



EUROPEAN COMMISSION

DG Competition

The Director-General

Brussels, 26 -07- 2013
COMP/ G2- D(2013)076950

TO:

Mr Charilaos DROSOS

Ask+request-633-
5bbb5267@asktheeu.org

**Subject: Application for access to documents according to Regulation 1049/2001
GESTDEM 2013-3568 relating to case COMP/38.638 – BR/ESBR**

Dear Sir,

Thank you for your letter dated 7 July 2013, registered on 8 July 2013 under GESTDEM number 2013-3568, requesting access to documents under Regulation No 1049/2001¹ regarding public access to European Parliament, Council and Commission documents (hereinafter 'Regulation 1049/2001').

1. DOCUMENTS CONCERNED

Your application concerns access to:

B. Commission Decision C(2006) 5700 in Case COMP/F/38.638 - Butadiene Rubber and Emulsion Styrene Butadiene Rubber:

#6. The cover note (or equivalent) with which DG COMP dispatched to the Legal Services the very first draft version of the Decision. It is clarified that this request does not concern the main body of the draft Decision but only the cover note requesting the opinion of the Legal Services.

#7. The cover note (or equivalent) with which the Legal Services dispatched to DG COMP their opinion about the first draft (item #6) above. It is clarified that this request does not concern the main body of the opinion dealing with the substance of the case, but only the cover note informing DG COMP the dispatch of main body of the opinion of the Legal Services.

¹ OJ L145, 31.05.2001, page 43.

Commission européenne, DG COMP GREFFE ANTITRUST, B-1049 Bruxelles, Belgique
Europese Commissie, DG COMP GREFFE ANTITRUST, B-1049 Brussel, België

Tel: (32-2) 299 11 11, Fax: (32-2) 295 01 28, e-mail: COMP-GREFFE-ANTITRUST@ec.europa.eu.

#8. The favourable opinion of the Legal Services submitted to the College in process of formal adoption of the Decision, which is expected to be a different document than that requested under #7 above.

#9. The first few pages of the proposal of the Member of the Commission to the College to adopt the Decision by the written procedure, which are concerned with the internal process of the Commission to adopt the Decision. It is clarified that this request does not concern the main body of the Decision dealing with the substance of the case and most probably runs into hundreds of pages.

#10. A copy of the duly signed Day Note covering the Decision according to the Commission's Rule of Procedure and the Rules giving effect to the Rules of Procedure at the material time.

The documents you request access to are internal documents.

Having carefully examined the documents concerned in the light of Regulation (EC) No 1049/2001, we have come to the conclusion that:

1. In accordance with Article 4 (6) of Regulation (EC) No 1049/2001, partial access may be granted to documents #6 and #9, which partially fall under the exceptions laid down in Article 4 of Regulation (EC) No 1049/2001.
2. With respect to documents # 7 and # 8 (same document), you will get a separate reply from the Legal service of the Commission which was responsible for its drafting.
3. With respect to document #10, you will get a separate reply from the Secretariat General as this document is part of its file.

2. PARTIAL ACCESS

The deletions in the documents to which partial access is granted concerns information that is not in the public domain as it has not been disclosed in the public version of the decision at it was published on the internet (see http://ec.europa.eu/competition/antitrust/cases/dec_docs/38638/38638_826_1.pdf).

2.1. Information related to leniency documents which has not been made public in the public version of the Commission decision

The deleted information contains dates of immunity and leniency submissions as well as a summary description of their content.

As recognised by the European Court of Justice, leniency programmes are useful tools if efforts to uncover and bring to end infringements of competition rules are to be effective and therefore serve the objective of an effective application of Article 101 TFEU.²

² Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, judgment of 14 June 2011.

In order to ensure that its Leniency programme can continue to facilitate and contribute to the detection and investigation of secret cartels, the Commission has to avoid that applicants, due to their cooperation, risk being more exposed in civil litigations than those companies that choose not to cooperate. Companies that cooperate with the Commission are required to disclose self-incriminating information including notably corporate statements where the applicant, for the sole purpose of the Commission investigation presents the cartel arrangements and its own role therein. Such information is very valuable for the investigation of secret cartels and cannot be obtained through other compulsory means (including inspections or decision requesting information).

The Commission has therefore clarified in its Leniency Notice that public disclosure of documents and written or recorded statements would normally undermine certain public or private interests, for example the protection of the purpose of inspections and investigations, within the meaning of Article 4 of Regulation 1049, even after the decision has been taken.³ It has for that reason developed and implemented a specific procedure to protect corporate statements given under the Leniency Notice.⁴ It has also clarified that such corporate statements can only under certain strict conditions be transmitted to other European competition authorities under the exchange of information provisions in Article 12 of Council Regulation 1/2003.⁵ The underlying objective of all these measures is to ensure that applicants are not dissuaded from cooperating with the Commission to an extent that would harm the public interest in an effective public enforcement as well as an effective subsequent or parallel private enforcement.

In reconciling the justified need for transparency of its administrative practice with the need to maintain the attractiveness of its leniency programme, the Commission publishes a non-confidential version of its final decision in which all cartel participants are identified and the elements that establish the infringement are set out.

Therefore, information in the Case file related to correspondence from and with applicants under the Leniency Notice (including references thereto in internal documents) that have not been disclosed through the public version of the decision or in the appeal proceedings fall under the exception for the protection of commercial interest of natural or legal persons (Article 4(2) first indent) as well as under the protection of the purpose of the investigation (Article 4(2) third indent).

2.2. Information related to companies against whom the investigation has been closed

Also names and references to companies against whom the investigation has been closed are taken out. The deletion of their names is pursuant to the jurisprudence in the Pergan case (Judgment of the Court of First Instance of 12 October 2007 in Case T-474/07). In this respect, reference is made to paragraph 78 of the judgment:

"The Court considers, further, that, since the Commission's findings relating to an infringement committed by an undertaking are capable of infringing the principle of the presumption of innocence, those findings must, in principle, be regarded as confidential

³ See paragraph 40 of the Leniency Notice.

⁴ See paragraph 33 of the Leniency Notice

⁵ See paragraph 35 of the Leniency Notice.

as regards the public, and therefore as being of the kind covered by the obligation of professional secrecy. This principle stems, inter alia, from the need to respect the reputation and dignity of the person concerned as that person has not been finally found guilty of an infringement (see, by analogy, Case T-15/02 BASF y Commission [2006] ECR II-497, paragraph 604). The confidentiality of such information is confirmed by Article 4(1)(b) of Regulation No 1049/2001, which provides that information, whose disclosure would harm the protection of privacy and the integrity of the individual, is to be protected. Finally, the confidentiality of that information cannot depend on whether, and to what extent, it is of probative value for the purpose of proceedings at national level."

3. MEANS OF REDRESS

If you want this position to be reviewed you should write to the Commission's Secretary-General at the address below, confirming your initial request. You have 15 working days in which to do so from receipt of this letter, after which your initial request will be deemed to have been withdrawn.

The Secretary-General will inform you of the result of this review within 15 working days from the registration of your request, either granting you access to the documents or confirming the refusal. In the latter case, you will be informed of how you can take further action.

All correspondence should be sent to the following address:

The Secretary-General
European Commission
B-1049 BRUSSELS

Yours faithfully,

Cecilio Madero Villarejo
Deputy Director-General
for Antitrust

Alexander Italianer