



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

The Secretary General

Brussels, 11.02.2014
SG.B.4/LR/rc - sg.dsg2.b.4(2014) 277835

Simon Davies

By e-mail only: simon@privacy.org

Subject: Confirmatory application for access to documents under Regulation 1049/2001 - Gestdem 2013/5871-5737

Dear Mr. Davies,

I refer to your letter of 19 December 2013, registered on the same day, in which you make a confirmatory application in accordance with Article 7(2) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹ ("Regulation 1049/2001").

As clarified with you, your confirmatory reply is being dealt with under Gestdem 2013/5871 but refers to the initial reply given under Gestdem 2013/5737.

1. CONTEXT OF YOUR REQUEST

The documents you seek to obtain are part of the antitrust file COMP/39740 - Google, concerning an investigation under Article 102 of the Treaty on the Functioning of the European Union (TFEU). The proceedings started in 2010 and are still ongoing.

2. SCOPE OF THE REQUEST

In your initial request of 14 November 2013, registered on 18 November 2013, you requested access to the following:

"8. All documents, including notes of minutes, emails, text messages and other correspondence relating to contacts between the Commissioner and Google's executives during the period 1st February 2013 to 3rd October 2013 relating to the present inquiry into Google.

¹ Official Journal L 145 of 31.5.2001, p. 43.

9. *All documents, including notes of minutes, emails and other correspondence relating to contacts between the Commissioner and EU Data Protection Authorities during the period 1st May 2012 to 3rd October 2013 relating to the present inquiry into Google.*

10. *Any documentation evidencing the number of letters from concerned parties relating to the Google inquiry, meetings held with them and responses to their requests.*

11. *The Commissioner's original assessment of Google's first proposal.*

12. *Any data supplied by Google in support of its revised proposals.*

13. *Any documentation setting out the details of the methodology Google has used to test its proposals.*

14. *Any internal documents, correspondence, policies, minutes, position papers and other material from October 2010 to the present, relating to consideration of the relevance of privacy and data protection aspects of the present inquiry into Google.*

15. *Minutes, correspondence and memos relating to the meeting in New York on the week of 22nd September 2013 between the Commissioner and Eric Schmidt of Google.*

16. *Minutes, correspondence and memos relating to meetings prior to the week of 22nd September 2013 between the Commissioner, senior Commission staff and Google executives.*

17. *Logs of phone interactions between the Commissioner and his staff and Google executives between October 2010 and the present.*

18. *Logs of phone interactions between the Commissioner and his staff and complainants between October 2010 and the present."*

In its initial reply of 28 November 2013, the Directorate-General for Competition (DG COMP) refused access to these documents pursuant to the exceptions of Article 4(2), third indent (protection of the purpose of investigations), Article 4(2), first indent (protection of commercial interests) and Article 4(3) first paragraph, (protection of the decision-making process) of Regulation 1049/2001.

Through your confirmatory application, you request a review of this position. You call into question the applicability of exceptions invoked by DG COMP as well as of the case law and allege that there is an overriding public interest in disclosure.

3. ASSESSMENT UNDER REGULATION 1049/2001

When assessing a confirmatory application for access to documents submitted pursuant to Regulation 1049/2001, the Secretariat-General conducts an independent review of the reply given by the Directorate-General concerned at the initial stage.

Following this assessment, I regret to inform you that the Commission has to confirm the refusal of DG COMP, based on the exceptions of Article 4(2)(3) (protection of the purpose of investigations), Article 4(2)(1) (protection of commercial interests) and Article 4(3), (protection of the decision-making process, which are closely linked in the present case, as explained below.

3.1. Relevance of Regulation (EC) No 1/2003 and its Implementing Regulation for interpreting the exceptions under Regulation (EC) No 1049/2001

Regulation (EC) No 1/2003 imposes far-reaching obligations on undertakings involved in competition proceedings to provide information and reveal sensitive commercial information and business secrets to the Commission, and confers on the Commission powers to require all necessary information and to carry out all necessary investigations. These obligations and extensive powers of investigation are, to some extent, counterbalanced by the provisions on the reinforced protection of the undertakings concerned pursuant to this Regulation and its Implementing Regulation (Regulation (EC) No 773/2004²). These rules set strict requirements on the handling of information received or discovered as part of antitrust proceedings.

Indeed, Article 28 of Regulation 1/2003 and Article 15 of the Implementing Regulation stipulate that information gathered by the Commission may only be used for the purpose for which it was acquired. These articles also require that the Commission respect the obligation of professional secrecy enshrined in Article 339 TFEU. Moreover, pursuant to Article 27 of Regulation (EC) No 1/2003, the Commission only grants access to the case file to the parties who have received a statement of objections.

These guarantees aim, firstly, to ensure the proper functioning of the system of enforcement of competition rules in the public interest and, secondly, to safeguard the legitimate expectations of the undertakings concerned that the information they provide to the Commission will be used only for the purposes of the investigation and that their confidential information will not be disclosed.

In the Commission's view, the obligation of 'limitation of use' forms an integral part of the professional secrecy obligation and has the purpose, essential for the functioning of the system, of protecting the fundamental rights of the undertakings concerned by establishing the purpose and the limits of the Commission's interference in the private

² Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, pages 18-24.

activities of the undertakings concerned. This interpretation is confirmed by the case-law of the Court of Justice³.

The Commission therefore considers that the application of Regulation (EC) No 1049/2001 cannot have the effect of depriving the aforementioned provisions of their useful effect. In several recent judgments concerning the right of access to files (in State aid, merger control, antitrust or court proceedings) under specific provisions of EU law, the Court of Justice and the General Court ruled that it was appropriate to recognise the existence of a general presumption of inaccessibility under Regulation (EC) No 1049/2001. This means that granting access to the file of the proceedings runs counter to the exception provisions in Regulation (EC) No 1049/2001 as explained below.⁴

3.2. Protection of the purpose of investigations

Article 4(2), third indent, of Regulation 1049/2001 provides that "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] the purpose of inspections, investigations and audits".

In its initial reply, DG COMP concluded that the document requested is covered by a general presumption of non-accessibility, based on the exception of Article 4(2), third indent of Regulation 1049/2001, as interpreted by the Court of Justice in the *Technische Glaswerke Ilmenau* case⁵, hereafter "TGI".

I have to confirm this analysis.

I would like to point out here that the antitrust investigation in question is ongoing and that the Commission has not yet made a final decision.

Natural and legal persons submitting information under Regulation (EC) No 1/2003 have a legitimate right to expect that - apart from the publication of the final decision with any business secrets and other confidential information removed from it - the information they supply to the Commission on an obligatory or voluntary basis will not be disclosed to the public. This legitimate right arises from the specific provisions concerning the professional secrecy obligation - which provide for documents to be used only for the purposes for which they have been gathered - and the special conditions governing access to the Commission's file.

³ See Case C-67/91, *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and others* [1992] ECR I-4785, and Case 85/87 *Dow Benelux v Commission* [1989] ECR 3137.

⁴ See Case C-139/07 P *Commission v Technische Glaswerke Ilmenau (TGI)*, 29.6.2010 and joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v Associated Press International (API)*, 21.9.2010, not yet published. More recently, Case C-404/10 P *Commission v Editions Odile Jacob SAS*, ruling of 28.6.2012, not yet published; C-477/10 P *Commission v Agrofert Holding*, ruling of 28.6.2012, not yet published; and T-380/08, *The Netherlands v Commission*, ruling of 13 September 2013.

⁵ Judgment of 29 June 2010 in the case C-139/07 P, *Commission v Technische Glaswerke Ilmenau*.

Careful respect by the Commission of its obligations in this area has created a climate of mutual confidence between the Commission and undertakings involved in antitrust proceedings, so that the latter have been willing to provide the Commission with the information necessary for its investigations. If necessary, the Commission may have recourse to the investigative powers conferred upon it by the applicable legislative framework.

Should the Commission be obliged to disclose the requested documents to the public under Regulation (EC) No 1049/2001 despite the guarantees offered to the undertakings concerned by Regulation (EC) No 1/2003 and its Implementing Regulation, in particular the obligation to limit the use of the documents in question to the purpose for which they have been gathered by the Commission, this would result in these guarantees being deprived of their meaningful effect and would jeopardise the balance which the European Union legislature sought to ensure in Regulation N° 1/2003 between the obligation on the undertakings concerned to send the Commission possibly sensitive commercial information, on the one hand, and the guarantee of increased protection, by virtue of the requirement of professional secrecy and business secrecy, for the information so provided to the Commission, on the other.

Furthermore, undertakings involved in investigations and potential informants and complainants would lose their trust in the Commission's reliability and in the sound administration of competition files. The parties involved would reduce their cooperation to the bare minimum in future .

This, in turn, would undermine the Commission's authority and lead to a situation where the Commission would be unable to properly carry out its task of enforcing EU competition law. Consequently, the purpose of competition proceedings and, implicitly, the effective enforcement of the EC competition rules would be seriously undermined.

As mentioned above, the General Court has recognised the existence of a general presumption that disclosure of documents exchanged between the Commission and undertakings during antitrust proceedings undermines, in principle, both protection of the objectives of investigation activities and that of the commercial interests of the undertakings involved in such a procedure (see, Case T-380/08, *The Netherlands v Commission*, paragraph 42), especially while the investigations are on-going.

It is essential that the Commission be allowed to conduct its investigations without being disrupted or influenced, and without information being disclosed about the course of the inquiry. It would be impossible to guarantee this if the details of the antitrust investigation were already publicly available. The right of access under Regulation (EC) No 1049/2001 refers to information made publicly available and not to privileged access for interested third parties, even if their concerns are valid.

In addition, the antitrust proceedings against Google currently take place in the framework of Article 9 of Regulation 1/2003 (the so-called "commitment procedure"). Therefore the reasons for which documents relating to ongoing antitrust proceedings cannot, in principle, be disclosed apply *a fortiori* to documents exchanged between undertaking and the Commission in ongoing proceedings under Article 9 of Regulation 1/2003.

I therefore conclude that your request for access to the file of the proceedings in the antitrust case COMP/39740 - Google falls under the exception provision in Article 4(2), third indent of Regulation (EC) No 1049/2001, pursuant to which ‘the institutions shall refuse access to a document where disclosure would undermine the protection of (...) the purpose of inspections, investigations and audits’.

3.3. Protection of the decision-making process

For the same reasons, the decision-making process of the Commission must also be protected.

Article 4 (3), first subparagraph of Regulation 1049/2001 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.

Since the College of Commissioners has not yet reached its final decision with regard to the ongoing antitrust proceedings, the decision-making process would be seriously undermined, as the Commission could be exposed to outside pressure from third parties. I conclude that, in this case, the exception under Article 4(3), first paragraph of Regulation (EC) No 1049/2001 does indeed apply.

3.4. Protection of commercial interests

Article 4(2), first indent 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.*

Having regard to the objective of antitrust proceedings, which consists of ascertaining whether or not a behavior of undertakings constitutes an infringement of Article 102 TFEU, the Commission gathers, in the context of such proceedings, sensitive information about the activities of the involved undertakings. This information concerns in particular market data such as price information, market shares, sales figures, customer information, commercial strategies etc. Release of these data would undermine the commercial interests of the undertakings involved, which as explained above have a legitimate expectation rooted in Regulation 1/2003 and its Implementing Regulation that the documents which they provide in all confidentiality to the Commission are not disclosed to third parties.

Please note that I cannot be more specific with regard to the content of the individual documents concerned, since this would have the effect of partly revealing their content and, thereby, deprive the exception of its purpose⁶.

It follows that, the documents in the file relating to this matter also fall under the exception provision in *Article 4(2), first indent* of Regulation (EC) No 1049/2001. Moreover, as already mentioned there is a general presumption that the disclosure of these documents would undermine the commercial interests of the companies concerned. (See judgment of the General Court of 13 September 2013, Case T-380/08, *The Netherlands v Commission*, paragraph 42). As the Court of Justice already ruled in an earlier decision of 22 October 2002 in Case C-94/00 *Roquette Frères*, the Commission's ability to guarantee the anonymity of certain of its sources of information is of crucial importance to ensure the effective prevention and combating of prohibited anti-competitive practices⁷.

Therefore, the Commission concludes that access to the requested documents must also be refused on the basis of the exception laid down in Article 4 (2), first indent of Regulation 1049/2001, which stipulates 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”.

This general presumption could possibly apply up to 30 years and possibly beyond.⁸

4. PARTIAL ACCESS TO THE REQUESTED DOCUMENTS

I have also examined the possibility of granting partial access to the documents concerned, in accordance with Article 4(6), of Regulation 1049/2001. However, it follows from the assessment made under section 3, that the documents which fall in the scope of your request are manifestly and entirely covered by the exceptions laid down in Article 4(2), first and third indents and Article 4 (3), first subparagraph, of Regulation 1049/2001. Consequently, they do not fall within an obligation of disclosure, in full or in part, of their content.

5. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

Pursuant to Article 4(2) and (3), the exceptions to the right of access must be waived if there is an overriding public interest in disclosure. For such an overriding public interest to exist, this interest, firstly, has to be public and, secondly, overriding, i.e. it must outweigh the interests protected by virtue of Article 4(2) and (3), of Regulation 1049/2001.

⁶ See settled case law, in particular case T-204/99, *Olli Mattila v Council and Commission*, [2001] ECR p. II-2265, paragraph 87; case T-105/95, *WWF UK v Commission*, [1997] ECR II-313, paragraph 65 and case T-84/03 *Turco v Council* [2004] ECR p. II-4061, paragraph 74.

⁷ See ECR I-9039, paragraph 64.

⁸ See Case C-477/10 P *Commission v Agrofert Holding*, ruling of 28.6.2012, not yet published, paragraph 67.

In your confirmatory application you stress three points that would support the existence of an overriding public interest:

1. Public trust in the processes of the inquiry

The first argument you raise relates to the need to maintain the public trust in the procedure and operations of Commission investigations. In your opinion, this is a matter of concern to all interested parties to the current Google case but which also extends generally to the conduct of investigations by the Commission.

I do not consider that this constitutes a reason for disclosure capable of overriding the interests protected by the exceptions of Article 4(2), first and third indents and Article 4(3), first subparagraph, of Regulation 1049/2001.

Firstly, the reasoning is not specific to the documents you request, neither to the case to which they relate. Should your reasoning be followed, there would be an overriding public interest in disclosing all documents from every Commission investigation, as this would always contribute to establishing the trust of the public in the operation of these investigations. Indeed, as you recognise, your concern "*extend[s] generally to the conduct of investigations*". However, the exception of overriding public interest can only apply in exceptional circumstances; otherwise it would deprive Article 4(2), first and third indents and Article 4(3), first subparagraph, of Regulation 1049/2001 of their effects.

In any case the public trust in the processes of the inquiry is safeguarded by the specific rules and regulations which are publicly available and are applicable to all stages of a competition investigation.

2. Lawfulness of Google's operations

The second argument you raise relates to the examination by data protection authorities (and not by competition authorities) of the lawfulness of Google's operations within Europe. In your opinion, the disclosure of the documents would allow to examine whether Google has derived competitive advantage from the breach of data protection rules in different European jurisdictions. You take the view that there is a public interest in clarifying that question.

It is precisely, as you underline, because there are allegations relating to Google's possible unlawful behaviour that the Commission must investigate the case with paramount diligence. As in every other administrative or legal proceeding, the results cannot be anticipated until all evidence has been collected and analysed.

Disclosing information at an early stage in an ongoing file 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 investigated entity, in particular if no decision is adopted establishing a violation of the competition rules. Moreover, 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.

Therefore, I consider your point is not a valid reason for disclosure capable of overriding the interests protected by the exceptions of Article 4, first and third indents and Article 4(3), first subparagraph, of Regulation 1049/2001.

3. Scope of the investigation, since there is a perception that the Commissioner has ignored crucial data protection and privacy concerns.

Your third argument relates to the need in your view to clarify the extent to which the Commission has taken into account the importance and the value of personal data for Google. In your opinion, there is a perception that Vice President Almunia has ignored crucial data protection and privacy concerns. You take the view that Vice President Almunia has taken first a position that "*the privacy aspect was relevant to competition considerations*", and then contradicted that previously stated position in the handling of the Google antitrust investigation. In your opinion the disclosure of the documents you request would allow to explore the reason for that change of position.

I consider your point is not a valid reason for disclosure capable of overriding the interests protected by the exceptions of Article 4, first and third indents and Article 4(3), first subparagraph, of Regulation 1049/2001.

Firstly, your reasoning on this point is entirely prejudiced on the assertion that Vice President Almunia has taken two contradictory positions in the course of the Commission's inquiry of the case at hand.

I cannot concur with this view. Indeed, in the speech you refer to, Vice President Almunia did not make any statement on the case to which the documents you request access to belong. Much to the contrary, the Vice President only gave a general view about the potential relevance of personal data in competition cases in high technology sectors. Even in this context, he stated that competition law "*is not well placed*" to address these issues, that "*DG Competition has not had to handle cases where the accumulation or the manipulation of personal data were used to hamper competition*" and that, apart from one case related to merger control, "*our [the Commission's] enforcement work has not had to tackle specific personal-data and privacy issues*".

It follows that this speech cannot reasonably be considered as setting out a view that personal data are systematically a relevant factor in individual competition cases in the sector. As the Vice President did not take a view on specific cases, and in particular on the case at hand, I cannot identify any contradiction between his positions. Absent a contradiction, there cannot logically be an overriding public interest in disclosing documents with a view to explore the reasons of that contradiction.

Secondly, the "*perception that the Commissioner [Commissioner Almunia] has ignored crucial data protection and privacy concerns*" appears to be your personal view. You did not adduce evidence that this view is shared more generally in the industry, let alone that it is a perception shared by the wider public. It can therefore not be held on the basis of the evidence you brought that the assessment of the accuracy of that perception would be in the interest of the public.

Under these circumstances, I have to conclude that there is no overriding public interest in disclosure in the sense of Regulation 1049/2001. Consequently, I consider that, in this case, the prevailing interest is the protection of the commercial interests of the undertakings concerned and the purpose of cartel investigations and the related decision-making process as protected by the exceptions in Article 4(2), first and third indents and Article 4 (3), of Regulation 1049/2001.

6. 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 TFEU.

Yours sincerely,

A handwritten signature in cursive script, appearing to read 'Catherine Day', written in black ink.

Catherine Day