



EUROPEAN COMMISSION
Competition DG

The Director General

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COMP/E2/HP/ (2017)/040799

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By e-mail and registered mail

Subject: GESTDEM 2017/2235 – Your request of 7 April 2017 for access to documents pursuant to Regulation (EC) No. 1049/2001 relating to Case COMP/AT.40345 – Formula One Championship

Dear Ms Reid,

Thank you for your application of 7 April 2017 concerning Case COMP/AT.40345 – Formula One Championship, 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 complaint of Sauber and Force India Formula One teams and to the correspondence between the parties and the Commission. These documents are part of the administrative file of DG Competition concerning Case COMP/AT.40345 – Formula One Championship.

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

The documents you request access to form part of the case file in a pending antitrust investigation under Article 101 of the TFEU in which no final decision has yet been adopted by the Commission.

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 such 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 assessments of the case and planning of procedural steps remain confidential.

The Court of Justice has upheld this reasoning in relation to documents in cases regarding the application of Articles 101 and 102 TFEU ("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.

In *Enbw*, the Court of Justice held that there is, with regard to the exception related to the protection of the purpose of investigations, a general presumption that disclosure of documents in cases regarding the application of Articles 101 and 102 TFEU ("antitrust cases"), would undermine the purpose of the access system introduced by Regulations No 1/2003 and 773/2004^[1]. As ruled by the General Court in the *Bitumen* case^[2], for an infringement under Article 101, if a document is not accessible under the "access to file

^[1] Case C-365/12 P *Commission v Enbw Energie Baden-Württemberg*, judgment of 27 February 2014, paragraph 88.

^[2] Case T 380/08, paragraphs 32-40

procedure", it cannot be made available to the public under Regulation 1049. In essence, Regulations 1/2003 and 773/2004 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)

As mentioned above, the requested documents relate to a pending antitrust investigation. This information could easily be misinterpreted or misrepresented as indications of the Commission's possible final assessment in this case. Such misinterpretations and misrepresentations may cause damage to the reputation and standing of the companies investigated, in particular if no decision is adopted establishing a violation of the competition rules.

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 anti-trust investigations set out in Article 4(2), third indent of Regulation 1049/2001. Moreover, the 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.

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.

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.

The documents requested by you, as specified above, are part of the file in a competition case and 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 concerns in particular commercial strategies. Disclosure of such documents could bring serious harm to the companies' 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.

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), 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 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. 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 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 document 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,


Johannes LAITENBERGER