



EUROPEAN COMMISSION

Competition DG

The Director General

Brussels, 13 March 2023

COMP/J3/EGC

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**Subject: EASE 2023/0692 – Your request of 30 January 2023 for access to documents pursuant to Regulation (EC) No. 1049/2001**

Dear Sir,

Thank you for your message of 30 January 2023, registered on 1 February 2023 under the above-mentioned reference number, in which you request access to documents concerning a number of meetings between the Commission and third parties in accordance with Regulation (EC) No. 1049/2001<sup>1</sup> ("Regulation 1049/2001").

#### **1. DOCUMENTS CONCERNED**

In your message, you request access to 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 several meetings.

Please note that the present letter addresses your request to access to documents related to:

1. The meeting between representatives from EU Travel Tech and Executive Vice President Vestager's cabinet member Penelope Papandropoulos of 17 January 2023 and
2. The meeting between Latham & Watkins LLP and Executive Vice President Vestager's cabinet members Michele Piergiovanni, Penelope Papandropoulos, Stina Soewarta and Pierre-Arnaud Proux of 11 January 2023.

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

Please note that due to the wide scope of your request, covering also areas falling under the responsibility of the Secretariat-General of the Commission, part of your request (that relating to the other meetings not listed above) has been attributed to the Secretariat-General (EASE No 2023/0712). This reply relates only to the documents held by the Directorate-General for Competition. You will receive the reply from the Secretariat-General in due course.

The documents identified under point 1 concern the minutes of a meeting with EU Travel Tech on the Regulation on Multimodal Digital Mobility Services (“MDMS”), the request for the meeting, the positive reply and internal communication for the meeting.

The documents identified under point 2 concern the minutes of a meeting with a lawfirm representing a client on the enforcement of the Digital Markets Act (“DMA”), the request for the meeting, the positive reply and internal communication for the meeting.

As regards the documents identified under point 1 above, there are two documents, namely the exchange of emails to set up the meeting and a letter received from EU Travel Tech, which can both be disclosed. In the case of the exchange of emails, however, a complete disclosure 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.

Please note that the documents originating from EU Travel Tech are disclosed to you based on Regulation (EC) No 1049/2001. However, this disclosure is without prejudice to the rules on intellectual property, which may limit your right to reproduce or exploit the released documents without the agreement of the originator, who may hold an intellectual property right on them. The European Commission does not assume any responsibility from their reuse.

As regards the rest of the documents identified under point 1, as well as all those identified under point 2 above, I have come to the conclusion that they 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), first indent, protection of commercial interests*

*Article 4(2), third indent, protection of the purpose of investigations*

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.

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.

In its judgment in Case C-404/10 P *Commission v Odile Jacob*<sup>2</sup>, the Court of Justice held that for the purposes of interpretation of the exceptions in Article 4(2), first and third indent of Regulation 1049/2001, there is a general presumption that disclosure of

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<sup>2</sup> Case C-404/10 P, *Commission v Odile Jacob*, ECLI:EU:C:2012:393.

documents exchanged between the Commission and notifying and other (third) parties in merger procedures in principle undermines the protection of the commercial interests of the undertakings involved and also the protection of the purpose of investigations related to the merger control proceedings.

The Court ruled that, by analogy to the case law in cases *TGI*<sup>3</sup>, *Bavarian Lager*<sup>4</sup> and *API*<sup>5</sup>, Regulation 1049/2001 has to be interpreted and applied in a manner which is compatible and coherent with other specific rules on access to information. The Court referred in particular to the Merger Regulation and emphasised that it not only governs a specific area of European Union law, but is also designed to ensure respect for professional secrecy and is, moreover, of the same hierarchical order as Regulation 1049/2001 (so that neither of the two set of rules prevails over the other). The Court stated that, if documents in the merger case-files were to be disclosed under Regulation 1049/2001 to persons other than those authorised to have access according to the merger control legislation, the scheme instituted by that legislation would be undermined. In that regard, the Court ruled that this presumption applies regardless of whether the request for access concerns merger control proceedings which have already been closed or proceedings which are pending.

Based on the same reasoning, the Court recognized in *Agrofert*<sup>6</sup> that general presumptions of non-disclosure are applicable 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. The disclosure of such documents would undermine the procedural rules system set up by the Merger Regulation, and in particular the rules on professional secrecy 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 773/2004<sup>7</sup>.

As ruled by the Court of Justice in the *Agrofert* case<sup>8</sup> for merger proceedings, and by the General Court in the *Bitumen* case<sup>9</sup> for antitrust proceedings, if a document is not accessible under the "access to file procedure", it cannot be made available to the public under Regulation 1049/2001. In essence, Regulations 1/2003 and 773/2004 and Regulation 1049/2001 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

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<sup>3</sup> Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau*, ECLI:EU:C:2010:376.

<sup>4</sup> Case C-28/08 P, *Commission v Bavarian Lager*, ECLI:EU:C:2010:378.

<sup>5</sup> Cases C-514/07 P, C-528/07 P and C-532/07 P, *Sweden and Others v API and Commission*, ECLI:EU:C:2010:541.

<sup>6</sup> Case C-477/10 P, *Commission v Agrofert Holding*, ECLI:EU:C:2012:394, paragraph 59.

<sup>7</sup> Case C-365/12 P, *Commission v EnBW Energie Baden-Württemberg*, ECLI:EU:C:2014:112, paragraph 88.

<sup>8</sup> *Agrofert*, paragraphs 61-63.

<sup>9</sup> Case T-380/08, *Netherlands v Commission*, ECLI:EU:T:2013:480, paragraphs 32-40

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).

Furthermore, in the recent *Mika* case, the General Court recalled that, as interested parties other than those directly concerned in State aid control procedures (the Member States) do not have the right to consult the documents in the Commission's administrative file, there is a general presumption that disclosure of documents in the administrative file undermines, in principle, the protection of the purpose of investigation activities, and also held that this presumption applies regardless of whether the request for access concerns a control procedure which has already been closed or one which is pending<sup>10</sup>.

The same reasoning used in the previously mentioned case law to establish a general presumption of non-disclosure for documents belonging to merger, antitrust and state aid case files is fully applicable to the disclosure of documents exchanged between the Commission and notifying and other (third) parties in the enforcement of the DMA and preparation of enforcement, given that this Regulation contains very similar provisions as regards both the obligation of professional secrecy and the access to file procedure<sup>11</sup>. If documents in the DMA case files were to be disclosed under Regulation 1049/2001 to persons other than those authorised to have access to them according to the DMA, the procedural scheme instituted by the latter would be undermined.

Consequently, and by analogy to what has been repeatedly recognized by the case-law in the context of merger, antitrust and state aid investigations, there is a general presumption that disclosure of documents in DMA case files in principle undermines the protection of the commercial interests of the undertakings involved and also the protection of the purpose of investigations related to the DMA proceedings, and this presumption applies regardless of whether the request for access concerns DMA proceedings which have already been closed or proceedings which are pending.

Natural and legal persons submitting information in the context of the DMA have a legitimate expectation that – apart from the publication of the non-confidential summaries provided for in Articles 8(6) and 18 (5) and (6) of the DMA and of the non-confidential versions of final decisions pursuant to Article 44 of the DMA – the information they supply to the Commission on an obligatory or voluntary basis under the DMA will not be publicly disclosed.

The documents requested by you under point 2, as specified above, are part of the file in a DMA 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 undertakings' commercial interests.

Undertakings have a legitimate interest that the information is used only for the purposes of the Commission proceedings in application of the DMA. It is for this reason that Article 36(1) of the DMA provides that information collected pursuant to this Regulation

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<sup>10</sup> Case T-214/21, *Mika v Commission*, ECLI:EU:T:2022:607, paragraphs 44 and 55.

<sup>11</sup> See, in this regard, Articles 34(4) and 36 of the DMA.

is used only for the purposes of this Regulation, namely the administrative proceedings carried out under its provisions.

Also, pursuant to Article 36(4) of the DMA, information covered by professional secrecy submitted to the Commission in the context of this Regulation cannot be disclosed to the public.

These exceptions aim at protecting the Commission's capacity to ensure that 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 assessments of the case and planning of procedural steps remain confidential.

Careful respect by the Commission of its obligations regarding professional secrecy creates a climate of mutual confidence between the Commission and undertakings, under which the latter cooperate by providing the Commission with the information necessary for its investigations.

In these circumstances, disclosure despite the protection provided for by the DMA, would lead to a situation where undertakings subject to investigations and potential informants and complainants would lose their trust in the Commission's reliability and in the sound administration of DMA files. These parties would then become reluctant to cooperate with the Commission and would reduce their cooperation to a minimum. This, in turn, would jeopardise the Commission's authority and lead to a situation where the Commission would be unable to properly carry out its task of enforcing the DMA. Consequently, the effective enforcement of the DMA would be undermined.

It thus follows that the requested documents are covered by a general presumption of non-disclosure of documents in DMA case-files.

In view of the foregoing the requested documents under point 2 above are covered by the exception set out in Article 4(2), first indent and third 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 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 relation to the documents under point 1, the requested documents have been gathered by the Commission in the context of the ongoing MDMS legislative process. Since the proposal for a regulation has not been yet adopted, public disclosure of any of the requested documents (except the letter and exchange of emails to which access is hereby granted) would expose the Commission and its services to undue external pressure, hence reducing its independence and its margin of manoeuvre. This would clearly seriously undermine the Commission's decision-making process.

In view of the foregoing these documents are covered by the exception set out in Article 4(3) of Regulation 1049/2001.

#### *Article 4(3) protection of privacy and the integrity of the individual*

With regard to the exchange of emails to set up the meeting under point 1 above, a complete disclosure of this document 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 it contains the following personal data:

- the names and contact information of Commission staff members not pertaining to the senior management;
- the names and contact details of other natural persons.

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 document, 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.

### **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 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 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 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.

As regards the documents under point 2, the general presumption of non-disclosure invoked above also applies to partial disclosure for all the documents concerned and, consequently, no partial access can be granted.

As regards the documents under point 1 to which access has been denied, after careful examination I have come to the conclusion that only fragmented parts, the reading of which would be meaningless, would not be covered by the applicable exception. Therefore, no partial access can be granted to these documents.

## 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](mailto:sg-acc-doc@ec.europa.eu).

Yours faithfully,

*[e-signed]*  
Olivier GUERSENT