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Markets and cases II: Information, Communication and Media
State aid

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Ministry of Economic Affairs and
Employment in Finland
Employment and Well-Functioning
Markets Department

Email: valtontuki@tem.fi

Subject: SA.48486 – Alleged illegal aid to the Finnish public service broadcaster Yleisradio Oy / Consultation under Article 5 of Regulation 1049/2001

Dear Sir/Madam,

Thank you for the emails of 4 June and 14 September 2020 in the above case. We understand that your authorities received several access to documents requests from the public in connection with the exchanges that took place between the Finnish authorities and the European Commission in the above mentioned State aid case. Therefore, your authorities consult the Commission on the basis of Article 5 of Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

In accordance with Article 5 of Regulation 1049/2001, where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the

institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of Regulation 1049/2001.

Under the current case law, and in particular the judgment in case C-139/07 P *Commission v Technische Glaswerke Ilmenau*¹, all documents in State aid cases are covered by a general presumption that their disclosure would undermine the protection of the purpose of investigations. The Court reasoned that this followed from the fact that under the State aid procedural rules the interested parties, other than the Member State concerned, had 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 was likely to be modified and thus the system for review of State aid would be called into question².

This general presumption equally applies to closed State aid case. In case C-477/10 P *Commission v Agrofert*³, the Court of Justice applied the general presumption by analogy to all documents exchanged between the Commission and the parties to a merger procedure, where the case was definitively closed. The presumption in *Agrofert* is based on the exceptions related to the protection of the purpose of the Commission's investigations and protection of the commercial interests of natural or legal persons. The same line was followed by the General Court in the *Deutsche Telekom* judgment.⁴

Furthermore, with regard to State aid procedures, the case-law has underlined the existence of a climate of mutual trust between the Commission and the Member State and the need to preserve this cooperation, in order to ensure the protection of the objectives pursued by the Commission's investigative activities (see for instance in case T-39/17, *Port de Brest v Commission*⁵).

DG Competition therefore considers that under EU law, the documents exchanged between the Commission and the Finnish authorities in relation to a State aid procedure are covered by the above presumption, independently on the originator of the documents. In these circumstances, DG Competition is of the opinion that the documents it sent to the Finnish authorities are covered by the above presumption and therefore should not be disclosed. Under EU law the documents sent by the Finnish authorities in the State aid procedure are also covered by the above presumption.

As mentioned above, according to case law the general presumption of non-disclosure of documents applies even in closed cases. Therefore, in principle, the documents in question cannot be disclosed even after the State aid case has been closed.

Please note that the above does not bar the Finnish authorities from informing the public about certain elements of the Commission's administrative letter in this State aid file, so

¹ Judgment of the Court of 29 June 2010 in C-139/07 P *Commission v Technische Glaswerke Ilmenau* (ECLI:EU:C:2010:376).

² See Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau GmbH*, paragraphs 58-59

³ Judgment of the Court of 28 June 2012 in C-477/10 P *Commission v. Agrofert* (ECLI:EU:C:2012:394)

⁴ See Case T-210/15, *Deutsche Telekom AG v European Commission* (ECLI:EU:T:2017:224), paragraphs 44-45.

⁵ Judgment of the General Court of 19 September 2018 in T-39/17 *Port de Brest v. Commission* (ECLI:EU:T:2018:560)

that the context of the legislative proposal on the modification of the YLE Act is clear to the public.

I hope you find the above information helpful. Should you need further clarifications on this matter, please do not hesitate to contact us.

Yours faithfully,

e-signed
Krzysztof KUIK
Head of Unit