



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR COMPETITION

The Director-General

Brussels
COMP.01/CA

Lora Verheecke
9 rue du Bronze
1070 Bruxelles
By email

Dear Madam,

Subject: EASE 2022/7439 – Your request of 28 December 2022 for access to documents pursuant to Regulation (EC) No. 1049/2001 relating to the meeting between Margrethe Vestager and European Round Table for Industry (ERT) on 30 November 2022

Thank you for your application of 28 December 2022, registered on 30 December 2022 under EASE number 2022/7439, concerning the meeting between Margrethe Vestager and European Round Table for Industry (ERT) on 30 November 2022, in which you request access to documents in accordance with Regulation (EC) No. 1049/2001¹ ("Regulation 1049/2001").

1. DOCUMENTS CONCERNED

In your message you request access to all documentation (including but not limited to all email correspondence, attendance lists, agendas, background papers, transcripts and recordings) and the meeting minutes/notes relating to the meeting in question. The relevant documents, which include documents concerning a preparatory meeting between European Round Table for Industry (ERT) and DG Competition's unit 01, are listed in Annex.

The briefing (listed as document 8 in Annex) covered by your request contains information related to the case file in a pending State aid investigation under Article 107 of the TFEU in which no final decision has yet been adopted by the Commission. It also contains information related to the case file in several pending merger cases concerning investigations under the EU Merger Regulation 139/2004 (the "Merger Regulation"), in which no final decision has yet been adopted by the Commission. Furthermore, it contains internal deliberations and personal data.

Having carefully examined your request in the light of Regulation 1049/2001, I have come to the conclusion that specific elements of document 8 that you have requested access to, as well as personal data in this and several other documents, fall under the exceptions of Article 4 of Regulation 1049/2001. Access to these elements, therefore, has to be refused

¹ Regulation (EC) N° 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ L145 of 31.5.2001, p. 43

and the relevant information has been redacted. Please find below the detailed assessment as regards the application of the exceptions of Article 4 of Regulation 1049/2001.

2. APPLICABLE EXCEPTIONS

As the effects of granting access to documents under Regulation 1049/2001 are *erga omnes*, in the sense that such documents become public, the disclosure of the requested documents at this stage might hurt the protection of lawful interests, as set forth in Article 4 of Regulation 1049/2001. Once access is granted, any potential requester receives access to the documents in question, irrespective of its legal standing, involvement in the competition case or not or other specific interests it may have, as "*the purpose of the regulation is to guarantee access for everyone to public documents and not just access for the requesting party to documents concerning it*".²

- As regards the paragraphs in document 8 concerning a pending State aid investigation,

Article 4(2), third indent, protection of the purpose of investigations and Article 4(3) protection of the institution's decision-making process

Pursuant to Article 4(2), third indent of Regulation 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), 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.

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.

In *TGP*³, 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 this follows from the fact that under the State aid procedural rules the interested parties, other than the Member State concerned, have no right to consult the documents in the administrative file and should such access be granted under Regulation 1049/2001 the nature of the procedure is likely to be modified and thus the system for review of State aid would be called into question⁴. This line of reasoning was upheld by the Court in *Sea Handling v Commission* even when it comes to a reduced number of documents pertaining to a State aid file⁵.

² See Joined Cases T-110/03, T-150/03 and T-405/03, *Sison v Council*, paragraph 50; Case T-181/10, *Reagens SpA v Commission*, paragraph 143

³ See Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau GmbH*

⁴ See Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau GmbH*, paragraphs 58-59

⁵ See Case T-456/13, *Sea Handling SPA v Commission*, paragraphs 55-58 and 61

It is noteworthy that in State aid procedures the Commission relies on submissions by the Member State concerned which typically contain sensitive data, including information related to the economic activities of undertakings. It therefore follows that, similarly to *Agrofert*⁶, disclosure of this information in State aid investigations would risk jeopardising the willingness of the Member State to cooperate with the Commission's State aid investigations even after the definitive closure of the case.

The State aid procedural regulations, especially Regulation 2015/1589⁷, contain specific rules regarding treatment of information obtained in the context of such proceedings and allowing public access to it on the basis of Regulation 1049/2001 would, in principle, jeopardise the balance which the Union legislature wished to ensure in State aid procedures between the obligation on Member States to communicate possibly sensitive information (including sensitive commercial information related to undertakings) to the Commission and the guarantee of increased protection in accordance with the State aid procedural regulations. In essence, the State aid procedural regulations 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 observance of 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).

As mentioned above, one of the requested documents has some paragraphs relating to a pending State aid investigation and contain a preliminary assessment of the facts and other information from which the direction of the investigation, 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 potential beneficiaries investigated, in particular if no decision is adopted establishing a violation of the competition rules.

This part of the document concerning a pending State aid investigation would reveal the Commission's investigation strategy and its 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, this part of document 8 is manifestly covered by the exception related to the protection of the purpose of the Commission's State aid investigations set out in Article 4(2), third indent of Regulation 1049/2001. Moreover, the redacted information is also covered by the exception related to the protection of the Commission's decision-making process, set out in Article 4(3) of Regulation 1049/2001.

Article 4(2), first indent, protection of commercial interests

Pursuant to Article 4(2), first indent of Regulation 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.

⁶ See Case C-477/10 P, *Commission v Agrofert*, paragraph 66

⁷ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (Text with EEA relevance) OJ L 248 of 24.9.2015, p. 9–29

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

The redacted information in the document covered by your request, as specified above, pertains to the file in a competition case, has not been brought into the public domain and is known only to a limited number of persons. In particular, the document covered by your request contains commercial and market-sensitive information regarding the activities of the potential beneficiaries, whose public disclosure would undermine the latter's commercial interests. Disclosure of this information could bring serious harm to the undertakings' commercial interests.

In view of the foregoing the redacted information in the requested document concerning a State aid investigation is also covered by the exception set out in Article 4(2), first indent of Regulation 1049/2001.

- As regards the paragraphs in document 8 concerning pending merger cases,

Article 4(2), first indent, protection of commercial interests

Article 4(2), third indent, protection of the purpose of investigations

Pursuant to Article 4(2), first indent of Regulation 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.

Pursuant to Article 4(2), third indent of Regulation 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.

In its judgment in Case C-404/10 P *Commission v Odile Jacob*⁸, 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.

The Court ruled that, by analogy to the case law in cases *TGI*⁹, *Bavarian Lager*¹⁰ and *API*¹¹, 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 referred in particular to the Merger Regulation and emphasised that it not only governs a specific area of European Union law, but is also 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). The Court stated that, if documents in the merger case-files were to be disclosed under Regulation

⁸ Case C-404/10 P, *Commission v Odile Jacob*, [2013] ECR

⁹ Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau*, [2010] ECR I-5885

¹⁰ Case C-28/08 P, *Commission v Bavarian Lager*, [2010] ECR I-6055

¹¹ Cases C-514/07 P, C-528/07 P and C-532/07 P, *Sweden and Others v API and Commission*, [2010] ECR I-8533

1049/2001 to persons other than those authorised to have access according to the merger control 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 merger control proceedings which have already been closed or proceedings which are pending.

The Court recognized in *Agrofert*¹² 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 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.

As ruled by the Court in the *Agrofert* case¹³, if a document is not accessible under the "access to file procedure", it cannot be made available to the public under Regulation 1049. In essence, the Merger Regulation and Regulation 1049 have different aims but must be interpreted and applied in a consistent manner. The rules on access to file in the Merger Regulation 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).

Natural and legal persons submitting information in the context of the Merger Regulation have a legitimate expectation that – apart from the publication of the Section 1.2 of the Form CO and of the final decision cleared of business secrets and other confidential information – the information they supply to the Commission on an obligatory or voluntary basis under the Merger Regulation will not be disclosed.

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

The information concerning pending merger investigations in the document covered by your request, as specified above has not been brought into the public domain and is known only to a limited number of persons. In particular, this part of the document covered by your access request contains commercial and market-sensitive information regarding the activities of the involved undertakings whose public disclosure would undermine the latter's commercial interests.

Undertakings also have a legitimate interest that the information is used only for the purposes of the Commission proceedings in application of the Merger Regulation. It is for this reason that Article 17(1) the Merger Regulation provides that information acquired through the investigative powers of this regulation is used only for the purpose for which it was acquired, namely the administrative Commission procedure and the Court review of the decision resulting from this procedure.

Also, pursuant to Article 17(2) of the Merger Regulation, information covered by professional secrecy submitted to the Commission in the context of this regulation cannot be disclosed to the public.

¹² Case C-404/10 P, *Commission v Agrofert Holding*, [2013] ECR, paragraph 59

¹³ *Agrofert*, paragraphs 32-40

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 in this domain has so far created a climate of mutual confidence between the Commission and undertakings, under which the latter have cooperated by providing the Commission with the information necessary for its investigations. Recourse to formal decisions requesting the information (subject to sanctions) or occurrences of opposition to inspections are indeed rare.

In these circumstances, disclosure despite the protection provided for by the above-mentioned regulations, 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 competition 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 EU competition law. Consequently, the purpose of merger procedures and, implicitly, of the effective enforcement of the EU competition rules would be undermined.

In view of the foregoing the redacted information in the requested document concerning merger investigations is covered by the exception set out in Article 4(2), first indent 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, the information contained on the requested document on several merger cases has been gathered or drawn up by the Commission in order to take several decisions on the compliance with the EU competition rules. Since the decisions have not yet been taken, public disclosure of any of the redacted information 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*¹⁴ 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 redacted information in the requested document relates to several pending merger investigations and contains a preliminary assessment of the facts and other information from which the direction of the investigation, 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

¹⁴ *Odile Jacob*, paragraph 130

misrepresentations may cause damage to the reputation and standing of the undertakings investigated. Moreover, the redacted information in the requested document would reveal the Commission's investigation strategy and its 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 redacted information in the requested document concerning merger investigations is also covered by the exception set out in Article 4(3) of Regulation 1049/2001.

- As regards internal deliberations

Pursuant to Article 4 (3), second paragraph, of Regulation 1049/2001 the Commission shall refuse access to documents containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned, even after the decision has been taken, when disclosure of the document would seriously undermine the institution's decision-making process.

In addition to the above-mentioned redacted information, one paragraph of the requested document 8 contains an evaluation by the Commission staff who prepared the briefing of what could possibly be the position of one of the participants at the future meeting and, as such, constitutes an opinion for purely internal use falling under this exception. Its disclosure should be refused as it does not reflect what was actually expressed at the meeting in question, but only an opinion for internal use within the institution. Public access to this type of internal considerations on the possible conduct of a third party would deter staff from making them independently and without being unduly influenced by the prospect of subsequent disclosure.¹⁵

- As regards personal data,

With regard to the documents listed in the Annex and marked as redacted, a complete disclosure of those documents is prevented by the exception concerning the protection of privacy and the integrity of the individual outlined in Article 4(1)(b) of Regulation (EC) No 1049/2001, because they contain the following personal data:

- the names/initials and contact information of Commission staff members not pertaining to the senior management or cabinets;
- the names/initials, contact details and identifiers of other natural persons.

Article 9(1)(b) of the Data Protection Regulation does not allow the transmission of these personal data, except if you prove that it is necessary to have the data transmitted to you for a specific purpose in the public interest and where there is no reason to assume that the legitimate interests of the data subject might be prejudiced. In your request, you do not express any particular interest to have access to these personal data nor do you put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data contained in the requested

¹⁵ Case T-18/15, *Philip Morris v Commission*, paragraph 87

documents, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Pursuant to Article 4(2) and (3) of Regulation 1049/2001, the exception to the right of access contained in that Article must be waived if there is an overriding public interest in fully disclosing the documents requested. In order for an overriding public interest in disclosure to exist, this interest, firstly, has to be public (as opposed to private interests of the applicant) and, secondly, overriding, *i.e.* in this case it must outweigh the interest protected under Article 4(2), first and third indents, and 4(3) of Regulation 1049/2001.

According to the *Agrofert*¹⁶ judgment, the abovementioned general presumptions do not exclude the right for the applicant to demonstrate the existence of an overriding public interest justifying the disclosure of the document requested.

In your application you have not established arguments that would present an overriding public interest to fully disclose the documents in which information has been redacted. Consequently, the prevailing interest in this case lies in protecting the effectiveness of the Commission's investigations, its decision-making process and the commercial interests of the undertakings concerned.

4. FURTHER CONSIDERATIONS

Please note that several documents originating from third parties are disclosed to you based on Regulation (EC) No 1049/2001. However, this disclosure is without prejudice to the rules on intellectual property, which may limit your right to reproduce or exploit the released documents without the agreement of the originator, who may hold an intellectual property right on them. The European Commission does not assume any responsibility from their reuse.

Please note that documents 6, 6(a) and 9 were drawn up for internal use under the responsibility of the relevant officials of the Directorate-General for Competition. It solely reflects the service's interpretation of the interventions made and does not set out any official position of the third parties to which the document refers, which was not consulted on its content. It does not reflect the position of the Commission and cannot be quoted as such.

5. 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 fifteen (15) working days in which to do so from receipt of this reply 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 fifteen (15) working days from the registration of your request, either granting you full access to the

¹⁶ *Agrofert*, paragraph 86

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:

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

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

Yours faithfully,

Electronically signed

Olivier GUERSENT