



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR MOBILITY AND TRANSPORT

The Director-General

Brussels
MOVE/HH/ARES(2022)

Mr Boris SAMOYLENKO
[ADDRESS REDACTED]

*Sent by e-mail with request for
acknowledgment of receipt:*
[ask+request-12027-
ea233be7@asktheeu.org](mailto:ask+request-12027-ea233be7@asktheeu.org)

Dear Mr. Boris Samoylenko,

Subject: Your applications for access to documents – EASE(2022)5971 and EASE(2022)5972

We refer to your applications registered on 9 November 2022 under case numbers EASE(2022)5971 and EASE(2022)5972, in which you make two requests for access to documents.

Under case EASE(2022)5971, you request access to the following documents:

“(…) I am requesting documents (including but not limited to: copies of any correspondence, written communications, operational and administrative conclusions, briefings, opinions, presentations and notes of telephone conversations or meetings) exchanged between the European Commission and any other parties (including, but not limited to EASA), that:
- *contain and/or could be understood or interpreted as direct, indirect, formal, or informal guidance to EASA or national aviation authorities to implement and enforce the additional restrictions listed above as well as the contents of this guidance; and*
- *could confirm that each and every one of these additional restrictions originates solely from the European Commission and reflects their official position.”*

Under case EASE(2022)5972, you request access to the following documents:

“(...) I am requesting documents (including but not limited to copies of any correspondence, written communications, operational and administrative conclusions, briefings, opinions, presentations and notes of telephone conversations or meetings) produced by the European Commission or exchanged between the European Commission and other parties (including, but not limited to the national aviation authorities of the Member States and EASA), that:

- contain and/or could be understood or interpreted as direct, indirect, formal, or informal guidance to recognize or prohibit to recognize the flights operated, within the capacity of their flight crew license or student permit, by the categories of pilots specified above, as a subject of an exemption under Article 3d, paragraph (3);
- contain any other opinion, guidance, recommendations, or advice of the European Commission on applying / not applying Article 3d, paragraph (3) to the categories of pilots specified above.”

Since your two requests for access to documents concern the same subject matter and the legal analysis provided below applies equally to both of them, we have decided to reply to the two requests together.

We consider your requests to cover documents held up to the date of your initial applications, i.e. 18 October 2022.

Article 6(1) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents¹ (hereinafter ‘Regulation (EC) No 1049/2001’), provides that *“applications for access to a document shall be made (...) in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application”*.

Applications for access to documents must therefore be sufficiently clear and precise, in order to allow the Commission to identify the documents concerned. This is not the case when the application refers to information which the document requested may or may not contain, or to the fact that it may be interpreted in a given sense, as documents cannot be identified by the institutions with regard to such criteria. Indeed, it is not possible for the Commission services to carry out a subjective assessment of the information contained in a given document, in order to conclude whether it could be interpreted or confirmed in the sense alluded to or intended by the applicant. The requirement set out in Article 6(1) of Regulation (EC) No 1049/2001 for the applications to be made in a sufficiently precise manner is therefore not complied with in these two cases.

Nevertheless, considering the subject matter to which you refer in your application, we will consider your requests as referring to exchanges concerning the application of certain restrictions laid down in Council Regulation (EU) No 833/2014² (as amended, *inter alia*, by Council Regulation (EU) 2022/334³) to student pilots and General Aviation pilots holding Russian and either an EU residence permit or dual citizenship of Russia and the

¹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43).

² Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ L 229, 31.7.2014, p. 1).

³ Council Regulation (EU) 2022/334 of 28 February 2022 amending Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ L 57, 28.2.2022, p. 1).

EU, irrespective of how the contents of such exchanges may be interpreted or understood.

We have thus identified the following category of documents as falling within the scope of your application:

- E-mail exchanges between the Commission services and competent authorities of certain Member States, dated between 4 March and 20 September 2022, corresponding to seventeen documents.

The Commission services have also identified one additional document which falls within the scope of your requests, already disclosed in the context of another access to documents request⁴.

Following an examination of the remaining seventeen documents under the provisions of Regulation (EC) No 1049/2001, I regret to inform you that your applications cannot be granted, as their disclosure is prevented by the exception to the right of access laid down in the second indent of Article 4(2) of this Regulation.

Article 4(2), second indent of Regulation (EC) No 1049/2001 establishes that “*The institutions shall refuse access to a document where disclosure would undermine the protection of (...) court proceedings and legal advice, (...) unless there is an overriding public interest in disclosure*”.

In its judgment in Case T-84/03⁵, the Court of First Instance⁶ underlined that the exception provided for in the second indent of Article 4(2) of Regulation (EC) No 1049/2001 protects two distinct interests: court proceedings and legal advice. In the case of the e-mail exchanges identified above, this exception applies to the protection of court proceedings.

It is first to be noted that according to the Court of Justice the exception of the second indent of Article 4(2) of Regulation (EC) No 1049/2001 can also apply to documents that were not drawn up solely for the purposes of specific court proceedings⁷.

The question of the interpretation of Council Regulation (EU) No 833/2014⁸ (as amended, *inter alia*, by Council Regulation (EU) 2022/334⁹) with respect to the application of certain restrictions to student pilots and General Aviation pilots holding Russian and EU citizenship is currently pending before the General Court as Case T-233/22 *Ekaterina ISLENTYEVA v Council of the European Union*. An EU institution is directly involved in those legal proceedings, on which the applicant requests, among other pleas, the annulment of Council

⁴ Available [here](#).

⁵ Judgment of the Court of First Instance of 23 November 2004, *Maurizio Turco v Council*, T-84/03, EU:T:2004:339, paragraph 65.

⁶ Now the General Court.

⁷ Judgment of the General Court of 15 September 2016, *Philip Morris v Commission*, T-796/14, EU:T:2016:483, paragraph 88.

⁸ Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ L 229, 31.7.2014, p. 1).

⁹ Council Regulation (EU) 2022/334 of 28 February 2022 amending Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ L 57, 28.2.2022, p. 1).

Regulation (EU) 2022/334. The Commission submitted a request to intervene in those legal proceedings.

The documents in question contain positions of the Commission services on the application and interpretation of these Council Regulations, which are presently the subject of these ongoing court proceedings. These documents have therefore a strong and relevant link with such proceedings.

The disclosure of these documents, related to the application of Council Regulation (EU) No 833/2014 as amended by Council Regulation (EU) 2022/334, could undermine the integrity and purpose of those proceedings, which is to ensure an independent examination of the matter by the EU courts, and contend with the principles of sound administration of justice. Indeed, the exclusion of these documents from the scope of the right of access to documents is justified in the light of the need to ensure that, throughout the court proceedings, the exchange of arguments by the parties and the deliberations of the court concerned in the case before it take place in an atmosphere of total serenity, without any external pressure on judicial activities. Disclosure of the documents setting out a position defended by an EU institution, which relates to pending court proceedings, would have the effect of exposing the judicial activities to external pressure, albeit only in the perception of the public, and would disturb the serenity of the proceedings.

Furthermore, there is a foreseeable and non-hypothetical risk that the disclosure of these documents would affect the Commission's position as intervener in the court proceedings, inasmuch as they contain legal views of services of the Commission on the aspects at issue¹⁰.

Therefore, the exception laid down in Article 4(2), second indent of Regulation (EC) No 1049/2001, concerning the protection of court proceedings, applies to these documents.

Additionally, the disclosure of these documents is also prevented by the exception to the right of access laid down in Article 4(1)(a), third indent of Regulation (EC) No 1049/2001.

Article 4(1)(a), third indent of Regulation (EC) No 1049/2001 establishes that “*The institutions shall refuse access to a document where disclosure would undermine the protection of: (a) the public interest as regards (...) international relations*”.

The documents in question concern exchanges between the Commission services and certain competent authorities of its Member States, being meant to help define a coherent EU-wide approach regarding the interpretation and application of Council Regulation (EU) No 833/2014 (as amended). This is an extremely sensitive and important legal framework in the current context of Russia's war of aggression against Ukraine and requires a uniform approach and implementation by the competent authorities of all Member States.

The Commission services have adopted and continuously update publicly available specific guidance on the interpretation and implementation of Council Regulation (EU) No 833/2014¹¹, which is the only document that should be considered as setting out a position of the Commission services on the topic.

¹⁰ Judgment of the General Court of 7 February 2018 in Case T-851/16, *In 't Access Info Europe v Commission*, paragraph 77.

¹¹ Available at https://finance.ec.europa.eu/publications/consolidated-version_en.

Rendering public information contained in other documents about the way in which the Commission and the Member States work to ensure a consistent application of EU legislation, an internal EU discussion, is likely to affect, in a foreseeable and non-hypothetical way, the EU's position in its external relations with third countries, in particular with the Russian Federation in the case at hand, which are considered politically sensitive. Such disclosure could indeed reveal internal views that may not correspond to the positions ultimately laid down in the publicly available guidance, which would in turn affect the international relations between the EU and third countries affected by the legal framework in question. It is to be noted that the EU institutions and Member States must be free to exchange views free from external pressure.

Consequently, the exception laid down in Article 4(1)(a), third indent of Regulation (EC) No 1049/2001, concerning the protection of the public interest as regards international relations, also applies to these documents.

Finally, the disclosure of these documents is also prevented by the exception to the right of access laid down in Article 4(3) of Regulation (EC) No 1049/2001.

Article 4(3) of Regulation (EC) No 1049/2001 establishes that *“Access 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.”*

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure”.

As mentioned above, the Commission services have adopted and continuously update publicly available specific guidance on the interpretation and implementation of Council Regulation (EU) No 833/2014. This is a working document *“meant to achieve the uniform application of sanctions across the EU”* which has been last updated on 10 November 2022.

To disclose internal EU discussions on matters which were or are to be introduced in this guidance would undermine, in a foreseeable and non-hypothetical way, the decision-making process of the Commission. Indeed, as also mentioned above, this is the only document that should be considered as setting out a position of the Commission services on the topic. By disclosing the documents requested, which represent EU-internal exchanges, the services of the Commission would expose preliminary assessments to undue external pressure and disseminate preliminary conclusions that may not represent the final positions that were or are to be included on this guidance. This may lead to premature conclusions and serious interference with the institution's decision-making process concerning the interpretation of Council Regulation (EU) No 833/2014 (as amended). It is to be noted that the Commission services must be free to explore all possible options in preparation of a decision free from external pressure, in order to avoid the risk that the disclosure would lead to future self-censorship.

Therefore, the exception laid down in Article 4(3), first and second subparagraphs of Regulation (EC) No 1049/2001, concerning the protection of the decision-making process of the institutions, also applies to these documents.

We have considered whether partial access could be granted to the documents requested, pursuant to Article 4(6) of Regulation (EC) No 1049/2001. However, given the nature and structure of the documents, no meaningful partial access would be possible without undermining the protection of the public interests described above. We have therefore concluded that these documents are entirely covered by the exceptions explained above.

The exceptions laid down in Article 4(2) and (3) of Regulation (EC) No 1049/2001 apply unless there is an overriding public interest in disclosure of the documents. We have examined whether there could be an overriding public interest in disclosure. However, we were not able to identify any public interest that would override, in this case, the need to safeguard the proper administration of justice by the European courts and preserve the independence and objectivity of the European judicial body, or the need to preserve the decision-making process of the Commission.

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 in one of the following ways:

by asking for a review via your portal¹² account (available only for initial requests submitted via the portal account),

or by mail:

European Commission
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 7/076
B-1049 Bruxelles

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

Yours sincerely,

Henrik HOLOLEI

¹² <https://www.ec.europa.eu/transparency/documents-request>