



EUROPEAN COMMISSION

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C(2019) 7457 final

[REDACTED]
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**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2019/4634**

Dear [REDACTED] and [REDACTED],

I refer to your email of 30 August 2019, registered on 2 September 2019, in which you submitted, on behalf of your clients [REDACTED] and [REDACTED], a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereafter ‘Regulation (EC) No 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 29 July 2019, addressed to the Directorate-General for Competition of the European Commission, you requested access to the following documents in relation to Case COMP/M.8870 – E.ON/Innogy:

- (i) all unpublished documents which are part of the administrative file pertaining, or in the alternative;

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, p. 43.

- (ii) all non-confidential unpublished documents, cleared of any business secrets, which are part of the administrative file in question; or
- (iii) all non-confidential unpublished documents that were exchanged between the European Commission and one of the parties involved in the file in question.

The European Commission identified the documents falling under the scope of your request. They form part of the case file in a pending merger case concerning an investigation under *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings*.³

In its initial reply of 19 August 2019, the Directorate-General for Competition refused access to these documents on the basis of the exceptions protecting commercial interests, the purpose of investigations and ongoing decision-making process, provided for respectively by Article 4(2), first and third indents, as well as Article 4(3), first subparagraph of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. You put forward arguments, which I will address in the corresponding sections below.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I regret to inform you that I have to confirm the initial decision of Directorate-General for Competition to refuse access to the requested documents on the basis of the exceptions of Article 4(2), first indent and third indents, as well as Article 4(3), first subparagraph of Regulation (EC) No 1049/2001, for the reasons set out below.

2.1. Protection of the purpose of investigations and of commercial interests

Article 4(2), first indent of Regulation (EC) No 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] commercial interests of a natural or legal person, including intellectual property [...], unless there is an overriding public interest in disclosure’.

Article 4(2), third indent of Regulation (EC) No 1049/2001 provides that ‘[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.’

³ Official Journal L 24 of 29 January 2004, p. 1. (Hereinafter, the ‘Merger Regulation’).

Pursuant to settled case law, ‘in the light of the objective of the merger control proceedings, which consists in verifying whether a transaction gives the notifying parties market power which would significantly impede effective competition, the [European] Commission gathers, in those proceedings, commercially sensitive information relating to the commercial strategies of the undertakings involved, their sales figures, market shares or customer relations, with the result that access to the documents of such proceedings may undermine the protection of commercial interests of those undertakings. Therefore, the exceptions relating to the protection of commercial interests and to that of the purpose of investigations are, in [merger] case[s], closely connected.’⁴

Moreover, the Court of Justice acknowledged ‘for the purpose of the interpretation of the exceptions under the first and third indents of Article 4(2) of Regulation [(EC)] No 1049/2001, [...] the existence of a general presumption that the disclosure of the documents concerned undermines, in principle, the protection of the commercial interests of the undertakings involved in the merger and also the protection of the purpose of investigations relating to the control proceedings.’⁵

The Court of Justice stated that ‘[...] generalised access, on the basis of Regulation [(EC)] No 1049/2001, to the documents exchanged in [...] a [merger] procedure between the Commission and the notifying parties or third parties would [...] jeopardise the balance which the European Union legislature sought to ensure in the merger regulation between the obligation on the undertakings concerned to send the Commission possibly sensitive commercial information to enable it to assess the compatibility of the proposed transaction with the common market, on the one hand, and the guarantee of increased protection, by virtue of the requirement of professional secrecy and business secrecy, for the information so provided to the Commission, on the other’.⁶

Furthermore, the Court of Justice clarified that the general presumption against public disclosure of documents related to a merger investigation applies: ‘irrespective of whether the request for access concerns a control procedure which is already closed or a pending procedure. The publication of sensitive information concerning the economic activities of the undertakings involved is likely to harm their commercial interests, regardless of whether a control procedure is pending. Furthermore, the prospect of such publication after a control procedure is closed runs the risk of adversely affecting the willingness of undertakings to cooperate when such a procedure is pending’.⁷

In accordance with Article 4(7) of Regulation (EC) No 1049/2001, this general presumption may apply for up to 30 years and possibly beyond.⁸

⁴ Judgment of 28 June 2012, *European Commission v Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 56.

⁵ *Ibid*, paragraph 64. See also judgment of 28 June 2012, *European Commission v Éditions Odile Jacob SAS*, C-404/10 P, EU:C:2012:393, paragraph 118.

⁶ See judgment in *European Commission v Éditions Odile Jacob SAS*, *op.cit.*, paragraph 121.

⁷ *Ibid*, paragraph 124.

⁸ Judgment in *European Commission v Agrofert Holding*, *op.cit.*, paragraph 67.

In this instance, the documents to which you request access concern Merger Case COMP/M.8870 – E.ON/Innogy regarding E.ON’s proposed acquisition of Innogy.

The European Commission decided to initiate proceedings in the case in question on 7 March 2019 after finding that the notified concentration raised serious doubts as to its compatibility with the internal market.⁹

On 17 September 2019, the European Commission concluded that the transaction, as modified by the commitments offered by E.ON would no longer raise competition concerns. The institution therefore approved, under the EU Merger Regulation, the acquisition by E.ON of Innogy’s distribution and consumer solutions business as well as certain of its electricity generation assets, subject to E.ON’s full compliance with its commitments package.

Against this background, I conclude that notwithstanding the approval of the merger in question, the requested documents remain protected by a general presumption against public disclosure resulting from Article 4(2), first and third indents of Regulation (EC) No 1049/2001, as construed per settled case law of the Court of Justice.

The European Commission remains indeed bound by the provisions for professional secrecy under Article 339 of the Treaty on the Functioning of the European Union¹⁰ and Article 17(2) of the Merger Regulation.¹¹

2.2. Protection of the decision-making process

Article 4(3), first subparagraph of Regulation (EC) No 1049/2001 provides that ‘access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not yet been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.’

The Court of Justice held that ‘[i]n a situation [...] where the institution concerned could [...] be called upon to recommence its investigation activities with a view to the eventual adoption of a new decision on the merger in question, it is appropriate to accept that there is a general presumption that the obligation which is placed on that institution to disclose [documents pertaining to the related file] would seriously undermine the institution’s decision-making process’.¹²

⁹ Official Journal C 102 of 18 March 2019, p.2.

¹⁰ According to this provision, ‘[t]he members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.

¹¹ This provision states that ‘[...] the [European] Commission and the competent authorities of the Member States, their officials and other servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information they have acquired through the application of [the Merger] Regulation of the kind covered by the obligation of professional secrecy.

¹² See judgment in *European Commission v Éditions Odile Jacob SAS*, *op.cit.*, paragraph 130.

In this instance, the merger investigation regarding Case COMP/M.8870 – E.ON/Innogy cannot be considered as finalised, because the decision adopted by the European Commission is conditional upon the full compliance of E.ON with the following commitments:

- To divest most of E.ON's customers supplied with heating electricity in Germany;
- To discontinue the operation of 34 electric charging stations located on German motorways. These stations will be operated by a new third party supplier in the future;
- To divest E.ON's business in the retail supply of electricity to unregulated customers in Hungary, including the necessary assets and staff;
- To divest Innogy's entire business in the retail supply of electricity and gas in Czechia, including all assets and staff.¹³

Thus, as long as the decision in question is subject to the monitoring of the above-mentioned commitments, the European Commission could be prompted to reconsider its decision and reopen the case. Moreover, the decision closing the merger control proceedings to which the documents relate cannot be considered as definitive insofar as it remains subject to appeal before the General Court.

Consequently, the institution's decision making-process regarding the file at the core of your application, must be considered as still ongoing, pending the monitoring of the above mentioned commitments; and the trigger and expiry of the time-limit to appeal it.

Therefore, I conclude that the disclosure of the requested documents would seriously undermine the decision-making process with regard to Case COMP/M.8870 – E.ON/Innogy, within the meaning of Article 4(3), first subparagraph of Regulation (EC) No 1049/2001, as construed per the above-mentioned case law.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) and (3) of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application, you allege the existence of such an overriding public interest. First, you argue that the merger in question 'is likely to be the biggest transaction in the energy sector across Europe in this decade' and that it 'will have an immense negative impact on millions of consumers, the prices for gas and electricity in the relevant markets, and the competitors to New E.ON as well as RWE',¹⁴.

¹³ See the related press release : https://europa.eu/rapid/press-release_IP-19-5582_en.htm.

¹⁴ See pages 3 and 4 of the confirmatory application.

You also stress that ‘[g]iven both the volume and the impact of the transaction, millions of private and business customers across Europe in general and Germany in specific will heavily be affected by the consequences of the merger. This applies not only for customers of the parties to the merger but for customers of competitors as well, because their ability to operate under fair and competitive conditions directly impacts the tariffs and services the competitors can offer their customers’.¹⁵

However, the more customers are affected by a transaction, the more it is actually important to safeguard the underlying investigation, as the latter aims at protecting customers and will ultimately benefit them. Moreover, the commitments package offered by E.ON is specifically designed to ensure that the merger will not lead to less choice and higher prices in the countries where E.ON and Innogy/RWE operate.¹⁶

Secondly, you argue that your clients ‘expressly reserve their right to challenge the merger and the decision to be made by the Commission in these proceedings’ and ‘[t]hey will only have access to effective judicial protection, though, if they are able to effectively examine the Commission’s decision.’

According to you ‘[t]his will only be ensured if [y]our Clients have access to the information on which the Commission based its decision’.

In this respect, I would like first to note that, in addition to the detailed press release already published, the European Commission, as per its usual practice, will publish a non-confidential version of its decision. This version of the decision will provide in detail the underlying justification of the European Commission’s clearance of E.ON’s acquisition of Innogy, subject to conditions.

The time limit to apply for judicial review of the European Commission’s decision will only start to run as from the publication of the said non-confidential version.

Contrary to your claim, access to the requested documents is therefore not necessary for your Clients’ effective judicial protection.

In any case, the Court of Justice expressly stated that ‘[...] an interest represented by damage suffered by a private undertaking in the context of a concentration does not constitute an overriding public interest within the meaning of [...] Regulation No 1049/2001’. The Court of Justice further noted that ‘[t]he interest claimed [...] which consists of facilitating the exercise of [the] rights of defence [of an undertaking] in the context of [an] action against a [decision concerning a merger], constitutes a “private” interest’. Pursuant to settled case law, private interests cannot indeed, in principle, be taken into consideration for the purpose of assessing the existence of an overriding public interest.¹⁷

¹⁵ *Ibid.*, pages 5 and 6 of the confirmatory application.

¹⁶ See the related press release, *op.cit.*

¹⁷ See *inter alia*, judgment of 20 March 2014, *Reagens SpA v European Commission*, T- 181/10, EU:T:2014:139, paragraph 144.

Therefore, I conclude that in your confirmatory application, you do not put forward any justification establishing an overriding public interest in disclosing the documents requested within the meaning of Article 4(2) and (3) of Regulation (EC) No 1049/2001, as construed per settled case law.

Nor have I been able to identify any overriding public interest that would outweigh the public interest in safeguarding the protection of the purpose of investigations, commercial interests and the decision-making process protected under Article 4(2) and (3) of Regulation (EC) No 1049/2001.

The fact that the investigations to which the documents relate are of an administrative nature and do not relate to any legislative acts, for which the Court of Justice has acknowledged the existence of wider openness¹⁸, provides further support to the conclusion that there is no overriding public interest in this case.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the documents requested.

As per settled case law, where the document requested is covered by a general presumption of non-disclosure, such document does not fall within an obligation of disclosure, in full, or in part.¹⁹

Therefore, I conclude in this instance that the documents requested are, at this stage, manifestly and entirely covered by the invoked exceptions to the right of public access, for the reasons explained above.

This conclusion is further supported by the fact that, as mentioned above, the European Commission will publish, as per its usual practice, a non-confidential version of its decision in compliance with Article 20 of the Merger Regulation, having regards to the legitimate interests of undertakings in the protection of their business secrets and other confidential information.

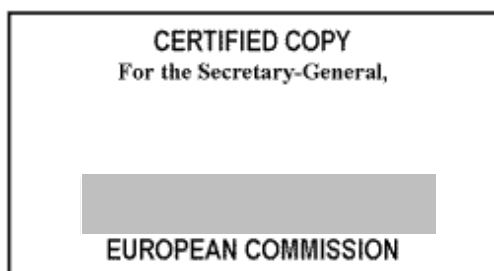
¹⁸ Judgment of 29 June 2010, *European Commission v Technische Glaswerke Ilmenau GmbH*, C-139/07 P, EU:C:2010:376, paragraphs 53-55 and 60; judgment of 29 June 2010, *European Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraphs 56-57 and 63.

¹⁹ Judgment of 28 June 2012, *European Commission v Éditions Odile Jacob*, *op.cit.*, paragraph 133.

5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



For the Commission

