



EUROPEAN COMMISSION
Competition DG

The Director General

Brussels, 11/07/2019
COMP/C2/ZZ

Mr. Quentin Ariès

[REDACTED]
Belgium

[REDACTED]
By e-mail and registered mail

Subject: GESTDEM 2019/3192 – Your request of 3 June 2019 for access to documents pursuant to Regulation (EC) No. 1049/2001

Dear Sir,

Thank you for your message of 3 June 2019, in which you request access to documents in accordance with Regulation (EC) No. 1049/2001 ("Regulation 1049/2001").

1. DOCUMENTS CONCERNED

In your message you request access to all documents (letters, memos, staff documents, e-mails) regarding the assessment of DG Competition concerning the Central European Press and Media Foundation (Közép Európai Sajtó és Média Alapítvány or "KESMA") in Hungary. You requested, in particular, exchanges of officials of DG Competition concerning whether KESMA complies with EU rules on mergers and antitrust.

Please note that the Commission has not opened a formal investigation under EU competition law in relation to the creation or the conduct of KESMA. However, DG Competition has drawn up or contributed to the following documents concerning KESMA:

- 1) a set of replies to parliamentary questions under reference numbers P-6152/18, P-6172/18 and P-235/19;
- 2) a reply to a citizen who contacted Commissioner Vestager; and

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

3) a set of internal e-mails and briefings.

Having carefully examined your request in the light of Regulation 1049/2001, I have come to the conclusion that the documents falling under points 1) and 2) above should be accessible.

You may find the documents under point 1) above at the following links:

http://www.europarl.europa.eu/doceo/document/E-8-2018-006152_EN.html

http://www.europarl.europa.eu/doceo/document/P-8-2018-006172_EN.html

http://www.europarl.europa.eu/doceo/document/P-8-2019-000235_EN.html

The documents under point 2) above are attached as annexes to this letter. Please note that personal data have been redacted in the documents in accordance with Article 4(1) b) and (6) of Regulation 1049/2001.

You may reuse these documents free of charge for non-commercial and commercial purposes, provided that the source is acknowledged and that you do not distort the original meaning or message of the documents. Please note that the Commission does not assume liability stemming from the reuse.

The documents falling under point 3) above (i.e. internal e-mails and briefings of the Commission) 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), 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 assessment of the case and planning of procedural steps remain confidential.

In *Commission v TGF*², 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

² See case C-139/07 *Commission v Technische Glaswerke Ilmenau GmbH (TGI)*.

investigations a general presumption that disclosure of documents in the file would undermine the purpose of State aid investigations. The Court reasoned that such disclosure would call into question the procedural system³.

The Court of Justice has upheld this reasoning in relation to documents in cases regarding the application of Articles 101 and 102 TFEU (i.e. antitrust cases) which are governed by the procedural rules set out in Regulation 1/2003. The disclosure of such documents would undermine the procedural rules system set up by that regulation, and in particular the rules on confidentiality and access to the file.

As mentioned above, the Commission has not opened a formal investigation under EU competition law in relation to the creation or the conduct of KESMA. However, the requested documents under point 3) above relate to the assessment of the facts and other information from which the direction of a potential investigation, the future procedural steps which the Commission may consider, 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. Such misinterpretations and misrepresentations may cause damage to the reputation and standing of KESMA. Moreover, the requested documents would reveal the Commission's investigation strategy, including its strategy prior to formal investigations, 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. The Commission's services must be free to explore all possible options in their enforcement activities free from external pressure.

In view of the foregoing, the requested documents under point 3) above are manifestly covered in their entirety by the exception related to the protection of the purpose of the Commission's anti-trust investigations set out in Article 4(2), third indent of Regulation 1049/2001. Moreover, the documents, as internal Commission 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.

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 and its decision-making process.

³ See also Case C-514/07 P, *API v Commission*, paragraphs 99 and 100, as well as Case C-404/10 P *Commission v Odile Jacob*, paragraphs 108-126 where the Court of Justice applied *Commission v TGI* by analogy to merger proceedings.

4. PARTIAL ACCESS

In addition to granting access to the requested documents under points 1) and 2) above, I have also considered the possibility of granting partial access to the documents under point 3) above, 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 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 letter, after which your initial request will be deemed to have been withdrawn.

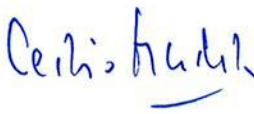
The Secretary-General will inform you of the result of this review within fifteen (15) working days from the registration of your request, either granting you access to the documents or confirming the refusal. In the latter case, you will be informed of how you can take further action.

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,

p.o.


p.o. Cecilio MADERO VILLAREJO
Johannes LAITENBERGER

Attachments:

- Annex 1 – e-mail from citizen
- Annex 2 – reply to citizen