice

Pursuant to Article 4(2), second indent of Regulation 1049/2001 the Commission shall refuse access to a document where its disclosure would undermine the protection of the court proceedings and legal advice.

In the case at stake, the action for annulment against the Commission decision of 30 August 2016 is currently pending before the General Court (T-778/16, *Ireland v Commission* and T-892/16, *ASI and AOE v Commission*). Additionally, on 4 October 2017, the Commission decided to refer Ireland to the Court, pursuant Article 108(2) TFEU, for failure to implement the recovery order. In this litigation scenario, it is of utmost importance that the Commission's position and its correspondence with the Member States remain confidential in order not to jeopardize the Commission's right to submit all relevant arguments in this set of proceedings before the Court.

For this reason, the requested documents are also covered in their entirety by the exception related to the protection of court proceedings and legal advice set out in Article 4(2), second 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 document 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), second and third indent.

In your application you have not established arguments that would present an overriding public interest to disclose the document 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 in protecting court proceedings.

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 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
BERL 5/282
B-1049 Bruxelles

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

Yours faithfully,



Johannes LAITENBERGER

