



EUROPEAN COMMISSION

Competition DG

The Director General

Brussels,
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By e-mail and registered mail

Subject: EASE 2022/5927 – 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 18/10/2022 under EASE number 2022/5927, concerning the meeting between Olivier Guersent and Orange of 15 December 2021, in which request access to documents in the Commission's possession 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, recordings and minutes/notes) relating to the meeting between Olivier Guersent and Orange of 15 December 2021.

The documents you request access to consist of a preparatory briefing, minutes of the meeting and an email proposing the agenda for the meeting.

Having carefully examined your request in the light of Regulation 1049/2001, I have come to the conclusion that access to these documents can only be provided partially, after the redaction of information relating to on-going investigations, of confidential business secrets whose disclosure would undermine the protection of commercial interests of Orange, as well as of personal data. Without prejudice to how they are to be qualified

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

under Regulation 1049/2001, the minutes of the meeting and the email proposing the agenda for the meeting are being provided after having consulted Orange on the disclosure of these documents.

2. APPLICABLE EXCEPTIONS

Article 4(1)(b) protection of personal data

With regard to the documents covered by this reply, a complete disclosure thereof 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 personal data such as the following:

- the names/initials and contact information of Commission staff members not pertaining to the senior management;
- the names/initials and contact details of other natural persons;
- other information relating to an identified or identifiable natural person such as their job titles.

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 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.

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. 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.

The documents requested by you, as specified above, contain information which is part of the file in a competition case and also relates to discussions concerning the enforcement of EU regulations and other rules applicable to the telecommunications industry. In particular, the parts of the requested documents in question contain commercial and market-sensitive information regarding Orange's activities, such as information on its business operations, including its commercial strategy, product design, business models and views. Such information has not been brought into 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 documents requested contain 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, parts of the requested documents are covered by the exception set out in Article 4(2), first indent of Regulation 1049/2001 and have accordingly been redacted.

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.

The documents requested by you as specified above, contain information relating to antitrust, merger and state-aid investigations. 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 *Commission v TGF*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

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

³ See case C-139/07, *Commission v Technische Glaswerke Ilmenau GmbH (TGI)*, judgment of 29 June 2010, ECLI:EU:C:2010:376, paragraphs 54-62.

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 system⁴.

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 773/2004⁵. As ruled by the General Court in the *Bitumen* case⁶, for an infringement under Article 101, 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, Regulations 1/2003 and 773/2004 and Regulation 1049 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).

Moreover, as the General Court has ruled in the *Bitumen* case, an investigation of the Commission cannot be considered as closed if there might be circumstances which might prompt the Commission to reopen the case. Furthermore, in its *Deutsche Telekom* judgment⁷, the General Court has held that, when it comes to antitrust investigations, having regard to the nature of the interests protected, a general presumption applies regardless of whether the request for access concerns an investigation which has already been closed or one which is pending.

⁴ See also Case C-514/07 P, *API v Commission*, judgment of 21 September 2010, ECLI:EU:C:2010:541, paragraphs 99 and 100, as well as Case C-404/10 P *Commission v Odile Jacob*, judgment of 28 June 2012, ECLI:EU:C:2012:393, paragraphs 108-126 where the Court of Justice applied *Commission v TGI* by analogy to merger proceedings.

⁵ Case C-365/12 P *Commission v EnBW Energie Baden-Württemberg*, judgment of 27 February 2014, ECLI:EU:C:2014:112, paragraph 88.

⁶ Case T-380/08, judgment of 13 September 2013, ECLI:EU:T:2013:480, paragraphs 32-40.

⁷ Case T-210/15, *Deutsche Telekom v Commission*, judgment of 28 March 2017, ECLI:EU:T:2017:224, paragraphs 31, 43 and 45. See also, by analogy, the *Odile Jacob*, *TGI* and *Agrofert* judgments quoted therein.

In the *Fessenheim* judgment⁸, the Court extended the scope of the general presumption of non-disclosure recognised by the case law with regard to the exception regarding the protection of investigations to documents drafted before the formal opening of a state aid investigation: if the documents drafted during this assessment phase, whether “internal” or “external”, were disclosed, this would also jeopardise the presumption applicable to formal investigations. These considerations apply, *mutatis mutandis*, to the analysis of market information from an antitrust or merger control perspective.

As mentioned above, the requested documents contain information relating to antitrust, merger and state-aid investigations, 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 companies investigated, in particular if no decision is adopted establishing a violation of the competition rules. Moreover, the information relating to such investigations in the requested documents 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, parts of the requested documents are manifestly covered by the exception related to the protection of the purpose of the Commission's investigations set out in Article 4(2), third indent of Regulation 1049/2001. Moreover, the information in the internal Commission documents 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. The relevant parts of the requested documents concerned by these exceptions have accordingly been redacted.

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 or the parts of the documents requested which have not been disclosed. 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 parts of the documents to which access has been hereby denied. Consequently, the prevailing interest in this case lies in protecting the

⁸ Case T-751/17, judgment of 14 Mai 2019, ECLI:EU:T:2019:330, paragraph 50.

commercial interests of the undertakings concerned, the effectiveness of the Commission's investigations and its decision-making process.

4. 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 parts of the documents which have been redacted 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
(p.p. Linsey MCCALLUM)