



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR COMMUNICATIONS NETWORKS, CONTENT AND
TECHNOLOGY

The Director-General

Brussels
CNECT.R.4

Johnny Ryan
First Floor Castleriver House
14/15 Parliament Street
Dublin 2, D02 FW60
Ireland

Email:
[ask+request-14268-
885aaac2@asktheeu.org](mailto:ask+request-14268-885aaac2@asktheeu.org)

Subject: Your application for access to documents EASE 2024/1029

Dear Mr Ryan,

We refer to your request for access to documents pursuant to Regulation (EC) No1049/2001 regarding public access to European Parliament, Council and Commission documents (hereinafter ‘Regulation 1049/2001’), which was registered on 22 February 2024 under the abovementioned reference number.

1. SCOPE OF YOUR APPLICATION

Dear Communications Networks, Content and Technology,

‘Under the right of access to documents in the EU treaties, as developed in Regulation 1049/2001, I am requesting documents which contain the following information, letters to X/Twitter:

*Ares(2023)6025944
Ares (2023)6473647
Ares(2023)6948036
Ares(2023)7344240
Ares(2023)8199067’*

2. DOCUMENTS FALLING WITHIN THE SCOPE OF THE REQUEST

The documents you request form part of the case file in a pending investigation under Regulation (EU) 2022/2065⁽¹⁾ (the Digital Services Act, hereinafter the ‘**DSA Regulation**’). As for these documents a general presumption of non-accessibility applies, the requested documents are not listed in detail.

3. ASSESSMENT UNDER REGULATION 1049/2001

We regret to inform you that access to the requested documents cannot be granted as disclosure is prevented by exceptions to the right of access laid down in Article 4 (2), first indent of Regulation 1049/2001 (protection of commercial interests) and Article 4(2), third indent of Regulation 1049/2001 (protection of the purpose of investigations).

The documents requested were addressed by the Commission to the entity concerned pursuant to Article 67 of DSA Regulation, which empowers the Commission to require providers of a very large online platforms to provide all necessary information to enable the Commission to carry out its duties under DSA Regulation. On 18 December 2023 the Commission opened proceedings against the concerned entity pursuant to Article 66 of the DSA.

In its judgment in Case C-404/10 P *Commission v Odile Jacob*², 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.

In addition, the Court ruled in Case C-404/10 P that 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 explained for the example of the Merger Regulation that where a specific area of European Union law is designed to ensure respect for 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), this needs to be taken into account for the application of Regulation 1049/2001. The Court stated that, if documents of such case-files were to be disclosed under Regulation 1049/2001 to persons other than those authorised to have access according to specific 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 proceedings which have already been closed or proceedings which are pending.

Based on the same reasoning, the Court recognized in *Agrofert*³ 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

⁽¹⁾ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277, 27.10.2022, p. 1–102

² Case C-404/10 P, *Commission v Odile Jacob*, ECLI:EU:C:2012:393.

³ Case C-477/10 P, *Commission v Agrofert Holding*, ECLI:EU:C:2012:394, paragraph 59.

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.

In the case C-365/12 P, *Commission v EnBW Energie Baden-Württemberg*⁴, the Court of Justice held that there is, with regard to the exception related to the protection of the purpose of investigations, a general presumption that disclosure of documents in cases regarding the application of Articles 101 and 102 TFEU (antitrust cases), would undermine the purpose of the access system introduced by Regulations No 1/2003 and 773/2004.

Also, as ruled by the Court of Justice in the *Agrofert* case⁵ for merger proceedings, and by the General Court in the *Bitumen* case⁶ for antitrust proceedings, if a document is not accessible under the "access to file procedure", it cannot be made available to the public under Regulation 1049/2001. In essence, Regulations 1/2003 and 773/2004 and Regulation 1049/2001 have different aims but must be interpreted and applied in a consistent manner. The rules on access to file in the above-mentioned regulations 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).

Furthermore, in the *Múka* case, the General Court recalled that, as interested parties other than those directly concerned in State aid control procedures (the Member States) do not have the right to consult the documents in the Commission's administrative file, there is a general presumption that disclosure of documents in the administrative file undermines, in principle, the protection of the purpose of investigation activities, and also held that this presumption applies regardless of whether the request for access concerns a control procedure which has already been closed or one which is pending⁷.

The same reasoning used in the above mentioned case law to establish a general presumption of non-disclosure for documents belonging to merger, antitrust and state aid case files is fully applicable to the disclosure of documents exchanged between the Commission and other (third) parties in the enforcement of the DSA and preparation of enforcement, given that the DSA Regulation contains very similar provisions as regards both the obligation of professional secrecy and the access to file procedure⁸. If documents in the DSA case files were to be disclosed under Regulation 1049/2001 to persons other than those authorised to have access to them according to the DSA, the procedural schemes instituted by the latter would be undermined.

Consequently, and by analogy to what has been repeatedly recognized by the case-law in the context of merger, antitrust and state aid investigations, there is a general presumption that disclosure of documents in DSA case files 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 DSA proceedings, and this presumption applies regardless of whether the request for access concerns DSA proceedings which have already been closed or proceedings which are pending.

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

⁴ Case C-365/12 P, *Commission v EnBW Energie Baden-Württemberg*, ECLI:EU:C:2014:112, paragraph 88.

⁵ *Agrofert*, paragraphs 61-63.

⁶ Case T-380/08, *Netherlands v Commission*, ECLI:EU:T:2013:480, paragraphs 32-40

⁷ Case T-214/21, *Múka v Commission*, ECLI:EU:T:2022:607, paragraphs 44 and 55.

⁸ See, in this regard, Articles 79 and 84 of the DSA.

contained in Commission's documents are commercially sensitive, particularly at a stage where an investigation has not been finally concluded yet.

Undertakings also have a legitimate interest that the information is used only for the purposes of the Commission proceedings in application of the DSA. It is for this reason that Article 79(5) of the DSA provides that information collected pursuant to this Regulation is used only for the purposes of this Regulation, namely the administrative proceedings carried out under its provisions. Article 79(4) limits access to file to the parties concerned.

Also, pursuant to Article 84 of the DSA, 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. For the effective conduct of pending investigations, it is of utmost importance that the Commission's investigative strategy, preliminary assessments of the case and planning of procedural steps remain confidential.

Careful respect by the Commission of its obligations regarding professional secrecy creates a climate of mutual confidence between the Commission and undertakings, under which the latter cooperate by providing the Commission with the information necessary for its investigations.

In these circumstances, disclosure despite the protection provided for by the DSA 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 DSA 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 the DSA. Consequently, the effective enforcement of the DSA would be undermined.

It thus follows that the abovementioned requested documents are covered by a general presumption of non-disclosure of documents in DSA case-files.

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

Article 4(3) protection of the institution's decision-making process

Pursuant to Article 4(3), access to the documents drawn by the Commission or received by the Commission shall be refused if the disclosure of the documents would seriously undermine the Commission's decision-making process.

In the present case, all documents of the DSA case file have been gathered or drawn up by the Commission in order to take a decision on the compliance with the DSA. Since the decision has not yet been taken, public disclosure of any of the requested documents would expose the Commission and its services to undue external pressure, hence reducing its independence and its margin of manoeuvre. This would clearly seriously undermine the Commission's decision-making process. Therefore, the exception set out in Article 4(3), first paragraph of the Regulation is manifestly applicable to the documents, access to which is requested.

Furthermore, the Court recognized in *Odile Jacob*⁹ and *EnBW*¹⁰, applicable also here by analogy, that there is a general presumption of non-disclosure of internal documents during the procedure as that would seriously undermine the Commission's decision-making process.

As mentioned above, the requested documents relate to DSA investigations and contain preliminary assessments of the facts and other information from which the direction of the investigations, the future procedural steps which the Commission may take, as well as its investigative strategy may be revealed to the public. This information could easily be misinterpreted or misrepresented as indications of the Commission's possible final assessment in this case. Such misinterpretations and misrepresentations may cause damage to the reputation and standing of the undertakings investigated. Moreover, the requested documents would reveal the Commission's investigation strategy and their disclosure would therefore undermine the protection of the purpose of the investigation and would also seriously undermine the Commission's decision-making process. The Commission's services must be free to explore all possible options in preparation of a decision free from external pressure.

In view of the foregoing, the requested documents are also manifestly covered in their entirety by the exception related to the protection of the Commission's decision-making process, set out in Article 4(3) of Regulation 1049/2001.

4. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) and Article 4(3) of Regulation 1049/2001 apply, unless there is an overriding public interest in the disclosure of documents. Such an interest must, firstly, be a public interest and, secondly, outweigh the harm caused by disclosure. We have examined whether there could be an overriding public interest in the disclosure of the documents which are being withheld but we have not been able to identify such an interest.

5. CONFIRMATORY APPLICATION

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretariat-General of the Commission **by asking for a review via your portal^[1] account** (available only for initial requests submitted via the portal account),

or via at the following address:

European Commission
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles,

⁹ *Odile Jacob*, paragraph 130.

¹⁰ *EnBW*, paragraph 114.

^[1] <https://www.ec.europa.eu/transparency/documents-request>

or by email to: sg-acc-doc@ec.europa.eu

Yours faithfully,

Electronically signed

Roberto Viola