



EUROPEAN COMMISSION

Competition DG

The Director General

Brussels, 24 November 2022
COMP/C1-C4-C5-C6

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By e-mail and registered mail

Subject: EASE 2022/5926 – Your request of 17 October 2022 for access to documents pursuant to Regulation (EC) No. 1049/2001

Dear Sir,

Thank you for your message of 17 October 2022, registered on 18 October 2022 under EASE number 2022/5926, concerning meetings held in February 2022 between Orange (France) and Mr. Olivier Guersent, Director-General of DG Competition, in which you request access to documents in the Commission's possession in accordance with Regulation (EC) No. 1049/2001¹ ("Regulation 1049/2001").

1. DOCUMENT CONCERNED

In your message you request access to the following documents:

All documentation (including but not limited to all email correspondence, attendance lists, agendas, background papers, transcripts, recordings and minutes/notes) related to

- the 02.02.2022 meeting between Olivier Guersent and Orange.

The documents you request access to related to the meeting with Orange consist of one preparatory briefing for the meeting.

Having carefully examined your request and the relevant document in the light of Regulation 1049/2001, I have come to the conclusion that the document you have requested access to fall under the exceptions of Article 4 of Regulation 1049/2001. As a result, access to the document related to the meeting with Orange 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

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

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.

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.

The document requested by you as specified above, relates to the Orange's strategic development plans in the EU such as possible transactions that could fall under the EU's Merger Control procedures and is commercially sensitive because it consists exclusively of information on an undertaking's business operations, including its commercial strategy, business model, product designs and customer relationships. Such information is not within the public domain and is known only to a limited number of persons. Furthermore, the General Court's judgment in *Mastercard v Commission*², confirms 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.*" (emphasis added).

As such, the document requested contains commercial and market-sensitive information regarding the activities of the undertaking concerned, whose public disclosure could seriously undermine and bring harm to the company's commercial interests.

In view of the foregoing, the requested document is covered by the exception set out in Article 4(2), first 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 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 order to enforce the Merger Regulation, the Commission has an interest in better understanding the business models, products, services and customer relationships of companies active in the telecommunications sector, such as Orange, and which are central to the application of the regulation. Such information, similar to that gathered during merger pre-notification discussions ensures a more efficient administrative procedure once a transaction is notified.

² See Case T-516/11 *Mastercard v Commission*, ECLI:EU:T:2014:759, paragraph 85.

The disclosure of undertakings' information provided in this specific context, thus risks seriously undermining the decision-making process of the Commission. As set out in *Client Earth v Commission*³, disclosure is capable of undermining the Commission's decision-making process through the external influences or pressures that the Commission may be subjected to, if it risks "*impeding that institution's capacity to act in a fully independent manner and exclusively in the general interest or seriously to affect, prolong or complicate the proper conduct of that institution's internal discussions and decision-making process.*"

In particular, and as explained above, the information concerned is commercially sensitive, only known to a limited number of persons, and disclosure seriously risks undermining the commercial interests of the undertaking concerned. Disclosure would inevitably discourage companies from providing this information in an open and detailed manner, which risks seriously affecting, prolonging and complicating the ability of the Commission to take into account such information for its enforcement of any possible future transaction.

In view of the foregoing, the requested document is 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.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

As regards the document concerning the meeting with Orange, it should be noted that, 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 document 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 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 document to which access has been hereby denied. Consequently, the prevailing interest in this case lies in protecting the commercial interests of the undertakings concerned and the effectiveness of the Commission's decision-making process.

4. PARTIAL ACCESS

I have also considered the possibility of granting partial access to the document concerning the meeting with Orange for which access has been denied in accordance with Article 4 (6) of Regulation 1049/2001. However, as explained the document consists wholly of commercially sensitive information capable of seriously undermining the

³ See case C 57/16 P, *Client Earth v Commission*, ECLI:EU:C:2018:660, paragraph 108.

commercial interests of the undertaking concerned. As such, the reasoning invoked above which prevents full disclosure of the document, also applies to partial disclosure thereof and, consequently, no partial access can be granted.

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 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 fifteen (15) working days from the registration of your request, either granting you access to the document 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,

[e-signed]
Olivier GUERSENT