Subject: GESTDEM 2018/2344 – Your request of 25 April 2018 for access to documents pursuant to Regulation (EC) 1049/2001 relating to contacts between DG Competition and Facebook

Dear Ms da Silva,

Thank you for your message of 25 April 2018, registered on 27 April 2018 under GESTDEM number 2018/2344, in which you request access to documents regarding contacts held between DG Competition and Facebook in accordance with Regulation (EC) No 1049/20011 ("Regulation 1049/2001").

1. DOCUMENTS CONCERNED

In your message you request access to the following documents:

- a list of lobby meetings held by DG Competition with Facebook or its intermediaries. The list should include: date, individuals attending + organizational affiliation, the issues discussed;

- minutes and other reports of these meetings;

- all correspondence (i.e. any emails, correspondence or telephone call notes) between DG Competition (including the Commissioner and the Cabinet) and Facebook or any intermediaries representing its interests.

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As regards the time period, you clarified on 18 May 2018 that your request concerns documents from 1st November 2014 onward.

As regards the list of the lobby meetings, I would like to inform you that information about meetings held with organisations by Commissioner Vestager and her members of Cabinet is published under section Transparency on the following site:


We have identified the following documents as falling under the scope of your request:

1. A series of documents relating to the following administrative files of DG Competition:


   b) Files concerning Cases AT.40099 – Google Android, AT.39740 – Google Search, and AT.40312 – investigation into online advertising.

   c) File concerning Case HT.4607 – Commission’s Sector Inquiry into e-commerce.

2. Two e-mail exchanges between DG Competition, including the Cabinet, and Facebook or its representatives.

The documents identified under point 1), as specified above, are part of the files in competition cases. In particular, Cases M.7612, M.7688, M.7813, M.8124, M.8180 and M.8228 concern merger control proceedings. Case AT.40099 concerns an ongoing antitrust investigation, which cannot be considered as closed since the Commission has not adopted a decision of any kind. Case AT.39740 concerns an ongoing antitrust investigation, which cannot be considered as closed since the Commission’s decision has been appealed. Case AT.40312 concerns a closed antitrust investigation. Finally, Case HT.4607 concerns the Commission's Sector Inquiry into e-commerce.

Having carefully examined your request in the light of Regulation 1049/2001, I have come to the conclusion that the documents you have requested access to under point 1) 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.

As regards the documents identified under point 2), I am glad to inform you that partial access may be granted to the two documents. The documents to which you have requested access contain personal data (names, e-mail accounts, phone numbers etc.). Therefore I enclose a copy of the documents requested, with the personal data expunged. The purpose of redactions is explained below in section 2.2).

You may reuse the documents requested free of charge for non-commercial and commercial purposes provided that the source is acknowledged, that you do not distort the original meaning or message of the documents. Please note that the Commission does not assume liability stemming from the reuse.
2. **Applicable Exceptions under Regulation 1049/2001**

2.1. **Article 4(2), first indent, protection of commercial interests, 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), 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.

Pursuant to Article 4(3) of Regulation 1049/2001, access to a document drawn by the Commission or received by the Commission shall be refused if its disclosure would seriously undermine the Commission's decision-making process.

2.1.1. **Relevant case-law**

In its judgment in Case C-404/10 P *Commission v Odile Jacob*, 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 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*, *Bavarian Lager* and *API*, 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.

In *Commission v TGI*, a case which concerned an access to documents request to all documents in two State aid cases, the Court of Justice upheld the Commission's refusal.

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and held that there exists a general presumption that disclosure of documents in the file would undermine the purpose of State aid investigations. The Court reasoned that such disclosure would call into question the procedural system.\(^7\)

Based on this reasoning, the Court recognized in the *Agrofert* case\(^8\) that the same general presumptions 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.

As ruled by the Court in the *Agrofert* case, if a document is not accessible under the "access to file procedure", it cannot be made available to the public under Regulation 1049. In essence, the Merger Regulation 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 Merger Regulation are also 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).

The reasoning set out in the above-mentioned case-law concerning merger procedures, has also been upheld by the Court of Justice in relation to documents in cases regarding the application of Articles 101 and 102 TFEU ("antitrust cases") which are governed by the procedural rules set out in the Council Regulation (EC) No 1/2003 of 16 December 2002 ("Regulation 1/2003")\(^9\). The disclosure of such documents would undermine the procedural rules system set up by that regulation, and in particular the rules on confidentiality and access to the file.

In particular, 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 antitrust cases, would undermine the purpose of the access system introduced by Regulation 1/2003 and the Commission Regulation (EC) No 773/2004 of 7 April 2004 ("Regulation 773/2004")\(^10\). As ruled by the General Court in the *Bitumen* case, if a document is not accessible under the rules on access to file under Regulation 1/2003, it cannot be made available to the public under Regulation 1049/2001\(^11\). In essence, Regulation 1/2003, Regulation 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 under Regulations 1/2003 and 773/2004 are of the

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\(^7\) See also Case C-514/07 P, *API v Commission*, ECLI:EU:C:2010:541, para. 99 and 100, as well as Case C-404/10 P *Commission v Odile Jacob*, ECLI:EU:C:2012:393, paragraphs 108-126 where the Court of Justice applied *Commission v TGI* by analogy to merger proceedings.


\(^12\) Case C-365/12 P *Commission v EnBW Energie Baden-Württemberg*, ECLI:EU:C:2014:112, paragraph 88.

same hierarchical order as the rules on access to documents under Regulation 1049/2001. Therefore, neither of the two sets of rules prevails over the other.

Furthermore, the Court of Justice has established in its case law that there is a close connection between exceptions relating to the protection of commercial interests and the purpose of investigations.\textsuperscript{14}

The General Court further recognized in its judgment Commission \textit{v} Deutsche Telekom AG the existence of a general presumption based on the exceptions laid down in Article 4(2), first and third indents, of Regulation 1049/2001 that applies in antitrust investigations under Articles 101 and 102 of the TFEU regardless of whether the request for access concerns an investigation which has already been closed or one which is pending. The General Court ruled that "\textit{the publication of sensitive information concerning the economic activities of the undertakings involved is likely to harm their commercial interests, regardless of whether an investigation is pending. Furthermore, the prospect of such publication after a procedure is closed runs the risk of adversely affecting the willingness of undertakings to cooperate when such a procedure is pending}."\textsuperscript{15}

The case-law presented above concerns access to documents under Regulation 1049/2001 in merger and antitrust cases. However, as explained below, the same reasoning can be applied by analogy to access to documents relating to Commission's Sector Inquiry into e-Commerce.

\textbf{2.1.2. The Commission's Sector Inquiry into e-commerce}

Under Article 17 of Regulation 1/2003, the Commission has the power to conduct inquiries into a particular sector of the economy - or a particular type of agreement across various sectors - where the level of trade between Member States, rigidity of prices or other circumstances suggest that competition may be distorted within the internal market.

On 6 May 2015, and in the context of its Digital Market Strategy, the Commission adopted a decision pursuant to Article 17 of Regulation 1/2003 to launch a Sector Inquiry into e-commerce in the EU. The purpose of this inquiry was to gather company-specific information with the view to shed light on the way the markets under investigation function, in particular in relation to the potential existence of contractual barriers to competition, for example in the form of vertical agreements which may restrict competition.\textsuperscript{16}

In the course of its inquiry, the Commission gathered detailed information from businesses and industry associations, including Facebook. The Commission assessed the information received in light of the EU competition rules.

The final report on the Sector Inquiry into e-commerce was published on 10 May 2017 together with the mid-term review of the Digital Single Market strategy. This report is publicly available at:

\url{http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html}.

\textsuperscript{14} Case C-404/10 P, \textit{European Commission v Editions Odile Jacob}, ECLI:EU:C:2012:393, paragraph 105.


\textsuperscript{16} For further details, see Commission Decision of 6.5.2015, C(2015)3026 final.
Given that the general presumption of non-disclosure is applicable to proceedings under Article 101 and 102 TFEU, by analogy it also applies to sector inquiries pursuant to Article 17 of Regulation 1/2003 for the following reasons:

- Article 17 of Regulation 1/2003 explicitly states that the purpose of a sector inquiry is to gather the necessary information for giving effect to Articles 101 and 102 TFEU;

- Consequently Article 17 (2) of Regulation 1/2003, which establishes the Commission powers in the area of sector inquiries, explicitly refers to the same power of investigations as those applicable to proceedings for the establishment of an infringement under Articles 102 and 102 TFEU, and in particular to Article 18 of the same Regulation, which establishes the Commission powers to request information;

- Sector inquiries are one investigation tool among a set of tools which the Commission can make use of pursuant to Regulation 1/2003 depending on the circumstances. Sector inquiries are launched by the Commission when the latter has preliminary concerns or evidence relating to the existence of potential barriers to competition in particular sectors of the economy. The purpose of sector inquiries is to ensure the respect of EU rules on restrictive agreements and abuse of dominant positions. Hence, by analogy the same regime applicable to other proceedings for the application of EU competition rules must also apply to sector inquiries. Although the results of a sector inquiry do not in itself imply that there are grounds for enforcement action against specific business, the inquiry might suggest the existence of practices that breach EU competition rules. On this basis and as a follow-up to the sector inquiry, the Commission could launch specific investigations in order to ensure compliance with the EU competition rules.

2.1.3. Assessment and conclusions under Article 4(2), first and third indent, and Article 4(3) of Regulation 1049/2001

The documents requested by you, as specified above, are part of files in competition cases.

In general, undertakings 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. Moreover, the assessments made by the Commission and contained in Commission's documents are commercially sensitive.

With specific regard to merger proceedings, natural and legal persons submitting information in the context of the Merger Regulation have a legitimate expectation that – apart from the publication of the Section 1.2 of the Form CO and of the final decision cleared of business secrets and other confidential information – the information they supply to the Commission on an obligatory or voluntary basis under the Merger Regulation will not be disclosed.

Also, pursuant to Article 17(2) of the Merger Regulation, information covered by professional secrecy submitted to the Commission in the context of this regulation cannot be disclosed to the public.

Undertakings also have a legitimate interest that the information is used only for the purposes of the Commission proceedings in application of the Merger Regulation. It is for this reason that Article 17(1) the Merger Regulation provides that information acquired through the investigative powers of this regulation is used only for the purpose
for which it was acquired, namely the administrative Commission procedure and the Court review of the decision resulting from this procedure. The same applies to documents provided in the context of antitrust investigations and sector inquiries.

Part of the documents requested by you, as specified above, are also part of the file in antitrust investigations including the Sector Inquiry into e-commerce. They 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 latters' commercial interests. This information concerns in particular commercial strategies. Disclosure of these documents could bring serious harm to the undertakings' commercial interests.

Careful respect by the Commission of its obligations in this domain has so far created a climate of mutual confidence between the Commission and undertakings, under which the latter have cooperated by providing the Commission with the information necessary for its investigations, including the Sector Inquiry. Recourse to formal decisions requesting the information (subject to sanctions) or occurrences of opposition to inspections are indeed rare.

In these circumstances, disclosure despite the protection provided for by Regulations 1/2003 and 773/2004, would lead to a situation where undertakings subject to investigations, potential informants and complainants would lose their trust in the Commission's reliability and in the sound administration of competition files. In the same vein, the prospect of publication of sensitive information concerning the economic activities of the undertakings involved after an investigation is closed runs the risk of adversely affecting the willingness of undertakings to cooperate when the investigation is pending. 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 EU competition law and, hence, undermine the protection of the purpose of investigations.

In addition, as specified above, some of the requested documents are also part of the file in ongoing antitrust investigations, which cannot be considered as closed either because the Commission has not adopted a decision of any kind (case AT.40099) or the Commission's decision has been appealed (case AT.39740). Consequently, the disclosure of such documents would also seriously undermine the Commission's decision-making process.

It thus follows that the requested documents identified under point 1) are covered by a general presumption of non-disclosure of documents in merger and antitrust case-files, including documents concerning the Commission's Sector Inquiry.

As the Court stated in the EnBW case, in order to apply the general presumption, the Commission does not need to examine individually all the documents requested. Such a requirement would deprive that general presumption of its proper effect, which is to permit the Commission to reply to a global request for access in a manner equally globally17. On the basis of the Agrofert18 and Deutsche Telekom19 cases, the fact that a

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18 Case C-477/10 P, Commission v Agrofert Holding, ECLI:EU:C:2012:394, paragraph 66.
merger or an antitrust investigation, including the Sector Inquiry into e-commerce, is closed does not prevent the application of the general presumption of non-disclosure.

In view of the foregoing, the requested documents under point 1) are manifestly covered by the exceptions set out in Article 4(2), first indent and third indent, and Article 4(3) of Regulation 1049/2001.

2.2. Article 4(1)(b): protection of privacy of individuals

Pursuant to Article 4(1)(b) of Regulation 1049/2001, access to a document can be refused where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with EU legislation regarding the protection of personal data.

Personal data as any information relating to an identified or identifiable natural person require protection in accordance with Regulation (EC) 45/2001 of the European Parliament and of the Council of 18 December 2000("Regulation 45/2001"). When access is requested to documents containing personal data, Regulation 45/2001 becomes fully applicable.

According to Article 8(b) of Regulation 45/2001, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced.

I consider that, on the basis of the information you submitted, the necessity of disclosing the aforementioned personal data has not been established and that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. Moreover, I have not obtained the consent to disclose such data.

Therefore, we are disclosing the documents requested expunged from this personal data.

In case you would disagree with the assessment that the expunged data are personal data which can only be disclosed if such disclosure is legitimate under the rules of personal data protection, you are entitled, in accordance with Article 7(2) of Regulation 1049/2001, to make a confirmatory application requesting the Commission to review this position.

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 Article 4(3) of Regulation 1049/2001.

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According to the *Agrofert* case\(^\text{22}\), the abovementioned general presumptions do not exclude the right for the applicant to demonstrate the existence of an overriding public interest justifying the disclosure of the document requested.

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 merger and antitrust investigations (including the Sector Inquiry), the Commission's decision-making process and the commercial interests of the undertakings concerned.

4. **PARTIAL ACCESS**

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting partial access to the documents requested. Having carefully examined your request, I note that one of the documents to which you have requested access (contained in case HT.4607) is already in the public domain. This document has been published at:

https://www.sec.gov/Archives/edgar/data/1326801/000132680115000006/fb-12312014x10k.htm. I therefore refer you to these public sources.

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 reply, 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
- Secretary-General
- Transparency unit SG -B-4
- BERL 5/282
- B-1049 Bruxelles

or by email to: sg-acc-doc@ec.europa.eu.

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\(^{22}\) Case C-477/10 P, *Commission v Agrofert Holding*. ECLI:EU:C:2012:394, paragraph 86.
Yours faithfully,

[Signature]

Johannes LAITENBERGER

**Attachments:**

1) E-mail exchange dated December 2014

2) E-mail exchange dated December 2015