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EUROPEAN COMMISSION

Brussels, 17.1.2019
C(2019) 340 final

[redacted]
OUT OF SCOPE
[redacted]
Austria

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 2018/5957**

Dear [redacted],

I refer to your letter of 6 December 2018, registered on the same date, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents[2] (hereafter 'Regulation 1049/2001').

1. SCOPE OF YOUR REQUEST

By your initial application of 20 September 2018, you had requested, as the insolvency administrator of [redacted] OUT OF SCOPE [redacted], access to the table of contents in merger cases M.8633 (Lufthansa/Certain Air Berlin assets) and M.8672 (EasyJet/Certain Air Berlin assets).

In its initial reply dated 3 December 2018, the Directorate-General for Competition refused access to the documents in question, based on the exceptions in Article 4(2), third indent, of Regulation 1049/2001 (protection of the purpose of inspections, investigations and audits) and Article 4(2), first indent, of the said Regulation (protection of commercial interests).

1 Official Journal L 345 of 29.12.2001, page 94.
2 Official Journal L 145 of 31.5.2001, page 43.
3 [redacted] OUT OF SCOPE .

In your confirmatory application, you request a review of this position. You put forward a number of arguments to support your request. These have been taken into account in our assessment, of which the results are described 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.

Having examined your confirmatory application, I have to inform you that the decision of the Directorate-General for Competition to refuse access to the requested documents has to be confirmed on the basis of Article 4(2), third indent, of Regulation 1049/2001 (protection of the purpose of inspections, investigations and audits), Article 4(2), first indent, of the said Regulation (protection of commercial interests), and Article 4(3), first subparagraph, of the above-mentioned Regulation (protection of the decision-making process), for the reasons set out below.

2.1. Protection of the purpose of investigations and of commercial interests

Although in your confirmatory application, you do not contest the applicability of the above-mentioned exceptions to the requested documents (your reasoning, instead is focused on the issue of overriding public interest, which will be addressed in part 4 of this decision), I would like to provide the additional information regarding the link between disclosure of the said documents and impact on the interest protected by these exceptions.

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 No 1049/2001' and two different exceptions can, as in the present case, be 'closely connected'[4].

Article 4(2), third indent of Regulation 1049/2001 provides that the 'institutions 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 the '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'.

In its initial reply, the Directorate-General for Competition explained that the documents falling under the scope of your request are part of a competition file regarding the ongoing merger case investigations M.8633 (Lufthansa/Certain Air Berlin assets) and M.8672 (EasyJet/Certain Air Berlin assets).

[4] Judgment of 13 September 2013, in Case T-380/08, *Netherlands v Commission*, (ECLI:EU:T:2013:480), paragraph 34.

These investigations cannot be considered as finalised, as the decisions adopted by the European Commission are still subject to the ongoing court proceedings, which might prompt the European Commission to reconsider its decision and reopen the case[5].

Consequently, all documents in the file are covered by a general presumption of non-accessibility based on the exceptions of the first and third indents of Article 4(2) of Regulation 1049/2001. This means that the institution is not required to carry out a specific and individual assessment of the content of each requested document.

In its judgment in *Commission v Technische Glaswerke Ilmenau*[6], which concerned a request for documents in two State aid cases, the Court of Justice upheld the European Commission's refusal. It held that there exists, with regard to the exception related to the protection of the purpose of investigations, a general presumption that disclosure of documents in the file would undermine the purpose of State aid investigations. The Court reasoned that such disclosure would call into question the State aid procedural system[7].

The Court of Justice has upheld this reasoning in relation to documents in merger control proceedings with regard to the exceptions related to the protection of the purpose of investigations and commercial interests[8]. The disclosure of such documents would undermine the system of procedural rules governing merger control proceedings, and in particular the purpose of the privileged access rules[9].

The Court of Justice indeed ruled in this regard that 'generalised access, on the basis of Regulation No 1049/2001, to the documents exchanged in […] a [merger control] procedure between the [European] Commission and the notifying parties or third parties would, as the [European] Commission has pointed out, jeopardise the balance which the European Union legislature sought to ensure in the merger regulation between the obligation on the undertakings concerned to send the [European] Commission possibly sensitive commercial information to enable it to assess the compatibility of the proposed transaction with the common market, on the one hand, and the guarantee of increased protection, by virtue of the requirement of professional secrecy and business secrecy, for the information so provided to the [European] Commission, on the other.

If persons other than those entitled to have access to the file by the rules on merger control proceedings, or those who could be regarded as involved parties but have not used their right of access to the information or have been refused access, were able to obtain access to the documents relating to such a procedure on the basis of Regulation

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5 Cases T-296/18, *Polskie Linie Lotnicze LOT v Commission*, and T-240/18 *Polskie Linie Lotnicze v Commission.*

6 Judgment of 29 June 2010, in Case C-139/07, *Commission v Technische Glaswerke Ilmenau.*, (ECLI:EU:C:2010:376).

7 See also judgment of 21 September 2010, in Case C-514/07 P, *Sweden and Others v API and Commission*, (ECLI:EU:C:2010:376), paragraphs 99 and 100.

8 Judgment of 28 June 2012, in Case C-477/10 P, *Commission v Agrofert Holding*, (ECLI:EU:C:2012:394) paragraph 56 to 59 and 64, as well as judgment of 28 June 2012 in Case C-404/10 P, *Commission v Odile Jacob*, (ECLI:EU:C:2010:54), paragraphs 108-126.

9 Judgment in *Commission v Odile Jacob*, cited above, (ECLI:EU:C:2010:54), paragraphs 118-123.

1049/2001, the system introduced by that legislation would be undermined.'[10]

This general presumption applies 'irrespective of whether the request for access concerns a control procedure which is already closed or a pending procedure. The publication of sensitive information concerning the economic activities of the undertakings involved is likely to harm their commercial interests, regardless of whether a control procedure is pending. Furthermore, the prospect of such publication after a control procedure is closed runs the risk of adversely affecting the willingness of undertakings to cooperate when such a procedure is pending.'[11] This general presumption can apply up to 30 years and possibly beyond[12].

As already explained, the tables of contents to which you requested access, form part of the files relating to the investigations in cases M.8633 and M.8672 and therefore are covered by the general presumption of non-disclosure mentioned above. Additionally, as confirmed by the General Court, public disclosure of information included in such documents is liable, in the same way as the disclosure of other documents in the file of a merger case, to undermine the interests protected by the exceptions provided for in the first and third indents of Article 4 (2) of Regulation 1049/2001[13].

Having regard to the above, I consider that the use of the exceptions under Article 4(2), third indent, of Regulation 1049/2001 (protection of the purpose of investigations), and Article 4(2), first indent, of the said Regulation (protection of commercial interests) is justified, and that access to the documents in question must be refused on that basis.

2.2. Protection of the ongoing decision-making process

Article 4(3), first subparagraph, of Regulation 1049/2001 provides that 'access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure'.

As explained under point 2.1, as long as the decision adopted by the European Commission are subject to the ongoing court proceedings, which might prompt the European Commission to reconsider its decision and reopen the case, the institution's decision-making process is still ongoing.

Indeed, disclosure of the requested documents would undermine the purpose of the investigation and seriously undermine the ongoing decision-making process with regard to the future procedural steps which the European Commission might have to take in case the above-mentioned decision is reopened. The European Commission's services must indeed be able to explore all possible options free from external pressure.

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10 Idem, paragraphs 121 and 122.

11 Idem, paragraph 124.

12 Judgment in *Commission v Agrofert Holding*, cited above, (ECLI:EU:C:2012:394), paragraph 67.

13 Judgment of 5 February 2018 in Case T-611/15, *Edeka-Handelsgesellschaft Hessenring GmbH v. Commission*, (ECLI:EU:T:2016:643), paragraph 75-77.

In this context, I would like to again refer to the case law of the General Court, according to which the table of contents of a competition file can be considered a document 'established for the institution's internal use' in the meaning of Article 4(3) of Regulation 1049/2001[14].

I conclude, therefore, that access to the documents which form part of the cases must also be denied on the basis of the exception laid down in Articles 4(3), first subparagraph, of Regulation 1049/2001.

3. NO PARTIAL ACCESS

I have also examined the possibility of granting partial access to the documents concerned, in accordance with Article 4(6) of Regulation 1049/2001. However, it follows from the assessment made above that the documents which fall within the scope of your request are manifestly and entirely covered by the exceptions laid down in Article 4(2), first and third indents, of Regulation 1049/2001 and Article 4(3), first subparagraph, of the said Regulation.

It must also be underlined that the Court of Justice confirmed that 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[15].

4. NO OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) and Article 4(3) must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

In your confirmatory application, you argue that such interest exists in the case at hand. You underline that '[you are] currently reviewing certain potential claims from the debtor OUT OF SCOPE against third parties and in particular [you are] trying to find out when exactly the inability to pay debts and the over-indebtedness occurred […]'.

I note that in your initial application of 20 September 2018, you point at alleged difficulties relating to the examination of the claims, linked to the problem in accessing informatics systems of OUT OF SCOPE, which 'was managed through the servers of OUT OF SCOPE'.

In this context, you underline that '[i]f the [European] Commission […] denies access to the file in the present case it would prevent [you] as the insolvency administrator […] to ensure that the purpose of Austrian insolvency law is adequately protected'.

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14 Judgment of 5 February 2018 in Case T-611/15, *Edeka-Handelsgesellschaft Hessenring GmbH v. Commission*, (ECLI:EU:T:2016:643), paragraph 116.

15 Judgment of 25 March 2015 in Case T-456/13, *Sea Handling v Commission*, (ECLI:EU:T:2015:185), paragraph 93.

Consequently, the public interest that, in your view, warrants disclosure of the requested documents, is linked to your role of the insolvency administrator and the obligations linked thereto. You underline that according to the Austrian law, 'an insolvency administrator is appointed to protect both private and public interests'. Therefore, ensuring a fair and equitable process of the insolvency proceedings constitutes, in your view, such an overriding public interest.

At the same time, however, you point out that '[you] have to assert claims of the insolvency estate in the interests of creditors […]'.

Therefore, while it cannot be disputed that fairness of the insolvency process must be ensured, the administrator's primary role is to represent private interests of the debtors.

In this respect, please note that any possible private interest cannot be taken into account for the purpose of assessing the possible existence of an overriding public interest[16]. Therefore, the above-mentioned use of the document cannot constitute an overriding public interest in the sense of Regulation 1049/2001[17].

Please note that the purpose of Regulation 1049/2001 is to define the rules regarding public access to European Parliament, Council and European Commission documents. All requests for access to documents must be treated in the same way and no specific interest or background of an applicant can be taken into account.

The General Court confirmed this view in its *Franchet* and *Byk* judgments in which it stated that '[i]t follows that the applicants' application must be examined in the same way as an application from any other person'[18]. The particular interest which you may have in obtaining access to the requested documents is therefore not relevant when applying Regulation 1049/2001, and cannot be confused with a public interest.

Furthermore, in the recent judgment in Case T-634/17, the Court acknowledged that the sum of a great number of private interests does not transform it into a public interest[19].

The fact that the documents requested relate to an administrative procedure rather than a legislative act, for which the Court of Justice has acknowledged the existence of wider openness, further supports this conclusion.

Consequently, I consider that in this case there is no overriding public interest that would outweigh the public interest in safeguarding the protection of the purpose of investigations, commercial interests and the ongoing decision-making process protected by the first and third indents of Article 4(2) of Regulation 1049/2001, as well as by Article 4(3), first subparagraph, of the said Regulation.

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16 Judgment of 20 March 2014, in Case T-181/10, *Reagens v Commission*, (ECLI:EU:T:2014:139), paragraph 144.

17 Judgment of 25 September 2014 in Case T-669/11, *Spirlea v Commission*, (ECLI:EU:T:2014:814), paragraph 99.

18 Judgment of 6 July 2006 in Joined Cases T-391/03 and T-70/04, *Yves Franchet and Daniel Byk v Commisison*, (ECLI:EU:T:2006:190), paragraph 82.

19 Judgment of 9 October 2018, in Case T-634/17, *Anikó Pint v Commission*, (ECLI:EU:T:2018:662), paragraph 59.

5. MEANS OF REDRESS

Finally, I would like to draw your attention to the means of redress that are available against this decision, that is, judicial proceedings and complaints to the Ombudsman under the conditions specified respectively in Articles 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 Commission
Martin SELMAYR
Secretary-General