Mr Alexander Fanta

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 – EASE 2023/5771

Dear Mr Fanta,

I refer to your e-mail of 27 October 2023, registered on the same day, in which you submitted a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereafter ‘Regulation (EC) No 1049/2001’), requesting a review of the initial reply to your application EASE 2023/5771.

Please accept our apologies for the delay in providing you with a reply to your confirmatory request.

1. **Scope of Your Request**

In your initial application of 3 October 2023, you requested access to the following documents, I quote:

‘All documents on recent interactions with Meta regarding a plan by the company to introduce a "subscription no ads" plan, as reported on October 3, 2023 by the Wall Street Journal ([https://urldefense.com/v3/__https://www.wsj.com/tech/meta-floats-charging-14-a-month-for-ad-free-instagram-or-facebook-5dbaf4d5__;!!DOxrgLBm!ByfWkucAsVbDq1-gC3ELO5o-8XzhrPnObAux8rO_Ot_YHL_mzIOqfwcgdlILRjGYctovqLRGgAwbXGHbULIfpsguO7v5dBMZCyd$](https://urldefense.com/v3/__https://www.wsj.com/tech/meta-floats-charging-14-a-month-for-ad-free-instagram-or-facebook-5dbaf4d5__;!!DOxrgLBm!ByfWkucAsVbDq1-gC3ELO5o-8XzhrPnObAux8rO_Ot_YHL_mzIOqfwcgdlILRjGYctovqLRGgAwbXGHbULIfpsguO7v5dBMZCyd$)). This request is meant to include meeting minutes, e-mails and any other document related to the proposal’.

---

In its initial reply of 26 October 2023, the Directorate-General for Communications Network, Content and Technology identified 2 documents as falling under the scope of your request:

- Ares(2023)6155112 - Email exchange of 7 and 8 September 2023 between Cabinet Breton and Meta (hereinafter ‘Document 1’);
- Ares(2023)6155112 - Attachment to the email exchange of 7 and 8 September 2023 between Cabinet Breton and Meta (hereinafter ‘Document 2’).

The Directorate-General for Communications Network, Content and Technology refused access based on the exceptions of Article 4(1)(b) (Protection of privacy and integrity of individuals) and of the first subparagraph of Article 4(3) (protection of ongoing decision-making process) of Regulation (EC) No 1049/2001.

In your confirmatory application of 27 October 2023, you request a review of this position contesting the lack of grounds for applying the exception based on the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 and arguing the existence of an overriding public interest in disclosure.

Your arguments will be addressed 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 at initial stage.

Following this assessment and after considering the arguments brought forward in your confirmatory application, the Secretariat-General finds that the documents should not be protected based on the second subparagraph of Article 4(3) of Regulation (EC) No 1049/2001. However, the Secretariat-General regrets to inform you that public access to the documents requested must be still refused on the basis of the exceptions laid down in Article 4 of Regulation (EC) No 1049/2001. Namely, document 1 must be refused based on the third indent (the protection of the purpose of inspections, investigations and audits) of Article 4(2) of Regulation (EC) No 1049/2001, and document 2 must be refused based on the first indent (the protection of commercial interests of a natural or legal person, including intellectual property) and third indent (the protection of the purpose of inspections, investigations and audits) of Article 4(2) of Regulation (EC) No 1049/2001.

Detailed reasons are set out hereunder.

2.1. **Protection of the purpose of investigations and protection of commercial interests of a legal person**

In accordance with the case-law of the Court of Justice, ‘a European Union institution may take into account cumulatively more than one of the grounds for refusal set out in..."
Article 4 of Regulation [EC] No 1049/2001 when assessing a request for access to documents held by it. In the present case, the exceptions to the right of access for the protection of the public interest as regards commercial interests and the protection of the purpose of investigations, inspections and audits are closely connected.

2.1.1. Protection of the purpose of investigations, inspections and audits

The third indent of Article 4(2) 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’.

The concept of ‘investigations’ as referred to in the third indent of Article 4(2) of Regulation (EC) No 1049/2001 has been defined in the case-law of the Court of Justice of the European Union as a structured and formalised Commission procedure that has the purpose of collecting and analysing information in order to enable the institution to take a position in the framework of its functions established by the Treaties. This procedure does not necessarily have to aim for the detection or pursuit of an offence or irregularity, nor does it necessarily have to lead to a formal Commission decision. It is an autonomous concept of EU law which must be interpreted taking into account, inter alia, its usual meaning as well as the context in which it occurs.

Please note that, as recognised by the Court in Ntouvas v ECDC, the exception laid down in third indent of Article 4(2) of Regulation (EC) No 1049/2001 is not designed to protect the inspections, investigations and audit as such, but their ‘purpose’.

This exception aims at protecting the Commission’s capacity to ensure that undertakings comply with their obligations under European Union law. For the effective conduct of investigations, it is of utmost importance that the Commission’s investigative strategy, preliminary assessments of the case and planning of procedural steps remain confidential.

Document 1 is a request for a meeting sent from Meta representatives to the Members of Cabinet Breton to discuss the compliance of Meta with Article 5.2 of Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (hereinafter DMA Regulation).

---

3 Judgment of the General Court of 13 September 2013, Netherlands v Commission, T-380/08, EU:T:2013:480, paragraphs 26 and 34.
7 OJ L 265, 12.10.2022, p. 1–66
Document 2 is the annex to document 1 and contains sensitive commercial information related to Meta’s plan to be compliant with Article 5.2 of the DMA Regulation.

Both documents form part of the administrative file of a procedure governed by the DMA Regulation pursuant to Article 20 in conjunction with Article 29 thereof for breach of Article 5(2) of the DMA Regulation, namely the non-compliance investigation (DMA.100055) opened by the European Commission on 25 March 2024 against Meta.

Article 20(2) of the DMA Regulation provides that the Commission may exercise its investigative powers under this regulation before opening proceedings related to the gatekeepers’ compliance (Article 8) or non-compliance (Article 29) with DMA obligations.

The Commission has opened the proceeding against Meta to investigate whether the ‘subscription for No Ads’ (as known as ‘pay or consent’ model) for users in the EU introduced by Meta in November 2023 complies with Article 5(2) of the DMA Regulation, which requires gatekeepers to obtain consent from users when they intend to combine or cross-use their personal data across different core platform services.

The investigation is aimed at assessing whether the binary choice imposed by Meta’s ‘pay or consent’ model provides an alternative in case users do not consent, thereby not achieving the objective of preventing the accumulation of personal data by gatekeepers.

For the sake of transparency, please note that you can find the non-confidential version of the decision to open the proceeding DMA.100055 against Meta at the link in the footnote. The investigation DMA.100055 is fully ongoing and is expected to be concluded within 12 months from the opening of the investigation dated 25 March 2024.

The investigation DMA.100055, conducted in accordance with the provisions of the DMA Regulation is comparable and has strong procedural similarities with other types of Commission investigations aimed at assessing the compliance with EU law of the undertakings’ activities, such as the antitrust proceedings under Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereafter ‘TFEU’), and the proceedings applicable to mergers, set out in Regulation (EC) No 139/2004.

Article 1(1) of the DMA Regulation provides that its purpose is ‘to contribute to the proper functioning of the internal market by laying down harmonised rules ensuring for all businesses, contestable and fair markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users’. In the DMA investigations, similarly to these other types of investigations in the field of competition, any decision of the European Commission has to be based on a complex assessment of the facts collected during an investigation concerning Union or foreign undertakings.

While it is true that there are differences in the nature and conduct of the antitrust, State

9 https://digital-markets-act-cases.ec.europa.eu/cases/DMA_100055
aid, merger control and DMA procedures, the fact remains that the commercial interests of those undertakings, which are protected in all these procedures, are similar.

Against this background, it is important to note that:

- Regarding the antitrust investigations, the Court of Justice held on several occasions that the disclosure, on the basis of a request submitted pursuant to Regulation (EC) No 1049/2001, of documents from an administrative file regarding the application of Articles 101 and 102 TFEU would undermine the system of procedural rules set up in Regulations No 1/2003\(^{12}\) and 773/2004\(^{13}\), and in particular the rules on confidentiality and access to the file. The Court stated that there is, with regard to the exception related to the protection of the purpose of investigations, a general presumption that the disclosure of documents in such cases would undermine the purpose of the privileged access rules introduced by the procedural rules set out by those regulations\(^{14}\). Additionally, the General Court acknowledged that, having regard to the nature of the interests protected, this presumption applies regardless of whether an application for access to documents concerns a proceeding that has already been closed or a proceeding that is pending\(^{15}\).

- With regard to documents forming part of investigations of State aid granted by a Member State to an undertaking, the Court reasoned that their disclosure to the public on the basis of Regulation (EC) No 1049/2001 would call into question the State aid control procedure. The Court of Justice pointed out that no interested party, except for the Member State responsible for granting the aid, has a right under the procedure for reviewing State aid to consult the documents on the Commission’s administrative file\(^{16}\).

- With regard to mergers, the Court of Justice stated that ‘such general presumptions are applicable to merger control proceedings because the legislation

---


governing those procedures also lays down strict rules as regards the treatment of information obtained or established in those proceedings. The Court acknowledged 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’. The Court recognised also in the context of merger control proceedings that the general presumption of confidentiality applies irrespective of whether the request for access concerns a control procedure that is already closed or a pending procedure.

The reasoning used in the above-mentioned case-law establishing a general presumption of non-disclosure for documents belonging to antitrust, State aid and merger administrative files can also be applied to DMA investigations, given that the DMA Regulation provided for investigation procedure and contains specific provisions on access to the file and confidentiality:

1) Article 34(4) sets out the right of the ‘gatekeeper, undertaking or association of undertakings concerned’ to have access to the Commission’s file, ‘under terms of disclosure, subject to the legitimate interest of undertakings in the protection of their business secrets’. It follows that, under the DMA, third parties do not have any right of access to the documents in the Commission’s file. The Commission Implementing Regulation (EU) 2023/814 sets out more details about the right of access to the file conferred to the undertakings concerned.

2) Article 36 sets out an obligation to observe the professional secrecy and sets out in paragraph 1 that ‘(…) the information collected pursuant to this Regulation shall be used for the purposes of this Regulation’. Paragraph 4 further provides that ‘(…) the Commission, the competent authorities of the Member States, their officials, servants and other persons working under the supervision of those

authorities and any natural or legal person, including auditors and experts appointed pursuant to Article 26(2), shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy’. The natural and legal persons submitting information under the DMA Regulation have a legitimate right to expect that the information they supply to the Commission on an obligatory or voluntary basis will not be disclosed to the public. 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.

Applying by analogy the above-mentioned reasoning followed by the Court in antitrust proceedings, State aid investigations and proceedings applicable to mergers, the Secretariat-General notes that the DMA Regulation and Regulation (EC) No 1049/2001 have different aims and do not contain any provision expressly giving one regulation primacy over the other. Therefore, it is necessary for the Commission to make sure that each of these regulations is applied in a manner that is compatible with the other and that enables a coherent application of them.

As mentioned above, both documents are part of an administrative file of an ongoing investigation governed by the DMA Regulation and relevant for its implementation and enforcement. Therefore, the right of access is also governed by the restrictive rules for the use of documents in such DMA procedure, referred to above. These considerations must be taken into account in interpreting the third indent of Article 4(2) of Regulation No 1049/2001 with regard to documents forming part of an investigation file under DMA. If persons other than those with a right of access under the DMA Regulation, or those who enjoy such a right in principle but have not used it or have been refused access, were able to obtain access to documents on the basis of Regulation (EC) No 1049/2001, the access system introduced by the DMA Regulation would be undermined.

As a result, the Secretariat-General concludes that documents 1 and 2 must be withheld in order to protect the purpose of an ongoing investigation pursuant to Article 20 in conjunction with Article 29 thereof for breach of Article 5(2) of the DMA Regulation and their disclosure must be refused based on third indent of Article 4(2) of Regulation (EC) No 1049/2001.

2.1.2. Protection of commercial interests of a legal person

The first indent of Article 4(2) 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), first indent of Regulation (EC) No 1049/2001 must be interpreted consistently with Article 339 of the Treaty on the Functioning of the European Union (hereafter ‘TFEU’), which requires staff members of the EU institutions to refrain from
disclosing information of the kind covered by the obligation of professional secrecy, in particular information about undertakings and their business relations. Applying Regulation (EC) No 1049/2001 cannot have the effect of rendering ineffective Article 339 TFEU, over which it does not have precedence.

In its judgment in Case T-516/11, the General Court held that ‘in order to apply the exception provided for by the first indent of Article 4(2) of Regulation No 1049/2001, the institution must show that the documents requested contain elements which may, as a result of the disclosure, seriously undermine the commercial interests of a legal person’21.

Document 2 is a presentation prepared by Meta for a meeting held with officials of DG CNECT on 7 September 2023. It contains sensitive commercial information relating to Meta’s plan to be compliant with Article 5.2 of the DMA Regulation. Namely, it contains the explanations of the envisaged changes to Meta’s business model to comply with obligations and prohibitions for large online platforms set by the DMA Regulation.

This information was shared by the undertaking in a climate of mutual trust, and it is not in the public domain. If disclosed, it would seriously risk undermining Meta’s commercial interests by distorting its competitive position on the market and by revealing its commercial and pricing strategies to the competitors. The need to protect document 2 stems, a fortiori, from the fact that it is the commercial information contained therein that led to the opening of the DMA investigation which is, as said, ongoing.

Against this background, the Secretariat-General concludes that public access to document 2 must be refused based on the first indent (the protection commercial interests of a natural or legal person, including intellectual property) of Article 4(2) of Regulation (EC) No 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) 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.

Although it is for the Commission to weigh up the different interests, it is for the applicant to refer to specific circumstances that show that there is an overriding public interest, which would justify the public disclosure of the documents concerned22. According to the case-law, when doing so, the applicant must, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of the documents concerned and, on the other hand, demonstrate precisely in


what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal.

In your confirmatory application, you contend that ‘decisions on data processing by Meta affect millions of users in Europe, and enforcement decisions are likely to have a huge fundamental rights impact. Non-disclosure and the lack of possibility for public scrutiny therefore constitute a clear harm to public debate’.

After having assessed your arguments, the Secretariat-General takes the view that the above-mentioned considerations do not establish the existence of an overriding public interest in the disclosure of the documents concerned. Moreover, general considerations about a ‘public debate’ and references to transparency and accountability, such as those mentioned in your confirmatory application, cannot provide an appropriate basis for establishing that the principle of transparency was in this case especially pressing and therefore capable of prevailing over the reasons justifying the refusal to disclose the documents in question.

Effectively, you do not provide any concrete arguments showing why, having regard to the specific facts of the case, a public interest is so pressing that it overrides the need to protect the purpose of investigation under DMA Regulation.

Moreover, the Secretariat-General has not been able to identify any public interest capable of overriding the interests protected by the first and third indents of Article 4(2) of Regulation (EC) No 1049/2001.

The Secretariat-General considers the overriding public interest to be better served by ensuring the protection of the DMA investigations, the aim of which is, inter alia, to guarantee a competitive and fair digital sector for the benefit of business users and end users.

In this context, the Secretariat-General considers that it is not for the applicants to establish to what degree EU law is being complied with by the Meta, in the light of the factual context set out in their complaint, and that, on the contrary, the Commission is best placed to make such assessment within the DMA legal framework.

It is thus necessary to conclude that an overriding public interest has not been demonstrated in this particular case. The fact that the document relates to an administrative procedure and not to a legislative act, for which the Court of Justice has

---


24 Judgment of the Court of Justice of 14 November 2013, Liga para a Protecção da Natureza (LPN) and Republic of Finland v Commission, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 93.
acknowledged the existence of wider openness\textsuperscript{25}, provides further support to this conclusion.

4. **Partial Access**

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

However, as stated by the Court of Justice\textsuperscript{26}, where the documents requested are covered by a general presumption of non-disclosure pursuant to Article 4(2) third indent of Regulation (EC) 1049/2001, such documents do not fall within an obligation of disclosure, in full, or in part.

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,

\textit{For the Commission}

\textit{Ilze JUHANSONE}

\textit{Secretary-General}
