



R&I family AtD coordinators

Meeting of 30 March 2022

rtd-access-documents@ec.europa.eu

Draft Agenda

- 1. Welcome and introduction
- 2. Presentation of cases relevant for the R&I family: 2020/7446 – [REDACTED] 2020/1030 – [REDACTED] 2021-6376- [REDACTED]
- 3. Updates of the administrative practice since the last meeting of 15 December 2021: Access to documents guidelines – Commission Implementing Decision for awarding the grants

AOB

- Patrick Breyer judgment summary T 158-2019 and implementation conditions and appeal C-135/22

GestDem 2020/7446 (confirmatory stage)

REQUESTED DOCUMENTS

All data and analyses in FP7 project MobiKids

(risk of brain cancer from exposure to radiofrequency fields in childhood and adolescence)

- 3rd party objected to public disclosure of one *periodic report* and *two deliverables* older than 5 years (exception: commercial interests, Article 4(2) of Regulation 1049/2001)
- Requested documents contain:
 - technical details, information on the conduct of the study in all countries, data/methodologies, all of which constitute specific know-how of the authors. The public disclosure of the documents could undermine its IPRs.
- Documents contain **preliminary, scientifically non-validated results which have been superseded in the new project GERONIMO.**
 - New final results are currently discussed with collaborators and about to be published.

GestDem 2020/7446 (confirmatory stage)

- Given the sensitivity of the science area in question, preliminary results should be thoroughly analysed and validated by the authors before they are made public as such results can:
 - be used for a wrong purpose
 - easily lead to misleading conclusions on the results
- Non-validated, outdated results could be used by the scientific competitors of the scientific study.
 - ➔ The work of the third party could be discredited and the upcoming publication and exploitation of the final GERONIMO results could be undermined, **leading to the damage of the third party's reputation and commercial interests.**

GestDem 2020/1030 (confirmatory stage)

REQUESTED DOCUMENTS

All documents related to audits on SMEs [REDACTED], performed on FP7 and H2020 projects, concerning Commission Decision C(2011)174 final and more specifically for documents concerning the costs for SME Owners/Managing Directors

- Some of the documents identified referred to audits were not finalised or implemented (follow up actions were still expected) → confirmatory ongoing since June 2020
- [REDACTED] [REDACTED], requested suspension of the implementation of its audit findings (May 2021), pending the outcome of the AtD request. It argued that it cannot prepare its position without receiving the requested documents

GestDem 2020/1030 (confirmatory stage)

- The Audit Services **granted the suspension of the audit findings' implementation**, while at the same time the **SG waited with the reply until the majority of audits are closed**.
- The SME in question was advised to **request access to its own file** instead of requesting the public AtD, under Regulation 1049/2001.
- Any person has a right to request its own file. This right is provided by the Charter of Fundamental Rights of the EU, Article 41(2), which sets *“the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy”*.

- GestDem 2021/6376

Multiple requests from [REDACTED] referred to « *All briefing material drawn up for Mariya Gabriel, member of the European Commission (including her cabinet), on Israel's participation or potential participation in the research programs known as Horizon 2020 and Horizon Europe betweenand* ».

- We have provided partial access to briefings that are drafted twice a year. They contain information related to the stage of negotiation of HE programme between EU and Israel, but also other information or evolution of different other projects presented in the briefings.
- By asking the same request twice a year, [REDACTED] was able to follow different **other** political aspects totally unrelated to the association negotiation with Israel.

- GestDem 2021/6376

- The problem in this case is that [REDACTED] is asking for the “**documents**” containing the information mentioned above.
- The former practice was to give partial access to the respective briefings to information that was not covered by any exception of the Regulation, but that was not directly connected to the subject of the request, i.e. the Israel participation in HE programme.
- This time we have changed the manner in which we have treated the request, and decided, together with our Cabinet, to redact the parts of these briefings that were not related to Israel participation in HE programme as « **out of scope** », even though the request specifically mentioned « **documents** containing the information ».
- [REDACTED] decided immediately to file a confirmatory application, file currently under examination by our colleagues in the SG. It is apparent that indeed, the journalist was interested in the general evolution of our activity.

Judgment in Case T-158/19: PATRICK BREYER v REA

- GC annulled the confirmatory decision of REA of 17 January 2019 because REA failed to rule on part of the initial application and refused full or partial access to some requested documents (i.e. deliverables), in so far as those documents contain information not entirely covered by the exception referred to in the Article 4(2), first indent, of Regulation 1049/2001, and
- rejected the second part of the first plea in law where the applicant alleged the existence of an overriding public interest in disclosure of the requested documents (points 181-205 of the judgment).

Case C-135/22 appeal to T-158/19: PATRICK BREYER v REA

- In the view of the appellant, the **GC erred in law when it ruled that the applicant did not establish the existence of an overriding public interest** that would justify the disclosure of the requested documents covered by the exception of the protection of commercial interests of a natural and legal person under Regulation 1049/2001.
- The arguments aim to establish the existence of a **public interest in transparency** which prevails over the protection of the commercial interests.
- As far as the public interest relates to a project of controversial nature from an ethical and legal point of view as claimed by the applicant, **the General Court considered that the respect of fundamental rights is ensured by the ethical and legal evaluation of the project.**
- The Court considered that **such an interest will be satisfied by the dissemination of the results and that any democratic debate on the project can be therefore held on the basis of the results of the project disclosed under Regulation 1290/2013 and grant agreement.**

Case C-135/22 appeal to T-158/19: PATRICK BREYER v REA

- In its pleas, the appellant contests the above-mentioned considerations of the GC and **puts into question the whole set-up of obligations of publication for participants in research projects as defined in Regulation 1290/2013 and in the grant agreement (see in particular points 42-49 of the appeal).**
- If won at this stage by the appellant, this could lead to a different understanding of public interest and put in question the conditions when the public interest could override and could impede the application of the exceptions of Regulation 1049/2001 in the context of the R&I framework programmes management.
- Based on the proposal of our colleagues from REA, [REDACTED] we have analysed the opportunity to ask the Legal Service to intervene for REA, and we decided that, indeed, should this interpretation of the public interest in the access to documents change within the field of R&I programmes, a general approach should be considered.