To: Sam Clarke - ask+request-8514-fcabd254@asktheeu.org

Brussels, 20 October 2020

Subject: Your confirmatory application for access to documents – Ref No 2020-30-C

Dear Sam Clarke,

We refer to your email dated 28/09/2020 in which you made a confirmatory request, registered on 29/09/2020 under reference number 2020-30-C.

In your initial request, you requested access to documents which contain correspondence between the European Data Protection Board and the European Commission regarding the proposed Google/Fitbit merger, as well as formal guidance provided by the European Data Protection Board to the European Commission regarding the data protection considerations involved in the Google/Fitbit merger.

In your confirmatory application, you request access to the documents whose disclosure was prevented by the exceptions enshrined in Article 4 (1) (b), Article 4(2) 3rd indent, and Article 4(3) 2nd paragraph of Regulation 1049/2001, i.e. all documents in scope of this request.

In accordance with Article 4 (1) (b) of Regulation 1049/2001, access to documents containing personal data, in particular names and contact details of data subjects, as well as other personal data shall be refused if their disclosure would undermine the protection and privacy of the individual.

In your confirmatory application, you have suggested that such personal information could be redacted and access could be provided to the remaining parts. In the initial assessment, we considered that apart from Article 4 (1) (b), which applies to each of the documents in scope of the request, the exceptions enshrined in Article 4(2) 3rd indent, and Article 4(3) 2nd paragraph of Regulation 1049/2001 apply to all of the documents in scope of this request, in their entirety. For this reason, a partial disclosure with the personal data redacted was considered not possible in our initial assessment.

In accordance with Article 4(2) 3rd indent of Regulation 1049/2001, access to documents which refer to the subject matter of investigations shall be refused if disclosure would seriously undermine the purpose of the investigation, unless there is an overriding public interest in disclosure. In the initial response, we considered that disclosure of these documents would seriously undermine the protection of the purpose and result of the investigation, as they contain views and opinions related to the subject matter of the investigation, which are not meant to be published at this stage. We also considered that disclosure may result in assumptions and conjectures regarding the procedural steps being taken, which would have a negative impact on the investigation as it would reveal information that is not meant to be public at this initial stage.

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Nonetheless, if there is an overriding public interest in disclosure, access to the documents shall be granted. In the initial response, we were not able to identify an overriding public interest that would prevail over the reasons justifying the refusal to disclose the documents concerned.

After having examined again whether there is such overriding public interest in disclosing the documents we have reached the same conclusion, as we consider the harm to the purpose and scope of the ongoing investigation as described above, outweighs the public concern you refer to in your confirmatory application regarding the use of health data by Google in case the acquisition is approved.

In your confirmatory application, you also suggest if the documents were disclosed, academics and practitioners may also contribute to the debate to help the EDPB and the European Commission come to a more informed conclusion. However, for the reasons explained above, we consider that disclosing these documents, which relate to the subject matter of an ongoing investigation, would be detrimental to the purpose of this investigation.

The Court of Justice of the European Union ("CJEU") has considered that there is a general presumption that the disclosure of such documents undermines the purpose of investigations relating 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.[1]

The CJEU has consider that the applicant has to demonstrate that the general presumption is not applicable, or that there is a higher public interest.[2] In your confirmatory application we consider that you have not demonstrated that the public interest in disclosure of these documents is higher than the harm which would result to the ongoing investigation, nor is there any evidence that this general presumption is not applicable.

In accordance with Article 4(3) 2nd paragraph of Regulation 1049/2001, access to documents containing opinions for internal use shall be refused even after the decision has been taken, if such disclosure would undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

In the initial response, we considered that disclosure of the documents to which the above-mentioned exception applied would seriously undermine the EDPB's decision-making process, since the documents contain discussions, views and/or opinions of the EDPB members and/or its Secretariat that are part of internal deliberations and positions. Access to those internal preparatory documents would create confusion with regard to the EDPB members' views, and would curtail the Members "space to think", by preventing them from freely discussing their opinions and views of the matter, especially taking into account that the views of the EDPB have been provided in the course of an ongoing investigation for which the EDPB may be requested to provide further feedback in the future. In this manner, we considered that public access to such documents would impair the quality of the decision-making process of the EDPB.

[1] In this regard, see e.g. Case C-477/10 P, Commission v Agrofert Holding, EU:C:2012:394, par 59 and 64.
[2] In this regard, see e.g. Case C-477/10 P, Commission v Agrofert Holding, EU:C:2012:394, par 68.

The CJEU has considered that, in the context of merger control proceedings, there is a general presumption that disclosure of internal memoranda would seriously undermine the decision-making process protected under Article 4(3)(2) of Regulation 1049/2001.[3]

Nonetheless, if there is an overriding public interest in disclosure, access to the documents shall be granted. In the initial response, we were not able to identify an overriding public interest that would prevail over the reasons justifying the refusal to disclose the documents concerned.

As mentioned above, the CJEU is consistent in considering that the applicant has to prove the existence of an overriding public interest in the disclosure.[4] In order to do this, the applicant has to refer to the specific circumstances that demonstrate the prevalence of the public interest over the reasons given for the non-disclosure based on Article 4(3) 2nd paragraph of Regulation 1049/2001. Thus, reference to general considerations such as the public's right to be informed would not be sufficient to substantiate the existence of an overriding public interest, unless the particular circumstances of the case indicate otherwise.[5]

In this regard, you argue in your confirmatory request that users have a right to know in more detail about the concerns mentioned by the European Commission, related to the use of health data by Google before the review moves to the next stage. According to the case law of the CJEU, such a reference does not constitute an overriding public interest that would prevail over the reasons provided for the non-disclosure of the documents. This is particularly applicable with regard to documents that are not part of legislative procedures, as is the case here. In these situations, the principle of transparency can only constitute an overriding public interest if it is especially pressing and based on concrete elements, as the CJEU has held in several rulings, such as *Pint v Commission*; *LPN and Finland v Commission*; *Strack v Commission* and *Sweden and Others v API and Commission*, among others.[6]

After having examined again whether there is such overriding public interest in disclosing the documents we have reached the same conclusion, as we consider the harm to the EDPB's decision-making procedures, which would result from disclosure of these documents, as described above, outweighs the public concern you refer to in your confirmatory application regarding the use of health data by Google in case the acquisition is approved. We consider this to be the case as any advice, analysis and/or views are provided by the EDPB in the context of its role and mandate, but also in the context of good inter-institutional cooperation with the European Commission, which are essential for the work of the EDPB. Therefore, disclosing documents pertaining to an investigation that is (i) being conducted by the European Commission and (ii) currently ongoing, given the potential impacts mentioned in the

[3] In this regard, see e.g. Case 404/10 P, Commission v Edition Odile Jacob, EU:C:2012:393, par 130 and 131.
[4] In this regard, see e.g. Joined Cases C-514/11 P and C-605/11 P, LPN and Finland v Commission, EU:C:2013:738, par. 94; and Case C-127/13, Strack v Commission, EU:C:2014:2250, par. 128.
[5] In this regard, see e.g. case C-514/07, Sweden and Others v API and Commission, EU:C:2010:541, par. 156-158; Joined Cases C-514/11 P and C-605/11 P, LPN and Finland v Commission, EU:C:2013:738, par. 93; case T-755/14, Herbert Smith Freehills v Commission, EU:T:2016:482, par. 74; case C-127/13, Strack v Commission, EU:C:2014:2250, par. 129-131; Case T-634/17, Pint v Commission, EU:T:2018:662, par. 56 & 70; and Case C-612/13 P, ClientEarth v Commission, EU:C:2015:486, par. 93.
[6] Case T-634/17, Pint v Commission, EU:T:2018:662; Joined Cases C-514/11 P and C-605/11 P, LPN and Finland v Commission, EU:C:2013:738; Case C-127/13, Strack v Commission, EU:C:2014:2250; and Case C-514/07, Sweden and Others v API and Commission, EU:C:2010:541.

paragraphs above, could impact said inter-institutional relations and consequently seriously harm the decision-making process of the EDPB. This is especially the case where the EDPB is consulted by other EU institutions concerning important discussions in the field of data protection and privacy.

Therefore, since disclosure of the documents would undermine the protection of the privacy and integrity of individuals, and would seriously undermine purpose and scope of the investigation referred to above, as well as the decision-making process of the EDPB, and the existence of an overriding public interest in disclosure has not been demonstrated, the exceptions enshrined in Article 4(1)(b), Article 4(2) 3rd indent and Article 4(3) 2nd paragraph of Regulation 1049/2001 apply. Accordingly, access to the documents concerned is denied.

In accordance with Article 8(1) of Regulation 1049/2001, you are entitled to institute court proceedings against the EDPB and/or make a complaint to the Ombudsman, under the conditions laid down in Articles 263 and 228 of the TFEU, respectively.

Yours faithfully,

Andrea Jelinek
Chair of the EDPB