

Studies

Main issues:

A study analyses an existing situation from a scientific, technical, economic, legal or other perspective, as a support to the decision-making process.¹ Commission services hold a wide range of studies produced either internally by Commission services, purchased from outside entities through a service contract, or produced externally under the responsibility of the outside entities concerned (whether or not with the help of EU grants).

Current administrative practice:

Two specific types of studies fall under a general presumption of non-disclosure:

- **studies** relating to the pre-litigation stage of infringement proceedings (**preliminary² or formal³**). The general presumption of non-disclosure derived from Article 4(2), third indent⁴ of Regulation 1049/2001 applies at least as long as these investigations are ongoing or imminent. The Commission applies the same rationale, *mutatis mutandis*, to studies carried out in the framework of, or leading up to, **other types of (antitrust, merger, state aid,....) inspections, investigations or audits provided they form part of the file.**

Use of the decision-making process exception of Article 4(3), first subparagraph can also be considered along with the investigation exception, including for cases where the Commission is still in the process of analysing the contents of a study with a view to taking a decision whether to launch the above-mentioned investigations during a reasonable deadline;

- **documents drawn up in the context of preparing an impact assessment.** The Commission currently presumes that their disclosure would, in principle, seriously undermine its decision-making process in the meaning of Article 4(3), first subparagraph if that process is still ongoing. The applicability of the general presumption to such documents, as recognised by the General Court in joined cases T-424/13 and T-425/13, is however being challenged before the Court of Justice (case C-57/16 P)

For **studies other than those falling under a general presumption**, a case-by-case assessment must be carried out. Whilst the general starting point for finalised studies is openness, some (parts of) studies will, because of the intellectual property rights pertaining to them or their particular sensitivity, fall under one or several exceptions of Article 4 of Regulation 1049/2001 (e.g. commercial interests, public security, international relations, legal advice and court proceedings, opinions for internal use as part of preliminary deliberations,...).

As regards studies **produced externally by outside entities**, a distinction must be made according to whether the Commission holds the intellectual property rights:

¹ A study may take various forms, e.g. a report, technical paper or opinion, concept paper, case study, survey, evaluation, feasibility study, definition of technical specifications, analysis, viewpoint etc. and may be accompanied by annexes, including datasets. Studies are normally stored in a dedicated Ares folder.

² EU Pilot.

³ Such as conformity studies of the degree of alignment of Member States' legislation with EU law.

⁴ Protection of inspections, investigations and audits.

- Intellectual property rights, such as copyright, on studies purchased by the Commission from outside entities **under a service contract** are normally the property of the Commission⁵, and the originator does not need to be consulted before releasing such studies, without prejudice to the possible applicability of specific exceptions defined in Article 4 of Regulation 1049/2001 to specifically sensitive (parts of the) documents;
- Intellectual property rights, such as copyright, on **studies produced as part of projects (co-)financed through EU grants** rest in principle with their authors (beneficiaries of the grant)⁶, while the Commission might simply have received a copy. In such cases, services must, if they consider granting full or partial access, consult the originator in accordance with Article 4(4) of Regulation 1049/2001. The purpose is to assess whether its commercial interests, including intellectual property rights, or any other exception of Article 4 of Regulation 1049/2001 would be undermined by the release of the study.

If the originator objects that the applicant re-uses or copies the study without his agreement, or imposes other restrictions of use, based on his intellectual property rights protected by Article 4(2), first indent of Regulation 1049/2001, services should inform the applicant and interpret the permission (licence) granted by the originator accordingly. Unless provided otherwise in the financing or grant agreement, the intellectual property rights holder is free to object to the Commission giving access to the study, at least to the extent such access would imply making of a copy of the study⁷.

In case the originator does not reply to the consultation, services will take a decision taking into account the interests of the originator and the possible violation of the intellectual property rights of the originator/author that could result either from making copies of the study or from allowing its use/the copying of its contents by third parties⁸. In so doing, they must take into account Article 16 of Regulation 1049/2001, which provides that [the] Regulation shall be without prejudice to any existing rules on copyright which may limit a party's right to reproduce or exploit released documents ;

- The same rules as those set out under the previous indent apply to **all other studies held by the Commission that were neither commissioned nor financed by the latter** (and on which the Commission has therefore not acquired the intellectual property rights).

In either of the last two scenarios, regardless whether or not the external study was produced in the framework of a service contract or a grant, services are **advised to specify that the study was carried out by external authors, does not reflect the position of the Commission and cannot be quoted as such**. Services are also advised to verify whether the service contract, grant agreement, or copyright law more generally, obliges the Commission service concerned to mention the names of the authors.

As to **studies produced internally by the Commission**, they will by definition be the property of the Commission, so that, as far as intellectual property rights are concerned, no external originator needs to be consulted before releasing them.

⁵ Under the standard service contract, the contractor transfers the ownership on the results to the Union and is obliged to either obtain any possible pre-existing third-party intellectual property rights (thereby enabling the Commission to give public access to the study), or to inform the Commission of such pre-existing rights (in which case the study, or parts thereof, may need to be protected under Article 4(2), first indent of Regulation 1049/2001. A reference to such pre-existing intellectual property rights is usually (but not always) made in the first pages of the study.

See the text of the standard framework contract for services:

https://myintracomm.ec.europa.eu/budgweb/EN/imp/procurement/Pages/imp-080-030-010_contracts.aspx

⁶ Article III of the General Conditions of decisions granting EU support.

⁷ In such case, the Commission service may consider giving access by allowing the applicant to consult the document on the spot, with no right to make copies.

⁸ In such case also, the Commission service could consider granting access by allowing the applicant to consult the document on the spot, with no right to make copies.

Case-law:

- Judgment of 16 July 2015 in case C-612/13 P.

Reference documents/links:

- Examples of confirmatory decisions and a summary of relevant case-law are available on the Commission's access-to-documents webpages on *My Intracomm*⁹;
- The full text of judgments of the EU Courts can be consulted on the website of the ECJ: www.curia.eu.
- Guidance fiche on documents from third parties:
<https://myintracomm.ec.europa.eu/sg/docinter/Documents/Fiche5.pdf>
- Standard framework contract for services:
https://myintracomm.ec.europa.eu/budgweb/EN/imp/procurement/Pages/imp-080-030-010_contracts.aspx
- Explanatory note on Intellectual Property Rights and clauses in the model contracts:
<https://myintracomm.ec.europa.eu/budgweb/EN/imp/procurement/Documents/ipr-note-en.pdf>
- Further guidance by DG BUDG on IP rights on studies:
<https://myintracomm.ec.europa.eu/budgweb/EN/imp/procurement/Documents/studies-ipr-en.pdf>
- Questions on IPR issues may also be addressed to the Commission Central IP Service at: EC-IPR@ec.europa.eu

⁹ <https://myintracomm.ec.europa.eu/sg/docinter/Pages/tools.aspx>.