Subject: Your application for access to documents - EASE 2024/3274

Dear Mr Meineck,

We refer to your email of 14 June 2024, wherein you request access to documents pursuant to Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (hereinafter ‘Regulation 1049/2001’), which was registered on 19 June 2024 under the abovementioned reference number.

1. SCOPE OF YOUR APPLICATION

You request access to the following documents:

‘[..] documents which contain the following information:
- requests for information (German: "Auskunftersuchen")
- risk assessment reports (German: "Risikobewertungsberichte") of the following three VLOPs according to the DSA:
  - Pornhub
  - XVideos
  - Stripchat [..]’
2. DOCUMENTS FALLING WITHIN THE SCOPE OF THE REQUEST

The documents you request form part of case files in pending investigations under Regulation (EU) 2022/2065 (1) (the Digital Services Act, hereinafter the ‘DSA Regulation’). As for these documents a general presumption of non-accessibility applies, the requested documents are not listed in detail.

3. ASSESSMENT UNDER REGULATION 1049/2001

Following an examination of your requests under the provisions of Regulation 1049/2001, we regret to inform you that access to the requested documents cannot be granted as disclosure is prevented by exceptions to the right of access laid down in Article 4(2), first indent of Regulation 1049/2001 (protection of commercial interests), Article 4(2), third indent of Regulation 1049/2001 (protection of investigations) and Article 4(3) (protection of the institution’s decision-making process).

Article 4(2) first and third indent - protection of commercial interests and protection of investigations

The first indent of Article 4(2) of Regulation 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’.

The third indent of Article 4(2) of Regulation 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 requested documents are part of DSA case files with the file numbers 100059, 100083 and 100068. These case files are related to the enforcement of the DSA Regulation. The DSA Regulation sets out rules for a safe, predictable and trusted online environment and lays down various obligations on the providers of intermediary services.

On 20 December 2023, Pornhub, XVideos, Stripchat were designated as very large online platforms within the meaning of the DSA Regulation. Following this designation, in accordance with Article 33(6) of the DSA Regulation, the providers had four months to make sure that they comply with the full set of obligations under the DSA. Among these obligations, the providers of the very large online platforms were required, pursuant to Article 34(1) DSA Regulation, to carry out risk assessments and diligently identify, analyse and assess any systemic risks in the Union stemming from the design or

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functioning of their services and their related systems, including algorithmic systems, or from the use made of their services.

The documents requested were both addressed to the Commission by the entities concerned as well as addressed to the entities concerned by the Commission. The Commission is empowered, pursuant to Article 67 of DSA Regulation, to require providers of a very large online platforms to provide all necessary information to enable the Commission to carry out its duties under DSA Regulation. Based on the assessment of the replies of the entities, the Commission assesses next steps, which could entail formal openings of proceedings pursuant to Article 66 of the DSA.

This procedure falls under the notion of investigation in line with Article 4(2), third indent of Regulation 1049/2001, which the case law (2) defines as a structured and formalized 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. In this respect and in light of the Múka case (3), the presumption of inaccessibility applies regardless of whether the investigation is pending or if it has already been closed.

The above-mentioned investigations conducted in accordance with the DSA Regulation are comparable and have strong procedural similarities with other types of Commission investigations aimed at assessing the compliance with EU law of the undertakings’ functioning, such as the antitrust proceedings under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), the state aid investigations laid down in Article 108 TFEU and the proceedings applicable to mergers, set out in Regulation (EC) No 139/2004. In the DSA investigations, similarly to these types of investigations in the field of competition, any decision of the European Commission has to be based on a complex assessment of 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 aid, merger control and DSA 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 1049/2001, of documents from an administrative file regarding the application of Article 101 and 102 TFEU would undermine the system of

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procedural rules set up in Regulations No 1/2003⁶ and 773/2004⁷, 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 Regulations⁸. It should additionally be mentioned that the General Court further 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 which has already been closed or a proceeding which is pending⁹.

- Also, with regard to documents forming part of procedures for reviewing State aid the Court reasoned that their disclosure to the public on the basis of Regulation 1049/2001 would call into question the State aid procedural system. 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 file¹⁰.

- 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’¹¹. 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

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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 12. 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 which is already closed or a pending procedure 13.

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 files can also be applied in DSA investigations, given that the DSA Regulation contains specific provisions on access to the file and confidentiality:

1) Article 79(4) sets out the right of the ‘parties concerned’ to have access to the Commission’s file, ‘under the terms of a negotiated disclosure, subject to the legitimate interest of the provider of the very large online platform or of the very large online search engine or other person concerned in the protection of their business secrets’. It follows that third parties do not, under such proceedings, have any right of access to the documents in the Commission’s file. Article 5 of the Commission Implementing Regulation (EU) 2023/1201 14 sets out detailed arrangements applicable to the right of access to the file.

2) Article 84 lays down the treatment of information obtained in the context of DSA proceedings, designed to ensure the observance of professional secrecy. Natural and legal persons submitting information under the DSA Regulation have a legitimate right to expect that - apart from the publication, as mentioned in Article 80(2), of the decisions with any confidential information removed from it - the information they supply to the Commission on an obligatory or voluntary basis will not be disclosed to the public. Detailed arrangements for the protection of confidential information are further laid down in Article 6 of the Commission Implementing Regulation (EU) 2023/1201, referred to above.

Applying by analogy the reasoning followed by the Court in the competition cases mentioned above, we note that the DSA Regulation and Regulation 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 which is compatible with the other and which enables a coherent application of them.


The documents requested are part of three administrative files of procedures governed by the DSA Regulation. These are relevant for the implementation and enforcement of the DSA Regulation. Therefore, the right of access to them is also governed by the restrictive rules for the use of documents in such DSA procedures, referred to in the preceding paragraph. These considerations must be taken into account in interpreting the first and third indents of Article 4(2) of Regulation 1049/2001. If persons other than those with a right of access under the DSA 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 1049/2001, the access system introduced by the DSA Regulation would be undermined.

Furthermore, having regard to the objectives of investigations launched by the Commission pursuant to the DSA Regulation - which is to ascertain whether or not the providers of very large online platforms and of very large online search engines comply with their obligations laid down in this Regulation - the Commission is likely to gather, in the context of such proceedings, commercially sensitive information concerning internal organisation arrangements, functioning of the entities concerned, as well as business practices and conducts, activities and strategies in relation to potential risks; therefore, disclosure of documents relating to such proceedings can indeed undermine the protection of the commercial interests of those entities.

The exceptions relating to the protection of commercial interests and the protection of the purpose of investigations are therefore, in such procedures, closely connected.

As mentioned above, the Court acknowledged the existence of the general presumption of confidentiality in relation to requests for disclosure of documents in a file relating to a procedure pursuant to Articles 101, 102 and 108 TFEU or a file concerning merger control proceedings and that the Commission is entitled to presume that disclosure of such documents will, in principle, undermine the protection of the commercial interests of the undertakings involved in those proceedings, as well as the protection of the purpose of investigations relating to such proceedings within the meaning of the first and third indents of Article 4(2) of Regulation 1049/2001. Therefore, requests for disclosure of documents in a DSA investigation can benefit, by analogy, from the same treatment as the aforementioned cases in the field of competition and thus from the application in this case of a general presumption of non-disclosure.

Furthermore, it should be noted that, when a general presumption of confidentiality applies for the purposes of the application of the exceptions provided for in the first and third indents of Article 4(2) of Regulation 1049/2001, the Court acknowledged in its case-law that it is not necessary for the Commission to carry out a specific, individual examination of the documents in a file covered by this presumption. The reasons mentioned above substantiate in sufficient manner that there is a real and non-hypothetical risk that the disclosure of the documents requested would undermine not only the protection of the purpose pursued by the Commission’s investigation and their follow-up, but also the protection of the commercial interests of the undertaking concerned.
In view of the foregoing the requested documents must be withheld based on the exceptions set out in the first indent (protection of commercial interests) and third indent (protection of investigations) of Article 4(2) of Regulation 1049/2001.

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

The first paragraph of Article 4(3) of Regulation 1049/2001 provides that ‘[a]ccess 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 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’.

In the present cases, all the documents of the DSA case files have been gathered or drawn up by the Commission in order to take decisions on the compliance with the DSA Regulation. Since the decisions have not yet been taken, public disclosure of any of the requested documents 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. Therefore, the exception set out in Article 4(3), first paragraph of the Regulation is manifestly applicable to the documents, access to which is requested.

Furthermore, the Court recognized in *Odile Jacob*\(^{15}\) and *EnBW*\(^{16}\), applicable also here by analogy, that there is a general presumption of non-disclosure of internal documents during the procedure as that would seriously undermine the Commission's decision-making process.

As mentioned above, the requested documents relate to DSA investigations and contain preliminary assessments of the facts and other information from which the direction of the investigations, the future procedural steps which the Commission may take, 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 in this case. Such misinterpretations and misrepresentations may cause damage to the reputation and standing of the undertakings investigated. Moreover, the requested documents would reveal the Commission's investigation strategy and a disclosure would therefore undermine the protection of the purpose of the investigations and would also seriously undermine the Commission's decision-making process. The Commission's services must be free to explore all possible options in preparation of decisions free from external pressure.

In view of the foregoing, the requested documents are also manifestly 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.


4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) and Article 4(3) of Regulation 1049/2001 apply, unless there is an overriding public interest in the disclosure of the documents. Such an interest must, firstly, be a public interest and, secondly, outweigh the harm caused by disclosure. We have examined whether there could be an overriding public interest in the disclosure of the documents being withheld but we have not been able to identify such an interest.

5. CONFIRMATORY APPLICATION

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretariat-General of the Commission by asking for a review via your portal[1] account (available only for initial requests submitted via the portal account),
or via 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,

Electronically signed

Roberto Viola