



EUROPEAN COMMISSION
Competition DG

The Director General

Brussels, 31 May 2023
COMP/A2

Mr Bram VRANKEN
Corporate Europe Observatory
Rue d'Edimbourg 26, 1050 Brussels
Belgium

By email:
ask+request-12776-5540902e@asktheeu.org

Subject: Your application for access to documents 2023/1931

Dear Mr Vranken,

We refer to your request for access to European Commission documents registered on 28/03/2023 under the above-mentioned reference number.

1. DOCUMENTS CONCERNED

You request access to *[a]ll documents - including but not limited to e-mails, reports, minutes, etc. - starting from 01/01/2020 related to meetings between DG Competition and the following four stakeholders: RBB Economics, Compass Lexecon, Charles River Associates International and Oxera.*

I consider your request to cover documents held up to the date of your initial application, i.e. 21/03/2023.

Insofar your request concerns documents which are part of the administrative file of the Commission concerning Merger, Antitrust or State aid investigations, 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, under C – Case related documents, the detailed assessment as regards the application of the exceptions of Article 4 of Regulation 1049/2001 to that category of documents.

Outside of the category of case-related documents, regarding meetings with Compass Lexecon and Oxera, we regret to inform you that the Commission does not hold any documents that would correspond to the description given in your application.

As specified in Article 2(3) of Regulation (EC) No 1049/2001, the right of access as defined in that regulation applies only to existing documents in the possession of the institution.

Given that no such documents, corresponding to the description given in your application, are held by the Commission, the Commission is not in a position to fulfil your request.

Regarding meetings with RBB Economics ('RBB') or Charles River Associates International ('CRA'), your application concerns the non-case-related documents listed in the annexed files entitled 'Annex 1 – List of documents – RBB' and 'Annex 2 – List of documents – CRA' detailing the reference Ares, author, addressee, date and title (or, if a title is not available, the subject).

2. DETAILED ASSESSMENT AND APPLICABLE EXCEPTIONS

The documents listed in the annexed files have been classified as either (A) marked as redacted/disclosed or (B) marked as non-redacted/non-disclosed, depending on whether partial access can, or cannot, be granted.

The detailed assessment of case related documents is provided under section C below.

A - Documents marked as redacted/disclosed

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, I have come to the conclusion that documents marked as redacted/disclosed in the annexed files above may be partially disclosed.

With regard to the documents commented in the annexed files mentioning 'personal data', a complete disclosure of the identified documents is prevented by the exception concerning the protection of privacy and the integrity of the individual outlined in Article 4(1)(b) of Regulation (EC) No 1049/2001, because they contain any of the following personal data:

- the names/initials and contact information of Commission staff members not pertaining to the senior management;
- the names/initials and contact details of other natural persons;
- handwritten signatures/abbreviated signatures of natural persons;
- other information relating to an identified or identifiable natural person.

Article 9(1)(b) of the Data Protection Regulation¹ does not allow the transmission of these personal data, except if you prove that it is necessary to have the data transmitted to you for a specific purpose in the public interest and where there is no reason to assume that the legitimate interests of the data subject might be prejudiced. In your request, you do not express any particular interest to have access to these personal data nor do you put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data contained in the requested documents, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to

¹ Regulation (EU) 2018/1725 of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, PE/31/2018/REV/1, OJ L 295 of 21.11.2018.

think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data and the commercially sensitive information concerned.

With regard to the documents commented in the annexed files mentioning ‘commercially sensitive information’, some parts of these documents have been blanked out as their disclosure is prevented by the exception to the right of access laid down in the first item of Article 4(2) Regulation (EC) No 1049/2001.

The redacted parts of these documents contain commercially sensitive business information of the company that submitted it, including information relating to any of the following: methodologies, know-how, specific pricing, breakdown of contractual execution timetables, involvement of experts or partners, information on detailed operational aspects, business strategies, detailed description of the proposed actions or other information including information carrying commercial value.

Disclosure of these parts relating to the execution of a procurement contract would undermine the protection of the contractor’s expertise, know-how, strategy and creativity and thus their commercial strength, as it could be used by competitors in future similar procedures, to the detriment of the contractor concerned.

Therefore, I conclude that, pursuant to the first item of Article 4(2) of Regulation (EC) No 1049/2001, access cannot be granted to the commercially sensitive information contained in the requested documents. The exceptions laid down in Article 4(2) of Regulation (EC) No 1049/2001 apply unless there is an overriding public interest in disclosure of the documents. I have examined whether there could be an overriding public interest in disclosure of the specific commercially sensitive information and have not been able to identify such an interest.

Please note that certain documents are preliminary drafts, which do not reflect the position of the Commission and cannot be quoted as such.

Please note that the documents are part of a study carried out by external experts. They do not reflect the position of the Commission and cannot be quoted as such.

Please note that documents originating from third parties are disclosed to you based on Regulation (EC) No 1049/2001. However, this disclosure is without prejudice to the rules on intellectual property, which may limit your right to reproduce or exploit the released documents without the agreement of the originator, who may hold an intellectual property right on them. The European Commission does not assume any responsibility from their reuse.

B - Documents marked as non-redacted/non-disclosed

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents, I regret to inform you that your application cannot be granted for documents marked as non-redacted/non-disclosed in the annexed files above. Disclosure of these document is prevented by exceptions to the right of access laid down in Article 4 of this Regulation.

Disclosure of the non-redacted/non-disclosed documents commented in the annexed files mentioning ‘document contains personal opinions’, ‘commercially sensitive information’, and/or document ‘is subject to the exception under Article 4(3) Regulation 1049/2001/investigation exception’ is prevented by the corresponding exceptions of the right of access laid down in Article 4.

These comments mean that the documents which you seek to obtain:

- contain personal information of officials or of external experts in the form of personal opinions for internal use as part of preliminary deliberations; or
- contain commercially sensitive business information of the company that submitted it; or
- relate to a decision which has not yet been taken by the Commission and/or contain opinions for internal use as part of deliberations and preliminary consultations;

Therefore, disclosure of the documents requested would undermine respectively the protection of:

- officials or of external experts personal interpretation of facts or acts expressed for internal use as part of preliminary deliberations which could be detrimental to their reputation, dignity and honor, and that does not set out any official position of the institution or of third parties; or
- the commercial interests of the company that submitted the commercially sensitive information, as putting it in the public domain would affect the company's competitive position on the market. More specifically, these documents contain information relating to industry specific study methodologies, professional intellectual product know-how, breakdown of contractual execution timetables, scope/purpose/methodology of experts involvement, information on detailed operational aspects of the execution of the contract, business strategies in implementation of European Commission requests, detailed description of the proposed actions in response to the European Commission comments. In other words, disclosure of these documents relating to the execution of a procurement contract would undermine the protection of the contractor's expertise, know-how, strategy and creativity and thus their commercial strength, as it could be used by competitors in future similar procedures, to the detriment of the contractor concerned.
- the decision-making process of the Commission in relation to (a) the completion of the on-going RBB study on the "Commission Assessment of Future Market Entry, Expansion and Imports in EU Merger Decisions", and (b) the policy enforcement decisions following the finalized CRA study in the electric vehicle recharging market, as it would reveal preliminary views and policy options which are currently under consideration. More specifically:
 - a) in the current state of completion of the on-going RBB study, there are several decisions still to be discussed internally by the Directorate-General on a number of issues (including but not limited to: study methodologies, exact list of decisions and part of decisions proposed for *ex post* evaluation, scope and extent of the involvement of independent experts). Disclosure of the non-redacted/non-disclosed documents would create a serious risk undermining the decision-making process, whereas the Commission's services must be free to explore all possible options in preparation of a decision, free from external pressure. Therefore the exception laid down in Article 4(3) first subparagraph of Regulation (EC) No 1049/2001 applies to these documents.
 - b) disclosure of the non-redacted/non-disclosed documents drawn up in the context of the study on the electric vehicle recharging market would reveal key issues, assessment methodologies, analytical techniques and enforcement policy options which the Commission is still in the process of analysing. The disclosure of these documents could seriously undermine this process by opening it to undue external influence or

pressure. In addition, the disclosure would provide entities active in this market and adjacent markets that would be subject to future investigations, should the Commission decide to launch such investigations, with undue insights into our methodological approaches and analytical techniques, thereby providing them with the ability to adjust or conceal some of their possible conducts accordingly. Moreover, disclosing the non-redacted/non-disclosed documents could foster misinformation and speculative interpretations, which may unnecessarily disturb the market dynamics. Therefore the exception laid down in Article 4(3) first subparagraph of Regulation (EC) No 1049/2001 along with the investigation exception applies to these documents.

C – Case related documents

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*², 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*³, *Bavarian Lager*⁴ and *API*⁵, 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 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 cases regarding the application of Articles 101 and 102 TFEU (“antitrust cases”), would undermine the purpose of the access system introduced by Regulations No 1/2003 and 773/2004⁶.

² Case C-404/10 P, *Commission v Odile Jacob*, [2013] ECR

³ Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau*, [2010] ECR I-5885

⁴ Case C-28/08 P, *Commission v Bavarian Lager*, [2010] ECR I-6055

⁵ 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

⁶ Case C-365/12 P *Commission v EnBW Energie Baden-Württemberg*, judgment of 27 February 2014, paragraph 88

A similar general presumption of confidentiality based on article 4§2 covers the documents which are part of the administrative file of the Commission related to State aid investigations. In the recent *Muka*⁷ judgment, a case which concerned an access to documents request in two closed State Aid investigations, the General Court stated that ‘the general presumption of non-disclosure concerning the documents relating to the Commission’s administrative file resulting from a State aid control procedure applies regardless of whether the request for access concerns a control procedure which has already been closed or one which is pending’⁸.

In view of the foregoing, insofar they are part of the case related documents category, the requested documents are manifestly covered in their entirety by the exception related to the protection of the purpose of the Commission's Competition investigations set out in Article 4(2), third indent of Regulation 1049/2001.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) and 4(3) of Regulation (EC) No 1049/2001 apply unless there is an overriding public interest in disclosure of the documents. I have examined whether there could be an overriding public interest in disclosure of the specific personal opinions, the commercially sensitive information as well as the information capable to seriously undermine the decision-making process/investigations of the Commission and have not been able to identify such an interest.

4. PARTIAL ACCESS

We have considered whether partial access could be granted to the documents requested. However, for the reasons explained above, no meaningful partial access is possible without undermining the interest described above and the information contained therein which could be made public would be of no substantial value as it is already of public knowledge.

I am aware that if a document contains information which is already in the public domain, this does not in principle justify a refusal of partial access, but instead requires its partial disclosure⁹. However, pursuant to settled case-law, in exceptional circumstances:

‘a derogation from the obligation to grant partial access might be permissible where the administrative burden of blanking out the parts that may not be disclosed proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required¹⁰’.

The General Court further held in the same judgment that:

⁷ See case T-214/21, *Ondrej Muka v Commission*

⁸ See case T-214/21, *Ondrej Muka v Commission*, paragraph 55. See also, by analogy, the *Agrofert* and *Deutsche Telekom* judgments quoted therein

⁹ Judgment of the Court of First Instance of 30 January 2008, *Terezakis v European Commission*, T-380/04, EU:T:2008:19, paragraph 101.

¹⁰ Judgment of the Court of First Instance of 7 February 2002, *Kuijter v Council of the European Union*, T-211/00, EU:T:2002:30, paragraph 57.

‘[...] The principle of sound administration requires that the duty to grant partial access should not result in an administrative burden which is disproportionate to the applicant's interest in obtaining that information¹¹’.

In this instance, I note that, in the framework of your application, you do not contest the particularly heavy workload which would be entailed by partial disclosure of the documents requested, nor the fact that the information that would be disclosed would not be of any substantial value as it is already publicly known¹².

Consequently, I have come to the conclusion that, in order to safeguard the principle of sound administration, the documents cannot be partially disclosed under Regulation (EC) No 1049/2001. Indeed, the administrative burden engendered by implementing such partial access would not weigh up against your possible interest in obtaining the (already public) information contained in the parts that would remain unredacted.

The exceptions laid down in Article 4(2) and 4(3) of Regulation (EC) No 1049/2001 apply to the entire documents, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure.

Finally, you will also find within the category of documents “non-redacted/non/disclosed” a number of transmission emails (identified as “Cover email – no substantive content”), which do not contain any material information not already contained in the list of documents or in the attachments they transmit, apart from personal data that would need to be redacted prior to the disclosure for the reasons explained above. As these messages do not have any substantive content, I assume that they are of no interest to you. Should that not be the case, please let me know.

5. MEANS OF REDRESS

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed to the Secretariat-General of the Commission within 15 working days upon receipt of this letter. You can submit it in one of the following ways:

by asking for a review via your portal¹³ account (available only for initial requests submitted via the portal account),

or by mail:

European Commission
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076

¹¹ Judgement of the Court of First Instance of 12 July 2001, *Mattila v Council of the European Union and European Commission*, T-204/99, EU:T:2001:190, paragraph 69.

¹² See the Procurement documents for the “Commission Assessment of Future Market Entry, Expansion and Imports in EU Merger Decisions” awarded to RBB available [here](#); and the study entitled “Competition analysis of the electric vehicle recharging market across the EU27 + the UK” prepared by Charles River Associates available [here](#).

¹³ <https://www.ec.europa.eu/transparency/documents-request>

B-1049 Bruxelles

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

Yours faithfully,

(e-signed)
Olivier GUERSENT

Annex(es):

‘Annex 1 – List of documents – RBB’

‘Annex 2 – List of documents – CRA’