



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

The Director-General

Brussels,
CNECT.R.4

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Subject: Your application for access to documents – EASE 2023/6843

Dear Sir,

We refer to your email dated 26 September 2023 wherein you make a request for access to documents pursuant to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (hereinafter ‘Regulation 1049/2001’), registered on 27 September 2023. We also refer to our email, dated 22 November 2023, our reference Ares(2023)7963257 whereby we informed you that part of your request was attributed to our Directorate-General on 16 November 2023 under the abovementioned reference number.

1. SCOPE OF YOUR APPLICATION

Your application reads as follows:

“Dear Secretariat General of the European Commission,

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:

- All documentation regarding a meeting on September 26th between Commissioner Breton and Apple CEO Tim Cook. This documentation should include but not be limited to: 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.

- All documentation regarding a meeting on September 26th between Commissioner Reynders and Apple CEO Tim Cook. This documentation should include but not be limited to: 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. ''

Due to the scope of your request, covering areas falling under the responsibility of different Directorates-General, your request was split between:

a) Directorate-General for Communications Networks, Content and Technology (DG CONNECT), under reference number EASE 2023/6843,

b) Directorate-General for Justice and Consumers (DG JUST), under reference number EASE 2023/5599.

This reply relates only to the reference number EASE 2023/6843 and to the meeting on 26 September between Commissioner Breton and Apple CEO Tim Cook. You will receive a separate reply related to EASE 2023/5599 from the other respective Directorate-General.

2. DOCUMENTS FALLING WITHIN THE SCOPE OF THE REQUEST

We have identified the following documents as falling within the scope of your application:

- Email of 16 August 2023 – Apple: CEO – Meeting request, Ares(2023)5627448 (**Document 1**)
- Annex to the email of 16 August 2023: Apple - Meeting request 081623, Ares(2023)5627448 (**Document 2**)
- Email exchanges 16 August – 20 September 2023 with regard to the CEO Tim Cook - Commissioner Breton meeting on 26th September, Ares(2023)5627448, (**Document 3**)
- Readout of meeting with Apple, Ares(2023)6696565 (**Document 4**)
- Briefing for the meeting between Commissioner Breton and Apple CEO Tim Cook, CAB BRETON/2305 (**Document 5**)
- Briefing for the Platforms (DSA, DMA), CAB BRETON/2267 (**Document 6**)

3. ASSESSMENT UNDER REGULATION 1049/2001

Following an examination of the identified documents under the provisions of Regulation 1049/2001 and taking into account the opinion of the third party, we have arrived at the conclusion that partial access can be granted to five documents, whilst access should be refused for one document, as disclosure is prevented by exceptions to the right of access laid down in Article 4 of Regulation 1049/2001.

A. Partial disclosure

(i) Protection of privacy and integrity of the individual

Full disclosure of Documents 1 - 5 is prevented by the exception concerning the protection of privacy and integrity of the individual outlined in Article 4(1)(b) Regulation 1049/2001, since they contain the following personal data:

- Names, functions and contact details of Commission staff members not pertaining to the senior management
- Names, functions, handwritten signatures, CV and contact details of other natural persons.

Article 9(1)(b) of the Data Protection Regulation ¹ 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) Regulation 1049/2001, access cannot be granted to the personal data contained in the requested 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.

(ii) Protection of the decision-making process

The first subparagraph of Article 4(3) of Regulation 1049/2001 provides that ‘access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.’

The second subparagraph of Article 4(3) of Regulation 1049/2001 provides that ‘access to a document, containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.’

Parts of Document 5 are covered by the abovementioned exceptions of Article 4(3) since they contain sensitive information with regard to the ongoing procedures relating to the Cyber Resilience Act (CRA) proposal, the Artificial Intelligence Act, the process of the EU Digital Identity framework and the process of the Digital Euro which have not been concluded yet. They also contain considerations with regard to the semiconductors. Furthermore, these parts contain reflections and views of the Commission services and of other parties. Speculations and misinterpretations of the public on the views, positions, considerations put forward at earlier stages of the procedures would affect the exploration of different options and expose the Commission to external pressure. They would also

¹Regulation (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/EC, OJ L 295, 21.11.2018, p. 39.

deter third parties and Commission services and officials from putting forward their views without being unduly influenced by the prospect of wide disclosure and would seriously undermine the Commission's functioning and internal decision-making process. This risk is also reasonably foreseeable and not purely hypothetical.

Consequently, the above-mentioned parts have been blanked out as their disclosure is prevented by the exceptions of Article 4(3) of Regulation 1049/2001.

B. Non-disclosure

We regret to inform you that access to Document 6 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).

Document 6 is an internal document (briefing) with information relating to the implementation and enforcement of the Digital Services Act ('DSA') and to the Digital Markets Act ('DMA'), including information provided by the entities concerned pursuant to Article 67 of DSA Regulation which will enable the Commission to carry out its duties under the DSA Regulation. Based on the assessment of this information, the Commission will assess next steps, which could entail the formal opening of proceedings 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

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

³Case 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 internal documents of the Commission and 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

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

⁵*Agrofert*, paragraphs 61-63.

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

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

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

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 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 which could be 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 Document 6 is covered by a general presumption of non-disclosure of documents in DSA case-files.

In view of the foregoing Document 6 is manifestly covered in its 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.

Document 6 was drawn up by the Commission and contains information relating to the enforcement and implementation of the DSA and DMA. It contains 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. Public disclosure of this document would expose the Commission and its services to undue external pressure, hence reducing

its independence and its margin of manoeuvre. This information could easily be misinterpreted or misrepresented as indications of the Commission's possible final assessment. Such misinterpretations and misrepresentations may cause damage to the reputation and standing of the undertakings concerned and would clearly 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.

Therefore, the exception set out in Article 4(3), first paragraph of the Regulation is manifestly applicable to this document.

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.

In view of the foregoing, Document 6 is also manifestly covered in its 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 parts of the documents which are being withheld but we have not been able to identify such an interest.

5. REUSE OF DOCUMENTS

You may reuse public documents which have been produced by the European Commission or by public and private entities on its behalf based on the [Commission Decision on the reuse of the Commission documents](#). You may reuse the part of Document 3 originating from the Commission and Documents 4-5 free of charge and for non-commercial and commercial purposes provided that the source is acknowledged and that you do not distort the original meaning or message of the documents. Please note that the Commission does not assume liability stemming from the reuse.

Please note that Documents 4-5 were drawn up for internal use under the responsibility of the relevant Commission services. They solely reflect the services' interpretation of the interventions made and do not set out any official position of the third parties to which the documents refer, which were not consulted on their content. They do not reflect the position of the Commission and cannot be quoted as such.

Documents 1- 2 and parts of Document 3 originate from third parties. Please note that they 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 originators, who

⁹*Odile Jacob*, paragraph 130.

¹⁰*EnBW*, paragraph 114.

may hold an intellectual property right on them. The European Commission does not assume any responsibility from their reuse.

6. 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. You can submit it in one of the following ways:

by asking for a review via your portal ⁽¹¹⁾ account (available only for initial requests submitted via the portal account),

or by mail:

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

Roberto Viola

Enclosures: (6)

⁽¹¹⁾ <https://www.ec.europa.eu/transparency/documents-request>