

DG TRADE

VADEMECUM ON ACCESS TO DOCUMENTS

*This vademecum will be updated regularly on the basis of the practical
experience gained in handling requests for access to documents*

Article 42 of the Charter of Fundamental Rights of the EU

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies offices and agencies of the Union, whatever their medium.

Article 15 of the Treaty on the Functioning of the EU

1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.

3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium (...).

10 things to remember on Access to Documents

1. **All documents**, including e-mails and meeting reports, created by us and received from third parties, can be the subject of access to document requests.
2. Applicants do not have to indicate who they are nor the reasons for their request. However, they have to indicate a valid postal address.
3. The European Commission is committed to the widest possible access. We must give reasons for any refusal to grant access; the only grounds are those set out in the **exceptions** in the Regulation 1049/01 (i.e. public security, defence and military matters; harm to international relations; economic policy; protection of privacy and integrity of individuals; protection of commercial interests, court proceedings and legal advice; investigations; and serious harm to decision-making - which can include the negotiating process).
4. No type of documents held by DG Trade can be automatically excluded from access: each document has to be examined **case-by-case**, on the basis of its actual **content** to see whether any exception applies. Even if an exception applies, it may still be in the **public interest** to release the information.
5. If only parts of a document are subject to an exception, the rest of the document must be released ("**partial disclosure**").
6. It is **for the Commission to decide** whether a document is released or not. Third parties will only be consulted in case of doubt.
7. **Deadlines** to reply are very tight, i.e. generally within 15 or 30 working days. Failure to reply is equivalent to refusing access.
8. **Remedies**: Refusals or partial disclosure can be appealed ("confirmatory application") to the Secretary General. If the refusal is upheld, the applicant can bring an action for annulment to the General Court or complain to the Ombudsman.
9. When you share or request information from **third parties** (e.g. FTA questionnaires, exchanges with negotiating parties), do not forget to mention that the information provided is subject to the EU rules on Access to Documents.
10. Make sure your **filing** allows you to find documents, even after people have left the unit. Documents, except those that are short-lived, should be filed in ARES.

I. OVERALL PRINCIPLES

- Any document is public unless its content is covered fully or partially by exception/s in the Regulation.
- A document corresponds to any content whatever its medium (written on paper, stored in electronic form and even sound, visual or audiovisual material) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility.
- In a democratic system, openness enables citizens to participate more closely in the decision-making process, guarantees that the administration enjoys greater legitimacy, is more effective and more accountable to the citizen.

A legal obligation

- Article 15 Treaty on the functioning of the EU ("TFEU")
- Article 42 Charter of Fundamental Rights of the EU
- Regulation No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (O.J. L 145, 31.5.2001, p. 43) (the "Regulation"), available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2001.145.01.0043.01.ENG&toc=OJ:L:2001:145:TQC
- Implementing decision adopted by the Commission on 5 December 2001 (O.J. L 345, 29.12.2001, p. 94) (the "Implementing decision"), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1454323698846&uri=CELEX:32001D0937>

Who can apply?

- Any EU citizens, and natural or legal persons residing or having its registered office in a Member State (Art. 2(1) of the Regulation), as well as
- Citizens of third countries not residing in a Member State and legal persons not having their registered office in one of the Member States (Art. 2(2) of the Regulation and Art. 1 of the Implementing decision). The latter category does not have the possibility of raising the issue with the EU Ombudsman, but may bring an action before the General Court (Art. 228(1) TFEU and Art. 1 of the Implementing decision).

What documents?

- The right of access applies to **all documents held by the Commission** (Art. 2(3)), i.e. not only those **drawn up** by it but **also those received** from third parties and in its possession, in all areas of activity of the EU, **whatever the medium**¹.

¹ The Regulation (Art. 3) defines a document as "any content produced or received by the Commission and its departments, concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility in connection with its official duties and whatever its medium - written on paper or stored in electronic form or as a sound, visual or audiovisual recording";

- This also includes **e-mails**. For instance: official exchanges between the Commission and outside organisations, institutions or businesses are Commission documents within the meaning of the Regulation, if they constitute an essential part for a given file. This can also include e-mails which we receive only in copy (*for example, an exchange between DG Development and outside organisations, where we are in copy. In such a case we would contact DG Development prior to releasing the documents*). This highlights the importance of having an effective filing system for your e-mails and having important correspondence registered in ARES.
- **No category of documents is excluded a priori** from the right of access. This includes **classified documents**². Each application for access, and each requested document, must be examined thoroughly, **case by case**. This would include, for example, responses to public consultations or questionnaires, records of meetings with third parties, etc.
- **The right of access applies to existing documents**. This may sound obvious, but it means that the Regulation does not require us to create documents to meet a given request (although we do normally provide lists of meetings or documents covered in a request) nor to reply under the Regulation to requests for information rather than documents per se. Requests for information should be handled under the Code of Good Administrative Behaviour³ (see: http://ec.europa.eu/transparency/code/docs/code_en.pdf).
- **Existing documents are under no circumstances to be modified to satisfy a request**, other than masking the parts that are covered by the exceptions, if relevant, and information that does not fall under the scope of the request.

Exceptions (Article 4 of the Regulation)

- Access to a document can only be refused :
 - for reasons of protection of **public interest**, as regards public security, defence and military matters, **international relations** and the **financial, monetary or economic policy** of the Community or a Member State (Art. 4(1)(a));
 - for reason of **protection of privacy and integrity of individuals** in accordance with Community legislation on protection of personal data⁴ (Art. 4(1)(b));

² Documents classified as "sensitive" (top secret, secret or confidential according to the rules of Commission Decision 2001/844) are not excluded from the scope of the Regulation. However, there are specific rules as to the handling of such requests: they must be handled by authorised persons, using protected procedures (Art. 9). In addition, a decision by the Commission to declassify a document is required before transmission can take place – this is a relatively straightforward process. DG Trade rarely handles such sensitive documents, but the issue of access to documents classified as "Restreint UE" does arise from time to time and again, in the event of its release, the document must be declassified before it is shared with the person making the request

³ Published in OJ L 267 of 20.10.2000

⁴ Regulation (EC) No 45/2001 of the European Parliament and the of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, 12.1.2001, p. 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:008:0001:0022:en:PDF>

- for reasons of **protection of commercial interests** (including intellectual property), court proceedings and legal advice, investigations; unless there is an overriding public interest in disclosure (Art. 4(2));
- for reasons of "**decision making**", which includes negotiating processes, (Art. 4(3)), i.e. for :

1) documents 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;

2) documents containing opinions for internal use as part of deliberations and preliminary consultations within the Commission *even after the decision has been taken* if disclosure of the document would seriously undermine the institution's decision-making process. However please note that following the *My Travel*⁵ judgment it will be extremely difficult to protect an internal document even after a final decision has been adopted.

unless there is an overriding public interest in disclosure.

- A refusal to disclose a document on the basis of the exceptions must be justified on a case-by-case basis according to the document's **content** and not its status. A refusal, which fails to give the reasons on which it is based, could give rise to a complaint on the grounds that the Commission is not meeting its commitments with regard to transparency (see Art. 2 of the Implementing decision).
- Nb: Notwithstanding the exceptions foreseen above there is a **public interest test** which applies in relation to the exemptions foreseen in Arts. 4(2) and 4(3): when disclosure of a document or parts of it would undermine the protection of commercial interests; court proceedings and legal advice; investigations; or serious harm the decision-making process; a refusal is justified unless there is an overriding public interest in disclosing the information concerned⁶.
- **Time-limit:** the exceptions only apply for the period during which protection is justified, on the basis of the content of the document, with a maximum limit of 30 years. However, this limit does not automatically apply in the case of documents covered by exceptions relating to privacy or commercial interests and in the case of sensitive documents where exceptions can continue to apply after this period (Art. 4(7)).
- If information contained in a document has already been transmitted to a large number of people or put onto an institution web site, a refusal would not be justified, even if the document was initially intended for internal use. However, the Court has recently recognised that a document is not put in the public domain simply by its release to a limited number of recipients.⁷
- Any refusal to grant access **must be based on one, or more, of the exceptions in the Regulation**. In case of refusal to grant access, the **applicant is informed** of the type of documents or information withheld and the **reasons for the refusal**. The

⁵ Judgment in *Kingdom of Sweden v European Commission and MyTravel Group plc*, Case C-506/08 P, EU:C:2011:496.

⁶ Judgment in *Kingdom of Sweden and Maurizio Turco v Council*, Joined cases C-39/05 and C-52/05, EU:C:2008:374.

⁷ Judgment in *Stichting Corporate Europe Observatory v Commission*, C-399/13 P, EU:C:2015:360.

reply is usually accompanied by a list of all the documents which have been identified as falling within the applicant's request – including those which have been withheld. Even in case of complete refusal, the reply should indicate at least the type of documents identified (and the reason why access is refused). The list should contain for each of the documents identified: a description of the document including dates and subject matter, the ARES (or BASIS) reference number, and a mention of the legal basis pursuant to the Regulation under which the document, or part of it, are withheld.

- If only part of the document requested is covered by one or more exceptions, the other parts of the documents must be disclosed ("**partial release**", Art. 4(6) – see below), unless it is considered that the document makes up an integral whole and it is not possible to separate out specific parts, or doing so would represent a disproportionate burden.
- **Refusals must effectively be based on the legal exceptions**, explaining in sufficient detail why the release of the information would "specifically and effectively" undermine the interest foreseen in the relevant exception⁸.

Partial release of documents

- Under certain conditions, documents can be partially released.
- There are two different situations to distinguish however:
 - First, when the released document covers issues which were not mentioned in the applicant's request, any parts that are **not relevant** to the request are not usually disclosed. **This is not a refusal** to grant access in the sense of the Regulation, nor is it an additional exception to the Regulation; rather it allows us to reflect better the scope of the applicant's request.

For example : an applicant asked for a report related to negotiations with country X which are contained in a report covering two other countries, only those parts referring to country X are relevant to the request. The other parts of the document will be replaced by the indication "[out of scope]".

- Second, where only parts of a document are covered by the exceptions foreseen in Article 4, the document must be partially released. Those parts that are withheld are replaced in the electronic version with redactions in light grey (using Adobe Acrobat Professional XI) and an indication in brackets of the legal basis under Article 4 of Regulation 1049/2001 for withholding each of those parts (e.g. for the protection of the public interest as regards international relations "[Article 4(1)(a) third indent]").

Third party documents

- Documents received from third parties "held" by the Commission are **subject to the Regulation**.
- There are no **specific exceptions** for third party documents other than those of Art. 4(1), (2) and (3), *i.e.* the exceptions under Article 4 apply to Commission documents and to third party documents.

⁸ Judgment in *Council v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraphs 51-52.

- It is **for the Commission to decide** whether a third party document can be disclosed or not. It does not have an obligation to consult a third party, except when there is a doubt as to whether the exceptions of Article 4(1) and 4(2) apply, in which case the third party shall be consulted.
 - At the initial stage, the practice is to accept the third party's objection, and we can state that the third party opposes the release of the document. However, we need to provide a reasoning to explain why the document is withheld based on that provided by the third party.
 - In practice, it is rare for DG Trade to consult a third party regarding release. As a matter of good practice we nonetheless inform correspondents of the Commissioner that their letters and the Commissioner's replies are to be released.
- When a third party is consulted, it should be given at least 5 working days to reply. In the case of third party governments those contacts can sometimes be facilitated by the EU Delegation.
- In the confirmatory stage if the Commission intends to disregard the third-party author's refusal to disclose a document (because their ground for refusal was not based on Art. 4, or because, in the Commission's view, none of these grounds apply), it must inform the author 10 working days before releasing the document. The deadline for reply may then need to be extended.
- The author can bring an action before the General Court requesting the suspension of the Commission's decision and the deadline (see Art. 5 of the Implementing decision).

Note that **DG Trade practice** is that:

⇒ *When the third party is a third country, we will normally consult them. If they refuse that access is given, we will in any case take our own view at the documents identified and decide on the basis of the content of the documents whether the exceptions in the regulation apply. However, a third country request not to disclose will have a bearing on our assessment of the possible impact of any release on our relations with them, which could give rise to concerns under Article 4(1)(a) (international relations).*

- Documents originating from **Member States** can be treated in the same way as the "third-party" category.
- Documents originating from **other Institutions** are also treated as third-party documents, but they are always consulted. Trade A3 will take care of the consultation in such cases on the basis of the Memorandum of Understanding in this area.

Processing of applications and time limits

- Applications for access must be **handled promptly**. Incoming requests are registered by the Secretariat General (SG) or Trade A3. An acknowledgment of receipt must be sent to the applicant, either by the SG (in case of applications via the Europa website) or by Trade A3, if the request is directly addressed to DG Trade. The default deadline for the reply is **fifteen working days**.
- If a request is addressed to a Unit other than Trade A3, Trade A3 must be promptly informed, so it can register the application and send an acknowledgment of receipt.

- **All replies** – even positive ones – **should be checked with Unit A3** before they are sent out to ensure coherence of our overall approach.
- **How to identify an application for access to documents?** Most applications carry a reference to Regulation 1049/2001, but there is no obligation for a request to mention the Regulation. Any request that refers to documents should therefore be considered as an application within the meaning of Regulation 1049/2001. In case of doubt, Trade A3 should be consulted. This is important as failure to "recognize" an access to documents request may lead you to forget to indicate means of redress if a full or partial refusal were to be given.
- Applicants are not obliged to state the reasons for their application, nor give details of organisations they may represent.
- If an application is **insufficiently clear**, we usually ask the applicant for a clarification or a narrowing down of the request, ask for clearer parameters for the period covered by the request, etc. (and if necessary, offer to help the applicant in defining these). In such a case the 15 working days term only starts when the request is clarified (Art. 6(2) of the Regulation and Art. 2 of the Implementing decision). The request for clarification should be discussed with, and sent out via, Trade A3.
- In **exceptional cases**, e.g. in case of an application covering a very long period or for a very large number of documents, this time limit can be **extended** by 15 extra days.
- However, for **complex requests** (involving numerous documents, concerning several different units and/or requiring consultation of another DG and/or of third parties), Art. 6.3. of the Regulation allows the Commission the possibility to confer with the applicant, with a view to finding a fair solution. **The solution under Article 6(3) may concern the number and content of the documents applied for, but not, in principle, the timeframe for dealing with the initial request.** In any case, the institution is not empowered to extend unilaterally the time limits laid down in Regulation 1049/2001.⁹ However, the applicant may agree to withdraw explicitly or implicitly some parts of his or her initial request, to be reintroduced or deemed to be reintroduced at a later stage or stages, and to be dealt with in a staggered way according to the time-limits applicable to those later requests. In all cases, Trade A3 will keep the applicant regularly informed of the progress.
- Documents are made available to the applicant in the form of a **copy** in electronic format and, in exceptional cases (if there is a very large volume of material or if documents are difficult to handle), the DG concerned can offer the possibility for the applicant to consult the documents on the spot.
- For complex requests, particularly, for which Art. 6.3 is invoked, you may want to consider releasing documents in **packages** or batches with the agreement of the applicant. Documents to be fully released should be sent first and as rapidly as possible.

Remedies

- Refusal to provide access to all or part of a requested document gives the applicant the right to submit a **confirmatory application** to the Secretary General within 15 working days of receiving DG Trade's reply.

⁹ Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraphs 25-28.

- **Failure to reply** within the 15-day period for the initial request or any unannounced extension of that period is **equivalent to refusing access**, giving the applicant the right to make a "confirmatory application" to the Secretary-General, as is the failure to give reasons for refusing access to an identified document.
- In case of a refusal being upheld within the reply to a confirmatory request, or a failure to reply by the SG within the prescribed deadlines, the applicant is entitled to bring an action in the **General Court** or to make a complaint to the **Ombudsman**.

For further info on the Secretariat General's role in access to documents, see the SG's Access to Documents website:

http://www.cc.cec/home/dgserve/sq/docinter/index_en.htm

II. ACCESS IN RELATION TO PARTICULAR TYPES OF DG TRADE DOCUMENTS

- The basic rule is that **every document** has to be assessed on a **case by case basis**, on the basis of its **content**. No single type of DG Trade document is automatically excluded from the right to access.

Negotiating directives

- Negotiating directives as such are not necessarily excluded. A difference, however, needs to be made between final negotiating directives incorporated in the Council decision authorising the opening of the negotiations of international agreements, and the draft negotiating directives as included in the Commission recommendation to the Council.
- As regards Council decisions, the recent Communication of the Commission entitled "*Trade for All: Towards a more responsible trade and investment policy*" provides that the Commission will in relation to future decisions of the Council authorising the opening of negotiations of free trade agreements, invite at launch the Council to disclose the negotiating directives immediately after their adoption.¹⁰ It is therefore expected that more and more of the Council decisions authorising negotiations and the associated negotiating directives will be made public on a case-by-case basis by the Council itself on its website. As regards existing Council authorisations relating to negotiations launched before the adoption of the above-mentioned Communication, the Commission favours in principle their publication. Yet it is for the Council to decide on the basis of a case-by-case assessment, whether to publish these documents.
- As regards the Commission recommendations incorporating the draft versions of the negotiating directives, we have found until now that a refusal of access has been justified on the basis of the exceptions provided for the protection of the decision-making process without a supervening public interest, and of international relations. This is because, in the event that the Council published the final version of the negotiating directives, the disclosure of their draft version as proposed by the Commission could allow a comparison, revealing the shifts of position in the EU decision making process and the internal debates of the Council, thus conferring an undue advantage to the EU negotiating partners in those or other negotiations

¹⁰ See Commission Communication on "*Trade for All: Towards a more responsible trade and investment policy*", p. 19, available at http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf.

covering similar areas.¹¹ But this does not mean that this will necessarily always be the case: the assessment must be based on the content and context of those negotiations. (For instance, when negotiations were concluded some time ago and the agreement is being implemented there may be no reason to withhold access; on the other hand, for example, negotiations in the context of rendez-vous clauses in the agreement several years after a deal is applied may still be based on the original guidelines and so they may need to be viewed in a different light). This needs to be examined on a case-by-case basis.

- The **Explanatory Memorandum** and the **recommendations** of any decision to authorise the opening of negotiations needs to be looked at carefully on a case-by-case basis: parts of these texts may be factual and already be public knowledge and therefore are often made available, while other parts may be covered, for example, by exceptions¹².

Negotiating documents

- Negotiating positions and documents exchanged between the Commission and negotiating partners, as well as information notes to the College on the state of play of negotiations are not automatically excluded. They can under certain circumstances be covered by the exceptions of Art. 4(1) (protection of international relations) and Art. 4(3) (documents for internal use relating to a matter where the decision has not yet been taken), but this has to be assessed on a case-by-case basis for each document.
- In particular, it is to be noted that in the recent Communication on "Trade for All", the Commission has committed to, during negotiations, extend the TTIP practices of publishing EU texts online for all trade and investment negotiations and make it clear to all new partners that negotiations will have to follow a transparent approach.¹³
- In case of documents originating from negotiating partners, the exception of "international relations" may apply if that country does not agree with its disclosure (see above), and/or we may find that information contained in these documents would harm the interests protected in the Regulation without it being in the general public interest for them to be released.
- The **time factor** may be important here. Depending on the state of advancement of negotiations (or indeed, the fact that the negotiations have successfully closed), past

¹¹ See Judgment in *Leonard Besselink v. Council of the European Union*, T-331/11, EU:T:2013:419, paragraph 71, where the General Court found that *"the consideration that knowledge of the negotiating directives might have been exploited by the other parties to the negotiations is sufficient to establish a risk that the interest of the Union as regards international relations might be undermined."*

¹² Such decisions to open negotiations are normally classified on the basis of their content as restricted documents. Where access is being given to parts of a Restreint UE document, Directorate A in DG Trade asks the SG to declassify those parts of the document if the documents exist under a "COM" code. For documents under a SEC code, Directorate A declassifies relevant parts and informs the SG which in turn updates the Commission's SG Vista database and the document register. If no particular code applies to the document, DG Trade as the author service can decide to declassify the relevant parts.

¹³ See Commission Communication on *"Trade for All: Towards a more responsible trade and investment policy"*, p. 19, available at http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf.

positions may already be publicly known in which case the impact of disclosure on decision-making or on our international relations may be reduced.¹⁴

- On the other hand, possibility of maintaining confidentiality beyond the 30 years time - limit (see above) provided for in Art. 4.7 for sensitive documents may in certain exceptional circumstances also apply to negotiating documents.

Reports and minutes of meetings

- **Reports or minutes of meetings are not excluded:** a case-by-case assessment must be made as to whether the exceptions apply to part(s) or the whole of the document. The full document must be considered, including comments, summaries, follow up points etc.
- **For the reports of meetings** involving the Commissioner, Trade A3 will check with the Cabinet based on your recommendation.

Content of documents: business secrets and names of persons

- **Business confidential information** that industry shares with us may fall under the protection of commercial interests; however, only those parts that fall under the exception in question can be withheld; the other parts of the report, minutes or correspondence would be potentially released. Obviously, we will not always be in a position to determine whether something is a "business secret", in which case it is better to cross check with the company concerned, but it will be for the Commission to make the final assessment.

The name of the company, date of the meeting and factual elements and views expressed would normally be released, unless we can establish that releasing that information could affect their business interests, for example, vis-à-vis the authorities of a third country.

- **Names of individuals** (e.g. participants in a meeting, signatories to a letter etc...) are normally released where the person holds a public function and acts within his normal functions, unless it appears from the context that disclosure would be harmful. In that case, the person will be consulted¹⁵. The current approach recommended by the SG in relation to names and functions of Commission staff is to grant access to the names and functions of Commissioners and their cabinet members and staff in senior management positions starting from the Director level (included). This access is exceptionally extended to the names and functions of staff not occupying any senior management position, if the need thereto has been clearly substantiated by the applicant and there are no reasons to assume that the legitimate rights of the individuals concerned might be prejudiced.¹⁶

¹⁴ In this respect, the recent Communication on "*Trade for All: Towards a more responsible trade and investment policy*" provides that after finalising the negotiations, the Commission will publish the text of the agreement immediately, as it stands, without waiting for the legal revision to be completed. See http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf, p. 19.

¹⁵ Art. 4(1)(b) of Reg. 1049/2001, Arts. 8b and 18 of Reg. 45/2001 and Court jurisprudence (Judgment in *Commission v The Bavarian Lager*, C-28/08 P, EU:C:2010:378).

¹⁶ As required by Article 8(b) of Regulation 45/2001.

Industry consultations and other consultations

- Replies to public consultations are made publicly available on line, in line with Commission practice. As regards more specific consultation exercises, the right of access applies to documents held by the Commission including those received from third parties. Hence, **replies to industry consultations, or consultations of other stakeholders** (for instance in the context of Market Access cases, preparations of FTA negotiations, identification of offensive and defensive interests in negotiations, etc...) **fall under the Regulation** and would, in principle, also be released.
- Such replies must be considered on a case-by-case basis, – but they may – particularly in the case of responses from business – be covered by the **exceptions**, and most notably **commercial interests** (Art. 4(2), first indent). This exception can potentially apply to sensitive information provided in such consultations, and in cases where the disclosure of the fact that a given company has participated in a consultation and/or given specific information to the Commission could harm their interests or their competitive position in the EU or in third country. However, the bottom line is that third parties participating in consultations need to be aware that documents and information shared with the Commission may fall under the access to documents rules.

⇒ *You may wish to add a **disclaimer** to **any** consultation document or questionnaire where the results are not intended to be made public, explaining that contributions received are subject to EU rules on public access to documents and the exceptions provided within those rules.*

Dispute settlement procedures and legal opinions

- **Legal opinions** on potential cases brought (compatibility of third-country measures with WTO rules or bilateral rules) or defended in the WTO (compatibility of Community measures with WTO rules or bilateral rules), may fall under the exception of Art. 4(2) only if it originates from the **Legal Service**, would effectively harm the protection of legal advice and there is no overriding public interest¹⁷. Notes giving opinions of the DG Trade Legal Unit cannot be excluded automatically on the basis of Art. 4(2).
- However, notes to prepare the **decision on whether or not to bring a WTO case**, or relating to **cases under way or concluded at the WTO** may fall under the exceptions linked to court proceedings (Art. 4(2) - and/or decision-making (Art. 4(3)).
- Submissions received from **other parties** to a dispute at the WTO would need to be assessed on a case by case basis, but may well fall under the exception in Art. 4(1)(a) third indent (international relations) since they are governed by Article 18 of the WTO's Dispute Settlement Body (DSB) Regulation, which obliges us to maintain confidentiality of proceedings.

Staff and budget issues

- Such documents must be considered on a case by case basis, but, based on experience, are likely to be partly covered by the exception in Art. 4(1)(b) (protection of privacy), partly by the exceptions in Art. 4(3) (documents for internal use relating to a matter where the decision has not yet been taken), and in very specific cases

¹⁷ See Judgement in *Kingdom of Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-59/05 P, EU:C:2008:374.

where retroactive transmission could seriously undermine the decision-making process.

- **Tender dossiers** must be considered on a case by case basis, but, based on experience, are likely to be considered in relation to the exception in Art. 4(2) (protection of commercial interests including intellectual property) unless there is an overriding **public** (and not private) interest, and/or partially by Art. 4(1)(b) (protection of privacy) such as names, resumes, etc. Separate rules on tender files apply (see rules of DG for budgetary affairs).

Anti-dumping, anti-subsidy, safeguard and Trade Barriers Regulation proceedings

- The documents received in this context may be covered by the exception in Art. 4(2) (protection of commercial interests of a natural or legal person court proceedings and legal advice, and of the purpose of investigations) and partly by the exception in Art. 4(1)(a) third indent (protection of public interest as regards international relations), on the basis of their content.
- Information received from a third-party during an investigation is covered by the exception in Art. 4(2) which includes all the information received pursuant to regulations or decisions in the field of trade defence instruments throughout proceedings initiated in accordance with the basic Regulations in this field, and until the conclusion of any court proceedings and/or dispute settlements at the WTO which may result from these administrative procedures. This corresponds to the practice adopted since 1994. The exception in Art. 4(3), first sub-paragraph, applies to internal or preparatory documents produced in the course of proceedings. The exception in Article 4(3), second sub-paragraph, may be applied to internal or preparatory documents produced in the course of proceedings which contain policy positions of a horizontal nature and are not case-specific. Information received from a third-party during an investigation is covered by the exception in Art. 4(2) since it is governed by Art. 6 of the WTO Anti-dumping Agreement, which obliges us to maintain confidentiality.

N.B.: in the recent Communication "*Trade for All: Towards a more responsible trade and investment policy*" the Commission announced that transparency will be increased also in the area of trade defence. In particular, the Commission committed from the first half of 2016 onwards, to provide more transparency *vis-à-vis* the general public, for instance in relation to the publication of the non-confidential version of complaints and requests for reviews of existing measures, including expiry reviews. The Commission also promised to explore initiatives to further increase transparency in the medium term, such as the possibility of improving access to anti-dumping and anti-subsidy investigation files by the legal representatives of interested parties and extending access to the non-confidential file to the general public.

- Under Art. 4(7), even after a proceeding is terminated, the exception can continue to apply to documents that might disclose business secrets, investigation practices or methods, or personal positions that could jeopardise the internal decision-making process, which are not to be disclosed.
- «Horizontal» documents (policy notes, procedural or investigation manuals) are closely linked to investigations and *can* be included in the general category of documents preparatory to a decision, but are not necessarily exempted from the Regulation: they have to be examined on a case-by-case basis.

- The same holds for all documents relating to the EU's defence against the actions of third countries. They can remain protected even after the initiation of court proceedings or dispute settlement and, if necessary, even longer after these procedures under one of the statutory exceptions in force (case-by-case decision).
- Where TDI cases are pending before the General Court/Court of Justice, the file related to that case is considered to fall fully under the exception in Article 4(3), second indent.
- **For the EU's trade barriers regulation:** the same type of approach as identified above is likely to apply.

Non-public Commission documents put on third party websites

- Requests for non-public documents which have been leaked to the public, or which have been put on web-sites by third parties, must be handled as if the documents were not yet public i.e. a case by case assessment must be made. Nevertheless, the fact that the document is already legitimately or otherwise in the public domain will be a factor in assessing whether their release under the Regulation would have any consequences beyond those already caused by the leak of the document, and hence whether the exemptions in the regulation could still apply.

Studies

- Studies carried out for the Commission by an external consultant should be treated in the same way as any internal Commission document. The letter accompanying a positive reply to a request for access to a study must specify that the study was carried out by independent experts and that the Commission cannot be held responsible for its content.

III. PRACTICAL IMPLICATIONS FOR DG TRADE

Drafting of documents

- Practice shows that when writing a report, you should be aware of how statements may look if taken out of context. For this reason you should limit giving personal as opposed to professional opinions.

Filing and registration of documents

- Given the very short time frames in which documents have to be found and the request has to be handled, it is important that documents can be easily identified and found. Hence the importance of proper filing and registration of documents, according to the rules and guidelines of the Commission and of DG Trade (see: <http://www.trade.cec.eu.int/intra/how/docmanag/index.cfm>).
- The principal tools are likely to be ARES (the document management database), BASIS (where records / reports of meetings for briefings requested via the BASIS database can be stored), Outlook (to establish dates of possible meetings) and the unit's own filing system. Trade A3 liaises with the Commissioner's cabinet regarding requests extending to the Commissioner's or Cabinet's meetings and correspondence.

- **Registration** of key documents (incoming and outgoing letters, e-mails, notes) is done through the ARES system. See <http://www.trade.cec.eu.int/intra/how/docmanag/doc.cfm?cat=74>
- **It is up to each Unit to ensure that its current filing and archiving system is reliable so that it is easy to find documents in the short time-limits laid down by the Regulation.**

Internal handling of requests for Access to Documents in DG Trade

- Management of document access is coordinated by **Trade A3** (functional mailbox TRADE ACCES DOCUMENTS), which will pass on applications to the units concerned, collect the documents selected by them and advise, if necessary, on the proper application of the Regulation. Trade A3 ensures consistency of DG Trade practices as regards access to documents, maintains contacts with the SG service in charge of access to documents and keeps track of case law and Ombudsman Decisions on access to documents.
- **Replies are prepared by the units in charge of the relevant file** (on the basis of the available templates¹⁸). Heads of Units must ensure that these replies meet the requirements of the Regulation and that the necessary justifications are set out clearly in cases of refusal or partial refusal of access.
 - **Replies** releasing documents in full may be sent out directly by the unit concerned, after having checked with Trade A3 prior to sending these out.
 - **Replies** refusing access to all or parts of the requested documents, or confirming that no relevant documents exist, must be signed by the Director-General, as well as positive replies that are part of a wider request from the same applicant which includes some negative answers. The signataire should go via the relevant Director and Trade A3.
 - **If a longer deadline is needed** because of the time needed to identify and review a large number of documents, to consult third parties and/or coordinate with different teams, Trade A3 must be informed so that it can update the applicant.
- In accordance with the Regulation, which provides for the protection of the Commission's copyright (Article 16), the draft reply shall contain certain dissemination disclaimers (see SG template for positive replies available at <https://myintracomm.ec.europa.eu/sg/docinter/Pages/tools.aspx>)
- The **Secretariat General** is in charge of replying to confirmatory applications. In this case, Trade A3 is consulted and provides elements (including additional factual justifications for non-disclosure and copies of all relevant documents) for reply to the SG on the basis of the elements provided by the relevant unit, which is always consulted before replying to the SG.
- Trade A3 has established a network of "Access to Documents" contact points in the relevant units, who can help follow requests and provide advice on specific cases.

¹⁸ See <https://myintracomm.ec.europa.eu/sg/docinter/Pages/tools.aspx>