



EUROPEAN COMMISSION

Competition DG

The Director General

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COMP/C1-C4-C5-C6

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By e-mail and registered mail

Subject: EASE 2022/5618 – Your request of 30 September 2022 for access to documents pursuant to Regulation (EC) No. 1049/2001

Dear Sir,

Thank you for your message of 30 September 2022, registered on 3 October 2022 under EASE number 2022/5618, concerning meetings held in September 2022 between different companies and several cabinet members, in which you request access to documents in the Commission's possession in accordance with Regulation (EC) No. 1049/2001¹ ("Regulation 1049/2001").

1. DOCUMENTS CONCERNED

In your message you request access to the following documents:

All minutes, agendas, summaries, notes or memos issued before or after; documents prepared for, issued in preparation for, or exchanged during; as well as all correspondence including attachments by either of the meeting parties related to

- the 07.09.2022 meeting between Alejandro Cainzos and the Atlantic Council
- the 07.09.2022 meeting between Michele Piergiovanni and Spotify
- the 07.09.2022 meeting between Penelope Papandropoulos and the European Competitive Telecommunications Association
- the 08.09.2022 meeting between Alejandro Cainzos and ACT (The App Association)
- the 08.09.2022 meeting between Werner Stengg and the IT-Political Association of Denmark

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

- the 09.09.2022 meeting between Alejandro Cainzos and OVH Gruppe
- the 14.09.2022 meeting between Werner Stengg and Oracle
- the 16.09.2022 meeting between Werner Stengg, Penelope Papandropoulos and Amazon
- the 19.09.2022 meeting between Michele Piergiovanni and Spotify.

Please note that this reply only concerns the meetings with Penelope Papandropoulos and Michele Piergiovanni. You will receive a reply concerning the other meetings from the Commission's Secretariat-General.

The documents you request access to related to the meeting with Spotify, to the extent that such documents exist, contain discussions on Spotify's business operations and customer relationships, in view of the entry into force of the new Digital Markets Act ("the DMA"), as well as case related correspondence. There was, however, only one meeting with Spotify on 7 September 2022 and there was no meeting on 19 September 2022.

The documents you request access to related to the meeting with the European Competitive Telecommunications Association (ECTA) consist of two preparatory briefings and an internal report of the meeting. You will receive a separate reply in respect of the second briefing, which was prepared by DG CNECT. The present reply concerns only the DG COMP briefing and the internal report.

Having carefully examined your request and the relevant documents 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. As a result, access to the documents related to the meeting with Spotify has to be refused.

Regarding the ECTA meeting, access to the preparatory briefing can only be provided partially, after the redaction of information relating to a matter on which the Commission has not yet decided and of confidential business secrets, as well as of personal data. Without prejudice to how it is to be qualified under Regulation 1049/2001, the internal report of the meeting is being provided after the redaction of personal data based on the agreement of ECTA that nothing therein is to be considered for their part as falling under the exceptions of the Regulation.

Please find below the detailed assessment as regards the application of the exceptions of Article 4 of Regulation 1049/2001.

2. APPLICABLE EXCEPTIONS

2.1. To the documents related to the meeting with Spotify

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 specified above, relate to the enforcement of the DMA and are commercially sensitive because they consist exclusively of information on an undertaking's business operations, including its commercial strategy, business model, product designs and customer relationships. Such information is not within the public domain and is known only to a limited number of persons. Furthermore, the General Court's judgment in *Mastercard v Commission*², confirms that "*an undertaking's working methods and business relationships may be revealed as a result of the disclosure of the documents requested, thereby undermining its commercial interests, **in particular when the documents contain information particular to that undertaking which reveal its expertise.***" (emphasis added).

As such, the documents requested contain commercial and market-sensitive information regarding the activities of the undertaking concerned, whose public disclosure could seriously undermine and bring harm to the company's 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.

Article 4(3) protection of the institution's decision making process

Pursuant to Article 4(3), access to the documents drawn up 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.

In order to enforce the DMA, the Commission has an interest in better understanding the business models, products, services and customer relationships of companies active in the digital sector, which are central to the application of the regulation. Such information, similar to that gathered during merger pre-notification discussions ensures a more efficient administrative procedure once the DMA is in force.

The disclosure of undertakings' information provided in this specific context, thus risks seriously undermining the decision-making process of the Commission. As set out in *Client Earth v Commission*,³ disclosure is capable of undermining the Commission's decision-making process through the external influences or pressures that the Commission may be subjected to, if it risks "*impeding that institution's capacity to act in a fully independent manner and exclusively in the general interest or seriously to affect, prolong or complicate the proper conduct of that institution's internal discussions and decision-making process.*"

² See Case T-516/11 *Mastercard v Commission*, ECLI:EU:T:2014:759, paragraph 85.

³ See case C 57/16 P, *Client Earth v Commission*, ECLI:EU:C:2018:660, paragraph 108.

In particular, and as explained above, the information concerned is commercially sensitive, only known to a limited number of persons, and disclosure seriously risks undermining the commercial interests of the undertaking concerned. Disclosure would inevitably discourage companies from providing this information in an open and detailed manner, which risks seriously affecting, prolonging and complicating the ability of the Commission to take into account such information for the upcoming enforcement of the DMA.

In view of the foregoing, the requested documents are covered in their entirety by the exception related to the protection of the Commission's decision-making process, set out in Article 4(3) of Regulation 1049/2001.

2.2. To the documents related to the meeting with European Competitive Telecommunications Association

Article 4(1)(b) protection of personal data

With regard to both documents regarding this meeting and covered by this reply, a complete disclosure thereof is prevented by the exception concerning the protection of privacy and the integrity of the individual outlined in Article 4(1)(b) of Regulation (EC) No 1049/2001, because they contain personal data such as the following:

- the names/initials and contact information of Commission staff members not pertaining to the senior management;
- the names/initials and contact details of other natural persons;
- other information relating to an identified or identifiable natural person such as their job titles.

Article 9(1)(b) of the Data Protection Regulation does not allow the transmission of these personal data, except if you prove that it is necessary to have the data transmitted to you for a specific purpose in the public interest and where there is no reason to assume that the legitimate interests of the data subject might be prejudiced. In your request, you do not express any particular interest to have access to these personal data nor do you put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data contained in the requested documents, 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.

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 briefing requested by you as specified above, relates to discussions concerning and the enforcement of EU regulations and other rules applicable to the telecommunications industry and the EU Merger Regulation and is commercially sensitive because it contains information on the business operations of undertakings, including their commercial strategy, business model, product designs and customer relationships. Such information is not within the public domain and is known only to a limited number of persons. Furthermore, the General Court's judgment in *Mastercard v Commission*⁴, confirms that *"an undertaking's working methods and business relationships may be revealed as a result of the disclosure of the documents requested, thereby undermining its commercial interests, in particular when the documents contain information particular to that undertaking which reveal its expertise."* (emphasis added).

As such, the document requested contains commercial and market-sensitive information regarding the activities of the undertaking concerned, whose public disclosure could seriously undermine and bring harm to the company's commercial interests.

In view of the foregoing, parts of the requested briefing are covered by the exception set out in Article 4(2), first indent of Regulation 1049/2001 and have accordingly been redacted.

Whilst similar arguments might cover also the internal report of the meeting, this note is being provided following confirmation by ECTA that it does not consider that it contains such information.

Article 4(3) protection of the institution's decision making process

Pursuant to Article 4(3), access to the documents drawn up 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.

The disclosure of undertakings' information provided in this specific context risks seriously undermining the decision-making process of the Commission. As set out in *Client Earth v Commission*,⁵ disclosure is capable of undermining the Commission's decision-making process through the external influences or pressures that the Commission may be subjected to, if it risks *"impeding that institution's capacity to act in a fully independent manner and exclusively in the general interest or seriously to affect, prolong or complicate the proper conduct of that institution's internal discussions and decision-making process."*

In particular, and as explained above, the information concerned in parts of the briefing is commercially sensitive, only known to a limited number of persons, and disclosure seriously risks undermining the commercial interests of the undertakings concerned.

⁴ See Case T-516/11 *Mastercard v Commission*, ECLI:EU:T:2014:759, paragraph 85.

⁵ See case C 57/16 P, *Client Earth v Commission*, ECLI:EU:C:2018:660, paragraph 108.

Disclosure would inevitably discourage companies from providing this information in an open and detailed manner, which risks seriously affecting, prolonging and complicating the ability of the Commission to take into account such information for its policy-making and enforcement activities. In addition, such information represents only the Commission's own understanding of the position of the undertakings concerned and has not been verified with the latter.

In addition, full disclosure would seriously undermine the decision-making freedom of the Commission, which adopts its decisions on the basis of the principle of collegiality, by disclosing information pertaining to views and recommendations addressed to one member of the Commission⁶.

In view of the foregoing, parts of the briefing have been redacted based on the exception related to the protection of the Commission's decision-making process, set out in Article 4(3) of Regulation 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

As regards the documents concerning the meeting with Spotify it should be noted that, 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 documents 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 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 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 the effectiveness of the Commission's decision-making process.

4. PARTIAL ACCESS

I have also considered the possibility of granting partial access to the documents concerning the meeting with Spotify for which access has been denied in accordance with Article 4 (6) of Regulation 1049/2001. However, as explained the documents consist wholly of commercially sensitive information capable of seriously undermining the commercial interests of the undertaking concerned. As such, the reasoning invoked above which prevents full disclosure of the documents, also applies to partial disclosure for all the documents concerned and, consequently, no partial access can be granted.

⁶ See Case T-403/05, *MyTravel v Commission*, ECLI:EU:T:2008:316, paragraph 51.

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
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,

[e-signed]
Olivier GUERSENT