



EUROPEAN COMMISSION

Competition DG

The Director General

Brussels, 27 May 2024

COMP/A1

Bram Vranken  
Corporate Europe Observatory  
Rue d'Edimbourg 26  
1050 Brussels

By e-mail

[ask+request-14458-  
c41a0c8f@asktheu.org](mailto:ask+request-14458-c41a0c8f@asktheu.org)

**Subject: EASE 2024/1945 – Your request of 9 April 2024 for access to documents pursuant to Regulation (EC) No. 1049/2001**

Dear Mr Vranken,

Thank you for your application registered on 9 April 2024 under EASE number 2024/1945, in which you request access to documents in accordance with Regulation (EC) No. 1049/2001<sup>1</sup> ("Regulation 1049/2001").

## **1. SCOPE OF YOUR APPLICATION**

In your message, you requested access to

*- all documents - including but not limited to e-mails, reports, minutes, etc. - related to meetings with companies, think tanks, law firms, consultancy firms, trade and industry associations on the new guidelines on the application of Article 102 TFEU and*

*- all correspondence including attachments (i.e. any emails, correspondence or telephone call notes) with companies, think tanks, law firms, consultancy firms, trade and industry associations on the new guidelines on the application of Article 102 TFEU*

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

## **2. IDENTIFICATION AND ASSESSMENT OF THE RELEVANT DOCUMENTS**

We have identified the following documents as falling within the scope of your request. Please note that parts of some of these documents do not relate to the new guidelines on exclusionary abuses by dominant undertakings under Article 102 TFEU. These parts fall outside the scope of your request and were therefore redacted (documents 2, 4, 10, 11, 12, 16, 17, 18, 22, 23, 26, 27, 29, 30 and 31).

### *Meeting of 26 October 2023 with GSMA*

1. GSMA position paper on the Guidance on exclusionary abuses
2. Presentation on 102 Guidelines review meeting
3. Emails setting up 26 October 2023 meeting

### *Meeting of 18 October 2023 with ETNO*

4. Presentation on 102 Guidelines review
5. Email of 20 October 2023 sending presentation
6. Emails setting up 18 October 2023 meeting
7. Email of 20 February 2024 sending ETNO position paper on Art. 102 Guidelines
- 7a ETNO position paper
8. Redline version of amended Guidance paper
9. Email of 25 October replying to email of 20 October 2023

### *Meeting of 25 April 2023 with the European Cement Association*

10. Emails setting up meeting of 25 April 2023
11. Briefing for the meeting
12. Follow up email of 11 May 2023

### *Meeting of 11 December 2023 with ECLF*

13. Email of 24 April 2023 with submission of position paper on 102 Guidelines
14. Position paper on 102 Guidelines
15. Slides presentation for 11 December 2023 meeting

### *Meeting of 26 September 2023 with ECLF*

16. Article 102 briefing for the meeting with ECLF
17. General briefing for the meeting with ECLF
18. Emails setting up the meeting with ECLF on 26 September 2023

### *Luncheon with Spanish Chamber of Commerce of 18 October 2023*

19. Speech for Spanish Chamber of Commerce
20. Emails setting up meeting of 18 October 2023

### *Meeting with BDI member of board of 14 November 2023*

21. Emails setting up the meeting
22. Briefing for meeting with board member of BDI

*Meeting with Amazon of 7 June 2023*

23. Briefing for meeting with Amazon on 7 June 2023
24. Email setting up meeting

*Meeting with BDI Competition Committee of 23 November 2023*

25. Agenda of meeting
26. Email setting up the meeting of 23 November 2023
27. Briefing for the BDI competition committee meeting

*Meeting of 20 February 2024 with ICC*

28. Email setting up meeting of 12 December 2023 (subsequently cancelled)
29. Email setting up new meeting of 20 February 2024
30. Agenda of meeting
31. Briefing for the ICC meeting

In addition, your request may cover documents that were submitted by stakeholders in the context of the Call for Evidence on the Guidelines on exclusionary abuses by dominant undertakings and that the Commission published on 27 March 2023 on its website.

All responses received in the context of the Call for Evidence can be accessed on the following websites:

- [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13796-EU-competition-law-guidelines-on-exclusionary-abuses-by-dominant-undertakings\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13796-EU-competition-law-guidelines-on-exclusionary-abuses-by-dominant-undertakings_en)

and

- [https://competition-policy.ec.europa.eu/antitrust-and-cartels/legislation/application-article-102-tfeu\\_en](https://competition-policy.ec.europa.eu/antitrust-and-cartels/legislation/application-article-102-tfeu_en) which contains a link to three additional submission received that are available here [https://competition-policy.ec.europa.eu/document/download/ea8db48-d50a-49cd-8dfe-22e4890da7c5\\_en?filename=2023\\_Article\\_102\\_Stakeholders\\_Responses.zip](https://competition-policy.ec.europa.eu/document/download/ea8db48-d50a-49cd-8dfe-22e4890da7c5_en?filename=2023_Article_102_Stakeholders_Responses.zip).

### **3. APPLICABLE EXCEPTIONS**

As the effects of granting access to documents under Regulation 1049/2001 are *erga omnes*, in the sense that such documents become public, the disclosure of some of the requested documents at this stage might undermine the protection of lawful interests, as set forth in Article 4 of Regulation 1049/2001. Once access is granted, any potential requester receives access to the documents in question, as "*the purpose of the regulation is to guarantee access*

*for everyone to public documents and not just access for the requesting party to documents concerning it".<sup>2</sup>*

## **EXCEPTIONS APPLICABLE TO THE DOCUMENTS IDENTIFIED ABOVE UNDER SECTION 2**

### *i. Article 4(1)(b), Protection of privacy and integrity of individuals*

With regard to the documents 3, 4, 5, 6, 7, 7a, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 listed above, 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 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 (namely, their specific function/job title).

Article 9(1)(b) of Regulation 2018/1725<sup>3</sup> 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 enumerated above, 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.

### *ii. Article 4(3): protection of the decision-making process*

Pursuant to Article 4(3), first subparagraph of Regulation 1049/2001, access to the documents drawn by the Commission for internal use or received by the Commission, which relates to a matter where the decision has not been taken by the Commission, shall

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<sup>2</sup> See Joined Cases T-110/03, T-150/03 and T-405/03, *Sison v Council*, paragraph 50; Case T-181/10, *Reagens SpA v Commission*, paragraph 143.

<sup>3</sup> 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, OJ L 295, 21.11.2018, p. 39.

be refused if disclosure of the documents would seriously undermine the Commission's decision-making process.

In the present case, parts of documents 16 and 17 (namely the sections labelled "defensives") were drafted in the context of the internal deliberations and reflections on the Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings, on which a final decision has not yet been taken.

The Commission services must be free to explore all possible options with regard to ongoing initiatives, policy processes and implementation of legislation. The risk of disclosing sensitive information regarding the Commission services' preliminary views while the decision-making processes on the issues at question is still ongoing would deter them from freely expressing their opinions. Speculations and misinterpretations by the public on the views, positions, and considerations put forward during the decision-making process would affect the exploration of different policy options and unduly restrict the Commission's internal space to think, exposing the Commission to external pressure. Disclosure of these parts of the document would therefore seriously undermine the ongoing decision-making process. This risk is reasonably foreseeable and not purely hypothetical.

More specifically, disclosure would put at risk the Commission's decision process insofar as the defensives contain the initial position on certain issues and how the Commission contemplates addressing them in the context of a first draft of the Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings to be published for consultation. The disclosure could undermine the Commission's ability to defend, and potentially change, its position as regards specific issues.

Pursuant to Article 4(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 document 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(3) of Regulation 1049/2001.

In your application you have not presented any arguments that would establish an overriding public interest to disclose in full document 16 and 17 to which access is hereby partially denied pursuant to Article 4(3) of Regulation 1049/2001.

Accordingly, the redacted parts of the requested documents 16 and 17 labelled "defensives" are covered by the exception laid down in Article 4(3), first subparagraph of Regulation 1049/2001 and cannot be disclosed.

#### **4. REUSE OF DOCUMENTS**

With respect to documents 1, 2, 4, 7a, 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.

With respect to document 8, please note that you may reuse public documents, which have been produced by the European Commission or by public and private entities on its behalf based on the [Commission Decision on the reuse of Commission documents](#). You may thus reuse document 8 disclosed free of charge and 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. Please note that the Commission does not assume liability stemming from the reuse.

## 5. CONFIRMATORY APPLICATION

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 within 15 working days upon receipt of this letter to the Secretariat-General of the Commission at 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](mailto:sg-acc-doc@ec.europa.eu).

Yours faithfully,

*e-signed*

Olivier GUERSENT