



EUROPEAN COMMISSION  
Competition DG

The Director General

Brussels, **05 JUL. 2018**

COMP/FTF/LG/2018/2851

***By registered letter with acknowledgment of receipt***

Olivier Hoedeman  
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***Advance copy by email:***

ask+request-5114-d6e4f237@asktheeu.org

**Subject: GESTDEM 2018/2851 –Your application for access to documents pursuant to Regulation (EC) 1049/2001 relating to contacts between DG Competition and tobacco industry**

Dear Mr Hoedeman,

We refer to your e-mail dated 05/02/2018 in which you request access to documents relating to contacts between DG Competition and tobacco industry in accordance with Regulation (EC) No. 1049/2001<sup>1</sup> ("Regulation 1049/2001"). Your request was split between several Directorates-General and the part of the request concerning DG Competition documents was registered and attributed to DG Competition on 24/05/2018 under the above mentioned reference number.

## **1. SCOPE OF YOUR REQUEST**

In your message you request access to the following documents:

*- all reports (and other notes) from meetings between the European Commission and representatives of the tobacco industry (producers, distributors, importers etc, as well as organisations and individuals that work to further the interests of the tobacco industry), since January 1st 2017.*

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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.

*- all correspondence (including emails) between the European Commission and representatives of the tobacco industry (producers, distributors, importers etc. as well as organisations and individuals that work to further the interests of the tobacco industry), since January 1st 2017.*

*- a list of all the above-mentioned documents (including dates, names of participants/senders/recipients and their affiliation, subject of meeting/correspondence).*

As regards our request for clarification of 05/06/2018 concerning the antitrust cases AT.38238 – Raw Tobacco (ES) and AT.40237 – Spanish Tobacco, we have not yet received a reply from you. Therefore, the assessment in this letter does not concern these cases. As explained in our email of 12/06/2018, extending the time limit for responding to your application, the deadline concerning these specific cases is suspended pending your reply. I would like to inform you that if you do not reply to our request of 05/06/2018 within 15 days from receipt of this letter, we will consider your application concerning these cases withdrawn.

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

We have identified the following documents as part of the scope of your request:

1. Documents concerning case M.8547 CELANESE/BLACKSTONE/JV.
2. E-mail of 2 October 2017, titled "Henvendelse til Margrethe Vestager" to the cabinet of Commissioner Vestager from Jens Hennild
3. Letter of 2 October 2017, to Commissioner Vestager from Jens Hennild (attached to above mentioned e-mail of 2 October 2017)
4. Tobaksindustrien's observations concerning Article 15 and 16 of the Tobacco Products Directive, September 2017 (attached to above mentioned e-mail of 2 October 2017)
5. Letter of 18 October 2017, to Tobaksindustrien from the Food Task Force (in English)
6. Email of 20 October 2017, to Tobaksindustrien from the Food Task Force (in Danish)
7. Email correspondence on 28-29 September 2017 between European Smoking Tobacco Association (ESTA) and the cabinet of Commissioner Vestager, titled "Trade barriers and competition issues arising from the Implementation of the EU tracking & tracing system for tobacco products"
8. Letter of 28 September 2017 from ESTA to Commissioner Vestager, titled "Trade barriers and competition issues arising from the Implementation of the EU tracking & tracing system for tobacco products" (attached to above mentioned email of 28 September 2017)
9. Undated letter from ESTA titled "ESTA Detailed Position on the Implementation of Track & Trace"(attached to above mentioned email of 28 September 2017)

Some of these documents originate from third parties and therefore the originators of the documents have been consulted in accordance with Regulation (EC) No 1049/2001.

Document identified under point 1 are part of a file in a competition case. 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 under point 1 fall under the exceptions of Article 4 of Regulation 1049/2001. Access to these documents, therefore, has to be refused. Please find in Section 3 below the detailed assessment as regards the application of the exceptions of Article 4 of Regulation 1049/2001.

I am glad to inform you however full access may be granted to the documents under points 2, 3, 4, 7, 8 and 9. As regards documents under point 5 and 6, partial access can be granted to them. The documents to which you have requested access contain personal data (names, e-mail accounts, phone numbers etc.). Therefore I enclose a copy of the documents requested, with the personal data expunged. The purpose of redactions is explained below in section 4).

You may reuse the annexed documents 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 documents. Please note that the Commission does not assume liability stemming from the reuse.

### **3. 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*,<sup>2</sup> 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*,<sup>3</sup> *Bavarian Lager*<sup>4</sup> and *API*,<sup>5</sup> 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

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

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

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

<sup>5</sup> 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.

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.

The Court recognized in *Agrofert*<sup>6</sup> 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.

As ruled by the Court in the *Agrofert* case,<sup>7</sup> 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 and Regulation 1049 have different aims but must be interpreted and applied in a consistent manner. The rules on access to file in the Merger Regulation 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 Merger Regulation 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 will not be disclosed.

In this particular case, it should be noted that the merger investigation in case M.8547 CELANESE/BLACKSTONE/JV has already been closed. Nonetheless, the prospect of publication of sensitive information concerning the economic activities of the undertakings involved after a procedure is closed runs the risk of adversely affecting the willingness of undertakings to cooperate when such a procedure is pending.<sup>8</sup>

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 document are commercially sensitive.

The documents requested by you, as specified above in point 1, are 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.

Undertakings also have a legitimate interest that the information is used only for the purposes of the Commission proceedings in application of the Merger Regulation. It is

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<sup>6</sup> Case C-404/10 P, *Commission v Agrofert Holding*, [2013] ECR, paragraph 59.

<sup>7</sup> *Bitumen*, paragraphs 32-40.

<sup>8</sup> See the *Deutsche Telekom* judgment, case T-210/15, paragraph 45. See also, by analogy, the *Odile Jacob* and *Agrofert* judgments quoted therein.

for this reason that Article 17(1) the Merger Regulation provides that information acquired through the investigative powers of this regulation is used only for the purpose for which it was acquired, namely the administrative Commission procedure and the Court review of the decision resulting from this procedure.

Also, pursuant to Article 17(2) of the Merger Regulation, information covered by professional secrecy submitted to the Commission in the context of this regulation cannot be disclosed to the public.

These exceptions aim at protecting the Commission's capacity to ensure that undertakings comply with their obligations under European Union law.

Careful respect by the Commission of its obligations in this domain has so far created a climate of mutual confidence between the Commission and undertakings, under which the latter have cooperated by providing the Commission with the information necessary for its investigations.

In these circumstances, disclosure despite the protection provided for by the above-mentioned regulations, 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 competition 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 EU competition law. Consequently, the purpose of merger procedures and, implicitly, of the effective enforcement of the EU competition rules would be undermined.

It thus follows that the documents under point 1 are covered by a general presumption of non-disclosure of documents in merger case-files.

In view of the foregoing the requested documents under point 1 are covered by the exception set out in Article 4(2), first indent and third indent of Regulation 1049/2001.

#### **4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE**

Pursuant to Article 4 (2) 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 (2), first and third indent of Regulation 1049/2001.

According to *Agrofert* case<sup>9</sup>, the abovementioned general presumptions do not exclude the right for the applicant to demonstrate the existence of an overriding public interest justifying the disclosure of the document requested.

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 commercial interests of the undertakings concerned and protection of the purpose of investigations.

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<sup>9</sup> *Agrofert*, paragraph 86.

## **5. ARTICLE 4(1)(B): PROTECTION OF PRIVACY OF INDIVIDUALS**

Pursuant to Article 4(1)(b) of Regulation 1049/2001, access to a document can be refused where 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.

Personal data as any information relating to an identified or identifiable natural person require protection in accordance with Regulation (EC) 45/2001 of the European Parliament and of the Council of 18 December 2000("Regulation 45/2001").<sup>10</sup> When access is requested to documents containing personal data, Regulation 45/2001 becomes fully applicable.<sup>11</sup>

According to Article 8(b) of Regulation 45/2001, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced.

I consider that, on the basis of the information you submitted, the necessity of disclosing the aforementioned personal data for documents under points 5 and 6 has not been established and that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned. Moreover, I have not obtained the consent to disclose such data.

Therefore, we are disclosing the documents requested under points 5 and 6 expunged from this personal data.

In case you would disagree with the assessment that the expunged data are personal data which can only be disclosed if such disclosure is legitimate under the rules of personal data protection, you are entitled, in accordance with Article 7(2) of Regulation 1049/2001, to make a confirmatory application requesting the Commission to review this position.

## **6. 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.

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<sup>10</sup> 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, OJ L 8, 12.1.2001, page 1.

<sup>11</sup> Case C-28/08 P, *Commission v Bavarian Lager*, ECLI:EU:C:2010:378, paragraph 63.

All correspondence should be sent to the following address:

European Commission  
Secretary-General  
Transparency unit SG-B-4  
BERL 5/282  
B-1049 Bruxelles  
or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

Yours faithfully,

  
Johannes LAITENBERGER

Enclosures:

Documents 2-9 as listed above in section 2.

