



EUROPEAN COMMISSION

Competition DG

The Director General

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Subject: GESTDEM 2015/2600 - Your request of 6 May 2015 for access to documents pursuant to Regulation (EC) No. 1049/2001 relating to Case COMP/SA.39854 – Restructuring plan of First Investment Bank (FIB) - Bulgaria

Dear Sir,

Thank you for your message of 6 May 2015, registered on 6 May 2015 under GESTDEM number 2015/2600, concerning Case COMP/39854 – Restructuring plan of First Investment Bank (FIB) - Bulgaria, 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 the following documents of the administrative file of DG Competition concerning Case COMP/39854 – Restructuring plan of First Investment Bank (FIB) – Bulgaria:

"The full text, without editing of the FIBANK Restructuring plan regarding State aid SA.39854 (2014/N) – Bulgaria - Restructuring plan of First Investment Bank (FIB) - Bulgaria and Annex COMMITMENT CATALOGUE - CASE SA.39358 (2014/PN) – RESTRUCTURING PLAN OF FIRST INVESTMENT".

The documents you request access to form part of the case file in a pending State aid investigation under Article 107 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

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

monitoring of commitments 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 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*".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.

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 *Commission v TGI*³, 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

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-139/07 P *Commission v Technische Glaswerke Ilmenau GmbH (TGI)*

nature of the procedure is likely to be modified and thus the system for review of State aid would be called into question⁴.

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*⁵, 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 659/1999⁶ as amended to date, 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 procedural regulations. In essence, the State aid procedural regulations and Regulation 1049 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 for 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). 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 file⁷.

Moreover, as the General Court has ruled in the *SEA Handling*⁸ case, an investigation of the Commission cannot be considered as closed if there might be circumstances which might prompt the Commission to reopen the case.

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.

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.

⁴ *TGI*, paragraphs 58-59.

⁵ See Case C-477/10 P, *Commission v Agrofert*, paragraph 66.

⁶ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83 of 27.3.1999, p. 1–9

⁷ See case T-465/13, *Sea Handling SPA v Commission (Sea Handling)*, paragraphs 55-58 and 61

⁸ *Sea Handling*, paragraphs 70-71

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 at a stage where an investigation has not been finally concluded yet.

The documents requested by you, as specified above, are part of the file in a State aid case, have not been brought into the public domain in their full version 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 beneficiary, whose public disclosure would undermine the latter's commercial interests. This information concerns in particular details of the beneficiary's business, assets and commercial strategies. Disclosure of these documents could bring serious harm to the undertakings' commercial interests.

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

The presumption recognized in the *Agrofert* judgment 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.

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 those articles 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. In particular, as regards your argument concerning the principles of transparency and accountability on the use of public finances, the reasoning for the decision of the Commission in this case, based on State aid rules, as well as the underlying facts, are presented in the text of the Decision whose non-confidential version is publicly available.

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

Having carefully examined the requested documents, I note that a public version of the documents which you requested is already in the public domain. This document has been published at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_SA_39854. I therefore refer you to these public sources.

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 5/327
B-1049 Bruxelles

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

Yours faithfully,



Alexander ITALIANER