



EUROPEAN COMMISSION
Competition DG

The Director General

Brussels, **16 JAN. 2020**
COMP/FTF/MB/2020/005546

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By e-mail and registered mail

Subject: GESTDEM 2019/7298 – Your request of 17th December 2019 for access to documents pursuant to Regulation (EC) No. 1049/2001 relating to contacts between DG Competition and the tobacco industry

Dear Mr. Hoedeman,

Thank you for your application of 17th December 2019, in which you request access to documents concerning all 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 19th December 2019 under the above mentioned reference number.

1. DOCUMENTS CONCERNED

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

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

as organisations and individuals that are funded by and/or work to further the interests of the tobacco industry), during 2019;

- 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 2019;

- 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 11th December 2018 (registered under GESTDEM 2018/6667), which DG Competition replied to on 22nd January 2019.

We have identified seven documents that correspond to your request. The documents that you request access to form part of the case file in a pending antitrust investigation under Article 102 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 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 assessments of the case and planning of procedural steps remain confidential.

In *Commission v TGI*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 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 ("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 the *EnBW* case, 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 773/2004⁴. As ruled by the General Court in the *Bitumen* case⁵, for an infringement under Article 101, 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, 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).

Moreover, as the General Court has ruled in the *Bitumen* 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.

As mentioned above, the requested documents relate to an antitrust investigation and contain information from which the direction of the investigation, the future procedural steps which the Commission may take, 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 in this case. Such misinterpretations and misrepresentations may cause damage to the reputation and standing

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

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 Case C-365/12 P *Commission v EnBW Energie Baden-Württemberg*, judgment of 27 February 2014, paragraph 88

⁵ Case T 380/08, paragraphs 32-40

of the companies investigated, in particular if no decision is adopted establishing a violation of the competition rules. Moreover, the requested documents would reveal the Commission's investigation strategy and its 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 preparation of a decision free from external pressure.

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. 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 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 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.

The general presumption recognised in the case-law cited above 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 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 document to which access has been hereby denied. 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. 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.

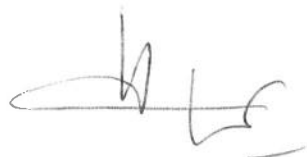
The Secretary-General will inform you of the result of this review within fifteen (15) working days from the registration of your request, either granting you access to the document or confirming the refusal. In the latter case, you will be informed of how you can take further action.

All correspondence should be sent to the following address:

European Commission
Secretariat-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,



Olivier GUERSENT

