

## Decision in case 2077/2019/FP on the European Commission's failure to grant access to documents relating to a merger procedure

Decision

**Case 2077/2019/FP - Opened on 02/12/2019 - Decision on 02/12/2019 - Institution concerned** European Commission ( No maladministration found ) |

The case concerned the Commission's refusal to grant access to documents relating to the notification and pre-notification procedure in a merger case. The Commission refused access to the document, arguing that documents in merger cases are covered by a 'general presumption' of non-disclosure, established by the EU courts. The complainant contended that there was an overriding public interest in its disclosure.

The Ombudsman found that the Commission was entitled to refuse access to the document, and thus closed the inquiry with a finding of no maladministration.

## The complaint to the European Commission

### Context

1. The complaint, submitted by the legal representative of two German energy companies, concerns the refusal of the European Commission to grant public access [1] to documents relating to an on-going merger notification (case COMP/M.8870 - E.ON/Innogy). [2]
2. On 31 January 2019, E.ON and Innogy notified the Commission of their intention to merge. E.ON, based in Germany, is an energy company currently active across the whole energy chain. Innogy is also an energy company active across the energy supply chain in several European countries, including distribution, retail supply and energy-related activities. On 17 September 2019, the Commission approved, [3] under the "EU Merger Regulation", [4] the acquisition by E.ON of Innogy's distribution and consumer solutions business, as well as some of its electricity generation assets. The approval is conditional on full compliance with a "commitments package" offered by E.ON.

### Background

3. On 29 July 2019, the complainant submitted to the Commission's Directorate-General for Competition (DG COMP), a request for public access to all unpublished documents concerning the notification and pre-notification procedure [5] in the merger case.



4. On 19 August 2019, the Commission refused to grant access to the requested documents (“initial decision”).

5. On 30 August 2019, the complainant submitted a request for review to the Commission, a so-called “confirmatory application”. The complainant identified two overriding public interests. First, it argued that the merger will have negative impact on millions of consumers, on the prices for gas and electricity in the relevant markets and on the competitors. The complainant also argued that access to effective judicial protection could be ensured only by having access to the Commission's decision, including all the information on which the Commission's decision is based.

6. On 11 October 2019, the Commission informed the complainant that it had identified the documents falling under the scope of the request, which formed part of a merger case. In its “confirmatory decision”, it refused access based on the protection of commercial interests [6] , the purpose of investigations [7] and the institution's decision-making process [8] . The Commission could not identify an overriding public interest in disclosure.

7. Dissatisfied with the Commission's response, the complainant turned to the Ombudsman on 14 November 2019.

## The European Commission's response to the complainant

8. In its confirmatory decision, the Commission provided the complainant with explanations on the application of the exceptions under Regulation 1049/2001 based on which it refused access.

9. As regards the exceptions of protecting **commercial interests** and **the purpose of investigations** , the Commission argued that, notwithstanding the approval of the merger in question on 17 September 2019, EU case-law has established that documents in merger case-files remain protected by a general presumption of non-disclosure. [9] The Commission identified that this general presumption may apply for up to 30 years and possibly beyond. [10]

10. As regard the exception on the **protection of the decision-making process** , the Commission argued that the merger investigation cannot be considered as finalised, because the decision adopted by the Commission is conditional upon E.ON's full compliance with four commitments. In case the Commission would be called upon to recommence its investigation activities with a view to adopting a new decision on the merger in question, the Commission argued that it is appropriate to accept that there is a general presumption that the disclosure would seriously undermine the institution's decision-making process. [11]

11. As regards to the arguments presented by the complainant on the existence of an **overriding interest in disclosure** , the Commission took the view that the more customers are affected by a transaction, the more it is important to safeguard the underlying investigation, as the investigation aims at protecting customers and will ultimately benefit them. Secondly, the



Commission informed the complainant that it would publish a non-confidential version of its decision, after which the time limit to apply for judicial review will start to run. The Commission therefore did not consider access to the requested documents necessary for the complainant's effective judicial protection.

**12.** The Commission therefore concluded that it could not identify any overriding interest in disclosure.

## **The European Ombudsman's findings**

**13.** The Ombudsman notes that the EU courts have ruled that there is a general presumption of non-disclosure for documents related to merger investigations. This general presumption is based on the understanding that disclosing documents that include sensitive information concerning the economic activities of the undertakings involved is likely to harm their commercial interests, regardless of whether a control procedure is pending. [12]

**14.** The general presumption against public disclosure, based on the need to protect sensitive commercial information, remains applicable to the documents of the merger file even after the merger has been approved.

**15.** The Ombudsman notes that the Commission informed the complainant that non-confidential version of its decision [13] on the merger approval will soon be published. [14] Thus the Ombudsman finds that there is no overriding public interest in the disclosure of the requested documents.

**16.** As the exception of the protection of commercial interests applies, and no overriding public interest in disclosure could be established, the Ombudsman does not deem it necessary to investigate the application of the other exceptions of Regulation 1049/2001 referred to by the Commission in its confirmatory decision.

**17.** Based on the information provided by the complainant, the Ombudsman finds no maladministration in this case. [15]

Fergal Ó Regan

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[1] In accordance with Regulation 1049/2001 of the European regarding public access to European Parliament, Council and Commission documents, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001R1049> [Link].



[2] [https://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_8870](https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8870) [Link].

[3] Commission press release of 17 September 2019, “ *Mergers: Commission clears E.ON's acquisition of Innogy, subject to conditions*”, available at: [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_5582](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_5582) [Link].

[4] Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), available at: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32004R0139> [Link].

[5] Or, in the alternative, the documents that either (i) do not contain confidential information and are not marked as “Business Secrets” or (ii) are cleared of any business secrets and/or confidential information; or, in the alternative, the documents that were exchanged between the Commission and one of the parties to the merger and do not contain information as defined under either point (i) or (ii).

[6] Article 4(2), first indent of Regulation 1049/2001.

[7] Article 4(2), third indent of Regulation 1049/2001.

[8] Article 4(3) of Regulation 1049/2001.

[9] Judgment of 28 June 2012, *European Commission v Agrofert Holding*, C-477/10 P, EU:C:2012:394,

paragraph 64.

[10] *Idem*, paragraph 67.

[11] See judgment in *European Commission v Éditions Odile Jacob SAS*, *op.cit.*, paragraph 130.

[12] Judgment of 28 June 2012, *European Commission v Agrofert Holding*, C-477/10 P, EU:C:2012:394,

paragraph 66 and 67.

[13] The decision will include the underlying justification of the Commission's clearance of the E.ON's acquisition of Innogy.

[14] As it is common practice of the Commission in merger cases.

[15] This complaint has been dealt with under delegated case handling, in accordance with Article 11 of the [Decision of the European Ombudsman adopting Implementing Provisions](#) [Link]

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