EUROPEAN COMMISSION

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Mr Alvaro Merino
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Spain

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001**[1]

**Subject:** **Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 - GESTDEM 2020/4289**

Dear Mr Merino,

I refer to your email of 7 August 2020, registered on the next day, in which you submitted 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 (EC) No 1049/2001').

## 1. SCOPE OF YOUR REQUEST

In your initial application of 9 July 2020, addressed to the Directorate-General for Competition of the European Commission, you requested access to the following documents, I quote:

> 'a) Meeting records (emails, minutes, reports, briefing papers, drafts, memos...) involving Huawei officials and/or people representing Huawei's interests.
>
> b) Correspondence within your personnel and/or the European institutions concerning Huawei, its products and its services.
>
> c) Invoices, tenders, service agreements, purchases, orders, procurement documents, offers, etc. concerning products and services using Huawei services.'

[1] OJ L 345, 29.12.2001, p. 94.
[2] OJ L 145, 31.5.2001, p. 43.

You further add that '[…] this is a request specifically for [Directorate-General for Competition]'.

Given the nature of the activities of the Directorate-General for Competition, all correspondence, meetings or other documents with or involving companies, such as Huawei, are related to ongoing or closed investigations and consequently filed in the respective administrative file. In this case, all the requested documents, which total 1435 documents, form part of the administrative files of several ongoing or closed antitrust and merger investigations, among which:

- AT.39247 Texas Instruments / Qualcomm;
- AT.39711 Qualcomm (predation);
- AT.40099 Google Android;
- AT.40220 Qualcomm (exclusivity payments);
- AT.40305 Network sharing – Czech Republic;
- AT.40608 Broadcom;
- M.5532 Carphone Warehouse/Tiscali UK;
- M.5669 Cisco/Tandberg;
- M.5732 Hewlett-Packard/3Com;
- M.5983 Tyco Electronics/ADC Telecommunications;
- M.6007 Nokia Siemens Networks/Motorola Network Business;
- M.6095 Ericsson/Nortel Group (MSS and Global Services);
- M.6314 Telefonica UK/Vodafone UK/Everything Everywhere/JV;
- M.6381 Google/Motorola Mobility;
- M.6554 EADS/STA/Elbe Flugzeugswerke JV;
- M.6568 Cisco Systems/NDS Group;
- M.7018 Telefonica Deutschland/E-Plus;
- M.7047 Microsoft/Nokia;
- M.7202 Lenovo/Motorola Mobility;
- M.7555 Staples/Office Depot;
- M.7585 NXP Semiconductors/Freescale Semiconductors;
- M.7612 Hutchison 3G UK/Telefonica UK;
- M.7632 Nokia/Alcatel-Lucent;
- M.7688 Intel/Altera;
- M.7758 Hutchison 3G Italy/Wind/JV;
- M.8251 Bite/Tele2/Telia Lietuva/JV;
- M.8284 Deutsche Telekom/Orange/Buyin;
- M.8306 Qualcomm/NXP Semiconductors;
- M.8314 Broadcom/Brocade;
- M.8797 Thales/Gemalto;
- M.9205 IBM/Red Hat;
- M.9226 Commscope/Arris;
- M.9324 Also/ABC Data Group;
- M.9332 Ericsson/Kathrein Antenna and Filter Assets;

- M.9424 Nvidia/Mellanox;
- M.9538 Broadcom/Symantec Enterprise Security Business;
- M.9660 Google/Fitbit.

This list is not exhaustive, since some of the investigations have not been made public, as mentioned by the Directorate-General for Competition in their initial reply.

In its initial reply of 7 August 2020, the Directorate-General for Competition refused access to the documents in question, based on the exceptions of the first indent of Article 4(2) (protection of commercial interests), the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) and the Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position. You underpin your request with arguments, which I will address in the corresponding sections below.

## 2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I regret to inform you that I have to confirm the initial decision of Directorate-General for Competition to refuse access to the requested documents, based on the exceptions of the first indent of Article 4(2) (protection of commercial interests) and the third indent of Article 4(2) (protection of the purpose of inspections, investigations and audits) of Regulation (EC) No 1049/2001, for the reasons set out below.

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

The first indent of Article 4(2) of Regulation (EC) No 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'.

The third indent of Article 4(2) of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of […] the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.'

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'[3].

[3] Judgment of the General Court of 13 September 2013, *Netherlands v Commission* (the *Bitumen* Case), T-380/08, EU:T:2013:480, paragraph 34.

As mentioned above, the documents to which you request access form part of the administrative files of antitrust and merger cases. The antitrust investigations are conducted under procedures laid down in Article 101 and Article 102 of the Treaty on the Functioning of the European Union and in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[4] and Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty[5]. The merger investigations are governed by the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings[6].

The Merger Regulation, Regulations (EC) No 1/2003 and No 773/2004, on one side, and Regulation (EC) No 1049/2001 on the other, have different aims but must be interpreted and applied in a consistent manner. The rules on access to files in the above-mentioned regulations are also designed to ensure the observance of professional secrecy and are of the same hierarchical order as Regulation (EC) No 1049/2001.

In its initial reply, Directorate-General for Competition concluded that the documents requested are covered by a general presumption of non-disclosure, based on the exceptions of the first and third indents of Article 4(2) of Regulation (EC) No 1049/2001.

Indeed, in the context of mergers, the Court of Justice acknowledged 'for the purpose of the interpretation of the exceptions under the first and third indents of Article 4(2) of Regulation [(EC)] No 1049/2001, […] the existence of a general presumption that the disclosure of the documents concerned undermines, in principle, the protection of the commercial interests of the undertakings involved in the merger and also the protection of the purpose of investigations relating to the control proceedings.'[7]

The Court of Justice ruled also in relation to documents in cases regarding the application of Article 101 of the Treaty on the Functioning of the European Union (i.e. antitrust cases), which are governed by the procedural rules set out in Regulations (EC) No 1/2003 and No 773/2004[8]. The Court held that '[i]f persons other than those with a right of access under Regulations Nos 1/2003 and 773/2004, or those who enjoy such a right in principle but have not used it or have been refused access, were able to obtain access to documents on the basis of Regulation No 1049/2001, the access system introduced by Regulations Nos 1/2003 and 773/2004 would be undermined'[9].

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4 OJ L 1, 4.1.2003, p. 1 (hereafter 'Regulation (EC) No 1/2003).

5 OJ L 123, 27.4.2004, p. 18 (hereafter 'Regulation (EC) No 773/2004').

6 OJ L 24, 29.1.2004, p. 1 (hereinafter the 'Merger Regulation').

7 Judgment in *European Commission v Agrofert Holding*, cited above, paragraph 64. See also judgment of the Court of Justice of 28 June 2012, *European Commission v Éditions Odile Jacob SAS*, C-404/10 P, EU:C:2012:393, paragraph 118.

8 Judgment of the General Court of 13 September 2013, *Netherlands v European Commission (Bitumen)*, T-380/08, EU:T:2013:480, paragraph 35; Judgment of the Court of Justice of 27 February 2014, *Commission v Energie Baden-Württemberg*, C-365/12 P, EU:C:2014:112, paragraphs 81-88 and 114.

9 Judgment in *Commission v Energie Baden-Württemberg*, cited above, paragraph 88.

Consequently, the disclosure of such documents would undermine the system of procedural rules set up by those Regulations, and in particular the rules on confidentiality and access to the file.

In setting up the presumption of confidentiality, the Court recognised that certain categories of documents, by their nature, contain sensitive information that undermine the interests protected by certain exceptions in Article 4 and warrant full refusal without the need for individual identification or assessment[10].

The purpose of the general presumption recognised by the Court is, among others, to protect the information that are commercially sensitive, irrespective of the fact that they cover entire documents or only parts thereof, hence the lack of the need for an individual assessment.

The Court of Justice stated that '[…] generalised access, on the basis of Regulation [(EC)] No 1049/2001, to the documents exchanged in […] a [merger] procedure between the Commission and the notifying parties or third parties would […] 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 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 Commission, on the other'[11].

In addition, recently the Court of Justice held in its judgment in *AlzChem* that the general presumption of confidentiality applies regardless whether the documents targeted by the application for access were specifically identified and few in number[12]. In addition, in the appeal on the above-mentioned *Sea Handling*[13] judgment, the Court recognised that the general presumption applies irrespective of the number of documents requested by the applicant.

Furthermore, the Court of Justice clarified that the general presumption against public disclosure of documents related to merger and antitrust investigations 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 a control procedure is pending.

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[10] Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 59; Judgment of the Court of Justice of 4 September 2018 *ClientEarth v Commission*, C-57/16 P EU:C:2018:660, paragraph 52.

[11] See judgment in *European Commission v Éditions Odile Jacob SAS*, cited above, paragraph 121.

[12] Judgment of the Court of Justice of 13 March 2019, *AlzChem AG v European Commission*, C-666/17 P, EU:C:2019:196, paragraph 32.

[13] Judgment of the Court of Justice of 14 July 2015, *Sea Handling SPA v Commission*, C-271/15 P, EU:C:2016:557, paragraph 41.

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'[14].

In accordance with Article 4(7) of Regulation (EC) No 1049/2001, this general presumption may apply for up to 30 years and possibly beyond[15].

Consequently, natural and legal persons submitting information to the European Commission in a procedure covered by the Merger Regulation or Regulations (EC) No 1/2003 and No 773/2004 have a legitimate right to expect that the information they supply on an obligatory or voluntary basis will not be disclosed to the public. 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. The requested documents have not been brought into the public domain in accordance with Article 20(2) of the Merger Regulation, Article 28 of Regulation (EC) No 1/2003 and Article 15 of Regulation (EC) No 773/2004, and are known only to a limited number of persons because they contain detailed market-sensitive information whose disclosure would undermine the commercial interests of the undertakings involved. In particular, these documents contain commercial and market-sensitive information regarding the activities of the involved undertakings whose public disclosure would undermine their commercial interests.

The Merger Regulation contains specific provisions in Article 17 regarding the treatment of information obtained in the context of such proceedings designed to ensure the observance of professional secrecy. Moreover, pursuant to Article 20(2) thereof '[t]he publication [of the decision] […] shall have regard to the legitimate interest of undertakings in the protection of their business secrets'. Indeed, Article 28 of Regulation (EC) No 1/2003 and Article 15 of Regulation (EC) No 773/2004 stipulate that such information may only be used for the purpose for which it was acquired. These articles also require that the European Commission respects the obligation of professional secrecy enshrined in Article 339 of the Treaty on the Functioning of the European Union[16].

The European Commission remains indeed bound by the provisions for professional secrecy.

Against this background, I conclude that the requested documents remain protected by a general presumption against public disclosure resulting from the first and third indents of Article 4(2) of Regulation (EC) No 1049/2001, as construed per settled case law of the Court of Justice.

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[14] Judgment of the General Court of 28 March 2017, *Deutsche Telekom AG v Commission*, T-210/15, EU:T:2017:224 paragraph 45; Judgment of The General Court of 7 October 2014, *Schenker v Commission*, T-534/11, EU:T:2014:854, paragraphs 57 and 58.

[15] Judgment in *European Commission v Agrofert Holding*, cited above, paragraph 67.

[16] Judgment in *Netherlands v Commission*, cited above, paragraphs 49 and 50.

## 3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) of Regulation (EC) No 1049/2001 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 the existence of an overriding public interest in disclosure because, I quote, 'I'm a journalist and my request is part of a broader investigation. All information disclosed will therefore be published, so there is a clear overriding public interest in disclosure'.

However, these general considerations or references to transparency do not demonstrate a pressing need for the disclosure of the documents requested and cannot provide an appropriate basis for establishing that a public interest prevails over the reasons justifying the refusal to disclose the documents in question. In non-legislative cases (e.g. in case of documents covered by a presumption of nondisclosure), transparency can only constitute an overriding public interest if it is especially pressing and based on a concrete element[17].

Moreover, the Court of Justice held 'that the particular interest of an applicant in obtaining access to documents cannot be taken into account by the institution called upon to rule on the question whether the disclosure to the public of those documents would undermine the interests protected'[18].

Nor have I been able to identify any public interest capable of overriding the public and private interests protected by the first and third indents of Article 4(2) of Regulation (EC) No 1049/2001.

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[19], provides further support to the conclusion that there is no overriding public interest in this case.

## 4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, I have considered the possibility of granting partial access to the documents requested.

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[17] Judgment of the Court of Justice of 21 September 2010, *Sweden and Others v API and Commission*, C-514/07, EU:C:2010:541, paragraphs 156-158.

[18] Judgment of the Court of Justice of 1 February 2007, *Sison v Council*, C-266/05, EU:C:2007:75, paragraph 47.

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

As per settled case law, where the document requested is covered by a general presumption of non-disclosure, such document does not fall within an obligation of disclosure, in full, or in part[20].

## 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 Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,


*For the Commission*
*Ilze JUHANSONE*
*Secretary-General*

[20] Judgment in *European Commission v Éditions Odile Jacob*, cited above, paragraph 133.