

To: Samuel Stolton - ask+request-9952-78709f5a@asktheeu.org

Brussels, 11 November 2021

**Subject: Your application for access to documents – Ref No 2021-25**

Dear Mr Stolton,

We refer to your e-mail dated 17/09/2021, in which you make a request for access to documents, registered on 28/09/2020 under reference number 2021-25. The deadline for our reply was originally set for the 19/10/2020. Given that your application covered a large amount of documents, as well as documents originating from third parties, the deadline was extended for another 15 working days in accordance with Article 7(3) of Regulation (EC) No 1049/2001 regarding public access to documents. The new deadline was therefore set for 11/11/2021.

You requested access to:

*“- All documentation (including but not limited to: general communications of any nature, written material of any kind, email correspondences, attendance lists, agendas, background papers, briefing papers, transcriptions of meetings, readouts of meetings, summaries of meetings, briefings for meetings, etc) concerning the EDPB's role in issuing advice to the European Commission, on the Google-Fitbit merger.  
- Any documentation transmitted between the EDPB and the European Commission on the subject of the Google-Fitbit merger, subsequent to the Commission's approval in December 2020.”*

**Assessment**

We have identified 115 documents that fall within the scope of your request.

To facilitate our assessment and your consultation of the files, the titles of the files have been adequately numbered. We will refer to the numbers of each single file in our assessment below.

We have conducted the following assessment in light of Regulation (EC) No 1049/2001 regarding public access to documents and the relevant case law of the Court of Justice of the European Union (CJEU):

**(1) Full non-disclosure**

Having examined these documents under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, we have come to the conclusion that the documents mentioned below cannot be disclosed, as some information in the documents falls outside the scope of your request and/or their disclosure is prevented by the following exceptions to the right of access laid down in Article 4 of the Regulation 1049/2001.

Documents partially falling out of scope of your request: 89

**1. Exception 4(1)(b) (“Privacy and integrity of the individual”):** The documents to which you request access contain personal data, in particular names and contact details of data subjects, as well as other personal information. Pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its 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. The applicable legislation in this field is Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC. When access is requested to documents containing personal data, Regulation 2018/1725 becomes fully applicable<sup>1</sup>. According to Article 9(1)(b) of this Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them for a specific purpose in the public interest and the controller considers it proportionate. We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. This exception applies to all the documents falling within the scope of your request. For this reason they cannot be disclosed.

This exception applies to the following documents: 2, 4 - 13, 15 - 24, 26 - 31, 33, 34, 37, 38, 40 - 44, 46, 47, 48, 51 - 80, 83, 84, 87 - 90, 95, 97, 98, 100 - 105, 107, 110 - 112, 114

**2. Exception 4(2) 1st (“commercial interests of a natural or legal person, including intellectual property”) and 3rd indent (“purpose of investigations”):** The documents you seek to obtain refer to a merger investigation in which the EPDB cooperated. These documents contain views, opinions and information related to the subject matter of this investigation, as well as to information possibly containing commercial interests of a legal person, including intellectual property. Notwithstanding the fact that the investigation is currently closed, this does not change the application of said exceptions. Applicable jurisprudence considered that specific general presumptions are applicable to merger proceedings, *“because the legislation that governs those proceedings also provides for strict rules regarding the treatment of information obtained or established in the context of such proceedings”*.<sup>2</sup> As a result, *“for the purposes of interpretation of the exceptions under the first and third indents of Article 4(2) of Regulation No 1049/2001, the General Court should have acknowledged the existence of a general presumption that disclosure of documents exchanged between the Commission and undertakings during merger control proceedings undermines, in principle, both protection of the objectives of investigation activities and that of the commercial interests of the undertakings involved*

<sup>1</sup> Judgment of the Court of Justice of the European Union of 29 June 2010 in Case C-28/08 P, *Commission/The Bavarian Lager Co. Ltd*, ECR 2010 I-06055. This case concerns the previous Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

<sup>2</sup> Judgment of the Court of Justice of the European Union of 28 June 2012 in case C-477/10, P, *Commission v. Agrofert Holding*, par. 59.

*in such a procedure (see, to that effect, Commission v Technische Glaswerke Ilmenau, paragraph 61).’’<sup>3</sup>*

Furthermore, the Court considered that “[h]aving regard to the nature of the interests protected in the context of merger control proceedings, clearly the conclusion reached in the preceding paragraph of this judgment is correct 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.”<sup>4</sup>

Finally, the Court considered that “the prospect of such a publication after the review procedure is closed could jeopardise the willingness of undertakings to cooperate when such proceedings are pending.”<sup>5</sup> Therefore, disclosure of such information would also seriously undermine the protection of the purpose and result of the investigation.

This exception applies to the following documents: 2 - 29, 31 - 36, 38 - 72, 74 - 97, 99 - 113.

**3. Exception 4(3) 2nd paragraph (“space to think”):** The documents you seek to obtain contain discussions, views and/or opinions of the EDPB members and/or of its Secretariat concerning decisions that have already been taken. Thus, disclosure of the views and opinions provided by the EDPB in this context would seriously undermine the decision-making process of the EDPB, in particular as it would curtail the members’ “space to think”, by preventing them from freely submitting their uncensored views on the matter, and freely discussing the issues at stake. The disclosure of these opinions will have consequences in forthcoming discussions, since specific views of the EDPB are subject to updates and revisions and can thus be reopened at any time, especially taking into account that the views of the EDPB have been provided in the course of an ongoing investigation for which the EDPB may be requested to provide further feedback in the future.

Furthermore, some of these documents contain references to internal email addresses, which are reserved for internal use only and its disclosure would create a disruption of the working arrangements / methods of the Board and/or its Secretariat, which would then seriously undermine the decision-making process of the EDPB. Some documents also contain references to a videoconferencing system used by the EDPB, which is not

<sup>3</sup> Judgment of the Court of Justice of 28 June 2012 in case C-404/10 P, Commission v Éditions Odile Jacob, par. 123. See, in the same vein, the judgment of the Court of Justice of the European Union of 28 June 2012 in case C-477/10, P, Commission v. Agrofert Holding, par. 64.

<sup>4</sup> Judgment of the Court of Justice of 28 June 2012 in case C-404/10 P, Commission v Éditions Odile Jacob, par. 124. See, in the same vein, the judgment of the Court of Justice of the European Union of 28 June 2012 in case C-477/10, P, Commission v. Agrofert Holding, par. 66

<sup>5</sup> Judgment of the Court of Justice of 28 June 2012 in case C-404/10 P, Commission v Éditions Odile Jacob, par. 124. See, in the same vein, the judgment of the Court of Justice of the European Union of 28 June 2012 in case C-477/10, P, Commission v. Agrofert Holding, par. 66. In relation to this latter case, the Court in fact considered that “under Article 4(7) of Regulation No 1049/2001, the exceptions concerning commercial interests or sensitive documents may apply for a period of 30 years and possibly beyond that period if necessary” (see par. 67).

intended to be made public for security reasons. Disclosure of this information would consequently seriously undermine the decision-making process of the EDPB.

This exception applies to the following documents: 1, 2, 4 - 13, 16 - 30, 34, 37 - 39, 41, 56, 58, 60, 67, 68, 71 - 73, 75, 76, 79, 88 - 90, 92, 95, 98

The exceptions laid down in Articles 4(2) and 4(3) of Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the document. We have not been able to identify such an interest. For these reasons, access to these documents is denied.

Please note that, regarding certain documents, we have considered whether partial access could be granted to the documents requested. However, the document(s) are either entirely covered by the exception(s), or the expungement of the information falling under the exception(s) is so significant that it renders the document irrelevant, which is why they are not provided in their entirety.

### Partial disclosure

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, alongside the scope of your request, I have come to the conclusion that full disclosure of the documents mentioned below cannot be granted, as some information in the documents falls outside the scope of your request and/or the disclosure of some information is prevented by the following exception to the right of access laid down in Article 4 of the Regulation 1049/2001:

Document partially falling outside the scope of this request: 1, 39.

Please note that document 39 has already been partially disclosed in the context of a previous access to documents request. You are therefore receiving the versions of these documents as they were previously disclosed. This may mean that some of the unredacted information in these documents may not be relevant to your specific request.

**1. Exception 4(1)(b) ("Privacy and integrity of the individual"):** The documents to which you request access contain personal data, in particular names and contact details of data subjects, as well as other personal information. Pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its 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. The applicable legislation in this field is Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC. When access is requested to documents containing personal data, Regulation 2018/1725 becomes fully applicable<sup>6</sup>. According to

<sup>6</sup> Judgment of the Court of Justice of the European Union of 29 June 2010 in Case C-28/08 P, *Commission/The Bavarian Lager Co. Ltd*, ECR 2010 I-06055. This case concerns the previous Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

Article 9(1)(b) of this Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them for a specific purpose in the public interest and the controller considers it proportionate. We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned.

This exception applies to the following documents: 78, 114

**2. Exception 4(2) 1st (“commercial interests of a natural or legal person, including intellectual property”) and 3rd indent (“purpose of investigations”):** The documents you seek to obtain refer to a merger investigation in which the EPDB cooperated. These documents contain views, opinions and information related to the subject matter of this investigation, as well as to information possibly containing commercial interests of a legal person, including intellectual property. Notwithstanding the fact that the investigation is currently closed, this does not change the application of said exceptions. Applicable jurisprudence considered that specific general presumptions are applicable to merger proceedings, *“because the legislation that governs those proceedings also provides for strict rules regarding the treatment of information obtained or established in the context of such proceedings”*.<sup>7</sup> As a result, *“for the purposes of interpretation of the exceptions under the first and third indents of Article 4(2) of Regulation No 1049/2001, the General Court should have acknowledged the existence of a general presumption that disclosure of documents exchanged between the Commission and undertakings during merger control proceedings undermines, in principle, both protection of the objectives of investigation activities and that of the commercial interests of the undertakings involved in such a procedure (see, to that effect, Commission v Technische Glaswerke Ilmenau, paragraph 61).”*<sup>8</sup>

Furthermore, the Court considered that *“[h]aving regard to the nature of the interests protected in the context of merger control proceedings, clearly the conclusion reached in the preceding paragraph of this judgment is correct 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.”*<sup>9</sup>

Finally, the Court considered that *“the prospect of such a publication after the review procedure is closed could jeopardise the willingness of undertakings to cooperate when*

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<sup>7</sup> Judgment of the Court of Justice of the European Union of 28 June 2012 in case C-477/10, P, Commission v. Agrofert Holding, par. 59.

<sup>8</sup> Judgment of the Court of Justice of 28 June 2012 in case C-404/10 P, Commission v Éditions Odile Jacob, par. 123. See, in the same vein, the judgment of the Court of Justice of the European Union of 28 June 2012 in case C-477/10, P, Commission v. Agrofert Holding, par. 64.

<sup>9</sup> Judgment of the Court of Justice of 28 June 2012 in case C-404/10 P, Commission v Éditions Odile Jacob, par. 124. See, in the same vein, the judgment of the Court of Justice of the European Union of 28 June 2012 in case C-477/10, P, Commission v. Agrofert Holding, par. 66

*such proceedings are pending.*<sup>10</sup> Therefore, disclosure of such information would also seriously undermine the protection of the purpose and result of the investigation.

This exception applies to the following documents:

Documents: 39, 78

**3. Exception 4(3) 2nd paragraph (“space to think”):** The documents you seek to obtain contain discussions, views and/or opinions of the EDPB members and/or of its Secretariat concerning decisions that have already been taken. Thus, disclosure of the views and opinions provided by the EDPB in this context would seriously undermine the decision-making process of the EDPB, in particular as it would curtail the members’ “space to think”, by preventing them from freely submitting their uncensored views on the matter, and freely discussing the issues at stake. The disclosure of these opinions will have consequences in forthcoming discussions, since specific views of the EDPB are subject to updates and revisions and can thus be reopened at any time, especially taking into account that the views of the EDPB have been provided in the course of an ongoing investigation for which the EDPB may be requested to provide further feedback in the future.

Furthermore, some of these documents contain references to internal email addresses, which are reserved for internal use only and its disclosure would create a disruption of the working arrangements / methods of the Board and/or its Secretariat, which would then seriously undermine the decision-making process of the EDPB.

This exception applies to the following documents: 1, 39, 78, 114

## Full disclosure

We have identified one document (the “EDPB Statement on the Privacy Implications of Mergers” adopted in 19 February 2020) that falls under the scope of your request and can be fully disclosed, since it is already published on our website. You can find the document following this link: [https://edpb.europa.eu/our-work-tools/our-documents/statements/statement-privacy-implications-mergers\\_en](https://edpb.europa.eu/our-work-tools/our-documents/statements/statement-privacy-implications-mergers_en).

## Disclaimer

You may reuse the documents requested free of charge for non-commercial and commercial purposes provided that the source is acknowledged and that you do not distort the original meaning or message of the document/documents. Please note that neither the EDPB, nor its Secretariat assume liability stemming from the reuse.

## Means of redress

<sup>10</sup> Judgment of the Court of Justice of 28 June 2012 in case C-404/10 P, Commission v Éditions Odile Jacob, par. 124. See, in the same vein, the judgment of the Court of Justice of the European Union of 28 June 2012 in case C-477/10, P, Commission v. Agrofert Holding, par. 66. In relation to this latter case, the Court in fact considered that “under Article 4(7) of Regulation No 1049/2001, the exceptions concerning commercial interests or sensitive documents may apply for a period of 30 years and possibly beyond that period if necessary” (see par. 67).

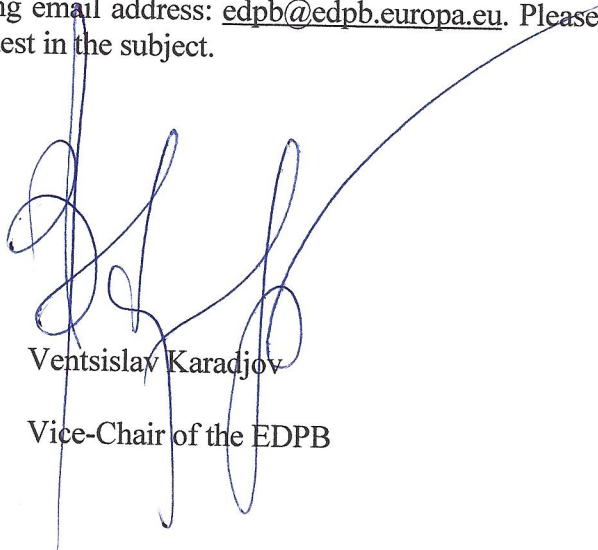
or message of the document/documents. Please note that neither the EDPB, nor its Secretariat assume liability stemming from the reuse.

### **Means of redress**

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

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the following email address: [edpb@edpb.europa.eu](mailto:edpb@edpb.europa.eu). Please make reference to the case number of your request in the subject.

Yours faithfully,



Ventsislav Karadjov

Vice-Chair of the EDPB