EUROPEAN COMMISSION
Competition DG

The Director General

Brussels, 14 November 2023
COMP/J

Samuel Stolton
Bloomberg
International Press Centre
1041 Brussels

By e-mail
ask+request-13824-b2ac73e9@asktheeu.org

Subject: EASE 2023/6641 – Your request of 8 November 2023 for access to documents pursuant to Regulation (EC) No. 1049/2001 relating to a meeting between Commissioner Didier Reynders and Bytedance

Dear Sir,

Thank you for your application of 8 November 2023, registered on the same day under the above-mentioned reference number, concerning a meeting between Commissioner Didier Reynders and Bytedance CEO Shou Zi Chew, which took place on 8 November 2023, in which you request access to documents in the Commission's case file in accordance with Regulation (EC) No. 1049/2001[1] ("Regulation 1049/2001").

1. DOCUMENTS CONCERNED

In your message, you request access to the following documents which are part of the administrative file of DG Competition concerning the above-mentioned meeting:

General communications of any nature, written material of any kind, consultation notes, email correspondences, attendance lists, agendas, background papers, briefing papers, transcriptions of meetings, readouts of meetings, summaries of meetings, briefings for meetings, etc.

The documents you request access to form part of the case file in a pending investigation under Regulation (EU) 2022/1925[2] (the Digital Markets Act, hereinafter the '**DMA**'), in which the procedure may not be considered finalized yet, as long as the decision adopted by the Commission is still subject to possible appeal which might prompt the Commission to reconsider its decision and reopen the case.

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

[2] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265 of 12.10.2022, p. 1.

Having carefully examined your request in the light of Regulation 1049/2001, I have come to the conclusion that the documents you have requested access to fall under the exceptions of Article 4 of Regulation 1049/2001. Access to these documents, therefore, has to be refused. Please find below the detailed assessment as regards the application of the exceptions of Article 4 of Regulation 1049/2001.

2. APPLICABLE EXCEPTIONS

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*[3], 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*[4], *Bavarian Lager*[5] and *API*[6], 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 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.

Based on the same reasoning, the Court recognized in *Agrofert*[7] 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

---

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

4 Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau*, ECLI:EU:C:2010:376.

5 Case C-28/08 P, *Commission v Bavarian Lager*, ECLI:EU:C:2010:378.

6 Cases C-514/07 P, C-528/07 P and C-532/07 P, *Sweden and Others v API and Commission*, ECLI:EU:C:2010:541.

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

Merger Regulation, and in particular the rules on professional secrecy 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 773/2004[8].

As ruled by the Court of Justice in the *Agrofert* case[9] for merger proceedings, and by the General Court in the *Bitumen* case[10] 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 recent *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 pending[11].

The same reasoning used in the previously 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 notifying and other (third) parties in the enforcement of the DMA and preparation of enforcement, given that this Regulation contains very similar provisions as regards both the obligation of professional secrecy and the access to file procedure[12]. If documents in the DMA case files were to be disclosed under Regulation 1049/2001 to persons other than those authorised to have access to them according to the DMA, the procedural scheme 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 DMA 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 DMA proceedings, and this presumption applies regardless of whether the request for access concerns DMA proceedings which have already been closed or proceedings which are pending.

Natural and legal persons submitting information in the context of the DMA have a legitimate expectation that – apart from the publication of the non-confidential summaries provided for in Articles 8(6) and 18 (5) and (6) of the DMA and of the non-

---

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

9 *Agrofert*, paragraphs 61-63.

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

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

12 See, in this regard, Articles 34(4) and 36 of the DMA.

confidential versions of final decisions pursuant to Article 44 of the DMA – the information they supply to the Commission on an obligatory or voluntary basis under the DMA will not be publicly disclosed.

The documents requested by you, as specified above, are part of the file in a DMA case, have not been brought into the public domain and are known only to a limited number of persons. In particular, the documents you request access to contains commercial and market-sensitive information regarding the activities of the involved undertakings whose public disclosure would undermine the latters' commercial interests. This information concerns in particular commercial strategies. Disclosure of these documents could bring serious harm to the undertakings' commercial interests.

Moreover, and by analogy to what the General Court ruled in the *Bitumen*[13] case, certain sections of the final decisions (including information supplied by the parties and third parties) may be covered by the exceptions from public access and an investigation of the Commission cannot be considered as closed if there might be circumstances which might prompt the Commission to reopen the case.

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 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 DMA. It is for this reason that Article 36(1) of the DMA 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.

Also, pursuant to Article 36(4) of the DMA, 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 DMA, 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 DMA 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

[13] Case T-380/08, *Kingdom of the Netherlands v European Commission (Bitumen)*, ECLI:EU:T:2013:480.

Commission would be unable to properly carry out its task of enforcing the DMA. Consequently, the effective enforcement of the DMA would be undermined.

It thus follows that the requested documents are covered by a general presumption of non-disclosure of documents in DMA 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) of Regulation 1049/2001, 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 the documents of the case file have been gathered or drawn up by the Commission in order to take a decision on Bytedance's compliance with the DMA. 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 Regulation 1049/2001 is manifestly applicable to the documents, access to which is requested.

Furthermore, the Court recognized in *Odile Jacob*[14] and *EnBW*[15], 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 a pending DMA 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 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.

The general presumption recognised in the case-law cited above does not exclude the possibility of demonstrating that certain documents, of which disclosure is sought, are not covered by the presumptions. However, you have not demonstrated this in your application.

14 *Odile Jacob*, paragraph 130.

15 *EnBW*, paragraph 114.

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 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 indent, and 4(3) of Regulation 1049/2001.

In your application you have not established arguments that would present an overriding public interest to disclose the documents to which access has been hereby denied. 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. PARTIAL ACCESS

I have also considered the possibility of granting partial access to the documents for which access has been denied in accordance with Article 4 (6) of Regulation 1049/2001. However, the general presumption of non-disclosure invoked above also applies to partial disclosure for all the documents concerned and, consequently, no partial access can be granted.

5. MEANS OF REDRESS

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 a confirmatory application should be addressed to the Secretariat-General of the Commission within 15 working days upon receipt of this letter. You can submit it **via your EASE portal[16] account**.

Yours faithfully,

(e-signed)
Olivier GUERSENT

[16] https://www.ec.europa.eu/transparency/documents-request