



EUROPEAN COMMISSION

Competition DG

The Director General

Brussels, 20.12.2023

Mr João Camargo

By e-mail
ask+request-13827-
84d8fea5@asktheu.org

Subject: EASE 2023/6646 – Your request of 8 November 2023 for access to documents pursuant to Regulation (EC) No. 1049/2001 relating to Daniel Coublucq and the Bayer Monsanto merger

Dear Sir,

Thank you for your message of 8 November 2023, registered on the same day under the above-mentioned reference number, in which you request access to documents in accordance with Regulation (EC) No. 1049/2001¹ ('Regulation 1049/2001').

1. DOCUMENTS CONCERNED

In your message, you request access to documents which contain "Daniel Coublucq and the Bayer Monsanto merger", as follows:

" I am requesting documents relating to any article 16, article 12B or article 40 (Staff Regulations) applications made by Daniel Coublucq when he left DG Comp to take up employment at Compass Lexecon in September 2018.

In particular, I request a note of all Daniel Coublucq's job titles at the Commission including dates held (incl. duration of his working contracts); copies of any application(s) that he made under article 12b, 16 and 40 to undertake the new professional activity; the date of issuing the authorisation; any assessments of the compatibility of his new role with his DG Comp role; and all documents (correspondence, emails, meeting notes etc) related to the authorisation of the new role.

In addition:

- I request all documents, correspondence and meeting notes concerned with Daniel Coublucq's role in the Bayer/Monsanto merger, including the information about his participation in Unit E4 or presence in any Unit E4 meetings concerning the Bayer / Monsanto merger

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

- I request all documents, correspondence and meeting notes that describe Daniel Coublucq's involvement in the Commission's evaluation of BASF acquisition of Bayer seed treat and herbicide assets and its digital farming assets

- I request all documents, correspondence and meeting notes on opinions's expressed by Daniel Coublucq in DG Comp, in Unit E4's meetings or as an invited member, concerning the following document from Compass Lexecon: "Analysis of BASF's incentives as regards to herbicides and herbicide tolerance traits" (13/3/2018)

Finally, I would like to request all declarations of interest made by Daniel Coublucq when he rejoined the Commission from Compass Lexecon in October 2020. I would like to receive all Commission documents including any emails, letters, minutes of meetings which discuss the risk of conflicts of interest in this case, and a note of any restrictions which were applied to Mr Coublucq when he rejoined the Commission."

We identified two types of documents falling within the scope of your request:

- a. Documents pertaining to the administrative file in Case M.8084 – Bayer/Monsanto, and
- b. Documents pertaining to the personal file of Mr Coublucq.

The documents you request access to, under item (a) above, form part of the case file in a merger case concerning an investigation under the EU Merger Regulation 139/2004² (the 'Merger Regulation'), in which the procedure may not be considered finalised yet, as long as the decision adopted by the Commission is still subject to the monitoring of commitments, which might prompt the Commission to reconsider its decision and reopen the case.

Having carefully examined your request in the light of Regulation 1049/2001, I have come to the conclusion that the list of documents that are mentioned falls under the exceptions of Article 4 of Regulation 1049/2001. Access to these documents, therefore, has to be refused. 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

Article 4(2), third indent, protection of the purpose of investigations

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.

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.

In its judgment in Case C-404/10 P *Commission v Odile Jacob*³, 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

² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.01.2004, p. 1-22.

³ Case C-404/10 P, *Commission v Odile Jacob*, [2013] ECR.

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.

The Court ruled that, by analogy to the case law in cases *TGI*⁴, *Bavarian Lager*⁵ and *API*⁶, 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 referred in particular to the Merger Regulation and emphasised that it not only governs a specific area of European Union law, but is also 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). The Court stated that, if documents in the merger case-files were to be disclosed under Regulation 1049/2001 to persons other than those authorised to have access according to the merger control 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 merger control proceedings which have already been closed or proceedings which are pending.

In *Commission v TGI*⁷, 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 and held that there exists 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 system⁸.

Based on this reasoning, the Court recognized in *Agrofert*⁹ that the same general presumptions 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 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.

As ruled by the Court in the *Agrofert* case¹⁰, 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, the Merger Regulation and Regulation 1049 have different aims but must be interpreted and applied in a consistent manner. The rules on access to file in the Merger Regulation 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).

Natural and legal persons submitting information in the context of the Merger Regulation have a legitimate expectation that – apart from the publication of the Section 1.2 of the Form CO and of the final decision cleared of business secrets and other confidential

⁴ Case C-139/07 P, *Commission v Technische Glaswerke Ilmenau*, [2010] ECR I-5885.

⁵ Case C-28/08 P, *Commission v Bavarian Lager*, [2010] ECR I-6055.

⁶ Cases C-514/07 P, C-528/07 P and C-532/07 P, *Sweden and Others v API and Commission*, [2010] ECR I-8533.

⁷ See case C-139/07, *Commission v Technische Glaswerke Ilmenau GmbH (TGI)*.

⁸ See also Case C-514/07 P, *API v Commission*, para. 99 and 100, as well as Case C-404/10 P *Commission v Odile Jacob*, paragraphs 108-126 where the Court of Justice applied *Commission v TGI* by analogy to merger proceedings.

⁹ Case C-404/10 P, *Commission v Agrofert Holding*, [2013] ECR, paragraph 59.

¹⁰ *Agrofert*, paragraphs 32-40.

information – the information they supply to the Commission on an obligatory or voluntary basis under the Merger Regulation will not be disclosed.

Undertakings 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 documents requested by you, as specified above, are part of the file in a competition case, have not been brought into the public domain and are known only to a limited number of persons. In particular, the documents you request access to contains commercial and market-sensitive information regarding the activities of the involved undertakings whose public disclosure would undermine the latter's commercial interests. This information concerns in particular commercial strategies. Disclosure of these documents could bring serious harm to the undertakings' commercial interests.

Moreover, as the General Court has ruled in the *Bitumen*¹¹ 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.

Undertakings also have a legitimate interest that the information is used only for the purposes of the Commission proceedings in application of the Merger Regulation. It is for this reason that Article 17(1) the Merger Regulation provides that information acquired through the investigative powers of this regulation is used only for the purpose for which it was acquired, namely the administrative Commission procedure and the Court review of the decision resulting from this procedure.

Also, pursuant to Article 17(2) of the Merger Regulation, 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.

Careful respect by the Commission of its obligations in this domain has so far created a climate of mutual confidence between the Commission and undertakings, under which the latter have cooperated by providing the Commission with the information necessary for its investigations. Recourse to formal decisions requesting the information (subject to sanctions) or occurrences of opposition to inspections are indeed rare.

In these circumstances, disclosure despite the protection provided for by the above-mentioned regulations, would lead to a situation where undertakings subject to investigations and potential informants and complainants would lose their trust in the Commission's reliability and in the sound administration of competition 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 EU competition law. Consequently, the purpose of merger procedures and, implicitly, of the effective enforcement of the EU competition rules would be undermined.

It thus follows that the requested documents under item (a) in Section 1 above are covered by a general presumption of non-disclosure of documents in merger case-files.

¹¹ Case T-380/08, *Kingdom of the Netherlands v European Commission (Bitumen)*.

In view of the foregoing the requested documents under item (a) in Section 1 above are covered by the exception set out in Article 4(2), first indent 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.

In the present case, all the documents of the case file have been gathered or drawn up by the Commission in order to make a decision on compliance with EU competition rules. Since the decision adopted by the Commission is still subject to the monitoring of commitments, public disclosure of any of the requested documents would expose the Commission and its services to undue external pressure, hence reducing its independence and its margin of manoeuvre. This would clearly seriously undermine the Commission's decision-making process. Therefore, the exception set out in Article 4(3), first paragraph of the Regulation is manifestly applicable to the documents, access to which is requested.

Furthermore, the Court recognized in *Odile Jacob*¹² 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.

As mentioned above, the requested documents relates to a merger investigation which cannot be considered finalised. The information contained in the file could easily be misinterpreted or misrepresented. Such misinterpretations and misrepresentations may cause damage to the reputation and standing of the undertakings investigated.

In view of the foregoing, the requested documents are manifestly covered in their entirety by the exceptions related to the protection of the purpose of the Commission's merger investigations set out in Article 4(2), third indent of Regulation 1049/2001 and the protection of the commercial interests set out in Article 4(2) first indent of Regulation 1049/2001. Moreover, the internal Commission documents are 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 presumption recognised in the *Agrofert* judgment does not exclude the possibility of demonstrating that certain documents, of which disclosure is sought, are not covered by the presumptions. However, you have not demonstrated this in your application.

Article 4(1)(b): protection of privacy and the integrity of the individual

Pursuant to Article 4(1)(b) of Regulation 1049/2001 the Commission shall refuse access to a document where disclosure would undermine the protection of the privacy and integrity of the individual, in particular in accordance with Union legislation regarding the protection of personal data. The relevant legislation in this case is Regulation 1725/2018¹³ which specifically applies to the Union institutions, bodies, offices and agencies when they process personal data.

¹² *Odile Jacob*, paragraph 130.

¹³ Regulation (EU) No 1725/2018 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, OJ L 295 of 21.11.2018, p. 39-98.

With regard to the request of Daniel Coublucq's job titles at the Commission, including dates held (incl. duration of his working contracts), disclosure 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 constitute personal data.

Documents under item (a) in Section 1 above moreover contain personal data, the disclosure of which would undermine privacy and the integrity of the individual as specified in Article 4(1)(b) of Regulation (EC) No 1049/2001.

With regard to the request concerning any Article 16, Article 12B or Article 40 (Staff Regulations) applications made by Mr Coublucq on his employment at Compass Lexecon in September 2018, disclosure of any information about the existence of documents falling under the scope of your request, formulated in relation to an identified or identifiable natural person, constitutes processing of personal data and reveals information relating to an identified or identifiable natural person, and therefore his personal data. Hence, to disclose the existence of documents falling under the scope of your request or not, and any identification of (a) document(s) covered by your request (if any), is also prevented by Regulation 1725/2018.

Article 9(1)(b) of Regulation 1725/2018 does not allow the transmission of 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 put forward 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 requested documents, the content of which constitutes personal data, 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.

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 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 and third indent, and 4(3) of Regulation 1049/2001.

According to *Agrofert*¹⁴, the abovementioned general presumptions do not exclude the right for the applicant to demonstrate the existence of an overriding public interest justifying the disclosure of the document requested.

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

¹⁴ *Agrofert*, paragraph 86.

4. PARTIAL ACCESS

In accordance with Article 4 (6) of Regulation 1049/2001, I have also considered the possibility of granting partial access to the sections of the concerned document.

Part of the documents to which you have requested access is already in the public domain. This document corresponds to Section 1.2 of the Form CO in case M.8084 – Bayer/Monsanto, which has been published on the Commission's competition website, in the public case register under the case number M.8084, which you can consult at the following link:

http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8084.

I therefore refer you to this publicly accessible link, in line with Article 10(2) of Regulation 1049/2001.

However, as far as the rest of the requested documents are concerned, the exceptions to the right of public access invoked above also apply to partial disclosure of the documents concerned. Therefore, no access to those other parts of the documents can be granted.

5. MEANS OF REDRESS

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed to the Secretariat-General of the Commission within 15 working days upon receipt of this letter. You can submit it

via your EASE portal¹⁵ account.

or by email, to: sg-acc-doc@ec.europa.eu

Yours faithfully,

(e-signed)

Olivier GUERSENT

p.o. Linsey MCCALLUM

¹⁵ <https://www.ec.europa.eu/transparency/documents-request>.