1. **Scope of the Request**

1.1. Documents requested under point 1 of the application

Under point 1 of the application, the applicant requests access to "Any documents relating to past and ongoing procedures aimed at the renewal, extension, or replacement for the contract with Commission contract number DI-06270 with Fujitsu Siemens Computers SA/NV (name changed later to “Fujitsu Technology Solutions SA/NV”), for Provision of Large Account Reseller (LAR) services for the acquisition of Microsoft software products and licenses under an Interinstitutional Licensing Agreement (ILA). This contract will expire during the year 2014."

In reality, Framework Contract DI-06270 already expired on 21 February 2012. It was replaced by Framework Contract DI-07020 with Hewlett-Packard Belgium BVBA/SPRL, signed on 1 March 2012 for an initial period of 2 years, renewable for 2 further periods of 1 year each. The new Framework Contract is the result of Open Call for Tenders DIGIT/R2/PO/2011/079 LAR 2011.

The documents related to this procurement procedure have been publicly available since the publication of the related contract notice on 21 September 2011, and remain accessible at the following URL:


Since the documents to which access is requested are already publicly available, this part of the request for access is deemed without object.

1.2. Documents requested under points 2 and 3 of the application

Under points 2 and 3 of the application, the Applicant requests access to "Any documents related to past and ongoing procedures aimed at the renewal, extension, or replacement of", on the one hand, "the so-called "Interinstitutional Licensing Agreement (ILA)" with Microsoft Ireland Operations Limited, which is made up by agreements with the following Commission contract numbers: DI-06890 (Business Agreement), DI-06891 (Enterprise Subscription Agreement), DI-06892 (Select Agreement), DI-06893 (Enterprise Subscription Enrollment - Commission), DI-06894 (Select

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1 Such renewals do not require a new procurement procedure.
Enrollment - Commission)" and, on the other hand, "the contract with Commission contract number DI-06900 with Microsoft SA/NV (Belgium) for the "Provision of high-level services" and a total value of 44 729 341 EUR".

At the time of writing, procurement procedures to replace those contracts are on-going, under references DIGIT/R2/PN/2013/065 (Interinstitutional Licensing Agreement) and DIGIT/R2/PN/2013/068 (High-level services). Both procedures are running in parallel.

As of 27 February 2014, a total of 84 documents were registered in Ares (the Commission's main official document repository) under the files corresponding to the above-mentioned procurement procedures. A full inventory of these documents is enclosed.

1.3. Outcome of the exchanges on a fair solution as regards the documents requested under points 2 and 3 of the application

Given the large number of documents potentially covered by points 2 and 3 of the application and the repetitive character of many of them, DIGIT and the applicant had a number of exchanges aimed at reaching a fair solution in the light of Article 6(3) of the Regulation and at striking the right balance between the applicant's right of access and the limited resources which can devoted to applications formulated in wide-ranging terms. This was based on a division of the documents into 4 categories, one of them further subdivided into 4 sub-categories, together with a description of their content, which had been carried out by DIGIT.

The outcome of these exchanges can be summarised as follows:

– **Category A (1 document)**. This category holds a note containing the official approval of the Orientation Document for the two procurement procedures; the Orientation Document, with its 10 annexes, is itself annexed to this note. Given the importance of the Orientation Document for the purposes sought by the applicant, DIGIT proposed to undertake a thorough assessment of it under the Regulation. The applicant confirmed that he agreed with this proposal.

– **Category B (76 documents)**. This category holds the documents related to the participation of other EU Institutions, Agencies and Other Bodies (hereafter EUIs) in the two procurement procedures, and is further subdivided into 4 sub-categories. DIGIT proposed to provide the applicant with: (a) a summary of the information contained in all the documents under Category B in the form of a table listing all the EUIs and stating, for each of them, whether they are part of the existing contracts and whether they have confirmed that they want to be associated to the two on-going procurement procedures; and (b) a copy of the standard "Memorandum of Understanding" that those EUIs having replied affirmatively had to sign and return to the Commission. The applicant confirmed that he agreed with

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3  2 new documents were registered under sub-category B2 between the date of the initial inventory and 27 February 2014.
This proposal. The information which the Commission undertook to supply to the applicant is enclosed. The documents under Category B are therefore no longer included in the scope of the request.

- **Categories C (5 documents) and D (2 documents).** These two categories hold, respectively, the exchanges between DIGIT and Microsoft in the context of the on-going procurement procedures (in particular, invitation to submit an initial offer and exchanges about requests to postpone the deadline for submission) (Category C) and the documents linked to formal steps of those procedures required by the Financial Regulation and/or its Rules of Application (in particular, appointment of Opening Committee and Evaluation Committee) (Category D). The Commission pointed out that these documents were, on the one hand, very unlikely to be of any interest for the purposes sought by the applicant, except to confirm the already known fact that the two procurement procedures were on-going; and that, on the other hand, they were very likely to fall under one or more of the exceptions laid down in Article 4 of the Regulation. The applicant, however, maintained his request, and the Commission undertook to proceed to a full assessment of these documents under the Regulation.

**1.4. Conclusion on the scope of the request**

In conclusion, the request for access covers:

1. the Orientation Document for the two on-going procurement procedures (Category A);
2. 5 documents containing exchanges between DIGIT and Microsoft in the context of the on-going procurement procedures (Category C);
3. 2 documents related to formal steps in the on-going procurement procedures such as the appointment of an Opening Committee and an Evaluation Committee (Category D).

**2. OUTCOME OF THE ASSESSMENT**

The requested documents have been examined under the provisions of the Regulation.

Following this assessment, DIGIT has come to the conclusion that it is not possible to grant full access to the requested documents, as they are all covered by one or more of the exceptions foreseen in the Regulation.

The applicable exceptions are, more specifically, the following:

- Article 4(1)(a), 1st indent, related to the protection of **public security**;
- Article 4(1)(b) related to the protection of **personal data** (“data privacy and the integrity of the individual”);
- Article 4(2), 1st indent related to the protection of **commercial interests** “of a natural or legal person, including intellectual property”;

3
Article 4(3) related to the protection of the decision-making process on “matter[s] where the decision has not been taken by the institution” and/or “containing opinions for internal use as part of deliberations and preliminary consultations”.

These exceptions apply as follows to the requested documents:

<table>
<thead>
<tr>
<th></th>
<th>Orientation Document</th>
<th>Category C</th>
<th>Category D</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public security</td>
<td>x</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Personal data</td>
<td>x</td>
<td>x</td>
<td>x</td>
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<tr>
<td>Commercial interests</td>
<td>x</td>
<td></td>
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<tr>
<td>Decision-making process</td>
<td>x</td>
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</table>

3. REASONS FOR THE APPLICABILITY OF THE EXCEPTIONS

3.1. Exception on the protection of public security

This exception applies to the Orientation Document. This document contains references to, and a short description of, a number of agreements with Microsoft in the IT security area, which are not the subject of the on-going procurement procedures. These agreements are aimed at improving the Commission's preparedness to address potential vulnerabilities of its IT infrastructure. Hence, access to this document under the Regulation would bring into the public domain the reasons why the Commission considered it necessary to enter into such agreements, and therefore compromise public security. In addition, the Commission is bound by contractual clauses limiting its ability to disclose this information.

3.2. Exception on the protection of personal data

All the requested documents contain “personal data” matching the definition set out in Article 2(a) of Regulation (EC) No 45/2001, i.e. “any information relating to an identified or identifiable natural person […] an identifiable person is one who can be identified, directly or indirectly […]”.

In its judgment C-28/08 P of 29 June 2010 (Commission / Bavarian Lager), the Court of Justice held that “where a request based on Regulation No 1049/2001 seeks to obtain access to documents including personal data, the provisions of Regulation No 45/2001 become applicable in their entirety, including Articles 8 and 18 thereof” (paragraph 63).

Disclosure through transmission of personal data by the Commission would qualify as a “processing” in the sense of Article 2(b) of Regulation (EC)

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No 45/2001 and must therefore be done in accordance with the provisions laid down in that Regulation, irrespective of the kind of personal data concerned.

According to Article 8(b) of Regulation (EC) No 45/2001, which applies to recipients other than EU institutions and bodies subject to Directive 95/46/EC, personal data shall only be transferred by an institution “if the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced”.

Since the applicant does not provide any reasons aimed at establishing the necessity of having any personal data transferred to it (1st condition), DIGIT is not in a position to grant his request, without it being necessary, at this stage, to assess the 2nd condition, i.e. whether the data subjects’ legitimate interests might be harmed.

3.3. **Exception on the protection of commercial interests**

This exception applies to the Orientation Document.

3.3.1. **Background**

Article 339 of the Treaty on the Functioning of the European Union requires members and staff of the EU Institutions to refrain from disclosing "information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components".

As regards contracts awarded and expenditure incurred by the EU Institutions, this general principle is translated through secondary legislation into provisions which restrict another important general principle, namely that of transparency. More particularly:

- Article 103 of the Financial Regulation5 lays down the Commission's transparency requirements in relation with the publication of various types of procurement notices. However, Article 103(1), 3rd subparagraph, states that "Publication of certain information after the contract has been awarded may be dispensed with where it would hinder application of the law, would be contrary to the public interest, would harm the legitimate business interests of public or private undertakings or would distort fair competition between them". A similar provision exists in Article 113(2), 2nd subparagraph of the Financial Regulation as regards transparency requirements towards unsuccessful tenderers or candidates at the conclusion of a procurement procedure.

- Article 35(3) of the Financial Regulation requires the Commission to make available information on the beneficiaries of funds

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deriving from the budget, but "with due observance of the [requirement] of confidentiality".

These provisions confirm that commercial interests exist in this area and need to be duly taken into account.

Against this background, two different commercial interests need to be considered in turn: those of the Commission and the other EU Institutions, Agencies and Other Bodies, on the one hand, and those of Microsoft, on the other hand.

3.3.2. Protection of the commercial interests of the Commission and the other EU Institutions, Agencies and Other Bodies

In order to fulfil its own needs for goods and services, the Commission (together, in this case, with a large number of other EU Institutions, Agencies and Other Bodies) acts both as a public body (in its capacity as awarding authority) and as a private entity (in its capacity as future contractor).

As a public entity, the Commission must ensure that public money is spent in accordance with the principle of sound financial management, inter alia, by applying the relevant procurement provisions.

When acting in its capacity as a private entity, the Commission must be able to preserve its ability to benefit from the best conditions offered by economic operators.

The Orientation Document contains information which would undermine this ability, in particular the following:

– Detailed explanations about the objectives of the negotiations, including mandatory targets in terms of product coverage, duration, etc. and the reasons why those objectives have to be fulfilled.

– A description of open issues, in particular a SWOT analysis of areas which the future contracts could cover, in addition to the mandatory objectives. Like all SWOT analyses, this includes an assessment of the weaknesses and threats in the EUI's position.

– A detailed description of the risks associated to the negotiations.

– The main elements of the Commission's negotiating strategy, including references to possible concessions which could be done in order to achieve the main objectives.

All these are aspects that, typically, a negotiating party does not want the other negotiating party to be aware about, in order to maximise its chances to obtain the best possible offer. In other words, disclosing this information would seriously undermine the Commission's and the EUI's bargaining power in the context of the on-going negotiations, to the detriment of their commercial interests.
Therefore, the document cannot be disclosed under the Regulation, as in that case it would become accessible to any member of the public requesting it, including Microsoft.

3.3.3. Protection of Microsoft's commercial interests

The Orientation Document contains many details about the existing contractual arrangements with Microsoft, such as the following:

– Detailed descriptions of the scenarios or product mixes set out under the current Interinstitutional Licensing Agreement (ILA). These were developed by Microsoft and customised to cover the needs of the EUIs. Each scenario was offered at a special discounted price.

– In-depth information about how the ILA works. This includes elements which are non-standard and describe concessions made by Microsoft in the context of past negotiations.

This information therefore reflects Microsoft's technical and commercial know-how and the methodology it put in place to address the EUI's needs, including price information. It also describes technical and contractual solutions which, by reason of their non-standard nature, Microsoft may or may not be willing to offer to other customers.

Disclosure of such information to the general public would clearly undermine the protection of the contractor's expertise, strategy, creativity, capacity to innovate and commercial strength.

This information falls therefore under the general obligation of professional secrecy laid down in Article 339 of the Treaty on the Functioning of the European Union.

In addition, according to a well-established principle of law, contractual relations are governed by the principle of good faith. Such good faith also entitles the contractors to expect from the Commission (when acting as a co-contractor) that it will respect the confidentiality about the performance of an on-going contractual relation where such confidentiality is necessary for protecting their legitimate rights. Furthermore, in this particular case, this principle of law is supplemented by contractual clauses binding the Commission.

In other words, disclosure to the general public of such sensitive information would clearly undermine the Commission's credibility as a reliable contractual partner. Therefore, failure to protect adequately Microsoft's commercial interests would ultimately also be detrimental to the Commission's and the other EUI's own commercial interests (cf. §3.3.2 above), as it would jeopardise their capacity to ensure sound financial management by obtaining the best possible value for money in future procurement procedures, including with other contractors.
3.4. Exception on the on-going decision-making process

This exception applies to all the requested documents, insofar as they relate to a matter on which, as of today, the Commission has not adopted a final decision, namely the award (or otherwise) of the contracts resulting from the two on-going procurement procedures. For the sake of completeness, it is reminded that a procurement procedure is not concluded until the resulting contract is signed.

More particularly, the Orientation Document contains detailed information about:

(1) preliminary discussions on the file known internally as FOAE (Future Office Automation Environment), reflecting input from various stakeholders, which ultimately led to the final version of the Orientation Document;

(2) the rationale for using a particular legal basis for the negotiated procedure;

(3) the organisation of the negotiating process.

As regards point (1) above, it must be stated that the Commission’s departments should be able to give advice and to explore all possible options in preparation of a decision without external pressure. They must also be able to express points of view freely so that they can guide the Commission —and, in this case, the Authorising Officer— in taking its decision. Disclosure of these documents would seriously affect this capacity and thereby undermine the decision-making process of the Commission. These considerations also apply to the information described under point (3) above, even if it is essentially of a practical nature.

As regards point (2) above, it must be reminded that, under Article 123(4) of the Rules of Application, contracts awarded under the negotiated procedure are subject to specific transparency requirements, provided that they are for a value above the applicable thresholds. These provisions seek to strike a balance between the rights of other economic operators (which may, at that point, obtain further information about the justification for using such procedure) and the public interest, which consists in achieving legal certainty by concluding the contract within a reasonable period of time. Under these circumstances, requiring the awarding authority to set out the full rationale for resorting to a particular legal basis at a moment when the negotiations are on-going and no formal decision has been adopted is bound to upset the decision-making process.

As for the documents under Categories C and D, it is clear that the exception applies as their very nature is intrinsically linked to the decision-making process itself:
– Category C includes the invitation to tender referred to in Article 138(1)(a) of the Rules of Application of the Financial Regulation. The other documents under this category relate to the date of submission of Microsoft's initial offer. This is because, under Article 157 of the said Rules of Application, initial offers have to be opened by an Opening Committee also in the case of a negotiated procedure.

– Category D contains the documents whereby the Authorising Officer, pursuant to Articles 157 and 158 of the Rules of Application, appointed the Opening and Evaluation Committees.

In other words, all these documents are nothing but preparatory measures in view of the decision on the award (or otherwise) of the contracts. Their very existence can only be understood as part of the steps leading to that decision.

In addition, as regards Category D, the considerations outlined above about the need to prepare the decision without external pressure apply fully, especially in relation to the Evaluation Committee.

4. **PARTIAL ACCESS**

Pursuant to Article 4(6) of the Regulation, DIGIT has considered the possibility to grant partial access to the requested documents.

4.1. **Orientation Document**

A detailed assessment of the Orientation Document has shown that it was possible to identify the specific parts thereof which are covered by the aforementioned exceptions, and that —although such parts are relatively extensive— the remaining parts of the document form an intelligible text with content which is both meaningful and likely to be useful for the purposes sought by the applicant.

DIGIT has therefore concluded that it is possible to grant partial access to the Orientation Document. A copy of the document enabling this partial access is enclosed.

In order to further assist the applicant to understand the rationale behind the redactions made to the document, the following colour code has been used:

– Parts covered by the exception related to the protection of public security (cf. §3.1 above) are highlighted in red.

– Parts covered by the exception related to the protection of personal data (cf. §3.2 above) are highlighted in yellow.

– Parts covered by the exception related to the protection of commercial interests (cf. §3.3 above) are highlighted in purple when they relate to the commercial interests of the Commission and the other EUIs (cf. §3.3.2).

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and in grey when they relate to the commercial interests of Microsoft (cf. §3.3.3).

– Parts covered by the exception related to the protection of the decision-making process (cf. §3.4 above) are highlighted in blue.

This system is, however, not exhaustive, as certain parts may be covered by more than one exception. For example, a section of text covered by the exception on the protection of the decision-making process may include parts which are also covered by the exception on the protection of personal data. In such cases, the colour code corresponding to the exception spanning a wider text range has been used.

DIGIT trusts that the remaining parts of the document are useful for the applicant, as they include large sections of text which would appear to correspond to the purpose sought by him, i.e. to understand the rationale behind the on-going procurement procedures and the future perspectives in the area of office automation software in the Commission and the other EUIs. In that context, DIGIT would bring to the applicant's attention the following parts of the Orientation Document, to which full access is granted:

– Annex 10, which contains the result of a recent reassessment of the Commission's office automation strategy, of which the on-going procurement procedures are one component. The introduction to the Orientation Document (Section 1) (to which partial but very substantial access is granted) contains further useful insight in this respect.

– Sections 2.1 and 2.2, which describe the existing contractual situation as regards both the licences and the high-level services.

– Section 5, which provides details on the overall financial background.

– Section 6.1, which outlines the main objectives of the procurement procedures, and which can be more easily understood in conjunction with Section 7 (to which partial but very substantial access is granted).

– Sections 8 and 9, which describe respectively the scope of the contracts which will result from the procurement procedures and particulars about how the needs of other EUIs will be covered.

4.2. Categories C and D

The 7 documents pertaining to Categories C and D are all short and straightforward documents which are aimed at completing a particular formal step in the procurement procedures:

– start those procedures through an official invitation to tender;
– agree on a date for the submission of an initial offer;
– appoint the Opening and Evaluation Committees.

They do not contain any parts which are unrelated, or additional, to their intrinsic purpose of serving as preparatory measures in the context of the on-going decision-making process.
Therefore, they are fully covered by the exception on the protection of the Commission's decision-making process and no partial access to them can be granted.

For the sake of completeness, it is reminded that, in addition, all these documents also contain personal data (cf. §3.2 above).

5. **OVERRIDING PUBLIC INTEREST**

According to Articles 4(2) and 4(3) of the Regulation, two of the exceptions applicable to the requested documents —namely those related to the protection of commercial interests and of the decision-making process— must be waived if “there is an overriding public interest in disclosure”.

The applicant does not refer to any such public interest. DIGIT does not have any elements at its disposal which would indicate the existence of a public interest outweighing the need to protect, on the one hand, the Commission's, the other EUIs' and Microsoft's commercial interests and, on the other hand, the Commission’s decision-making process.