



EUROPEAN COMMISSION

Competition DG

The Director General

Brussels, 13 July 2023

COMP/(2023)/3136

Samuel Stolton

By e-mail: ask+request-13053-babcad00@asktheeu.org

Subject: EASE 2023/3136 – Your request of 31 May 2023 for access to documents pursuant to Regulation (EC) No. 1049/2001

Dear Sir,

Thank you for your message of 31 May 2023, registered on the same date under EASE number 2023/3136, 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 following documents

- Any documentation referring to OpenAI or ChatGPT. This documentation should include but not be limited to: general communications of any nature, written material of any kind, consultation notes, email correspondences, attendance lists, agendas, background papers, briefing papers, transcriptions of meetings, readouts of meetings, summaries of meetings, briefings for meetings, etc.

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.

¹ Regulation (EC) N° 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ L145 of 31.5.2001, p. 43

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*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 *Commission v TGI*⁶, 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

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

would undermine the purpose of State aid investigations. The Court reasoned that such disclosure would call into question the procedural system⁷.

Based on this reasoning, the Court recognized in *Agrofert*⁸ that general presumptions of non-disclosure 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.

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 773/2004⁹.

As ruled by the Court in the *Agrofert* case¹⁰ for merger proceedings, and by the General Court in the *Bitumen* case¹¹ for antitrust proceedings, 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 (for merger proceedings) and Regulations 1/2003 and 773/2004 (for antitrust proceedings) and Regulation 1049 have different aims but must be interpreted and applied in a consistent manner. The rules on access to file in the above-mentioned regulations 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).

Natural and legal persons submitting information in the context of the above mentioned regulations 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 for merger proceedings and Regulations 1/2003 and 773/2004 for antitrust proceedings 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

⁷ 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

⁸ Case C-404/10 P, *Commission v Agrofert Holding*, [2013] ECR, paragraph 59

⁹ Case C-365/12 P, *Commission v EnBW Energie Baden-Württemberg*, ECLI:EU:C:2014:112, paragraph 88.

¹⁰ *Agrofert*, paragraphs 32-40

¹¹ Case T-380/08, *Netherlands v Commission*, ECLI:EU:T:2013:480, paragraphs 32-40

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, may form 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.

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.

The general presumption recognised in the case-law cited above does not exclude the possibility of demonstrating that certain documents, of which disclosure is sought, are not covered by the presumption. 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.

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.

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
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles

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

Yours faithfully,

(e-signed)
Olivier GUERSENT