**Access to draft impact assessment reports**

**Main issues:**

The implementation of the Better Regulation Package, adopted by the Commission on 19 May 2015, envisages changes in the way impact assessments of legislative proposals are being prepared. A new Regulatory Scrutiny Board examines draft impact assessments. The _final version of the impact assessment report and its summary_, as approved by the Regulatory Scrutiny Board, are public. The opinions of the Regulatory Scrutiny Board are also public once the Commission has taken its political decision on the legislative proposal it concerned.

- Given that these documents are provided proactively by the Commission, they fall outside the scope of Regulation (EC) No 1049/2001.

**Current administrative practice:**

The Commission had been refusing access to (preliminary) drafts of impact assessment reports concerning legislative proposals and internal exchanges between Commission services in the framework of draft impact assessments, at least as long as the legislative decision-making process to which the report relates is still on-going (i.e. until the policy initiative has been either adopted or abandoned). The Commission considered that such documents had to be protected until the proposal was adopted by the Union legislature and our practice was to refuse access to draft impact assessments also while the inter-institutional decision-making process was pending. Such refusals were based on the exception laid down in the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001 relating to the protection of the ongoing decision-making process.

Although the General Court had initially recognised a general presumption of non-disclosure to documents drawn up in the context of preparing an impact assessment, the Court of Justice set aside the judgment of the General Court (C-57/16 P, _ClientEarth v. European Commission_). Consequently, the Commission services can no longer apply a general presumption of non-disclosure to documents drawn up in the context of an impact assessment. The documents which gave rise to the judgement of the Court were an impact assessment, a draft impact assessment and the opinions of the Impact Assessment Board (now Regulatory Scrutiny Board) in two separate fields of activity. At the time of the request, the Commission had not yet adopted any proposal on the subject matters.

It is clear from the _ClientEarth v. European Commission_ judgment that an individual assessment has to be made for each one of the documents drawn up in the context of an impact assessment. The Court of Justice held that Regulation (EC) No 1049/2001 does not rule out the possibility of requesting access to documents of a provisional nature. If the Commission is of the view that full access cannot be granted to a document drawn up in the context of an impact assessment, it will have to establish that disclosure would create a serious risk undermining its decision-making process. Although the Court of Justice did not explain which are the documents to be considered as drawn up in the context of an impact assessment, it referred to the factors to be taken into account when evaluating such a risk. It held that '[i]ndeed, such a risk depends on factors such as:

- the state of completion of the document in question;
- the precise stage of the decision-making process in question at the time when access to that document is refused;
- the specific context in which that process takes place; and
- the issues still to be discussed internally by the institution concerned.

Consequently, Commission services should make an individual assessment of documents drawn up in the context of an impact assessment (including draft impact assessments and opinions of the Regulatory Scrutiny Board) in the light of the guidance provided by the Court of Justice. If no exception applies, the requested documents have to be disclosed.

**Case-law:**

- See _Judgement of the Court of Justice of of 4 September 2018, C-57/16 P, ClientEarth v. Commission_.

Reference documents/links:

- Examples of confirmatory decisions and a summary of the relevant case-law are available on the Commission's access-to-documents webpages on My Intracommm¹;

- The full text of judgments of the EU Courts can be consulted on the website of the ECJ: www.curia.eu.