



EUROPEAN COMMISSION
Competition DG

Director General

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Subject: GESTDEM 2018/3122 – Your request of 7 June 2018 for access to documents pursuant to Regulation (EC) No. 1049/2001 relating to Case M.8084 – Bayer/Monsanto

Dear Sir,

Thank you for your e-mail of 7 June 2018, registered on 8 June 2018 under GESTDEM number 2018/3122, concerning Case M.8084 – Bayer/Monsanto, in which you request access to documents in the Commission's case file in accordance with Regulation (EC) No. 1049/2001¹ ("Regulation 1049/2001").

1. DOCUMENTS CONCERNED

In your message you request access to the various documents which compose the administrative file of DG Competition concerning Case M.8084 – Bayer/Monsanto: “-all documents, correspondence (letters, emails, Whatsapp messages, text messages, etc), minutes of meetings or any other reports of such meetings where the merger between Bayer and Monsanto was discussed and/or referred to by officials of DG Competition; -all correspondence (letters, emails, Whatsapp messages, text messages, etc) between officials of DG Competition and third parties (other DGs, SG, companies, organizations, etc) where the merger between Bayer and Monsanto was discussed and/or referred to. The request entails all documents produced between September 2016 and June 2018. 'Officials' are to be interpreted in the broadest sense possible, meaning all civil servants including as well Commissioner Margrethe Vestager and her Cabinet members/staff.”

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 documents you request access to form part of the case file in a merger case concerning an investigation under the EU Merger Regulation 139/2004² (the "Merger Regulation"), in which the procedure may not be considered finalized yet. The decision adopted by the Commission has not been published yet. Upon its publication, the decision will still be subject to appeal, which might prompt the Commission to reconsider its decision and reopen the case.

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 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*³, 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.

² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.01.2004, p. 1-22.

³ Case C-404/10 P, *Commission v Odile Jacob*, [2013] ECR.

The Court ruled that, by analogy to the case law in cases *TGI*⁴, *Bavarian Lager*⁵ and *API*⁶, 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*⁷, 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 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 system⁸.

Based on this reasoning, the Court recognized in *Agrofert*⁹ 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* case¹⁰, 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 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).

⁴ Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau*, [2010] ECR I-5885.

⁵ Case C-28/08 P, *Commission v Bavarian Lager*, [2010] ECR I-6055.

⁶ Cases C-514/07 P, C-528/07 P and C-532/07 P, *Sweden and Others v API and Commission*, [2010] ECR I-8533.

⁷ See case C-139/07, *Commission v Technische Glaswerke Ilmenau GmbH (TGI)*.

⁸ See also Case C-514/07 P, *API v Commission*, para. 99 and 100, as well as Case C-404/10 P *Commission v Odile Jacob*, paragraphs 108-126 where the Court of Justice applied *Commission v TGI* by analogy to merger proceedings.

⁹ Case C-404/10 P, *Commission v Agrofert Holding*, [2013] ECR, paragraph 59.

¹⁰ *Agrofert*, paragraphs 32-40.

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.

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, particularly at a stage where an investigation has not been finally concluded yet.

The documents requested by you, as specified above, are part of the file in a competition 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.

Moreover, as the General Court has ruled in the *Bitumen*¹¹ case, certain sections of the final decisions (including information supplied by the parties and third parties) may be covered by the exceptions from public access and an investigation of the Commission cannot be considered as closed if there might be circumstances which might prompt the Commission to reopen the case.

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) of 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.

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.

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.

¹¹ Case T-380/08, *Kingdom of the Netherlands v European Commission (Bitumen)*.

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. 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 the above-mentioned regulations, 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 competition 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 EU competition law. Consequently, the purpose of merger procedures and, implicitly, of the effective enforcement of the EU competition rules would be undermined.

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

In view of the foregoing the requested documents 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 the present case, all the documents of the case file have been gathered or drawn up by the Commission in order to take a decision on the compliance with the EU competition rules. Since the decision has 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*¹² 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 a merger investigation which cannot be considered as finalized and contain information that 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

¹² *Odile Jacob*, paragraph 130.

documents would reveal the Commission's investigation strategy and their disclosure would therefore undermine the protection of the purpose of the investigation and would also seriously undermine the Commission's decision making process.

In view of the foregoing, the requested documents are manifestly covered in their entirety by the exception related to the protection of the purpose of the Commission's merger investigations set out in Article 4(2), third indent of Regulation 1049/2001. Moreover, the internal Commission documents are also covered by the exception related to the protection of the Commission's decision-making process, set out in Article 4(3) of Regulation 1049/2001.

The presumption recognised in the *Agrofert* judgment does not exclude the possibility of demonstrating that certain documents, of which disclosure is sought, are not covered by the presumptions. However, you have not demonstrated this in your application.

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.

According to *Agrofert*¹³, 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 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. However, the general presumption of non-disclosure invoked above also applies to partial disclosure for all documents concerned and, consequently, no partial access can be granted.

¹³ *Agrofert*, paragraph 86.

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.

Yours faithfully,


Johannes LAITENBERGER