EUROPEAN COMMISSION

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DECISION OF THE EUROPEAN COMMISSION PURSUANT TO ARTICLE 4 OF THE IMPLEMENTING RULES TO REGULATION (EC) NO 1049/2001[1]

Subject: Your confirmatory application for access to documents under Regulation (EC) No 1049/2001 – GESTDEM 2022/7151

Dear Mr Rudl,

I refer to your email of 22 February 2023, registered on the same day, in which you submit a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents[2] (hereafter 'Regulation (EC) No 1049/2001').

Please accept our apologies for the delay in replying to your request.

1. SCOPE OF YOUR REQUEST

In your initial application of 11 December 2022, addressed to the Directorate-General for Communications Networks, Content and Technology, you requested 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) relating to the meeting between Roberto Viola and Orange on 03.05.2022.'

1 Official Journal L 345 of 29.12.2001, p. 94.

2 Official Journal L 145 of 31.5.2001, p. 43.

The Directorate-General for Communications Networks, Content and Technology identified the following documents as falling under the scope of your request:

- Back to Office Report, meeting with Orange, reference Ares(2022)3438514, ("Document 1");
- Briefing Note, Meeting with Orange, reference Ares(2022)8820001, ("Document 2");
- Email exchanges, 2-3 May 2022, reference Ares(2022)8811768, ("Document 3").

In its initial reply dated 7 February 2023, the Directorate-General for Communications Networks, Content and Technology granted partial access to the documents. The personal data in the documents was withheld based on the exception laid down in Article 4(1)(b) (protection of privacy and the integrity of the individual) of Regulation (EC) No 1049/2001. In addition, parts of documents 2 and 3 were protected based on the exception under Article 4(2) first indent (protection of the commercial interests) of Regulation (EC) No 1049/2001. Finally, parts of documents 1 and 2 were additionally protected based on the exception laid down in Article 4(3) first and second subparagraphs (protection of the decision-making process) of Regulation (EC) No 1049/2001.

In your confirmatory application, you request a review of this position as far as the redacted passages on pages 5 and 6 ("OTT's contribution to network investments – Orange's position") and on pages 9 and 10 of document 2 are concerned. Consequently, the scope of the confirmatory review is circumscribed to these parts of document 2.

2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION (EC) NO 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation (EC) No 1049/2001, the Secretariat-General conducts a review of the reply given by the Directorate-General concerned at the initial stage.

Following this review, I regret to inform you that I have to confirm the initial position of the Directorate-General for Communications Networks, Content and Technology and refuse access to the parts concerned of document 2 on the basis of the exceptions under Article 4(2) first indent (protection of the commercial interests) and the first subparagraph of Article 4(3) (protection of the decision-making process) of Regulation (EC) No 1049/2001.

The reasons are set out below.

2.1. Protection of the commercial interests

The first indent of Article 4(2) of Regulation (EC) No 1049/2001 provides that '[t]he institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, […], unless there is an overriding public interest in disclosure'.

Article 4(2), first indent of Regulation (EC) No 1049/2001 must be interpreted consistently with Article 339 of the Treaty on the Functioning of the European Union (hereafter 'TFEU'), which requires staff members of the EU institutions to refrain from disclosing

information of the kind covered by the obligation of professional secrecy, in particular information about undertakings and their business relations. Applying Regulation (EC) No 1049/2001 cannot have the effect of rendering ineffective Article 339 TFEU, over which it does not have precedence.

As the Court of Justice explained, 'in order to apply the exception provided for by the first indent of Article 4(2) of Regulation No 1049/2001, it must be shown that the documents requested contain elements which may, if disclosed, seriously undermine the commercial interests of a legal person. That is the case, in particular, where the requested documents contain commercially sensitive information relating, in particular, to the business strategies of the undertakings concerned or to their commercial relations […]'[3].

In addition, the sphere of information covered by obligation of professional secrecy benefits from the provisions of Article 339 TFEU. The Court of Justice of the European Union recognised that, '[i]n order that information be of the kind to fall within the ambit of the obligation of professional secrecy, it is necessary, first of all, that it be known only to a limited number of persons. It must then be information whose disclosure is liable to cause serious harm to the person who has provided it or to third parties. Finally, the interests liable to be harmed by disclosure must, objectively, be worthy of protection. The assessment as to the confidentiality of a piece of information thus requires the legitimate interests opposing disclosure of the information to be weighed against the public interest that the activities of the Community institutions take place as openly as possible.'[4]

Document 2 is a briefing prepared by the Commission services in the context of the meeting between a representative of Orange and the Director-General of the Directorate-General for Communications Networks, Content and Technology of the European Commission. The topics in the redacted parts concern net neutrality rules, volumes of data flows exchanged on its network with related addition costs, IP interconnection markets, Orange's suggestions as to the potential solutions to issues it identifies on IP interconnection markets. Such information is also covered by the obligation of professional secrecy. After its assessment, the Commission considers that the legitimate interests of redacting this information prevail over the public interests in transparency.

In that sense, the redacted parts of document 2 contain commercial information and Orange's views on these topics, which were not made publicly available, and had been shared with the Commission in confidence, as well as Orange's views related to competition on the French and Spanish market.

These respective parts contain sensitive business information, views and positions that are strategically sensitive and capable of seriously undermining the commercial interests of the legal entity concerned as they would provide the company's competitors with knowledge about its internal strategies. In the Secretariat-General's view, access to such

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[3] Judgment of the General Court of 5 February 2018, *PTC Therapeutics International* v *European Medicines Agency (EMA)*, T-718/15, EU:T:2018:66, paragraph 85.

[4] Judgment of the Court of First Instance of 30 May 2006, *Bank Austria Creditanstalt* v *Commission*, T-198/03, EU:T:2006:136, paragraph 71.

information may enable its competitors to adapt and orient their own commercial strategies based on the information received which may seriously undermine the commercial interests of the company concerned, in the competitive context. Furthermore, public disclosure of such information would undermine the protection of the expertise and knowledge of the companies in an intensely regulated and competitive sector, thus prejudicing their legitimate commercial interests. In this respect, the information provided therein could be sensationalised or instrumentalised by third parties, competitors and clients in ways that could have real adverse impacts on the interests of the company concerned. Such a disclosure would put the company in a delicate position as regards its competitors and clients.

It should be noted that the third parties should feel free to engage in a discussion with the European Commission and feel confident to share their views, positions, as well as confidential and commercially sensitive information, in trust that this will not be further disseminated putting at risk their interests. Therefore, disclosure of sensitive information, shared in confidence with European Commission services, could also discourage companies from speaking freely with European Commission without the fear of adverse impacts to their interests.

Consequently, the Secretariat-General confirms that the parts of the document need to be protected based on the exception provided for in the first indent of Article 4(2) (protection of the commercial interests, including intellectual property) of Regulation (EC) No 1049/2001.

2.2. Protection of the decision-making process

The first subparagraph of Article 4(3) provides that: '[a]ccess 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.'

It is to be noted that the decision-making exception in Article 4(3) of Regulation (EC) No 1049/2001 does not refer only to decisions having legal effect. The wording in Article 4(3) of Regulation (EC) No 1049/2001 includes neither a definition of the decision-making process, nor any indication that would enable establishing the legislator's intention to limit the scope of the decision-making process protected by that exception only to the legislative process.

Indeed, the decision-making process has to be interpreted in a broad sense, encompassing also processes relating to administrative and other functions of the Institutions.

In addition, according to settled case-law, the administrative activity of the Commission does not require as extensive an access to documents as that concerning the legislative activity of a Union institution[5].

As already mentioned, document 2 is a briefing prepared by the Commission services in the context of the meeting between the representative of Orange and the Director-General of the Directorate-General for Communications Networks, Content and Technology of the European Commission. The topics discussed concern sensitive ongoing initiatives of the Commission in the field of digital single market, for which a decision has not yet been taken such as the assessment of the responses to the exploratory consultation on 'The future of the electronic communications sector and its infrastructure'.

The topics discussed in the briefing are the subject of an exploratory consultation launched on 23 February 2023 and ended on 19 May 2023[6]. The Commission is analysing the numerous responses and, on that basis, will assess the functioning of the IP interconnection markets, and any potential follow up action.

In addition, other topics discussed in the briefing relate to the Commission Gigabit Recommendation[7].

Briefings are usually drawn up by the Commission services and made available to persons representing the Commission to inform them of the issues and objectives at political level so that they can prepare for and conduct political discussions or exchanges with stakeholders. Public disclosure of the redacted parts would have a negative effect on the ability of the services to correctly inform the members of the Cabinet or, as in the case in hand, other members of the senior management of the Commission of possible policy options and would undermine the Commission's ability to take well-informed decisions. In addition, if preliminary opinions of the relevant services were disclosed, it would make them more hesitant to express their opinions freely from fear of external pressure.

If this information is made public, this will lead to interferences and speculations by exposing the Commission's internal views on these topical issues. It would also generate unwarranted pressures on the Commission from stakeholders seeking to influence the debate on these issues.

The General Court has confirmed that access to documents can be refused if it would seriously undermine the free exchange of views and carry a risk of self-censorship[8].

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5 Judgment of the Court of Justice of 21 July 2011 in case C-506/08, *Sweden* v *MyTravel and Commission*, EU:C:2011:496, paragraph 87.

6 The future of the electronic communications sector and its infrastructure | Shaping Europe's digital future: https://digital-strategy.ec.europa.eu/en/consultations/future-electronic-communications-sector-and-its-infrastructure.

7 Gigabit connectivity recommendation | Shaping Europe's digital future (europa.eu).

8 Judgment of the Court of first Instance of 9 September 2008 in case T-403/05, *MyTravel* v *Commission*, EU:T:2008:316, paragraphs 50-52.

In addition, the General Court has already found that 'the possibility of expressing views independently within an institution helps to encourage internal discussions with a view to improving the functioning of that institution and contributing to the smooth running of the decision-making process'[9].

The disclosure of these parts would pose a continued risk to discussions and deliberations of the initiatives in question, such as any potential initiative resulting from the assessment of the responses to the exploratory consultation on the future of the electronic communications sector and its infrastructure[10] and would expose the European Commission to external pressure and disseminate preliminary conclusions that do not represent its position.

The redacted parts contained in the requested document represent views of Orange on some of these topics, as specifically interpreted by the Commission's representative who drafted the briefing document. The exchange of information and views took place in the context of activities aimed at ensuring that the Commission has all the information necessary to conduct a wide-ranging assessment of impacts of all available policy options, in the context of the ongoing initiatives and discussions that are likely to lead to policy initiatives and/or decisions in the future.

The risk of disclosing sensitive information concerning preliminary opinions of the company and the European Commission would disincentivise businesses from speaking freely with the Commission and undermine decision-making processes significantly. Speculations and misinterpretations of the public and other third parties on the views and reflections put forward in these ongoing decision-making discussions would affect the exploration of different policy options and unduly restrict the Commission's internal space to think, exposing the Commission and the companies involved to external pressure during the ongoing legislative decision-making processes.

Therefore, disclosure of the redacted information at this stage would specifically and actually undermine the decision-making process in the meaning of the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

The risk of such external pressure is real and not hypothetical given the specific and sensitive nature of the redacted parts.

Consequently, the Secretariat-General concludes that the relevant parts of document 2 are protected under the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

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[9] Judgment of the General Court of 15 September 2016, *Philip Morris* v *Commission*, T-18/15, EU:T:2016:487, paragraph 87.

[10] The future of the electronic communications sector and its infrastructure | Shaping Europe's digital future: https://digital-strategy.ec.europa.eu/en/consultations/future-electronic-communications-sector-and-its-infrastructure.

3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exceptions laid down in Article 4(2) first indent and in Article 4(3), first subparagraph, of Regulation (EC) No 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, firstly, be public and, secondly, outweigh the harm caused by disclosure.

According to the case-law, the applicant must, on the one hand, demonstrate the existence of a public interest likely to prevail over the reasons justifying the refusal of the documents concerned and, on the other hand, demonstrate precisely in what way disclosure of the documents would contribute to assuring protection of that public interest to the extent that the principle of transparency takes precedence over the protection of the interests which motivated the refusal[11].

In your confirmatory application, you argue that you 'strongly believe it's in the public interest to be informed about all arguments and considerations regarding this topic'.

In its *Turco v Council* judgment, the Court held explicitly that the overriding public interest capable of justifying the disclosure of a document must, as a rule, be distinct from the principles of transparency, openness, and democracy or of participation in the decision-making process[12]. The reason is that those principles are effectively implemented by the provisions of Regulation (EC) No 1049/2001 as a whole. In its judgment in the *Strack* case[13], the Court of Justice ruled that, in order to establish the existence of an overriding public interest in transparency, it is not sufficient to merely rely on that principle and its importance, but that an applicant has to show why in the specific situation at hand, the principle of transparency is in some sense especially pressing and capable, therefore, of prevailing over the reasons justifying non-disclosure[14].

The arguments put forward in your confirmatory application do not demonstrate a pressing need for the disclosure of the relevant parts in the document.

Nor has the Secretariat-General has not been able to identify any public interest capable of overriding the interests protected by Article 4(2) first indent and the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

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11 Judgment of the General Court of 9 October 2018, *Anikó Pint* v *European Commission*, T-634/17, EU:T:2018:662, paragraph 48; Judgment of the General Court of 23 January 2017, *Association Justice & Environment, z.s* v *European Commission*, T-727/15, EU:T:2017:18, paragraph 53; Judgment of the General Court of 5 December 2018, *Falcon Technologies International LLLC* v *European Commission*, T-875/16, EU:T:2018:877, paragraph 84.

12 Judgment of the Court of First Instance of 23 November 2004, *Maurizio Turco* v *Council of the European Union*, T-84/03, EU:T:2004:339, paragraphs 81-83.

13 Judgment of the Court of Justice of 2 October 2014 in case C-127/13 P, *Strack* v *Commission*, (EU:C:2014:2250), paragraph 128.

14 Judgment of the Court of Justice of 2 October 2014 in case C-127/13 P, *Strack* v *Commission*, (EU:C:2014:2250), paragraph 129.

4. PARTIAL ACCESS

In accordance with Article 4(6) of Regulation (EC) No 1049/2001, the Secretariat-General has considered the possibility of granting further partial access to the document requested.

However, for the reasons explained above, no further meaningful partial access is possible without undermining the interests described above.

5. MEANS OF REDRESS

Finally, I draw your attention to the means of redress available against this decision. You may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

Yours sincerely,

For the Commission
Ilze JUHANSONE
Secretary-General

CERTIFIED COPY
For the Secretary-General

Martine DEPREZ
Director
Decision-making & Collegiality
EUROPEAN COMMISSION