EUROPEAN COMMISSION

Brussels, 5.6.2019
C(2019) 4306 final

[redacted]
10178 Berlin
Germany

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 2019/1706

Dear [redacted],

I refer to your email of 25 April 2019, registered on 26 April 2019, 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 (EC) No 1049/2001').

1. SCOPE OF YOUR REQUEST

In your initial application of 21 March 2019, addressed to Directorate-General for Competition, you requested access to the '[p]reliminary Assessment of 7 May 2008 in Cases COMP/39.388 German electricity wholesale market and COMP/39.389 — German Electricity Balancing Market'.

In its initial reply of 3 April 2019, the Directorate-General for Competition refused access to the document based on the exceptions protecting the commercial interests and the purpose of inspections, investigations and audits provided for, respectively, in the first and third indents of Article 4(2) of Regulation (EC) No 1049/2001.

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

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 (EC) No 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 document 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 (EC) No 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 (EC) No 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 (EC) No 1049/2001 and two different exceptions can, as in the present case, be 'closely connected'.[3]

Article 4(2), first indent 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'.

Article 4(2), third indent of Regulation (EC) No 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'.

In its initial reply of 3 April 2019, the Directorate-General for Competition underlined that disclosure of the document would have a negative impact on the European Commission's ability to detect antitrust infringements and, hence, undermine the protection of the purpose of competition investigations. It also concluded that even if the investigation has already been closed in this case, disclosure of the requested document would undermine the companies' commercial interests, as the document contains commercially and market sensitive information and reveals the commercial strategies of the companies involved.

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

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 future antitrust proceedings.

In order to support its position in this respect, the Directorate-General for Competition referred to the *Commission v Éditions Odile Jacob*[4], *Agrofert Holding v Commission*[5], *Commission v Technische Glaswerke Ilmenau GmbH (TGI)*[6], *Commission v EnBW Energie Baden-Wurttemberg*[7], *Deutsche Telekom AG v Commission*[8] judgments.

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

Firstly, you point out that the disclosure of the requested document does not threaten the purpose of inspections, investigations and audits. You argue that the general presumption of non-disclosure relied upon by the Directorate-General for Competition does not apply in this case, as the requested preliminary assessment does not fall within one of the categories in which the Court has recognised the existence of a general presumption. Furthermore, you specify the following, I quote, '[r]ather, a preliminary assessment pursuant to Article 9 (1) of Regulation (EC) No 1/2003 summarises the concerns of the Commission in a specific case to the undertakings concerned. It thus represents a significant milestone at a late stage of proceedings. In addition, the Commission's investigation came to an end more than a decade ago. While disclosure of a preliminary assessment at a stage before a final agreement on an offer of commitments to meet the concerns expressed to the undertakings concerned (in this case E.ON) may have impacted negatively on the willingness of E.ON to cooperate with the Commission, this is no longer of relevance'.

Secondly, you question the applicability of the exception protecting the commercial interests. You argue the following, I quote, '[…] where information that could constitute business secrets at a certain moment in time is at least five years old, that information must, as a rule, on account of the passage of time, be considered historical and therefore as having lost its secret or confidential nature unless, exceptionally, the party relying on that nature shows that, despite its age, that information still constitutes an essential element of its commercial position or that of interested third parties (Bafin v Baumeister, C-15/16, EU:C:2018:464, paragraph 54). More than a decade after the Commission's investigation came to an end, it thus cannot reasonably be assumed information contained in the requested Preliminary Assessment would be of current commercial relevance to E.ON SE'.

---

4 Judgment of the Court of Justice of 28 June 2012, *Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2013:808, (hereafter referred to as *Commission v Éditions Odile Jacob*).

5 Judgment of the Court of Justice of 28 June 2012, *Agrofert Holding v Commission*, C-477/10 P, EU:C:2012:394, (hereafter referred to as *Commission v Agrofert Holding C-477/10 P*)

6 Judgment of the Court of Justice of 29 June 2010, *Commission v Technische Glaswerke Ilmenau GmbH (TGI)*, C-139/07, EU:C:2010:376.

7 Judgement of the Court of Justice of 27 February, *Commission v EnBW Energie Baden-Wurttemberg*, C-365/12 P, EU:C:2014:112.

8 Judgment of the General Court of 28 March 2017, *Deutsche Telekom AG v Commission*, T-210/15, EU:T:2017:224, (hereafter referred to as *Deutsche Telekom AG v Commission*).

You further specify that E.ON's current business activities are focussed on matters unrelated to its activities which were subject of the European Commission's preliminary assessment of 7 May 2008.

As regards your first 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 provides 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, Regulation (EC) No 1/2003[9] establishes a specific procedure for information exchanges in the context of an antitrust investigation. In particular, it provides that access to the European Commission's file is subject to the legitimate interest of undertakings and the protection of their business secrets.

In the *Deutsche Telekom AG v Commission* judgement, the General Court expressly acknowledged the existence of a general presumption of non-disclosure as regards procedures for the application of Article 102 of the Treaty on the Functioning of the EU, concerning the right to consult documents in the European Commission's file relating to those procedures, without there being any need to distinguish between internal documents and documents exchanged with third parties, since the general presumption applies to the whole case file in the administrative procedure.[10]

Furthermore, in that judgment the General Court found that '[…] generalised access on the basis of Regulation (EC) No 1049/2001, to the documents exchanged, in a proceeding under Article 102 of the Treaty on the Functioning of the EU between the Commission and the parties concerned by that procedure or third parties would jeopardise the balance which the EU legislature sought to ensure in Regulations Nos 1/2003 and 773/2004 between the obligation on the undertakings concerned to submit to the Commission possibly sensitive commercial information and the guarantee of increased protection, by virtue of the requirement of professional secrecy and business secrecy'.[11]

In this context, I note that Regulation (EC) No 1/2003 is of the same hierarchical order as Regulation (EC) No 1049/2001 and therefore none of them takes precedence over the other. Both legal instruments must be interpreted in a consistent manner.

---

9 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, Official Journal L 1 of 4.1.2003, p. 1.

10 *Deutsche Telekom AG v Commission*, paragraph 43.

11 Ibid, paragraph 41.

Furthermore, in the recent *AlzChem v Commission* judgment, which concerned a State aid investigation, the Court of Justice held that the general presumption continues to apply regardless of whether the documents targeted by the application for access were specifically identified and few in number.[12]

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.

Indeed, if this kind of sensitive information is disclosed to the public, regardless of whether the proceedings are still open or closed, 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 European Commission's authority and lead to a situation where the European Commission would be unable to properly carry out its task of enforcing EU competition law.

In order to address your second concern, I note that the information provided by undertakings in the context of antitrust proceedings 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'.[13]

In line with the *Deutsche Telekom AG v Commission* judgment of the General Court, the general presumption of non-disclosure '[…] 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. […]'.[14]

---

12 Judgment of the Court of Justice of 13 March 2019, *AlzChem v Commission*, C-666/17 P, EU:C:2019:196, paragraphs 31-32.

13 Judgment of the General Court of 7 July 2010, *European Commission v Agrofert Holding*, T-111/07, EU:T:2010:285, paragraphs 54, 56 and 62.

14 *Deutsche Telekom AG v Commission*, paragraph 45.

Contrary to what you argue in your confirmatory application, the fact that the document is older than a decade, does not necessarily remove the sensitivity of the information provided by the undertakings concerned.

In this regard, the Court held in the *Commission v Agrofert Holding* judgment that the exceptions concerning commercial interests or sensitive documents may apply for a period of 30 years and possibly beyond.[15]

Although several years have passed, the information included in the document still has commercial value.

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

Against this background, I confirm that the document falling under the scope of your application needs 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 (EC) No 1049/2001.

3. 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.

You argue that '[…] the German Bundeskartellamt and Bundesnetzagentur on 20 March 2019 jointly launched a consultation on the control of abusive practices in electricity generation/wholesale trade […] by publishing draft guidelines' and that '[w]ith respect to the ongoing consultation regarding guidelines aimed at countering abusive practices in fields such as those for which the Commission performed relevant calculations, it is of overriding public interest to (a) be able to discuss and (b) to incorporate (where relevant) the Commission's principle findings into the prospective guidelines on the control of abusive practices in electricity generation/wholesale trade'.

I note that these considerations that you put forward in order to establish an overriding public interest are rather of a general nature. You do not explain why it is in the public interest to discuss and incorporate the European Commission's findings contained in the document.

These general considerations would not outweigh the interests protected under Article 4(2) of Regulation (EC) No 1049/2001. In the *Port de Brest v Commission* judgment[16], the General Court confirmed once again that the applicant must rely on specific circumstances to show that there is an overriding public interest, which is able to justify

[15] *Commission v Agrofert Holding*, C-477/10 P, paragraph 67.

[16] Judgment of the General Court of 19 September 2018, *Port de Brest v Commission*, T-39/17, EU:T:2018:560, paragraph 104.

the disclosure of the documents. Moreover, in this judgment the General Court held that among the limits with regard to the right of access to documents held by the European Commission, is the exception referred to in the third indent of Article 4(2) of Regulation (EC) No 1049/2001, protecting the purpose of inspections, investigations and audits of the institutions.[17]

In addition, 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 (EC) No 1049/2001.

The fact that the investigations to which the document relates 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[18], 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 document requested. However, as pronounced by the Court of Justice,[19] 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.

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 Commission
Martin SELMAYR
Secretary-General

[17] Ibid, paragraph 112.

[18] Judgment of the Court of Justice of 29 June 2010, *European Commission* v *Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraphs 56-57 and 63.

[19] *Commission v Éditions Odile Jacob*, paragraph 133.