



EUROPEAN COMMISSION

Competition DG

The Director General

Brussels, 10 July 2023

COMP/J

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By email only

Subject: EASE 2023/3305 – Your request of 20 June 2023 for access to documents pursuant to Regulation (EC) No. 1049/2001 relating to a meeting between EVP Vestager and Meta on 19 June.

Dear Sir,

Thank you for your application of 20 June 2023, registered on the same day under the above-mentioned reference number, in which you request access to documents in accordance with Regulation (EC) No. 1049/2001¹ ("Regulation 1049/2001").

1. DOCUMENTS CONCERNED

In your message, you request access to the following documents:

- 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 EVP Vestager's meeting with Meta's Mark Zuckerberg and Meta representatives on Monday June 19, 2023.

The documents you request access to form part of the case file in a pending investigation under Regulation (EU) 2022/1925² (the Digital Markets Act, hereinafter the 'DMA'), in which no final decision has yet been adopted by the Commission.

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 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265 of 12.10.2022, p. 1.

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.

We have, however, identified the following documents that relate to EVP Vestager's meeting with Meta's Mark Zuckerberg and Meta representatives on Monday June 19, 2023 and which can be shared with you to a certain extent:

- 1) Ares(2023)3572273: exchange related to setting up the meeting;
- 2) The minutes of this meeting.

With regard to the document listed above, a complete disclosure 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 it contains 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.

Article 9(1)(b) of the Data Protection Regulation (Regulation 2018/1725) 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 think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

Document 2 was redacted based on Article 4(2), third indent of Regulation (EC) No 1049/2001, which allows the Commission to refuse access to a document where its disclosure would undermine the protection of the purpose of inspections, investigations and audits. The redacted sentence is redacted to the protection of the purpose of the Commission's on-going DMA investigation.

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.

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.

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.

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.

Based on the same reasoning, the Court recognized in *Agrofert*⁷ 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

³ Case C-404/10 P, *Commission v Odile Jacob*, ECLI:EU:C:2012:393.

⁴ Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau*, ECLI:EU:C:2010:376.

⁵ Case C-28/08 P, *Commission v Bavarian Lager*, ECLI:EU:C:2010:378.

⁶ Cases C-514/07 P, C-528/07 P and C-532/07 P, *Sweden and Others v API and Commission*, ECLI:EU:C:2010:541.

⁷ Case C-477/10 P, *Commission v Agrofert Holding*, ECLI:EU:C:2012:394, paragraph 59.

(antitrust cases), would undermine the purpose of the access system introduced by Regulations No 1/2003 and 773/2004⁸.

As ruled by the Court of Justice in the *Agrofert* case⁹ for merger proceedings, and by the General Court in the *Bitumen* case¹⁰ 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 1049/2001. In essence, Regulations 1/2003 and 773/2004 and Regulation 1049/2001 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).

Furthermore, in the recent *Mika* case, the General Court recalled that, as interested parties other than those directly concerned in State aid control procedures (the Member States) do not have the right to consult the documents in the Commission's administrative file, there is a general presumption that disclosure of documents in the administrative file undermines, in principle, the protection of the purpose of investigation activities, and also held that this presumption applies regardless of whether the request for access concerns a control procedure which has already been closed or one which is pending¹¹.

The same reasoning used in the previously mentioned case law to establish a general presumption of non-disclosure for documents belonging to merger, antitrust and state aid case files is fully applicable to the disclosure of documents exchanged between the Commission and notifying and other (third) parties in the enforcement of the DMA and preparation of enforcement, given that this Regulation contains very similar provisions as regards both the obligation of professional secrecy and the access to file procedure¹². If documents in the DMA case files were to be disclosed under Regulation 1049/2001 to persons other than those authorised to have access to them according to the DMA, the procedural scheme instituted by the latter would be undermined.

Consequently, and by analogy to what has been repeatedly recognized by the case-law in the context of merger, antitrust and state aid investigations, there is a general presumption that disclosure of documents in DMA case files 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 DMA proceedings, and this presumption applies regardless of whether the request for access concerns DMA proceedings which have already been closed or proceedings which are pending.

Natural and legal persons submitting information in the context of the DMA have a legitimate expectation that – apart from the publication of the non-confidential summaries provided for in Articles 8(6) and 18 (5) and (6) of the DMA and of the non-

⁸ Case C-365/12 P, *Commission v EnBW Energie Baden-Württemberg*, ECLI:EU:C:2014:112, paragraph 88.

⁹ *Agrofert*, paragraphs 61-63.

¹⁰ Case T-380/08, *Netherlands v Commission*, ECLI:EU:T:2013:480, paragraphs 32-40

¹¹ Case T-214/21, *Mika v Commission*, ECLI:EU:T:2022:607, paragraphs 44 and 55.

¹² See, in this regard, Articles 34(4) and 36 of the DMA.

confidential versions of final decisions pursuant to Article 44 of the DMA – the information they supply to the Commission on an obligatory or voluntary basis under the DMA will not be publicly disclosed.

One of the documents you requested (documents 6) and 7) above) contains information extracted from a number of antitrust and DMA case files which has not been brought into the public domain and is known only to a limited number of persons. In particular, this document contains 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 this document could bring serious harm to the undertakings' commercial interests.

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.

Careful respect by the Commission of its obligations regarding professional secrecy creates a climate of mutual confidence between the Commission and undertakings, under which the latter cooperate by providing the Commission with the information necessary for its investigations.

In these circumstances, disclosure despite the protection provided for by Regulation 1/2003 and the DMA, 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 antitrust and DMA 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 Articles 101 and 102 TFEU and the DMA. Consequently, the effective enforcement of these legal provisions would be undermined.

It thus follows that the requested document is covered in its entirety by the general presumption of non-disclosure of documents in both antitrust and DMA investigations.

In view of the foregoing the requested document is 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, the document in question contains information which has been gathered or drawn up by the Commission in order to take decisions on the compliance with Articles 101 and 102 TFEU and with the DMA. Since the decisions have not yet been taken, public disclosure of the requested document 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 document 2), access to which is requested.

Furthermore, the Court recognized in *Odile Jacob*¹³ and *EnBW*¹⁴, applicable also here by analogy, 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.

In view of the foregoing, the requested document is manifestly covered in its entirety 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 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 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.

In your application you have not established arguments that would present an overriding public interest to disclose the document to which access has been hereby denied. Consequently, the prevailing interest in this case lies in protecting the effectiveness of the Commission's 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 document 2), 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 the document 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 letter, 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.

¹³ *Odile Jacob*, paragraph 130.

¹⁴ *EnBW*, paragraph 114.

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