



EUROPEAN COMMISSION

Brussels, 7.8.2024
C(2024) 5818 final

Mr Mathias Schindler

**DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE
IMPLEMENTING RULES TO REGULATION (EC) No 1049/2001¹**

**Subject: Your confirmatory application for access to documents under
Regulation (EC) No 1049/2001 - EASE 2023/1929**

Dear Mr Schindler,

I refer to your email of 7 May 2023, registered on the same day, by which you lodge a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents² (hereafter ‘Regulation (EC) No 1049/2001’).

Please accept our apologies for the delay in the handling of your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 28 March 2023, you requested access to, I quote,

“...a copy of all information the European Commission (including but not limited the units under the authority of VP Vestager) concerning the European Encyclopedia network or any of the publishers represented by this network acting individually.”

Given the scope of your request, the case was assigned to the Directorate-General for Competition.

In their initial reply of 5 May 2023, the Directorate-General for Competition informed you that public access to the documents requested had to be refused as their disclosure was prevented by the exception to the right of access laid down in the first indent of Article 4(2) (protection of commercial interests), the third indent of Article 4(2)

¹ OJ L 345, 29.12.2001, p. 94.

² OJ L 145, 31.5.2001, p. 43.

(protection of the purpose of inspections, investigations, and audits), as well as in Article 4(3) first subparagraph (the protection of the decision-making process of the Commission) of Regulation (EC) No 1049/2001.

In your confirmatory application, you underpin your request with detailed arguments, which will be addressed 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 thorough review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, the Secretariat-General has identified the following documents, existing at the time of your request, as falling within its scope:

- Open letter from the European Encyclopedia Network to EVP Vestager, dated 1 February 2023, reference Ares(2024)805413;
- Two email exchanges, dated 1 February 2023, reference Ares(2024)805413 and dated 7 March 2023, reference Ares(2024)727024;
- Report of a conference call, dated 15 March 2023, reference Ares(2024)727481.

The requested documents form part of the case file in an antitrust investigation opened under the reference Case AT.40896 *Google – Knowledge Panels*, which is ongoing, but still at a preliminary stage. No decision has yet been made as to whether to open formal proceedings under the applicable legislation.

Following the assessment of the identified documents, I regret to inform you that public access must be refused on the grounds of the exceptions to the right of access laid down in 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), as well as in Article 4(3) first subparagraph (the protection of the decision-making process of the Commission) of Regulation (EC) No 1049/2001, for the reasons set out below.

Nonetheless, as indicated in the initial reply, the “Open letter” has been made public by the European Encyclopedia Network on its website³. The Secretariat-General carried out a specific assessment of that document and concluded that, in its regard, the general presumption of non-disclosure discussed below can be waived. That document is therefore enclosed in an annex to this letter in a redacted version in line with the provisions laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001, protecting the personal data of the individual.

³ <https://encyclopedia.network.eu/news/open-letter>

2.1. Protection of privacy and the integrity of the individual

Article 4(1)(b) of Regulation (EC) No 1049/2001 provides that “[t]he institutions shall refuse access to a document where disclosure would undermine the protection of [...] privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data”.

In its judgment in Case C-28/08 P (*Bavarian Lager*)⁴, the Court of Justice ruled that when a request is made for access to documents containing personal data, Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data⁵ (hereafter ‘Regulation (EC) No 45/2001’) becomes fully applicable.

Please note that, as from 11 December 2018, Regulation (EC) No 45/2001 has been repealed by Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC⁶ (hereafter ‘Regulation (EU) 2018/1725’).

However, the case-law issued with regard to Regulation (EC) No 45/2001 remains relevant for the interpretation of Regulation (EU) 2018/1725.

In the above-mentioned judgment, the Court stated that Article 4(1)(b) of Regulation (EC) No 1049/2001 ‘requires that any undermining of privacy and the integrity of the individual must always be examined and assessed in conformity with the legislation of the Union concerning the protection of personal data, and in particular with [...] [the Data Protection] Regulation’⁷.

Article 3(1) of Regulation (EU) 2018/1725 provides that personal data ‘means any information relating to an identified or identifiable natural person [...]’.

As the Court of Justice confirmed in Case C-465/00 (*Rechnungshof*), ‘there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of private life’⁸.

⁴ Judgment of the Court of Justice of 29 June 2010, *European Commission v The Bavarian Lager Co. Ltd* (hereafter referred to as ‘*European Commission v The Bavarian Lager* judgment’) C-28/08 P, EU:C:2010:378, paragraph 59.

⁵ Official Journal L 8, 12.1.2001, p. 1.

⁶ Official Journal L 295, 21.11.2018, p. 39.

⁷ *European Commission v The Bavarian Lager* judgment, cited above, paragraph 59.

⁸ Judgment of the Court of Justice of 20 May 2003, *Rechnungshof and Others v Österreichischer Rundfunk*, Joined Cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

The ‘Open letter’ contains personal data such as the name, the surname and the contact details of a third-party individual and has therefore been redacted accordingly to protect their privacy and integrity as foreseen in Article 4(1)(b) of Regulation (EC) No 1049/2001.

2.2. Protection of commercial interests

Pursuant to Article 4(2), first indent of Regulation (EC) No 1049/2001, the Commission shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person.

Economic entities 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 contained in Commission’s documents are commercially sensitive, particularly at a stage where an investigation had not been finally concluded yet.

Article 4(2), first indent of Regulation (EC) No 1049/2001 must be interpreted consistently with Article 339 of the Treaty on the Functioning of the European Union (hereafter “TFEU”), which requires staff members of the EU institutions to refrain from disclosing information of the kind covered by the obligation of professional secrecy, in particular information about undertakings and their business relations. Applying Regulation (EC) No 1049/2001 cannot have the effect of rendering ineffective Article 339 TFEU, over which it does not have precedence.

The Courts have already established⁹ that the exception provided for by the first indent of Article 4(2) of Regulation No (EC) 1049/2001 can be invoked to documents which, if disclosed, would ‘seriously’ undermine the commercial interests of a legal person, which is also the case when the requested documents contain commercially sensitive information relating to the working methods and business relationships or the expertise of the undertaking involved. The General Court has confirmed that “an undertaking’s working methods and business relationships may be revealed as a result of the disclosure of the documents requested, thereby undermining its commercial interests, in particular when the documents contain information particular to that undertaking which reveal its expertise”¹⁰.

As mentioned above, the non-disclosed documents are part of the file in a competition investigation. They have not been brought into the public domain and are known only to a limited number of persons. In particular, they contain commercial and market-sensitive information regarding the activities of the undertakings involved.

⁹ In its judgment in Case T-516/11, the General Court held that “*in order to apply the exception provided for by the first indent of Article 4(2) of Regulation No 1049/2001, the institution must show that the documents requested contain elements which may, as a result of the disclosure, seriously undermine the commercial interests of a legal person*”. Judgment of the General Court of 9 September 2014, *MasterCard, Inc. and Others v European Commission* (hereafter referred to as ‘*MasterCard, Inc. and Others v European Commission*’), T-516/11, EU:T:2014:759, paragraph 82.

¹⁰ Judgment of 9 September 2014, *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraphs 82 to 84.

The public disclosure of such information would undermine the undertakings concerned commercial interests. Further, by their very nature, the documents concern practices that are suspected, but not yet proven, of contravening the Union's rules on competition, as well as preliminary assessments of those practices by the Commission. Disclosure of these documents could therefore bring serious harm to the undertakings' reputation.

2.3. Protection of the purpose of inspections, investigations and audits, and the decision-making process of the Commission

Pursuant to Article 4(2), third indent of Regulation (EC) No 1049/2001, the Commission shall refuse access to a document where its disclosure would undermine the protection of the purpose of inspections, investigations and audits.

Pursuant to Article 4(3) of that Regulation, access to the documents drawn up 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 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, as two different exceptions can, as in the present case, be closely connected¹¹.

These exceptions aim at protecting the Commission's capacity to ensure that Member States and undertakings comply with their obligation 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. Besides, the Commission's services must be free to explore all possible options in preparation of a decision free from external pressure. The General Court has confirmed that access to documents can be refused if it would seriously undermine the free exchange of views and carry a risk of self-censorship¹².

In its initial reply, the Directorate-General for Competition concluded that the documents requested are covered by a general presumption of non-disclosure, based on the exception of the third indent of Article 4(2) of that Regulation, together with the exception of Article 4(3) of the same Regulation, as part of an antitrust investigation.

¹¹ Judgment of the General Court of 13 September 2013, *Netherlands v European Commission*, T-380/08, (hereafter *Netherlands v European Commission*), EU:T:2013:480, paragraph 34.

¹² Judgment of the Court of first Instance of 9 September 2008 in case T-403/05, *MyTravel v Commission*, EU:T:2008:316, paragraphs 50-52.

As the Directorate-General for Competition indicated, in *Commission v TGI*¹³, a case which concerned an access to documents request to all documents in two State aid cases, the Court of Justice upheld the Commission's refusal and 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 procedural system¹⁴.

The Court of Justice has upheld this reasoning in relation to documents in cases regarding the application of Articles 101 and 102 TFEU ("antitrust cases") which are governed by the procedural rules set out in Regulation 1/2003. The disclosure of such documents would undermine the procedural rules system set up by that Regulation, and in particular the rules on confidentiality and access to the file.

In the *EnBW* case, 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 773/2004¹⁵. As ruled by the General Court in the *Bitumen* case¹⁶, for an infringement under Article 101 TFEU, if a document is not accessible under the "access to file procedure", it cannot be made available to the public under Regulation (EC) No 1049/2001. In essence, Regulations 1/2003 and 773/2004 and Regulation (EC) No 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 (EC) No 1049/2001 (so that neither of the two sets of rules prevails over the other).

In this regard, please note that the aim of the exception under the third indent of Article 4(2) of Regulation (EC) No 1049/2001, as is clear from its wording, is not to protect the investigations as such, but rather their purpose. In its judgment in Case T-480/11, *Technion v European Commission*¹⁷, the General Court found that the exception of the third indent of Article 4(2) of Regulation (EC) No 1049/2001 applies if disclosure of the requested documents may endanger the completion of inspections, investigations or audits.

¹³ See case C-139/07 *Commission v Technische Glaswerke Ilmenau GmbH (TGI)*.

¹⁴ See also Case C-514/07 P, *API v Commission*, paragraphs 99 and 100, as well as Case C-404/10 P *Commission v Odile Jacob*, paragraphs 108-126 where the Court of Justice applied *Commission v TGI* by analogy to merger proceedings.

¹⁵ Case C-365/12 P *Commission v EnBW Energie Baden-Württemberg*, judgment of 27 February 2014, paragraph 88.

¹⁶ Case T 380/08, paragraphs 32-40.

¹⁷ Judgment of the General Court of 12 May 2015, *Technion v European Commission*, T-480/11, EU:T:2015:272.

According to the settled case-law, the institutions may base their decisions on general presumptions which apply to certain categories of documents, as similar general considerations are likely to apply to requests for disclosure relating to documents of the same nature¹⁸.

In setting up this presumption of confidentiality, the Court of Justice recognised that certain categories of documents, by their nature, contain sensitive information that undermine the interests protected by certain exceptions in Article 4 of Regulation (EC) No 1049/2001 and warrant full refusal without the need for individual identification of the documents or their assessment¹⁹. Where a general presumption of non-accessibility applies, all documents in the file are covered by that presumption.

As the Directorate-General for Competition explained, the requested documents relate to a potential antitrust investigation and contain information from which elements of (i) the direction of the investigation, (ii) the future procedural steps which the Commission may take, as well as (iii) 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 companies investigated, in particular if no decision is adopted establishing a violation of the competition rules. Their disclosure would reveal aspects of the Commission's investigation strategy and undermine the protection of the purpose of the investigation and the Commission's decision-making process.

Therefore, the Secretariat-General concludes that the non-disclosed documents are covered in their entirety by the exception laid down in the first indent (protection of the commercial interests) and third indent (protection of the purpose of inspections, investigations and audits) of Article 4(2), as well as in Article 4(3) first subparagraph (protection of the decision-making process of the Commission), of Regulation (EC) No 1049/2001, and that public access thereto must be denied on that basis.

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.

¹⁸ Judgment of the Court of Justice of 29 June 2010, *European Commission v Technische Glaswerke Ilmenau*, C-139/07 P, EU:C:2010:376, paragraph 54; Judgment of the Court of Justice of 14 November 2013, *LPN and Finland v European Commission*, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738, paragraph 45.

¹⁹ Judgment in *Commission v TGI*, cited above, 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.

According to the case-law, the applicant must, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal²⁰.

In your confirmatory application, you argue that “*access to information on the European Encyclopedia Network is of significant public interest, particularly given the potential impact of the network on the European cultural landscape*”.

The Secretariat-General notes that considerations of a purely general nature cannot be such as to establish that the public interest is especially pressing and capable of prevailing over the reasons justifying the refusal to disclose the documents²¹.

In its judgment in the *Strack* case²², the Court of Justice ruled that in order to establish the existence of an overriding public interest in transparency, it is not sufficient to merely rely on that principle and its importance, but that an applicant has to show why in the specific situation at hand, the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure²³.

Documents containing commercial and market-sensitive information regarding the activities of undertakings, which come into the possession of a competition authority in the preliminary stage of an investigation, are not normally subject to public disclosure. This includes any information brought to the investigating authority’s attention. The fact that the European Encyclopedia Network chose to render public its “Open letter” to EVP Vestager does not mean that any information that comes into the Commission’s possession concerning the facts asserted in the letter can be made public.

The Secretariat-General has not been able to identify any public interest capable of overriding the interests protected by Article 4(2) of Regulation (EC) No 1049/2001.

The Secretariat-General concludes, therefore, that an overriding public interest has not been demonstrated in this particular case.

²⁰ Judgment of the General Court of 9 October 2018, *Anikó Pint v European Commission*, T-634/17, EU:T:2018:662, paragraph 48; Judgment of the General Court of 23 January 2017, *Association Justice & Environment, z.s v European Commission*, T-727/15, EU:T:2017:18, paragraph 53; Judgment of the General Court of 5 December 2018, *Falcon Technologies International LLC v European Commission*, T-875/16, EU:T:2018:877, paragraph 84.

²¹ See case T-214/21, *Ondrej Muka v Commission*, paragraph 69 and judgments cited therein.

²² Judgment of the Court of Justice of 2 October 2014 in case C-127/13 P, *Strack v Commission*, (EU:C:2014:2250), paragraph 128.

²³ Judgment of the Court of Justice of 2 October 2014 in case C-127/13 P, *Strack v Commission*, (EU:C:2014:2250), paragraph 129.

4. PARTIAL ACCESS

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

However, as found by the Court of Justice, where the requested document is covered by a general presumption of non-disclosure, such a document does not fall within an obligation of disclosure, in full, or in part²⁴.

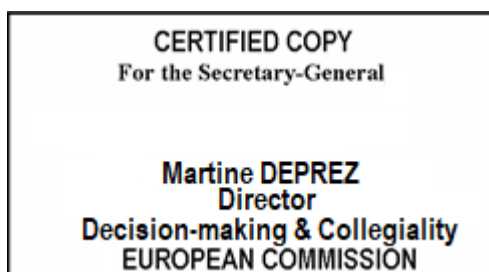
5. MEANS OF REDRESS

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

Encl. 1



²⁴ Judgment of the Court of Justice of 28 June 2012, *European Commission v Éditions Odile Jacob*, C-404/10 P, EU:C:2012:393, paragraph 133.