



EUROPEAN COMMISSION
Competition DG

The Director General

Brussels, 23 -01- 2014***D/2014/006406**
COMP/G-3/THK/mvk

Mr Miguel Ongil

Only by e-mail:
ask+request-1065-
81d2cdb2@askthecu.org

Subject: GESTDEM 2013/6124 – Your request of 5/12/2013 for access to documents pursuant to Regulation (EC) No. 1049/2001 relating to the Commission decisions of 4/12/2013 imposing a fine of € 1.71 billion for cartels in the interest rate derivatives industry

Dear Mr Ongil,

I refer to your email of 5 December 2013 by which you request pursuant to Regulation (EC) No. 1049/2001¹ ("Regulation 1049/2001") access to the *"actual legal document approved by the college of European Commissioners on December 4th where the Commission fines banks € 1.71 billion for participating in cartels in the interest rate derivatives industry."*

1. DOCUMENTS CONCERNED

You confirmed in your email of 20 December 2013 that your request concerns *"a copy or copies of the actual legal document(s) approved by the college of European Commissioners on December 4th whereby the Commission took the formal decision to fine banks € 1.71 billion for participating in cartels in the interest rate derivatives industry."* Hence, you request access to the Commission's decisions of 4 December 2013 concerning case AT 39.861 (Yen Interest Rate Derivatives) and case AT 39.914 (Euro Interest Rate Derivatives). You point out in your email of 20 December 2013 that you do not request access to a non-confidential version of those decisions, but *"rather the original documents adopted by the Commission."* You take the view that *"it is not acceptable for the Commission to provide parallel versions of documents for the public while denying access to the original documents"* and that *"there is a strong (...) public interest in having access to the full information in order to understand (...) how the EU has evaluated the illegal behavior in order to arrive at the sanction which has been imposed."*

Having carefully examined your request in the light of Regulation 1049/2001, I have come to the conclusion that the documents to which you have requested access fall under the

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

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 obligations under European Union law. For the effective conduct of pending investigations it is of utmost importance that the Commission's investigative strategy, preliminary, intermediary or partial assessments of the case and planning of procedural steps remain confidential.

The press release IP 13/1208 of 4 December 2013, to which you referred in your request, noted for case AT 39.861 (Yen Interest Rate Derivatives) that in "*the context of the same investigation, the Commission has also opened proceedings against the cash broker ICAP*" and that the "*investigation continues under the standard (non-settlement) cartel procedure.*" The press release noted for case AT 39.914 (Euro Interest Rate Derivatives) that in "*the context of the same investigation, proceedings were opened against Crédit Agricole, HSBC and JPMorgan*" and that "*the investigation will continue under the standard (non-settlement) cartel procedure.*" Hence, already the press release set out that the antitrust proceedings continue against further (non-settling) undertakings and that the antitrust investigations were not completed with the imposition of fines of € 1.71 billion. Furthermore, I note in this context that even the two settlement decisions, to which you request access, might still be appealed by the settling parties. Therefore, it has to be concluded that Article 4(2), third indent of Regulation 1049/2000 applies to your request for access to documents. The Commission must therefore refuse access at this stage to the Commission's decisions of 4 December 2013 as disclosure of those documents would seriously undermine the protection of the purpose of its pending antitrust investigations for AT 39.861 (Yen Interest Rate Derivatives) and case AT 39.914 (Euro Interest Rate Derivatives).

Moreover, the requested documents relate not only to a pending antitrust investigation where the final decision has not yet been taken with regard to the non-settling banks, but contain also a partial and preliminary assessment of the facts and other information from which the direction of the further investigation against the non-settling parties, the future procedural steps which the Commission may take against non-settling parties 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 for those (non-settling) undertakings, against which the antitrust investigations are still on-going. Such misinterpretations and misrepresentations may cause damage to the reputation and standing of

the undertakings investigated, in particular if no decision establishing a violation of competition rules has yet been adopted against them. The disclosure of the requested documents as well as any other document of the file would also seriously undermine the Commission's decision making process against those undertakings which were not yet addressees of the two settlement decisions.

As the General Court has ruled in case Case T-380/08 (Bitumen), certain sections of the final decisions may be covered by the exceptions from public access and also an investigation of the Commission cannot be considered as closed if there might be circumstances which might prompt the Commission to reopen the case. This argument is even stronger in the case at hand where the investigation is still open and the Commission has not yet taken a decision against the non-settling parties.

In view of the foregoing, all requested documents are manifestly covered in their entirety by the exceptions related to the protection of the purpose of the Commission's anti-trust investigations set out in Article 4(2), third indent and the protection of the institution'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 you explicitly confirmed in your email of 20 December 2013, are the confidential versions of the decisions of 4 December 2013 concerning case AT 39.861 (Yen Interest Rate Derivatives) and case AT 39.914 (Euro Interest Rate Derivatives), which have not been disclosed to the public 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. 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.

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 email of 20 December 2013 you referred only to the general interest of the public in understanding the Commission's assessment of the two cases and of the sanctions it imposed. You do, however, not set out why this general public interest can only be met by the disclosure of the two confidential decisions and not by the (later) publication of non-confidential versions of the two decisions from which (only) the relevant business secrets have been redacted. Hence, 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 effectiveness of the Commission's investigations, its decision-making process and 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. Partial access to the decisions requested can, however, not be given at this stage, because the confidentiality of the pending proceedings must be preserved until the completion of the entire investigation. As already indicated in the email of 19 December 2013, DG Competition will publish in due course a public version of the decisions you requested.

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 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
The Secretary-General
Transparency Unit
BERL 5/327B-1049 BRUSSELS
or by email to: sg-acc-doc@ec.europa.eu

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Alexander Italianer', with a long horizontal stroke extending to the left.

Alexander Italianer