EUROPEAN COMMISSION

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OUT OF SCOPE
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DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) N° 1049/2001[1]

Subject: **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - Gestdem 2018/5457**

Dear ,

I refer to your email of 20 November 2018, registered on the same day, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents[2] (hereafter: 'Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 18 October 2018, addressed to Directorate-General for Competition, you requested access to the following document relating to the merger case M.5421 ' Panasonic/Sanyo':

- Response submitted by Nokia Corporation in the context of the market investigation conducted by the Commission in Case M.5421 Panasonic/Sanyo.

[1] Official Journal L 345 of 29.12.2001, p. 94.
[2] Official Journal L 145 of 31.5.2001, p. 43.

In its initial reply of 6 November 2018, the Directorate-General for Competition refused access to the documents based on the exceptions protecting commercial interests and the purpose of inspections, investigation and audits provided for, respectively, in the first and third indents of Article 4(2) of Regulation 1049/2001.

In your confirmatory application, you request a review of this position. In particular, you question the applicability of the exceptions invoked by the Directorate-General for Competition to refuse access to the documents falling under the scope of your application. You put forward detailed arguments, which I will address below.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I regret to inform you that the refusal to grant access to the documents requested has to be confirmed based on the exceptions relating to, respectively, the protection of the purpose of inspections, investigations and audits, provided for in Article 4(2), third indent of Regulation 1049/2001 and the protection of the commercial interests of a natural or legal person, provided for in the first indent of Article 4(2) of Regulation 1049/2001.

The detailed reasons are set out below.

2.1 Protection of the purpose of investigations and of commercial interests

In accordance with the case-law of the Court of Justice, the European Commission, when assessing a request for access to documents held by it, may take into account more than one of the grounds for refusal provided for in Article 4 of Regulation 1049/2001 and two different exceptions can, as in the present case, be 'closely connected'.[3]

Article 4(2), third indent of Regulation 1049/2001 provides that the '[i]nstitutions shall refuse access to a document where disclosure would undermine the protection of […] the purpose of inspections, investigations and audits'.

Article 4(2), first indent of Regulation 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, […], unless there is an overriding public interest in disclosure'.

[3] Judgment of 13 September 2013, *Netherlands v European Commission*, T-380/08, EU:T:2013:480, paragraph 34.

In its initial reply of 6 November March 2018, the Directorate-General for Competition concluded that the documents requested are covered by a general presumption of non-disclosure, based on the exceptions of Article 4(2), first and third indents of Regulation 1049/2001 and underlined that disclosure of the documents exchanged between the European Commission and the undertaking during the merger control proceedings would undermine both the protection of the objectives of investigation activities and that of the commercial interests of the undertaking involved in such a procedure.

The Directorate-General for Competition also specifically underlined a risk of jeopardising the willingness of undertakings to cooperate with the European Commission in the context of a merger investigation.

In order to support its position in this respect, the Directorate-General for Competition referred to the *Odile Jacob*[4] and *Agrofert*[5] judgments.

In your confirmatory application, you contest this reasoning. Your main arguments are the following:

Firstly, you point out that disclosure of the requested documents would not seriously undermine Nokia Corporation's commercial interests. You argue that the documents were submitted by Nokia almost ten years ago making any prevailing commercial strategy or business secrets irrelevant nowadays. Furthermore, you point out that, in your view, the irrelevance of past commercial strategy is even more obvious given the nature of the market in question, namely the market of portable rechargeable batteries, characterised by a very high pace of technical innovation, making any past commercial strategy significantly outdated. Finally, you argue that the commercial interest exception does not apply in this specific case, since Nokia Corporation sold its handset business in 2014, with the transaction taking the form of an asset deal, which made its past strategy totally irrelevant for the new acquirer. Therefore, you argue that since Nokia is no longer active on the mobile handsets market, the commercial interest exception is not applicable in this case.

Secondly, you contest the reasoning of the Directorate-General for Competition that disclosing the documents would undermine the effective conduct of investigations by reducing the cooperation of undertakings with the European Commission in the context of merger control proceedings. Furthermore, you argue that refusing to grant access to the requested documents based on an allegedly 'blind application' of the general presumption would jeopardise the principle of good administration.

I am unable to agree with these allegations.

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4 Judgment of 28 June 2012, *Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2013:808.

5 Judgment of 28 June 2012, Agrofert Holding v European Commission, Case C-477/10 P, EU:C:2012:394.

In order to address your first concern, I note that the information provided by the undertaking in the context of a merger investigation often contains sensitive data, including information related to the economic activities of undertakings.

Indeed, according to the judgment of the General Court in *Agrofert*, 'documents exchanged, on the one hand, between the Commission and the notifying parties and, on the other, between the Commission and third parties are likely to concern, amongst others, commercial strategies, turnover, market shares and business relations, and thus commercially sensitive information relating to the parties at issue'.[6]

Furthermore, the documents falling under the scope of your application are covered by a general presumption of non-disclosure. That presumption, in line with the recent *Deutsche Telecom* judgment of the General Court, 'applies regardless of whether the request for access concerns an investigation which has already been closed or one which is pending. The publication of sensitive information concerning the economic activities of the undertakings involved is likely to harm their commercial interests, regardless of whether an investigation is pending. […]'.[7]

Contrary to what you argue in your confirmatory application, the fact that the documents containing the responses provided by Nokia are almost ten years old, does not necessarily remove the sensitivity of the information provided.

In this regard, the Court held in the *Agrofert* judgment that the exceptions concerning commercial interests or sensitive documents may apply for a period of 30 years and possibly beyond[8]. Although several years have passed since Nokia submitted the responses, the information included therein still has commercial value. This remains true in this specific case as the requested documents concern a market investigation in a merger control review in which the respondents are typically requested to provide sensitive information concerning, among others, prices, turnover, available suppliers, level of competition and future developments. Furthermore, even if the market of portable rechargeable batteries is characterised by a high rate of technical innovation, the information collected during a merger investigation typically aims also at analysing the potential evolution of the market.

Furthermore, the documents requested continue to contain commercially and market-sensitive information regarding the activities of the involved undertakings, regardless of the fact that Nokia Corporation has sold its business. Indeed, nothing indicates in the present case that its commercial strategy and business secrets have lost their importance for the new acquirer once the transaction was concluded. You contest the latter statement by saying that since the operation took the form of an asset deal, the past commercial strategy and business secrets of Nokia became irrelevant for the acquirer once the

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6 Judgement of 7 July 2010, *European Commission v Agrofert Holding*, Case T-111/07, EU:T:2010:285, paragraphs 54, 56 and 62.

7 Judgment of 28 March 2017, *Deutsche Telekom AG v European Commission*, T-210/15 EU:T:2017:224, paragraph 45.

8 Judgment of 28 June 2012, *Commission v Agrofert Holding*, C-477/10 P, EU:C:2012:394, paragraph 67.

transaction was concluded. I am unable to agree with this argument since (i) I lack further information about the scope of the asset deal and (ii) irrespective of whether the deal is structured as an asset or share deal, the acquirer will purchase the business as a going concern, including the value derived from its past confidential business strategies which the acquirer will want to preserve and protect from public disclosure.

I therefore consider that there is still a real and non-hypothetical risk that public disclosure of the documents would undermine the commercial interests of the undertakings concerned.

As regards your second argument, I note that natural and legal persons submitting information to the European Commission have a legitimate right to expect that the information they supply on an obligatory or voluntary basis will not be disclosed to the public.

This legitimate right arises from the specific provisions concerning the professional secrecy obligation - which provide for documents to be used only for the purposes for which they have been gathered - and the special conditions governing access to the European Commission's file. Indeed, article 17(1) of the Merger Regulation[9] 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 procedure conducted by the European Commission and the Court review of the decision resulting from this procedure.

In this context, I note that the Merger Regulation is of the same hierarchical order as Regulation 1049/2001 and therefore none of them takes precedence over the other. Indeed, both legal instruments must be interpreted in a consistent manner.

Furthermore, contrary to the incriminating antitrust proceedings, the procedure of merger control is of an administrative nature, making the European Commission largely reliable on the cooperation of third parties in order to collect the necessary evidence and to issue a final decision. Nokia Corporation’s contribution was collected in the context of a Request for Information under Article 11(2) of the Merger Regulation.[10] Article 11(2) does not impose fines for non-compliance, and could not force Nokia or any other respondent to provide to the European Commission the much needed evidence to draft the final decision.

As the Directorate-General for Competition rightly pointed out, careful respect by the European Commission of its obligations regarding professional secrecy has so far created a climate of mutual confidence between the European Commission and undertakings, under which the latter have cooperated by providing the former with the information necessary for its investigations.

9 Official Journal L 24 of 29.1.2004, p.16.
10 Official Journal L 24 of 29.1.2004, p.13.

Indeed, if this kind of sensitive information is disclosed to the public, regardless of whether the undertaking which provided it exists or does not exist anymore on the market, this would lead to a situation where undertakings subject to investigations and potential informants and complainants would lose their trust in the European Commission's reliability and would become reluctant to cooperate with the institution.

This, in turn, as the Directorate-General for Competition has rightly pointed out, 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.

Against this background, I confirm that the documents falling under the scope of your application Gestdem 2018/5457 need to be protected against the risks associated with their public disclosure under the exceptions provided for in the first and third indents of Article 4(2) of Regulation 1049/2001.

3. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Articles 4(2) of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public (as opposed to any possible private interests of the applicant) and, secondly, overriding, it must outweigh the harm caused by disclosure.

Please note in this respect that I have not been able to identify any public interest that would outweigh the protection of the commercial interests, as well as the purpose of the investigations pursuant to Article 4(2), first and third indents of Regulation 1049/2001.

In your confirmatory application you act as the representative of , and the purpose of your request is to receive access to the information provided by Nokia. I note that this interest is private in nature.

The fact that the investigations to which the documents relate are of an administrative nature and do not relate to any legislative acts, for which the Court of Justice has acknowledged the existence of wider openness[11], provides further support to the conclusion that there is no overriding public interest in this case.

4. NO PARTIAL ACCESS

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting partial access to the documents requested. However, as pronounced by the Court of Justice[12], where the documents requested are covered by a general presumption of non-disclosure, such documents do not fall within an obligation of disclosure, in full, or in part.

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[11] Judgment of 29 June 2010, *Commission v Technische Glaswerke Ilmenau Gmbh*, Case C-139/07 P, EU:C:2010:376, paragraphs 53-55 and 60; judgment of 29 June 2010, *European Commission* v *Bavarian Lager*, Case C-28/08 P, EU:C:2010:378, paragraphs 56-57 and 63.

[12] Judgment of 28 June 2012, *European Commission* v *Odile Jacob*, Case C-404/10 P, EU:C:2012:393, paragraph 133.

5. 5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

For the European Commission
Martin SELMAYR
Secretary-General