



EUROPEAN COMMISSION

Competition DG

The Director General

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COMP/FTF/LG/2019/006067

By registered letter with acknowledgment of receipt

Olivier Hoedeman
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Rue d'Edimbourg 26
1050 Brussels

Advance copy by email:

ask+request-6176-cfbb3dd8@asktheeu.org

Subject: GESTDEM 2018/6667 –Your application for access to documents pursuant to Regulation (EC) 1049/2001 relating to contacts between DG Competition and the tobacco industry

Dear Mr Hoedeman,

We refer to your e-mail dated 11/12/2018 in which you request access to documents relating to contacts between DG Competition and the tobacco industry in accordance with Regulation (EC) No. 1049/2001¹ ("Regulation 1049/2001"). Your request was split between several Directorates-General and the part of the request concerning documents in the possession of DG Competition was registered and attributed to DG Competition on 11 November 2018 under the above mentioned reference number.

1. SCOPE OF YOUR REQUEST

In your message you request access to the following documents:

- all reports (and other notes) from meetings between the European Commission and representatives of the tobacco industry (producers, distributors, importers etc, as well as organisations and individuals that work to further the interests of the tobacco industry), during 2018.

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

- all correspondence (including emails) between the European Commission and representatives of the tobacco industry (producers, distributors, importers etc. as well as organisations and individuals that are funded by and/or work to further the interests of the tobacco industry), during 2018.

- a list of all the above-mentioned documents (including dates, names of participants/senders/recipients and their affiliation, subject of meeting/correspondence)

In your message you ask to exclude all documents that you have already received as a result of your access to document request of 5 February 2018 (registered under GESTDEM 2018/2851), which DG Competition replied to on 5 July 2018.

2. IDENTIFICATION AND ASSESSMENT OF THE RELEVANT DOCUMENTS

We have identified the following documents as part of the scope of your request:

1. Documents concerning Case M.8547 CELANESE/BLACKSTONE/JV;
2. Letter of 29 June 2018, titled “Implementation of the Articles 15 and 16 of the European Tobacco Products Directive – 2014/40/EU (Track and Trace)” to Commissioner Vestager from the European Smoking Tobacco Association;
3. Email correspondence of 29 June 2018, titled “Implementation of the EU tracking & tracing system for tobacco products” between the European Smoking Tobacco Association sending the letter cited above in 2 to Commissioner Vestager’s cabinet;
4. Letter of 12 July 2018, titled “Your letter to Commissioner Vestager of 29 June 2018” to the European Smoking Tobacco Association from the Commission;
5. Email of 12 July 2018, titled “Your letter to Commissioner Vestager of 29 June 2018” from DG Competition to the European Smoking Tobacco Association and
6. Emails titled “HT. [...] – Competition and Monopoly in EU”, forming an exchange of messages between a tobacco producer and DG Competition starting on 5 March 2018 and ending on 14 August 2018.

Some of these documents originate from third parties and therefore the originators of some of the documents have been consulted in accordance with Regulation (EC) No 1049/2001.

The documents identified under point 1 are part of the file in a competition case. Having examined these documents under the provisions of Regulation 1049/2001, we have come to the conclusion that the documents under point 1 fall under the exceptions of Article 4 of Regulation 1049/2001. Access to these documents, therefore, has to be refused. Please find in Section 3 below a detailed assessment as regards the application of the exceptions of Article 4 of Regulation 1049/2001.

I am glad to inform you that full access may be granted to the document under point 2. As regards the documents under point 3-6, partial access can be granted to them. The documents to which you have requested access contain personal data (names, e-mail accounts, phone numbers etc.), as well as sensitive business information. Therefore I enclose

a copy of the documents requested, with the personal data expunged. The purpose of redactions is explained below in sections 3 and 4.

You may reuse the annexed 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.

3. DOCUMENTS IDENTIFIED UNDER POINT 1: APPLICABLE EXCEPTIONS

Article 4(2), first indent, protection of commercial interests

Article 4(2), third indent, protection of the purpose of investigations

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 the commercial interests of a natural or legal person.

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.

In its judgment in Case C-404/10 P *Commission v Odile Jacob*,² the Court of Justice held that for the purposes of interpretation of the exceptions in Article 4(2), first and third indent of Regulation 1049/2001, there is a general presumption that disclosure of documents exchanged between the Commission and notifying and other (third) parties in merger procedures in principle undermines the protection of the commercial interests of the undertakings involved and also the protection of the purpose of investigations related to the merger control proceedings.

The Court ruled that, by analogy to the case law in cases *TGI*,³ *Bavarian Lager*⁴ and *API*,⁵ Regulation 1049/2001 has to be interpreted and applied in a manner which is compatible and coherent with other specific rules on access to information. The Court referred in particular to the Merger Regulation and emphasised that it not only governs a specific area of European Union law, but is also designed to ensure respect for professional secrecy and is, moreover, of the same hierarchical order as Regulation 1049/2001 (so that neither of the two set of rules prevails over the other).

The Court stated that, if documents in the merger case-files were to be disclosed under Regulation 1049/2001 to persons other than those authorised to have access according to the merger control legislation, the scheme instituted by that legislation would be undermined. In that regard, the Court ruled that this presumption applies regardless of whether the request for access concerns merger control proceedings which have already been closed or proceedings which are pending.

The Court recognized in *Agrofert*⁶ that general presumptions of non-disclosure are applicable to merger control proceedings, because the legislation which governs those proceedings also provides for strict rules regarding the treatment of information obtained or established in the context of such proceedings. The disclosure of such documents would

² Case C-404/10 P, *Commission v Odile Jacob*, [2013] ECR.

³ Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau*, [2010] ECR I-5885.

⁴ Case C-28/08 P, *Commission v Bavarian Lager*, [2010] ECR I-6055.

⁵ Cases C-514/07 P, C-528/07 P and C-532/07 P, *Sweden and Others v API and Commission*, [2010] ECR I-8533.

⁶ Case C-404/10 P, *Commission v Agrofert Holding*, [2013] ECR, paragraph 59.

undermine the procedural rules system set up by the Merger Regulation, and in particular the rules on professional secrecy and access to the file.

As ruled by the Court in the *Agrofert* case,⁷ if a document is not accessible under the "access to file procedure", it cannot be made available to the public under Regulation 1049. In essence, the Merger Regulation and Regulation 1049 have different aims but must be interpreted and applied in a consistent manner. The rules on access to file in the Merger Regulation 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).

Natural and legal persons submitting information in the context of the Merger Regulation have a legitimate expectation that – apart from the publication of the Section 1.2 of the Form CO and of the final decision cleared of business secrets and other confidential information – the information they supply to the Commission on an obligatory or voluntary basis under the Merger Regulation will not be disclosed.

In this particular case, it should be noted that the merger investigation in case M.8547 CELANESE/BLACKSTONE/JV has already been closed. Nonetheless, the prospect of publication of sensitive information concerning the economic activities of the undertakings involved after a procedure is closed runs the risk of adversely affecting the willingness of undertakings to cooperate when such a procedure is pending.⁸

Undertakings 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 document are commercially sensitive.

The documents requested by you, as specified above in point 1, are part of the file in a competition case, have not been brought into the public domain 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 involved undertakings whose public disclosure would undermine the latter's commercial interests. This information concerns in particular commercial strategies. Disclosure of these documents could bring serious harm to the undertakings' commercial interests.

Undertakings also have a legitimate interest that the information is used only for the purposes of the Commission proceedings in application of the Merger Regulation. It is for this reason that Article 17(1) the Merger Regulation provides that information acquired through the investigative powers of this regulation is used only for the purpose for which it was acquired, namely the administrative Commission procedure and the Court review of the decision resulting from this procedure.

Also, pursuant to Article 17(2) of the Merger Regulation, information covered by professional secrecy submitted to the Commission in the context of this regulation cannot be disclosed to the public.

These exceptions aim at protecting the Commission's capacity to ensure that undertakings comply with their obligations under European Union law.

Careful respect by the Commission of its obligations in this domain has so far created a climate of mutual confidence between the Commission and undertakings, under which the

⁷ *Bitumen*, paragraphs 32-40.

⁸ See the *Deutsche Telekom* judgment, case T-210/15, paragraph 45. See also, by analogy, the *Odile Jacob* and *Agrofert* judgments quoted therein.

latter have cooperated by providing the Commission with the information necessary for its investigations.

In these circumstances, disclosure despite the protection provided for by the above-mentioned regulations, would lead to a situation where undertakings subject to investigations and potential informants and complainants would lose their trust in the Commission's reliability and in the sound administration of competition files. These parties would then become reluctant to cooperate with the Commission and would reduce their cooperation to a minimum. This, in turn, would jeopardise the Commission's authority and lead to a situation where the Commission would be unable to properly carry out its task of enforcing EU competition law. Consequently, the purpose of merger procedures and, implicitly, of the effective enforcement of the EU competition rules would be undermined.

It thus follows that the documents under point 1 are covered by a general presumption of non-disclosure of documents in merger case-files.

In view of the foregoing the requested documents under point 1 are covered by the exception set out in Article 4(2), first indent and third indent of Regulation 1049/2001.

4. PARTIAL ACCESS FOR DOCUMENTS IDENTIFIED UNDER POINTS 3 TO 6

4.1. Article 4(1)(b): protection of privacy of individuals – Documents identified under points 3 to 6

Pursuant to Article 4(1)(b) of Regulation 1049/2001, access to a document can be refused where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data. The documents identified under points 3 to 6 contain personal data

The applicable legislation in this field is Regulation (EC) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC ('Regulation 2018/1725')⁹.

Article 3(1) of Regulation 2018/1725 provides that personal data 'means any information relating to an identified or identifiable natural person [...]'. The Court of Justice has specified that any information, which by reason of its content, purpose or effect, is linked to a particular person is to be considered as personal data¹⁰.

Please note in this respect that the names, signatures, functions, telephone numbers and/or initials pertaining to staff members of an institution are to be considered personal data¹¹.

In its judgment in Case C-28/08 P (*Bavarian Lager*)¹², the Court of Justice ruled that when a request is made for access to documents containing personal data, the Data Protection Regulation becomes fully applicable¹³.

⁹ OJ L 205 of 21.11.2018, p. 39.

¹⁰ Judgment of the Court of Justice of the European Union of 20 December 2017 in Case C-434/16, *Peter Nowak v Data Protection Commissioner*, request for a preliminary ruling, paragraphs 33-35, [ECLI:EU:C:2017:994](#).

¹¹ Judgment of the General Court of 19 September 2018 in case T-39/17, *Port de Brest v Commission*, paragraphs 43-44, [ECLI:EU:T:2018:560](#).

¹² Judgment of 29 June 2010 in Case C-28/08 P, *European Commission v The Bavarian Lager Co. Ltd*, [EU:C:2010:378](#), paragraph 59.

¹³ Whereas this judgment specifically related to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of

Pursuant to Article 9(1)(b) of Regulation 2018/1725, ‘personal data shall only be transmitted to recipients established in the Union other than Union institutions and bodies if ‘[t]he recipient establishes that it is necessary to have the data transmitted for a specific purpose in the public interest and the controller, where there is any reason to assume that the data subject’s legitimate interests might be prejudiced, establishes that it is proportionate to transmit the personal data for that specific purpose after having demonstrably weighed the various competing interests’.

Only if these conditions are fulfilled and the processing constitutes lawful processing in accordance with the requirements of Article 5 of Regulation 2018/1725, can the transmission of personal data occur.

According to Article 9(1)(b) of Regulation 2018/1725, the European Commission has to examine the further conditions for a lawful processing of personal data only if the first condition is fulfilled, namely if the recipient has established that it is necessary to have the data transmitted for a specific purpose in the public interest. It is only in this case that the European Commission has to examine whether there is a reason to assume that the data subject’s legitimate interests might be prejudiced and, in the affirmative, establish the proportionality of the transmission of the personal data for that specific purpose after having demonstrably weighed the various competing interests.

In your request, you do not put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest. Therefore, the European Commission does not have to examine whether there is a reason to assume that the data subject’s legitimate interests might be prejudiced.

Notwithstanding the above, please note that there are reasons to assume that the legitimate interests of the data subjects concerned would be prejudiced by disclosure of the personal data reflected in the documents, as there is a real and non-hypothetical risk that such public disclosure would harm their privacy and subject them to unsolicited external contacts.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation 1049/2001, access cannot be granted to the personal data for documents under points 3-6, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

Moreover, I have not obtained the consent to disclose such data.

Therefore, we are disclosing the documents requested under points 3-6 expunged from this personal data.

In case you would disagree with the assessment that the expunged data are personal data which can only be disclosed if such disclosure is legitimate under the rules of personal data protection, you are entitled, in accordance with Article 7(2) of Regulation 1049/2001, to make a confirmatory application requesting the Commission to review this position.

personal data by the Community institutions and bodies and on the free movement of such data, the principles set out therein are also applicable under the new data protection regime established by Regulation 2018/1725.

4.2. Protection of commercial interests – Documents identified under point 6

In respect of the documents under point 6, the documents concern a question to the Commission regarding the application of EU competition law to a commercial dispute between a tobacco producer and one of its suppliers. In order to protect the commercial interests of the undertakings involved in accordance with Article 4(2), first indent of Regulation 1049/2001, in particular their interest that commercial conflicts are not disclosed to the public, we are disclosing the documents requested expunged from any identifying information concerning the undertaking, its supplier, and the product involved.

5. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Pursuant to Article 4(2) 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 of Regulation 1049/2001.

According to *Agrofert* case¹⁴, the abovementioned general presumptions do not exclude the right for the applicant to demonstrate the existence of an overriding public interest justifying the disclosure of the document requested.

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 and protection of the purpose of investigations.

6. 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
Unit C.1 - Transparency, Document Management and Access to Documents
BERL 7/076
B-1049 Bruxelles

¹⁴ *Agrofert*, paragraph 86.

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

Yours faithfully,



Johannes LAITENBERGER

Enclosures:

Documents 2-6 as listed above in section 2.