





EUROPEAN COMMISSION

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**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - GESTDEM 2018/4734**

Dear ,

I refer to your letter of 17 October 2018, registered on 18 October 2018, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereafter ‘Regulation 1049/2001’).

1. SCOPE OF YOUR REQUEST

In your initial application of 7 September 2018, you requested access to documents in the file regarding the merger case investigation M.8444 (ArcelorMittal/Ilva).

In its initial reply dated 21 September 2018, the Directorate-General for Competition refused access to the documents in question, based on the exceptions of Article 4(2), third indent (protection of the purpose of inspections, investigations and audits), Article 4(2), first indent (protection of commercial interests), and Article 4(3) (protection of the decision-making process) of Regulation 1049/2001.

¹ Official Journal L 345 of 29.12.2001, p. 94.

² Official Journal L 145 of 31.5.2001, p. 43.

In your confirmatory application, you request a review of this position. You put forward a number of arguments to support your request. These have been taken into account in the assessment, the results of which are described below.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Having examined your confirmatory application, I wish to inform you that the decision of the Directorate-General for Competition to refuse access to the requested documents has to be confirmed on the basis of Article 4(2), third indent (protection of the purpose of inspections, investigations and audits), Article 4(2), first indent (protection of commercial interests), and Article 4(3), first subparagraph (protection of the ongoing decision-making process), of Regulation 1049/2001, for the reasons set out below.

2.1. Protection of the purpose of investigations and of commercial interests

In accordance with the case law of the Court of Justice, the European Commission, ‘when assessing a request for access to documents held by it, may take into account more than one of the grounds for refusal provided for in Article 4 of Regulation No 1049/2001’ and two different exceptions can, as in the present case, be ‘closely connected’³.

Article 4(2), third indent of Regulation 1049/2001 provides that the ‘institutions shall refuse access to a document where disclosure would undermine the protection of (...) the purpose of inspections, investigations and audits’.

Article 4(2), first indent, of Regulation 1049/2001 provides that the ‘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’.

In its initial reply, the Directorate-General for Competition explained that the documents falling under the scope of your request are part of a competition file regarding the ongoing merger case investigation M.8444 (ArcelorMittal/Ilva). Please note in this context that the purpose of the European Commission's investigation in this merger case is limited to the competition review of the acquisition of Ilva assets by ArcelorMittal, and that the investigation consequently does not concern the prior decisions taken by the Italian state (such as the assessment of ArcelorMittal's environmental plan, industrial plan and the bids in a public tender procedure).

³ Judgment of 13 September 2013, *Netherlands v Commission*, T-380/08, EU:T:2013:480, paragraph 34.

Contrary to what you state in your confirmatory application, this investigation cannot be considered finalised, as the decision adopted by the European Commission is still subject to the monitoring of commitments, which might prompt the European Commission to reconsider its decision and reopen the case⁴.

Consequently, all documents in the file are covered by a general presumption of non-accessibility, based on the exceptions of the first and third indents of Article 4(2) of Regulation 1049/2001. This means that the institution is not required to carry out a specific and individual assessment of the content of each requested document.

In its judgment in *Commission v Technische Glaswerke Ilmenau*⁵, which concerned a request for documents in two State aid cases, the Court of Justice upheld the European Commission's refusal. It held that there exists, with regard to the exception related to the protection of the purpose of investigations, 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 State aid procedural system⁶.

The Court of Justice has upheld this reasoning in relation to documents in merger control proceedings with regard to the exceptions related to the protection of the purpose of investigations and commercial interests⁷. The disclosure of such documents would undermine the system of procedural rules governing merger control proceedings, and in particular the purpose of the privileged access rules⁸.

The Court of Justice ruled in this regard that ‘generalised access, on the basis of Regulation No 1049/2001, to the documents exchanged in [...] a [merger control] procedure between the [European] Commission and the notifying parties or third parties would, as the [European] Commission has pointed out, 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 [European] 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 [European] Commission, on the other. If persons other than those entitled to have access to the file by the rules on merger control proceedings, or those who could be regarded as involved parties but have not used their right of access to the information or have been refused access, were able to obtain access to the documents relating to such a procedure on the basis of Regulation No 1049/2001, the system introduced by that legislation would be undermined.’⁹

⁴ Please see in this regard the press release on http://europa.eu/rapid/press-release_IP-18-3721_en.htm.

⁵ Judgment of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07, EU:C:2010:376.

⁶ See also judgment of 21 September 2010, *Sweden and Others v API and Commission*, C-514/07 P, EU:C:2010:376, paragraphs 99 and 100.

⁷ Judgment of 28 June 2012, *Commission v Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 56 to 59 and 64, as well as judgment of 28 June 2012, *Commission v Odile Jacob*, C-404/10 P, EU:C:2010:54, paragraphs 108-126.

⁸ Judgment in *Commission v Odile Jacob*, cited above, EU:C:2010:54, paragraphs 118-123.

⁹ Idem, paragraphs 121 and 122.

This general presumption applies ‘irrespective of whether the request for access concerns a control procedure which is already closed or a pending procedure. The publication of sensitive information concerning the economic activities of the undertakings involved is likely to harm their commercial interests, regardless of whether a control procedure is pending. Furthermore, the prospect of such publication after a control procedure is closed runs the risk of adversely affecting the willingness of undertakings to cooperate when such a procedure is pending.’¹⁰ This general presumption can apply for up to 30 years and possibly beyond¹¹.

Having regard to the above, I consider that the use of the exceptions under Article 4(2), third indent (protection of the purpose of investigations), and Article 4(2), first indent (protection of commercial interests), of Regulation 1049/2001 is justified, and that access to the documents in question must be refused on that basis.

2.2. Protection of the ongoing decision-making process

Article 4(3), first subparagraph, of Regulation 1049/2001 provides that ‘access 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’.

The Directorate-General for Competition refused access to the requested documents explaining that they are related to an ongoing merger control investigation and contain information that could reveal the course of the investigation, future procedural steps and the investigation strategy followed by the European Commission.

As explained under point 2.1, as long as the decision adopted by the European Commission is subject to the monitoring of commitments, which might prompt the European Commission to reconsider its decision and reopen the case, the institution's decision-making process is still ongoing. The disclosure of the requested documents would undermine the purpose of the investigation and seriously undermine the ongoing decision-making process with regard to the future procedural steps that the European Commission might have to take in case the above-mentioned decision is reopened. The European Commission's services must be able to explore all possible options free from external pressure.

I conclude, therefore, that access to the documents that form part of the case must also be denied on the basis of the exception laid down in Articles 4(3), first subparagraph of Regulation 1049/2001.

¹⁰ Idem, paragraph 124.

¹¹ Judgment in *Commission v Agrofert Holding*, cited above, EU:C:2012:394, Idem, paragraph 67.

3. NO PARTIAL ACCESS

I have also examined the possibility of granting partial access to the documents concerned, in accordance with Article 4(6) of Regulation 1049/2001. However, it follows from the assessment made above that the documents that fall within the scope of your request are manifestly and entirely covered by the exceptions laid down in Article 4(2), first and third indents, and Article 4(3), first subparagraph, of Regulation 1049/2001.

It must also be underlined that the Court of Justice confirmed that where the documents requested are covered by a general presumption of non-disclosure, such documents do not fall within an obligation of disclosure, in full or in part¹².

4. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) and Article 4(3) 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.

In your confirmatory request, you do not establish the existence of any overriding public interest in the disclosure of the documents in question. Nor have I been able, based on the elements at my disposal, to establish the existence of any such overriding public interest.

Consequently, I consider that in this case there is no overriding public interest that would outweigh the public interest in safeguarding the protection of the purpose of investigations, commercial interests and the ongoing decision-making process protected by the first and third indents of Article 4(2) as well as by Article 4(3), first subparagraph, of Regulation 1049/2001.

5. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,



For the Commission
Martin SELMAYR
Secretary-General

¹² Judgment of 25 March 2015, *Sea Handling v Commission*, T-456/13, EU:T:2015:185, paragraph 93.