



# ACCESS TO DOCUMENTS TOOLKIT

## 2016 Edition

This document is a working tool intended to give practical guidance on **how to handle access to documents (ATD) requests**.

It is an internal document and should not be shared as such or circulated outside the Commission.

This Toolkit is prepared and updated by the Access to Documents Team (A.3) at [TRADE-ACCES-DOCUMENTS@ec.europa.eu](mailto:TRADE-ACCES-DOCUMENTS@ec.europa.eu).



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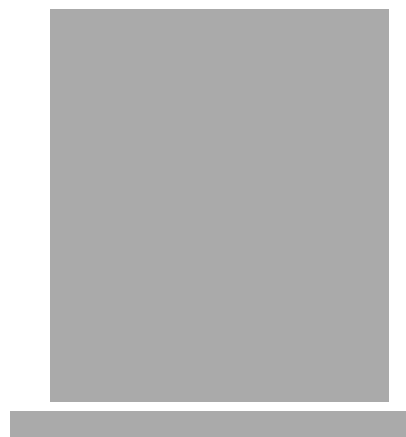
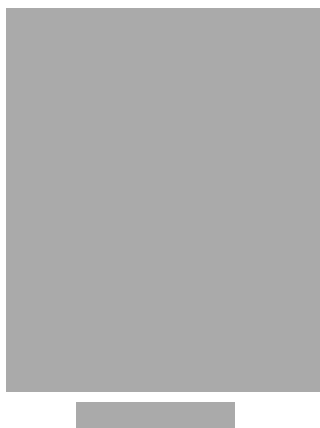
## FOREWORD

*In recent years trade policy has been the subject of an increasing public interest. This has translated into a demand for transparency and openness of the decision making. Transparency is now one of the main priorities of this Commission and unprecedented steps have been taken by this DG to ensure that trade policy is conducted in a transparent and inclusive manner towards the EU citizens.*

*Access to documents is part of this debate. Increased public interest in trade policy has generated a massive number of requests for access to documents in all areas of activities of DG Trade, and most prominently in the negotiations of international agreements (TTIP leading). On the other hand, the Access to Documents Regulation sets out strict legal obligations on the Commission, which the case-law of the EU Court calls firmly to observe.*

*This situation has confronted our resources with legal and practical challenges, and revealed the need for practical guidance on how to handle access to documents requests. This Toolkit is meant to provide a user-friendly guide to the colleagues in DG Trade and help them in preparation of the replies. It is based on our day-to-day experience.*

*We hope this Toolkit will be useful to you. If you have any questions that are not addressed here do not hesitate to contact us in the ATD team (A.3). Our job is to help and support you so that together we can overcome the practical challenges of the access to documents work and ensure transparency to the public.*



# INTRODUCTION

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## WHY?

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We have a **legal obligation** to grant public access to documents of the EU institutions. The right of access to documents is a **fundamental right** enshrined in Article 42 of the Charter of Fundamental Rights of the EU and Article 15(3) of the Treaty on the Functioning of the EU. Its purpose is to enable citizens to **participate more closely in the decision-making** process and to ensure that the administration enjoys **greater legitimacy** and is **more effective** and **more accountable to the citizens** in a democratic system.

[Regulation \(EC\) No 1049/2001](#) sets out the specific rules on public access to Parliament, Council and Commission documents. The procedures for handling access to documents requests are contained in the [detailed rules for the application of Regulation 1049/2001](#) (Commission Decision 2001/937).

- ⇒ **Access is the rule!** However, documents can be fully or partially **withheld** if there is a "*reasonably foreseeable*" risk of **harm to certain public or private interests**, *e.g.* to (1) international relations, (2) privacy and integrity of the individual, (3) commercial interests of third parties, or (4) the Commission's decision-making process. The exceptions to the right of access must be interpreted restrictively.

When a request for access to documents contains **personal data**, [Regulation 45/2001](#) applies.

- ⇒ **Names**, and any other information revealing the identity of members of institutions or third party staff under Director/CEO level, are **redacted** from the documents to be disclosed, unless the applicant can establish the necessity of receiving the data and in addition, there is no reason to assume that the legitimate interests of the data subjects might be prejudiced.

When a request concerns information relating to emissions into the environment the [Aarhus Regulation](#) (Regulation 1367/2006) applies together with Regulation 1049/2001.

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## WHAT DOCUMENTS?

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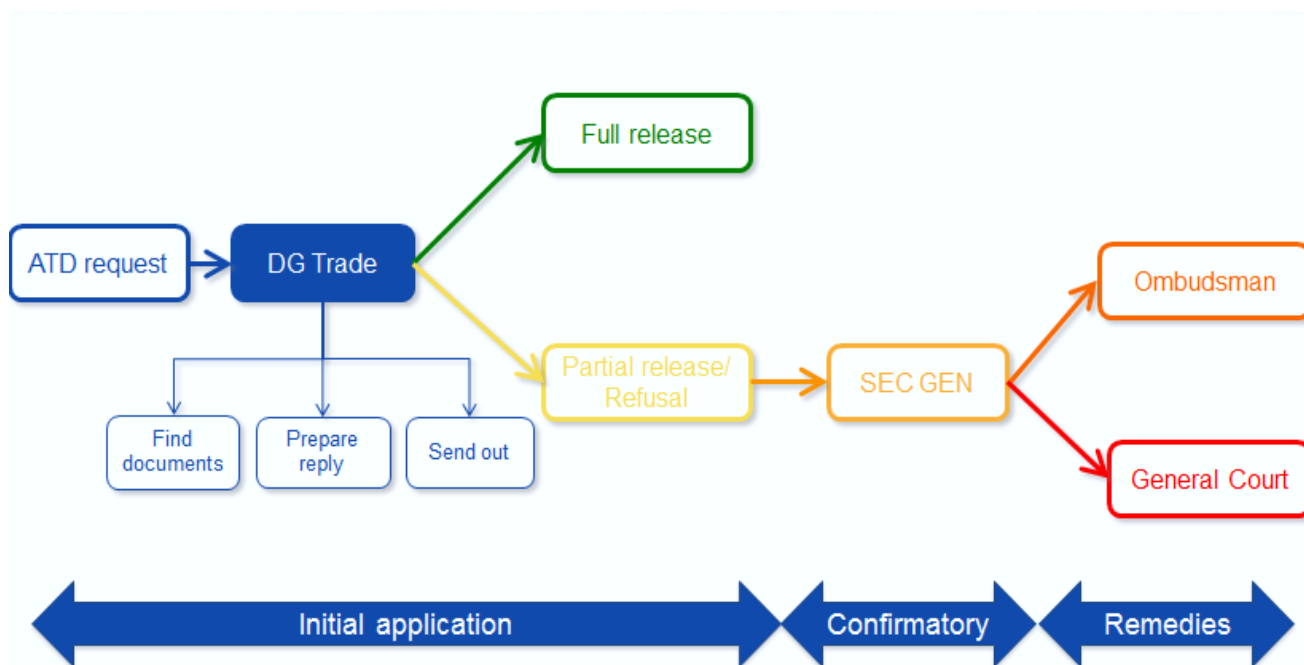
**All documents held by an EU institution** can be subject to an access request, *i.e.*:

- documents drawn up by the institution,
- documents in its possession,
- documents received from third parties.

**No category of documents is excluded a priori** from the right of access. This includes classified documents. Even a database can be considered as a document if the requested data can be easily extracted as part of a routine search.

- ⇒ In practice all documents (reports, notes, emails including attachments) identified in reply to an ATD request **must be registered in ARES** or in an equivalent document-management system (*e.g.* Basis).
- ⇒ **The right of access applies only to existing documents.** These are released in their existing version and format. This means, for instance, that documents do not need to be translated, nor new documents need to be created for the purpose of replying to a request. However, a list of documents (including the ARES numbers of the originals) is drawn up for each request under the [Code of Good Administrative Behaviour](#).
- ⇒ When the request concerns **third party documents** (*e.g.* Member State, company) the originator of the document must be consulted in case of doubt. The [SG Intranet](#) contains templates for the consultation of Member States authorities and of third parties in general. If it is clear that the document should or should not be disclosed, we can take the decision without consulting the third party. In any event the opinion of the third party is not binding and the responsibility for the final decision lies with the Commission.

## HOW? THE PROCESS



### (A) WHO CAN REQUEST ACCESS?

**Any individual or organisation** can ask access to documents. Usual applicants are NGOs, journalists, lawyers and academics; more rarely, citizens.

Also EU officials, MEPs, Member State national or sub-national authorities may ask access to documents under Regulation 1049/2001 **if they act in their personal capacity**. MEPs and national or sub-national Member State authorities may have a privileged access if they ask for documents in their official capacity. In this case, requests of MEPs are dealt with under the [Framework Agreement](#) on relations between the European Parliament and the European Commission. Requests from Member States national and sub-national authorities are handled under the duty of loyal cooperation (Article 4(3) of the Treaty on European Union).

## (B) REQUEST COMES IN – INITIAL REPLY

When the request comes in to DG Trade the ATD team in **A3 registers** and analyses it and then **distributes** it to the unit in charge of the matter. **The lead unit (CdF) coordinates the collection of the documents** (including from other units) and **prepares the reply**.

An **immediate assessment of the workload** required to prepare the reply is the first thing that the CdF should communicate to A3. In case of a request concerning a large number of documents, it is possible to agree with the applicant to reduce the scope of the request. If a fair solution cannot be found, a part of the request may exceptionally be refused on the ground that the workload relating to the disclosure of the requested documents would be disproportionate in comparison with the interest of the applicant. However detailed explanations would need to be given to the applicant in this case.

In A3 we offer support to the units in charge of the replies by **managing the deadlines and the correspondence with the applicants, advising on procedural and legal questions** and by making a **final check** of the replies before signature. A3 also coordinates with other DGs and other institutions when needed. To enable A3 to handle the required contacts with the applicant, the unit in charge of the reply would usually keep A3 regularly informed about the status of the preparation of a reply. It would also inform A3 as soon as it realises that an extension of deadline is needed to finalise the reply.

### **What you need to do if you are in charge of a request:**

- 1) identify the documents that fall under the scope of the request;
- 2) individually assess the documents and edit/redact them in pdf-format;
- 3) draft the reply letter, using the [SG templates](#);
- 4) prepare the signataire (paper file and in ARES);
- 5) send out the reply (by email or via ARES, and when signed by the Director General, also by registered letter sent by A3).

**You can find in this Toolkit a detailed 10 steps guide on how to prepare an ATD reply.** For any further questions do not hesitate to contact us at [TRADE-ACCES-DOCUMENTS@ec.europa.eu](mailto:TRADE-ACCES-DOCUMENTS@ec.europa.eu).

## (C) DEADLINES

The requests for access to documents must be handled **within 15 working days**. This deadline may be extended by **additional 15 working days**. If we fail to reply within the prescribed time limits the applicant is entitled to submit a request to the Secretariat General (confirmatory application). In general, when this happens the Secretariat General will give us the opportunity to issue our initial reply first, if this can be done in reasonable timeframe.

## (D) IF APPLICANT IS NOT SATISFIED – CONFIRMATORY DECISION

In case of a total or partial refusal, or where the institution fails to reply within the time limit (15+15 working days), the applicant can make **a confirmatory application** (within 15 working days upon receipt of the initial reply) **to the Secretary General** asking the Commission to reconsider its position. The Secretary General will adopt a definitive decision either confirming or fully or partially reversing the initial reply.

## (E) LEGAL REMEDIES AVAILABLE TO THE APPLICANT

In case of a negative decision or failure to reply within the prescribed time limit at the confirmatory level, the applicant can make an application for annulment **before the General Court** and/or **a complaint to the Ombudsman**. Only EU citizens or natural or legal persons residing or having their registered office in a Member State can make a complaint to the Ombudsman.

*Please keep in mind that any document we produce (which is not short lived)  
can be released under access to documents rules.*

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## **10 STEPS TO PREPARE A REPLY**

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## STEP 1: READ THE REQUEST CAREFULLY

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When you receive a request for access to documents it is important that you first read it carefully.

- ⇒ This will allow you to understand whether the applicant is asking **for documents or rather for information**. If you are dealing with a request for information, you must handle it under the [Code of Good Administrative Behaviour](#) and not Regulation 1049/2001.
- ⇒ If you are dealing with an access to documents request, you need to **determine its material scope**, *i.e.* the documents that are covered by the request (which thus need to be identified in the reply).
  - If applicable, the request should specify a **time period** for the requested documents. If the end date is not specified, we can normally consider this to correspond to the date of the request.
- ⇒ If a document covers issues which are 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, rather it allows us to reflect better the scope of the applicant's request.

For example : if applicant asks 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]"**, as in the example below.

### China

[Out of scope]

### Turkey

EFPIA called upon the COM to be ambitious when modernizing the Customs Union (CU) with Turkey. They suggested the EEA model, as under this model regulations are harmonized with the EU acquis.



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## STEP 2: IF THE REQUEST IS NOT PRECISE, OR IS TOO WIDE

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If a request is **not sufficiently precise** to allow identifying specific documents, the ATD team in A3 would ask the applicant for a **clarification**, usually even before distributing the request to the unit(s).

- ⇒ A request for clarification **stops the clock** and the deadlines start running only when the applicant has provided the required clarifications. If the applicant does not react, the request is normally closed.

If the request is very **broad** and concerns a large number of documents which cannot be dealt with in 15+15 working days, we can try to find a **fair solution** with the applicant. The Unit CdF would normally make the workload assessment and A3 would take care of negotiating with the applicant.

The fair solution may concern **the number and content of the documents** applied for, but **not the deadlines for dealing with the initial request** (C-127/13 P, *Strack*, EU:C:2014:2250, §§ 25-28).

- ⇒ The applicant may agree to **withdraw some parts of the request**, which may then be **reintroduced at a later stage**, *e.g.* by reducing the temporal/material scope of the request, splitting it in several requests, setting an order of priority and agreeing to a calendar for dealing with the documents. The applicant's agreement must be **unequivocal and recorded in writing** (*e.g.* e-mail).
- ⇒ To facilitate reaching a fair solution, we would need to provide the applicant with **concrete elements to enable it to make an informed decision**, such as: a list of documents; an estimation of the total number of documents/pages covered; the estimated number/category(ies) of documents that could be dealt with within 30 working days.

If a fair solution cannot be found, we may **exceptionally refuse access to certain documents** on the ground that the workload relating to their disclosure would be disproportionate in comparison with the interest of the applicant. We must however **explain in detail** why the full treatment of the request would entail an unreasonable amount of work, and invite the applicant to introduce a new request covering the remaining documents.

For more detail, please consult A3 and the [SG Guidance note on wide-scope requests](#).

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## STEP 3: PREPARE A COMPLETE LIST OF DOCUMENTS

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Once the scope of the request is defined, you need to **identify one by one the documents that fall within the scope of the request. These documents are either registered or should have been registered in ARES**. If the documents date back to a few years ago and have not been registered in ARES although they should have been, they can be registered in Ares now as "Note to File". The unit CdF would need to coordinate, ask and receive documents from other units.

- ⇒ For guidance as to which documents should be saved in Ares, we advise you to consult the **Note on Document Management and Access to Documents, Ares(2015)182108**.
- ⇒ A list of all the documents identified as falling within the scope of the request needs to be incorporated in the reply to the applicant. This list must be **clear, relevant and exhaustive** and include **titles, dates, authors and addressees of the documents, and the corresponding ARES reference numbers**. See example below.
- ⇒ If the documents identified contain annexes (*e.g.* email with attachments), the annexed documents are normally considered to be part of the documents identified.

On the basis of your request we have identified the following documents:

- the report dated 5 March 2015 of a meeting with Chevron on 4 March 2015 (Ares(2015)5969847) ("**document 1**");
- the report of a meeting with Dow Chemical Company on 19 May 2015, and an annex containing names and other personal data of company employees attending the meeting (Ares(2015)5382829) ("**document 2**");
- the report dated 29 May 2015 of a meeting with ConocoPhillips on 28 May 2015, and an enclosed paper by ConocoPhillips on "*Reversing the US Ban on Crude Oil Exports: What it could mean for Europe*" (Ares(2015)5382529) ("**document 3**").

Furthermore, we have established under the Code of Good Administrative Behaviour, a list of the relevant meetings, enclosed in Annex I. That list also provides for each of the meeting reports identified above, a description (*e.g.* date, company/association concerned) and indicates whether parts are withheld and if so, under which ground pursuant to Regulation 1049/2001. Copies of the accessible documents are enclosed in Annex II.

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## STEP 4: CONDUCT THE NECESSARY CONSULTATIONS

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The first thing to do when we deal with documents of third parties or companies (*e.g.* position papers of a company or industry association given to the Commission at a meeting), is to check whether these documents are published online. Often documents that are marked confidential or presented to the Commission as such are public.

If they are not public, it is then for the Commission to decide whether they can be disclosed or not. The Commission does not have an obligation to **consult a third party**, except **when there is a doubt** as to whether the exceptions of to the right of access apply.

- ⇒ For **Member States' documents**, we can consult the national authorities via the PermReps in Brussels. This would normally be done by the Unit CdF.
- ⇒ For **third-party documents**, we can consult the author of the document, if not already done in the meeting when the documents were handed over. This would normally be done by the Unit CdF. In the case of third countries, contacts can be facilitated by the EU Delegation.
- ⇒ For documents of **other EU institutions or of other DGs**, we can consult them accordingly. This is normally done by A3.

The [SG Intranet](#) contains templates for the consultation of third parties or Member States. Consulted parties should be given at least 5 working days to reply.

If the parties consulted object to the release of the document, their objections are normally **not overruled at the initial stage**. However, the parties consulted **would need to provide reasons** as to why the document should not be disclosed.

If the third party consulted **asks for the identity of the applicant**, this should not be revealed, unless the applicant agrees. We can however provide an indication of the category to which the applicant belongs (*e.g.* NGO, journalist, academic).

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## STEP 5: ASSESS ALL IDENTIFIED DOCUMENTS

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Once the documents are identified, you would need to carry out a **concrete and individual examination of their content** to verify whether any of the exceptions set out in Art. 4 of Regulation 1049/2001 applies.

- ⇒ Any refusal to grant access must be based on one, or more, of the exceptions in Regulation 1049/2001 and **explain in sufficient detail why the release of the information would "specifically and effectively" undermine** the interest foreseen in the relevant exception.
  - 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.

In exceptional and very specific cases (recognised by the case-law), a **general presumption of non-disclosure applies**, which means that the documents would not need to be individually assessed.

- ⇒ Documents of an **ongoing negotiation are not as such covered by a general presumption of non-disclosure**. This means that they need to be examined one by one and disclosed fully or partially if their content does not fall under any of the exceptions of Regulation 1049/2001.

The fact that a document has been **leaked is not a reason to release the document** if the disclosure undermines one of the interests protected by Regulation 1049/2001. In practice however, the fact that the document is already (unofficially) in the public domain weakens the argument that its disclosure undermines one of the interests protected by Regulation 1049/2001.

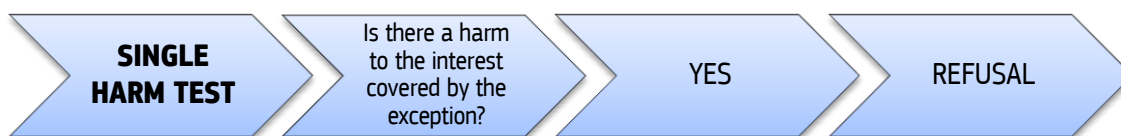
### ABSOLUTE EXCEPTIONS

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Access to a document, or part of it, must 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 data (Art. 4(1)(b)).

Absolute exceptions require a "**single harm test**":



- ⇒ The exception concerning **international relations** is generally used to protect information which reveals the EU strategic objectives in the negotiations and confidential negotiating positions. It is also used to protect the negotiating position of trading partners in order not to undermine the mutual trust in the negotiations.
- ⇒ The exception concerning the **financial, monetary or economic policy of the Community or a Member State** has been used to protect ongoing WTO negotiations (T-264/04, *WWF European Policy Programme v Council*, EU:T:2007:114).
- ⇒ **Personal data** (e.g. names, e-mail addresses, job titles) are protected under Art. 4.1(b), unless the applicant can establish the necessity of receiving the data and in addition, there is no reason to assume that the legitimate interests of the data subjects might be prejudiced. Absent these conditions, the administrative practice of the Commission is to **systematically remove the names and other personal data of**:
  - **all Commission staff except for senior management** (Director level and above), members of **Cabinet** (but not the administrative staff of Cabinet), and the **Commissioners**;
  - **representatives of a private body, except for CEO, President, Director or equivalent**;

- **Member State/third country administration staff, except for Head of State, Minister, State Secretary, Director-General, Ambassador, Permanent Representative.**

Names of **public figures** (e.g. MEPs, politicians) are generally **disclosed**.



## SELECTED EXCERPTS FROM ATD REPLIES

### 2.2. Protection of international relations (documents 2 and 3)

Article 4.1(a) third indent, of Regulation 1049/2001 provides that “[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: the public interest as regards: [...] international relations.”

According to settled case-law, “the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) of Regulation No 1049/2001, combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care. Such a decision therefore requires a margin of appreciation”.<sup>7</sup> In this context, the Court of Justice has acknowledged that the institutions enjoy “a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by [the] exceptions [under Article 4.1(a)] could undermine the public interest”.<sup>8</sup>

The General Court found that “it is possible that the disclosure of European Union positions in international negotiations could damage the protection of the public interest as regards international relations” and “have a negative effect on the negotiating position of the European Union” as well as “reveal, indirectly, those of other parties to the negotiations”.<sup>9</sup> Moreover, the “the positions taken by the Union are, by definition, subject to change depending on the course of those negotiations and on concessions and compromises made in that context by the various stakeholders. The formulation of negotiating positions may involve a number of tactical considerations on the part of the negotiators, including the Union itself. In that context, it cannot be precluded that disclosure by the Union, to the public, of its own negotiating positions, when the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating capacity of the Union”.<sup>10</sup>

Some of the withheld parts of documents 2 and 3 reveal the positions of stakeholders in relation to certain aspects of the Chinese foreign investment policy and their input on specific issues that they would like to be reflected in a possible future investment agreement with China. The disclosure of this information could reveal to our negotiating partners strategic interests that the EU may be pursuing in the negotiations, and thus indirectly the negotiating position of the EU. Exposure of such position could weaken the negotiating power of the EU and reduce its margin of manoeuvre, thus undermining in a reasonably foreseeable manner the protection of the public interest as regards international relations.

<sup>7</sup> Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 36

<sup>8</sup> Judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

<sup>9</sup> Judgment in *Sophie in 't Veld v Commission*, T-301/10, EU:T:2013:135, paragraphs 123-125.

<sup>10</sup> *Id.*, paragraph 125.

### 2.3. Protection of the privacy and the integrity of the individual (documents 1, 2, 3 and 4)

Article 4.1(b) of Regulation 1049/2001 provides that "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data."

The Court of Justice has ruled that "where an application based on Regulation 1049/2001 seeks to obtain access to documents containing personal data" "the provisions of Regulation 45/2001, of which Articles 8(b) and 18 constitute essential provisions, become applicable in their entirety".<sup>11</sup>

Article 2(a) of Regulation 45/2001 provides that "'personal data' shall mean any information relating to an identified or identifiable natural person [...]". The Court of Justice has confirmed that "there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of 'private life'"<sup>12</sup> and that "surnames and forenames may be regarded as personal data",<sup>13</sup> including names of the staff of the institutions.<sup>14</sup>

According to Article 8(b) of this Regulation, personal data shall only be transferred to recipients if they establish "the necessity of having the data transferred" and additionally "if there is no reason to assume that the legitimate interests of the data subjects might be prejudiced". The Court of Justice has clarified that "it is for the person applying for access to establish the necessity of transferring that data".<sup>15</sup>

Documents 1, 2, 3 and 4 contain names and other personal information that allow the identification of natural persons.

I note that that you have not established the necessity of having these personal data transferred to you. Moreover, it cannot be assumed on the basis of the information available, that disclosure of such personal data would not prejudice the legitimate interests of the persons concerned. Therefore, these personal data shall be removed in order to ensure the protection of the privacy and integrity of the individuals concerned.

We do however disclose the names of senior management of the Commission starting from the Director level (included), and names of public figures.

<sup>11</sup> Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 101; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraphs 63 and 64.

<sup>12</sup> Judgment in *Rechnungshof v Rundfunk and Others*, Joined cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

<sup>13</sup> Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

<sup>14</sup> Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

<sup>15</sup> *Id.*, paragraph 107; see also judgment in *C-28/08 P Commission v Bavarian Lager*, EU:C:2010:378, paragraph 77.



## RELATIVE EXCEPTIONS

Access to a document, or part of it, must be refused:

⇒ for reasons of protection of **commercial interests (including intellectual property), court proceedings and legal advice, investigations...**

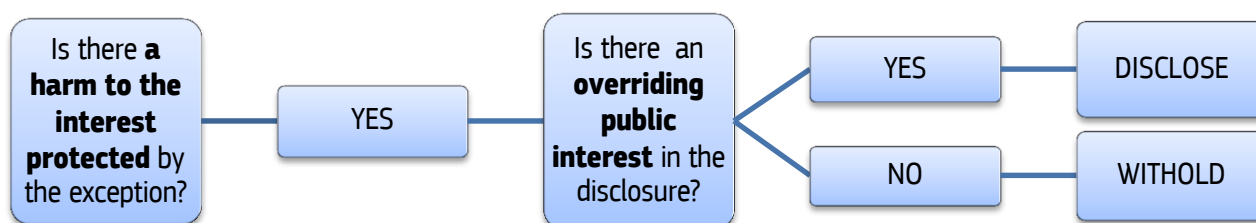
... unless there is an **overriding public interest** in disclosure (Art. 4(2));

⇒ for reasons of "**decision making**" (which includes negotiating processes), *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**; or
- (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...

...unless there is an **overriding public interest** in disclosure (Art. 4(3)).

**Relative exceptions** require a double harm test



The exception of **commercial interest** is generally applied to protect information that could harm the competitive position of a company, by undermining its reputation, or disclosing commercially sensitive information (IPs, know-how, prices, costs) that could give an unfair advantage to

competitors, or which could lead to a risk of retaliation from competitors or regulators and other authorities in third countries.

The exception concerning **legal advice and court proceedings** is interpreted rather restrictively. It applies only to the documents prepared for Court proceedings (e.g. application, defence, reply and rejoinder), and legal opinions which cover particularly sensitive issues or have a wide scope.

⇒ The exception concerning **inspections, investigations and audits** applies to ongoing investigations.

- A general presumption of non-disclosure was recognised by the Ombudsman to cover **anti-dumping proceedings**. This however has not been confirmed by the EU Courts yet.

⇒ The exception concerning the protection of the decision making process applies to internal documents drawn up or received during an **ongoing decision making process**

- e.g. a general **presumption of non-disclosure** applies to documents drawn up in the context of preparing **an ongoing impact assessment**.

In a recent judgment (T-424/14 and T-425/14, *ClientEarth v Commission*, EU:T:2015:848, §§ 97-99), the General Court found that: *"for the purposes of applying the exception laid down in the first subparagraph of Article 4(3), the Commission is entitled to presume, without carrying out a specific and individual examination of each of the documents drawn up in the context of preparing an impact assessment, that the disclosure of those documents would, in principle, seriously undermine its decision-making process for developing a policy proposal."*

The Court added that this general presumption may apply: *"for as long as the Commission has not made a decision regarding a potential policy proposal, that is to say, until a policy initiative has been, depending on the circumstances, either adopted or abandoned."*

- ⇒ The exception concerning the protection of the decision making process applies also to **internal opinions** exchanged within the institution (including within an advisory committee) **after the decision making process is concluded**.
- The EU Courts have recognized that the capacity of the EU staff to **express their opinions freely** must be preserved to avoid the risk that the disclosure would lead to future self-censorship,<sup>1</sup> which would ultimately affect the quality of the internal decision-making.

For guidance on the use of the exceptions, you can consult the SG Intranet page which contains an updated summary of the [relevant case law](#) and [examples of replies](#). In case of doubt, do not hesitate to consult A3.

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<sup>1</sup> Judgment in T-144/05, *Muñiz v Commission*, EU:T:2008:596, § 89.

## SELECTED EXCERPTS FROM ATD REPLIES

### 2.4. Protection of commercial interests (documents 1, 2 and 3)

Article 4.2 first indent, of Regulation 1049/2001 provides that “[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] commercial interests of a natural or legal person, including intellectual property [...] unless there is an overriding public interest in disclosure”.

While not all information concerning a company and its business relations can be regarded as falling under the exception of Article 4.2 first indent,<sup>16</sup> it appears that the type of information covered by the notion of commercial interests would generally be of the kind protected under the obligation of professional secrecy.<sup>17</sup> Accordingly, it must be information that is “known only to a limited number of persons”, “whose disclosure is liable to cause serious harm to the person who has provided it or to third parties” and for which “the interests liable to be harmed by disclosure must, objectively, be worthy of protection.”<sup>18</sup>

Document 1 contains the preliminary internal assessments of individual Commission staff members regarding a study conducted by an independent consultant, Syndex, contracted out by the association of European trade unions, ETUC, to conduct a study on the costs and benefits of the EU-China investment agreement. The disclosure of this information could affect the commercial interests of Syndex by indirectly revealing elements of its preliminary analysis in the study.

Documents 2 and 3 reveal the specific views, concerns and interests raised by the business associations in relation to investment and regulatory issues in foreign markets. They also contain the assessments of the economic situation and market access problems in third countries as well as commercial priorities, strategies and concerns that a company or the members of a business association pursue in the third country markets. These were shared with the Commission in confidence in order to support the EU's objectives in the ongoing investment negotiations. This information, if released, would harm the relations that these organisations have with the governments and regulators, at the same time exposing EU investors to the risk of retaliation. Moreover the commercial interests of the EU investors in the conclusion, implementation and enforcement of trade agreements as well as the negotiation of future agreements could be undermined by revealing the positions taken in the course of the negotiations of such agreements. Finally, there is a reasonably foreseeable and not purely hypothetical risk that the commercial interests of the members of the business association be undermined by revealing their commercial strategies and priorities as well as their commercially sensitive business information.

<sup>16</sup> Judgment in *Terezakis v Commission*, T-380/04, EU:T:2008:19, paragraph 93.

<sup>17</sup> See Article 339 of the Treaty on the Functioning of the European Union.

<sup>18</sup> Judgment in *Bank Austria v Commission*, T-198/03, EU:T:2006:136, paragraph 29.



**2.3. Protection of the institution's decision-making process (documents 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19-27, 28 and 29)**

Article 4.3 first subparagraph, of Regulation 1049/2001 provides that “[a]ccess 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.”

The jurisprudence of the EU Courts has recognized that “the protection of the decision-making process from targeted external pressure may constitute a legitimate ground for restricting access to documents relating to the decision-making process”<sup>19</sup> and that the capacity of its staff to express their opinions freely must be preserved<sup>20</sup> so as to avoid the risk that the disclosure would lead to future self-censorship. As the General Court has recognized, the result of such self-censorship “would be that the Commission could no longer benefit from the frankly-expressed and complete views required of its agents and officials and would be deprived of a constructive form of internal criticism, given free of all external constraints and pressures and designed to facilitate the taking of decisions [...]”.<sup>21</sup>

Documents 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19-27, 28 and 29 all contain internal views, analyses, opinions, proposals and ideas of Commission staff members on the principles, goals and objectives that could form part of a possible communication strategy on TTIP, and reflections on possible actions for implementation. They reveal individual positions, divergent views, internal priorities and planned initiatives that were or were not eventually pursued, or that may still be pursued in the future. In addition, some of these documents reveal internal comments and views regarding the economic and political situation in the Member States, the positions of relevant public and private actors in the national contexts and possible joint communication activities of the Commission with the Member States. In particular, documents 19 to 27 contain internal analyses and assessments regarding the coverage of TTIP negotiations in the media.

Some of the documents also reflect exchanges of views with representatives of the Member States on the subject of communication in the context of the TTIP negotiations and related activities, and reveal the individual position of certain Member States with regard to communication initiatives discussed with the Commission. Document 19, in particular, contains the report of a meeting between Commission staff members and members of the cabinet of the French Minister for external trade, in which the French representatives presented certain communication initiatives envisaged by the French government at the time, and expressed personal views and ideas regarding a TTIP communication strategy in general.

<sup>19</sup> Judgment in *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraph 71

<sup>20</sup> Judgment in *Muñiz v Commission*, T-144/05, EU:T:2008:596, paragraph 89.

<sup>21</sup> Judgment in *MyTravel v Commission*, T-403/05, EU:T:2008:316, paragraph 52.

All this information was meant for internal use of the Commission as a basis to inform its decision-making process in relation to communication activities related to the TTIP negotiations. This deliberative process is not entirely concluded. As the TTIP negotiations unfold the Commission is continuously reflecting on the best possible means to enhance the understanding of the public and adapting its communication activities accordingly.

As you are aware, there have been a number of controversies and divergent opinions in relation to the Commission's initiatives in relation to the TTIP negotiations, including on its communication initiatives. Publicly releasing the internal opinions and initial ideas of Commission staff members on the envisaged TTIP communication activities (some of which do not reflect the final position of the Commission), and the positions of the Member States in this context, would pose a "*reasonably foreseeable and not purely hypothetical*" risk of undermining the protection of the Commission's decision-making process. In particular, public disclosure of the documents and passages mentioned above would unduly expose the Commission's deliberative process to external pressure, potential manipulation and unfounded conclusions and would restrict the free exchange of views within the Commission staff and between the Commission and the Member States. Protecting the confidentiality of these passages allows for the individuals involved in the decision-making process to speak frankly and freely. Reducing this degree of confidentiality would give rise to a risk of self-censorship of those involved, which would deprive the Commission's deliberative process of that "*constructive form of internal criticism, given free of all external constraints and pressures*" which is "*designed to facilitate the taking of decisions*".<sup>22</sup> Ultimately, this would affect the quality of the internal consultations and deliberations, and seriously undermine the Commission's decision making process.

## INSTRUCTIONS ON HOW TO REDACT DOCUMENTS

The redactions in the documents to be partially released must all be done **electronically through "Adobe Acrobat Professional XI"** using **the lightest shade of grey**. You can find this program by typing "Adobe Acrobat Professional XI" in your Windows program search box, or asking the IT Helpdesk for it ([EC-HELPDESK-ix@xx.xxropa.eu](mailto:EC-HELPDESK-ix@xx.xxropa.eu) or 77777).

The steps to follow once you are in the program are:

1. Open the pdf-document by clicking "edit pdf";



2. Go to "protection" menu and "redaction properties" on the right side to change the redaction colour to lightest grey;
3. Click "mark for redactions" and start editing by selecting the text you want to take out;
4. Once redactions are done, click "apply redactions";
5. Go to "content editing" and add on each redacted part the justification article from Reg. 1049/2001 (e.g. "[Article 4(1)(a) third indent]");
6. Save the redacted version.

Please note that the **redactions would need to be made by the Units responsible for the reply**. Therefore the redactions would need to have already been done once the signatory reaches A3.

If the documents to be (fully or partially) disclosed are marked "restricted", they would need to be (fully or partially) **declassified** before release. For declassifying a document, do not hesitate to consult A3.

- ⇒ A3 will help you by preparing a note to be signed by the Dir A Director to request the SG to declassify the document. You would however need to provide A3 with a full or partial version of the document.
- ⇒ Once the declassification is done by the SG, the declassified version of the document will be uploaded on SG Vista.

## EXAMPLE OF A REDACTED DOCUMENT

 Ref. trade.dga2.g.3(2015)5969847

[Out of scope]

[Out of scope]

**From:** [Art. 4.1(b)] (TRADE)  
**Sent:** Thursday, March 05, 2015 7:13 PM  
**To:** GARCIA BERCERO Ignacio (TRADE); [Art. 4.1(b)] (TRADE-WASHINGTON); [Art. 4.1(b)] (TRADE); [Art. 4.1(b)] (TRADE); [Art. 4.1(b)] (TRADE); [Art. 4.1(b)] (TRADE); [Art. 4.1(b)] (TRADE); [Art. 4.1(b)] (EEAS-WASHINGTON)  
**Cc:** [Art. 4.1(b)] (TRADE)  
**Subject:** 04/03/2015 Chevron - TTIP - report

Chevron: Mr [Art. 4.1(b)] (law department), Ms [Art. 4.1(b)] (Brussels office), Mr [Art. 4.1(b)] (Weil, law firm)  
TRADE: Mr [Art. 4.1(b)] (HH), Ms [Art. 4.1(b)] (report)

Short meeting organised at the request of the company interested in the overall progress of the negotiations, the dynamics and the main elements of the discussion. HH debriefed according to the usual line. On energy, HH presented our interest to solve in TTIP our bilateral issues, set rules on energy trade and investment beyond WTO (e.g. transit through pipelines, trading monopolies, non-discriminatory accessed to monopolised infrastructure) as a stepping stone for global standard, as well as our wish to work on consolidation of existing common environmental principles (e.g. offshore safety) and disciplines for renewable energy and energy efficiency. Several example of a geopolitical value of such a chapter were discussed (UA, Central Asia, Russia). Chevron asked principally questions on ISDS and was interested in the dynamic and arguments used in the current debate in the EU.

[Art. 4.1(b)]

**European Commission**  
DG TRADE  
Unit G3 Market Access, Industry, Energy and Raw Materials

[Art. 4.1(b)]  
B-1049 Brussels/Belgium

[Art. 4.1(b)] [@ec.europa.eu](mailto:[Art. 4.1(b)]@ec.europa.eu)



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## STEP 6: CONSIDER WHETHER PARTIAL ACCESS IS POSSIBLE

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If only parts of the document are covered by exceptions set out in Art. 4 of Regulation 1049/2001, the remaining parts must be released. In case of partial access it is important that the **parts released to the applicant are meaningful**. If not, then it is advisable to withhold the entire document (T-204/99, *Mattila v Council and Commission*, EU:T:2001:190, § 69: "[...] the Council and the Commission are in any event entitled to refuse partial access in cases where examination of the documents in question shows that partial access would be meaningless because the parts of the documents that could be disclosed would be of no use to the applicant.")

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### SELECTED EXCERPT FROM AN ATD REPLY

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#### 4. PARTIAL ACCESS

Pursuant to Article 4.6 of Regulation (EC) No 1049/2001 "[i]f only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released". We have carefully analysed the content of documents 17, 19-27 and 29 with a view to determining whether parts of these documents could be released. We have however concluded that these documents are to be withheld in their entirety as their content is wholly covered by some of the exceptions set out in Article 4 of Regulation 1049/2001 as explained above, and it would be impossible to disclose any part without undermining the protection of the interests covered by those exceptions.

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## STEP 7: CONSIDER THE "OVERRIDING PUBLIC INTEREST"

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If you rely on one of the exceptions set out in Articles 4(2) and 4(3) of Regulation 1049/2001, *i.e.* the relative exceptions, you should not forget to assess whether there is **an overriding public interest in disclosure** and include the relevant reasoning in a separate section of the reply.

- ⇒ There is little guidance as to what would constitute an overriding public interest. The EU Courts seem to recognise that the overriding public interest relates to increased openness and public participations in the institutions' decision making process (Joined cases C-39/05 and C-52/05 P, *Sweden and Turco v Council*, EU:C:2008:374).
- ⇒ What is however clear is that there is a distinction to be made between cases where the institution acts in a legislative capacity and cases where it acts in an administrative or non-legislative capacity.
  - The public interest is of particular relevance when the institution is acting in its **legislative capacity**. In this case, there is a presumption that an overriding public interest exists and it is for the institutions to rebut that presumption. Therefore, if we refuse access to a document of a legislative procedure we need to provide reasons as to why a public interest is not deemed to exist.
  - In case of **administrative or non-legislative documents** the situation is the reverse: an overriding public interest is presumed not to exist, unless the applicant proves otherwise. Therefore in these cases, the overriding public interest can be dispelled with a less extensive reasoning.
    - ❖ A private interest of the applicant in obtaining the document is not relevant for the assessment of whether a public interest exists.
  - In the **negotiation of international agreements** the participation of the public is necessarily restricted in view of not revealing strategic interest in the negotiations (T-301/10, *Sophie in't Veld v Commission*, EU:T:2013:135).

### SELECTED EXCERPT FROM AN ATD REPLY

#### 3. OVERRIDING PUBLIC INTEREST

The exceptions laid down in Article 4.2 and 4.3 of Regulation 1049/2001 apply unless there is an overriding public interest in disclosure of the documents. Such an interest must, first, be public and, secondly, outweigh the harm caused by disclosure. The Court of Justice has acknowledged that it is for institution concerned by the request for access to balance the particular interest to be protected by non-disclosure of the document against the public interest. In this respect, the public interest is of particular relevance where the institution *"is acting in its legislative capacity"*<sup>16</sup> as transparency and openness of the legislative process strengthen the democratic right of European citizens to scrutinise the information which has formed the basis of a legislative act.<sup>17</sup>

The negotiations of international agreements as such *"fall within the domain of the executive"*, which entails that *"public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations"*.<sup>18</sup> Documents 2.c, 3.c and 4 all pertain to the domain of the executive functions of the EU as they concern the negotiation and conclusion of international agreements.

After careful assessment, we have concluded that on balance, preserving the Commission's decision-making in the context of the TTIP negotiations and the commercial interests of the stakeholders involved prevail over transparency in this specific case. In particular, disclosure at this stage of documents 2.c, 3.c and parts of document 4 would undermine the possibility of achieving the best possible outcome in the public interest. Such public interest would instead be better served by the possibility for the Commission to complete the decision-making processes in question without external pressure.

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## STEP 8: DRAFT A REPLY TO THE APPLICANT

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In sum, the reply needs to contain the following **essential elements**:

- ⇒ A **list of documents** which is clear, relevant and exhaustive (including titles, dates, authors, addressees, ARES/document management references);
- ⇒ Correct and exhaustive **choice of the exceptions** and a clear reference to them;
- ⇒ **Detailed and solid reasoning** for withholding documents (or parts of documents) on the basis of the exceptions;
- ⇒ (If required) input from third party/MS consultations;
- ⇒ In case the relative exceptions are used, explanation of why there is no **overriding public interest** in the disclosure;
- ⇒ Assessment of **whether partial access is possible**;
- ⇒ Reference to the **means of review** (confirmatory request).
- ⇒ In case documents are disclosed remember to include the proper "**dissemination clause**" from the [positive letter template](#).
- ⇒ If the deadline for replying to the applicant (15+15 working days) has been exceeded, it is good practice to include in the reply an **apology** and, if possible, **an explanation for the delay**.

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## STEP 9: MAKE SURE THE RIGHT PERSON SIGNS THE LETTER

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For **partially negative and negative replies**, make sure that they are signed by **Director-General**.

If the reply is **positive** or when the only parts **redacted concern personal data**, it may be signed at **Head of Unit** level.

If **no document exists** that corresponds to the request, a letter informing the applicant must be signed by the **Director General**.

## STEP 10: SIGNATAIRE

The lead unit will **save the finalized reply letter and the redacted documents in ARES and prepare the e-signatory** for the paper **signataire**:

- ⇒ the **original request** goes on the left side first page, together with email consultations of other units or third parties;
- ⇒ the **letter** is printed one sided and placed in the signataire;
- ⇒ the **list of documents** is the first annex;
- ⇒ the documents follow so that the **original is placed on the left side and the redacted version on the right side** of the page (remember to number each document according to the list of documents) – if a document is fully released it goes only on the right side, and if it is fully withheld it goes only on the left side;
- ⇒ the file is **circulated**:

Positive reply + Partial reply with personal data redactions only	Partial reply	Negative reply
<b>Lead unit</b> <b>Associated unit(s)</b> <b>(A3 - ATD team)</b> <b>Lead unit HoU</b>	<b>Lead unit</b> <b>(Director)</b> <b>Associated unit(s)</b> <b>(Director)</b> <b>A3 - ATD team</b> <b>A3 – HoU</b> <b>Dir A Director</b> <b>Assistant to DG</b> <b>DG</b>	<b>Lead unit</b> <b>(Director)</b> <b>Associated unit(s)</b> <b>(Director)</b> <b>A3 - ATD team</b> <b>A3 – HoU</b> <b>Dir A Director</b> <b>Assistant to DG</b> <b>DG</b>

- ⇒ Once the reply is signed it is sent out by the lead unit by email/ARES and copied to [TRADE\\_ACCES\\_DOCUMENTS@ec.europa.eu](mailto:TRADE_ACCES_DOCUMENTS@ec.europa.eu)
- ⇒ the reply is filed in ARES in the ATD folder for access to documents: **(09.02.67.010.010)**  
**Access to documents 2016.**

In case of **partial or negative reply** the lead unit would have to bring the signed letter to A3 Secretariat for sending out **by registered mail** (this is needed for proof of calculation of the 15 days that the applicant has to make a confirmatory request to the SG if it is not satisfied).

## FACTS AND FIGURES 2015

**In 2015 a total of 302 requests for access to documents were handled in DG Trade.**

This figure includes:

- ⇒ **37** requests received in 2014 and closed in 2015,
- ⇒ **211** requests received and closed in 2015, and
- ⇒ **54** requests received but not closed and moved to 2016.

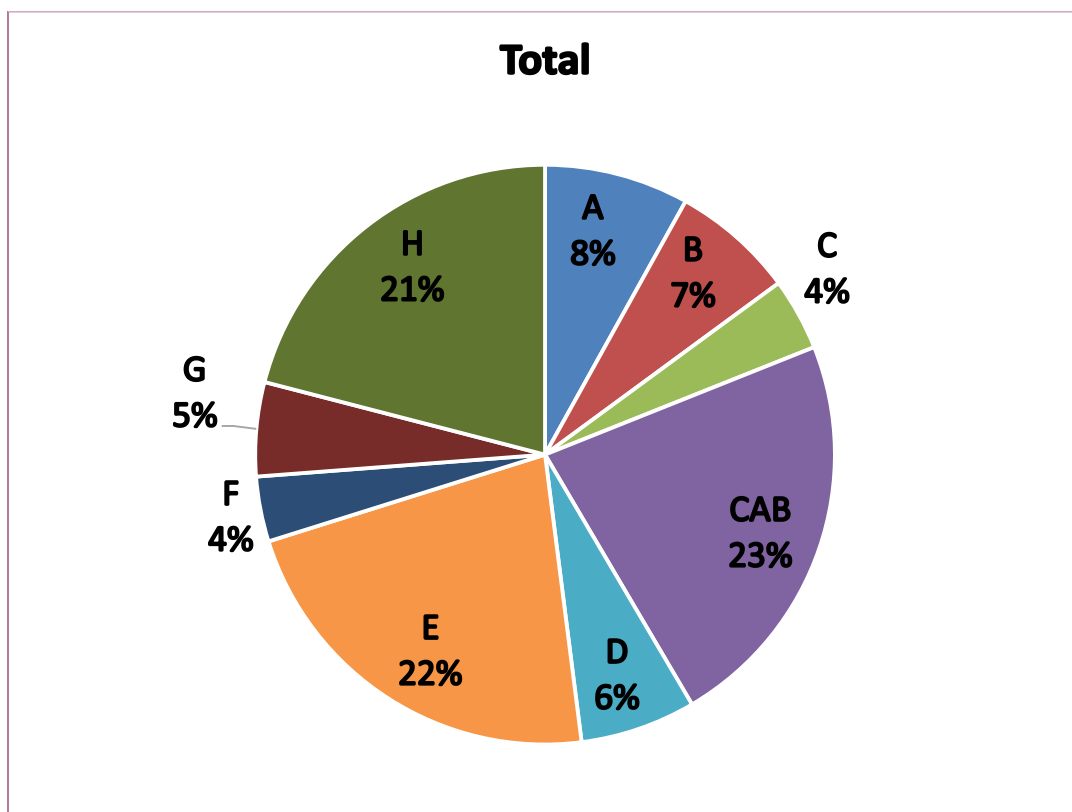
The table below illustrates that in terms of the number of requests, and the number of documents assessed, the year 2014 was a peak year in the trend of the past three years.

	<b>2015</b>	<b>2014</b>	<b>2013</b>
Requests received	265	320	286
Requests closed	248	285	258
Number of documents	1541	2066	1145

### SHARES OF REQUESTS BY DIRECTORATE IN DG TRADE

The chart below on the shares of the requests by directorate shows three main areas, each with a bit over fifth of the total number of requests: the Cabinet (23%), directorate E (22%), directorate H (21%). The share of the requests received for the Cabinet documents (mainly meeting reports for meetings listed on-line since December 2014) was not specified previously so it cannot be compared. As for directorate E the share has increased by 4% and for directorate H the increase is 2% compared to 2014.





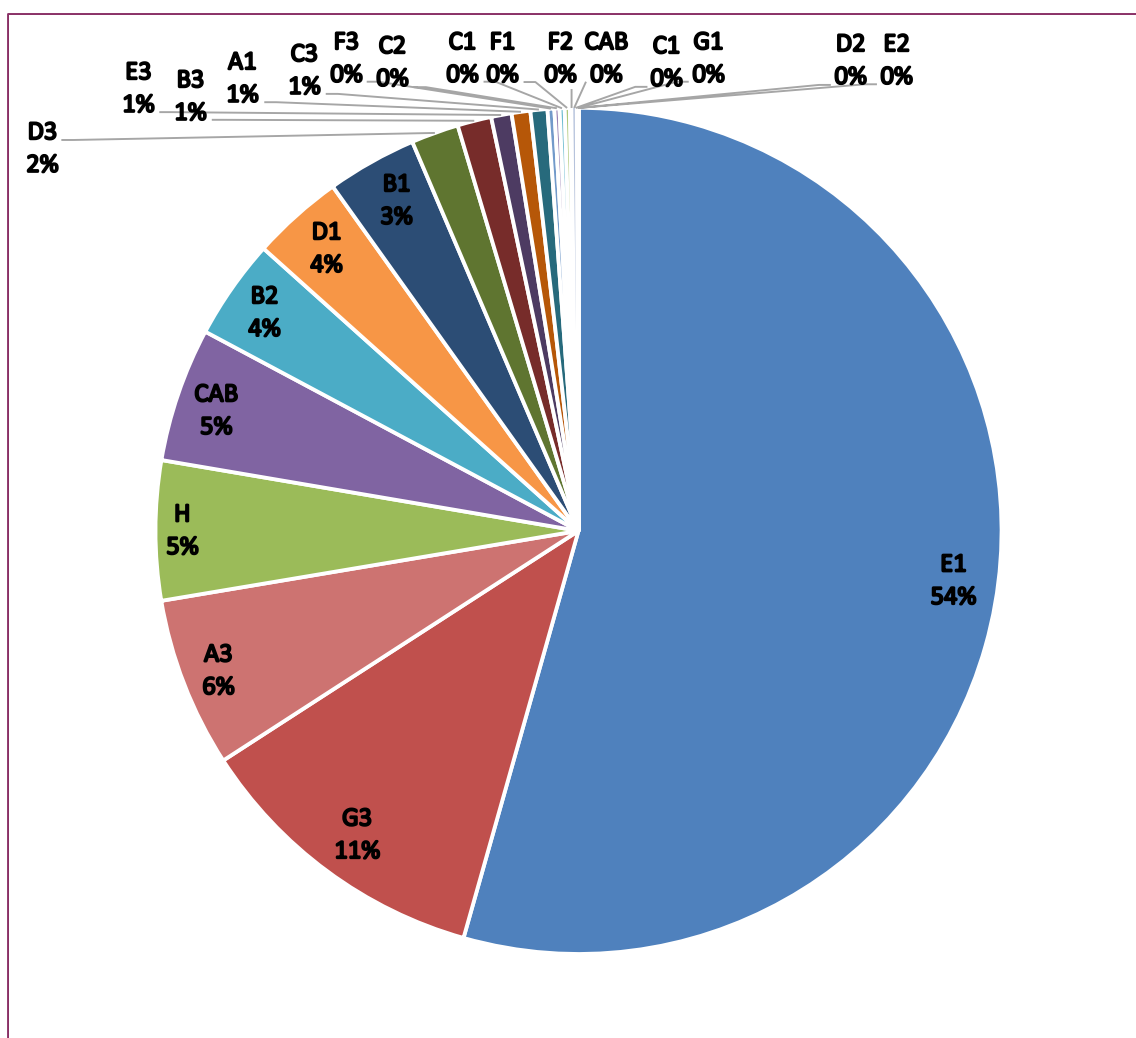
The **nature of the requests** for each of the three biggest areas was however very different. Most directorate H (TDI) and CAB requests resulted in one or two documents being identified, assessed and disclosed. Therefore the number of requests was high but the number of documents involved was not as impressive (about 80 in total for H and CAB each in 2015). The case of directorate E is the opposite.

## SHARES OF DOCUMENTS IN ATD REPLIES BY UNIT

The below chart shows that 54% (838) of all documents (1541) were treated by unit E1. A large number of these documents was however identified and assessed in other units, then reviewed for coherence in E1. Also to be noted that although only 7% of the requests involved directorate A, 100% of the requests went through A3 for a review.

The most voluminous applications (in terms of documents identified and assessed) were on TTIP (stakeholder meetings and correspondence, communication strategy, energy) and CETA. Some individual larger requests came also for conflict minerals, TiSA and investment issues. As mentioned above, the input in terms of documents and assessment work for the E1 requests comes

largely from other units. For ease of analysis only one lead unit for each request has been introduced. The shares of documents treated by each unit are shown in the chart below.



On the **requester** side the largest number of requests (about 40%) came from the civil society (NGOs, Corporate Europe Observatory leading) followed by lawyers mostly with TDI requests (20%), academia (20%), journalists (10%) and citizens (10%).

In 2015 the Secretariat General received eight confirmatory applications for DG Trade initial replies which is a sharp decrease from 2014 (20 confirmatory requests). One of the confirmatory replies (on DG Trade and tobacco company meetings) resulted in a public outcry, linked to the blacking out of the text in question contrary to present practice, lead by CEO in social media and newspapers in August 2015.

DG Trade was involved in one Ombudsman investigation filed in February by Friends of the Earth on TTIP negotiation documents. The decision of no maladministration was delivered in November 2015. Two older Ombudsman cases were closed and one is still ongoing. One court case (on TDI documents) was withdrawn by the applicant after the hearing in July 2015 and no new court cases were filed on DG Trade access to documents files. One case by PAN Europe on endocrine disruptor documents is still pending before the court.

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## COMPARISON OF DOCUMENTS SCREENED AND RELEASED IN 2015 COMPARED TO 2014

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- ⇒ **38%** of documents fully released in 2015, compared to **29%** in 2014
- ⇒ **39%** of documents partially released, compared to **49%** in 2014
- ⇒ **23%** of documents refused compared to **22%** in 2014

In the above analysis a link to a public document is considered a fully released document. The publication of many TTIP documents following the transparency initiative of November 2014 could have contributed to the increase of fully released documents. Many positive TDI replies consist of a link also.

In the share of partial releases we have a growing number of documents that are substantially fully disclosed but only personal data under privacy protection rules is taken out. For example, one third of the TTIP related documents (1542 in total) released in 2013-2015 were with redaction of personal data (mostly names) only.



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# **REGULATION (EC) NO 1049/2001**

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**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**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 255(2) thereof,

Having regard to the proposal from the Commission <sup>(1)</sup>,

Acting in accordance with the procedure referred to in Article 251 of the Treaty <sup>(2)</sup>,

Whereas:

- (1) The second subparagraph of Article 1 of the Treaty on European Union enshrines the concept of openness, stating that the Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.
- (2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.
- (3) The conclusions of the European Council meetings held at Birmingham, Edinburgh and Copenhagen stressed the need to introduce greater transparency into the work of the Union institutions. This Regulation consolidates the initiatives that the institutions have already taken with a view to improving the transparency of the decision-making process.
- (4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty.
- (5) Since the question of access to documents is not covered by provisions of the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, the European Parliament, the Council and the Commission should, in accordance with Declaration No 41 attached to the Final Act of the Treaty of Amsterdam, draw guidance from

this Regulation as regards documents concerning the activities covered by those two Treaties.

- (6) Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent.
- (7) In accordance with Articles 28(1) and 41(1) of the EU Treaty, the right of access also applies to documents relating to the common foreign and security policy and to police and judicial cooperation in criminal matters. Each institution should respect its security rules.
- (8) In order to ensure the full application of this Regulation to all activities of the Union, all agencies established by the institutions should apply the principles laid down in this Regulation.
- (9) On account of their highly sensitive content, certain documents should be given special treatment. Arrangements for informing the European Parliament of the content of such documents should be made through interinstitutional agreement.
- (10) In order to bring about greater openness in the work of the institutions, access to documents should be granted by the European Parliament, the Council and the Commission not only to documents drawn up by the institutions, but also to documents received by them. In this context, it is recalled that Declaration No 35 attached to the Final Act of the Treaty of Amsterdam provides that a Member State may request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement.
- (11) In principle, all documents of the institutions should be accessible to the public. However, certain public and private interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks. In assessing the exceptions, the institutions should take account of the principles in Community legislation concerning the protection of personal data, in all areas of Union activities.
- (12) All rules concerning access to documents of the institutions should be in conformity with this Regulation.

<sup>(1)</sup> OJ C 177 E, 27.6.2000, p. 70.

<sup>(2)</sup> Opinion of the European Parliament of 3 May 2001 (not yet published in the Official Journal) and Council Decision of 28 May 2001.

- (13) In order to ensure that the right of access is fully respected, a two-stage administrative procedure should apply, with the additional possibility of court proceedings or complaints to the Ombudsman.
- (14) Each institution should take the measures necessary to inform the public of the new provisions in force and to train its staff to assist citizens exercising their rights under this Regulation. In order to make it easier for citizens to exercise their rights, each institution should provide access to a register of documents.
- (15) Even though it is neither the object nor the effect of this Regulation to amend national legislation on access to documents, it is nevertheless clear that, by virtue of the principle of loyal cooperation which governs relations between the institutions and the Member States, Member States should take care not to hamper the proper application of this Regulation and should respect the security rules of the institutions.
- (16) This Regulation is without prejudice to existing rights of access to documents for Member States, judicial authorities or investigative bodies.
- (17) In accordance with Article 255(3) of the EC Treaty, each institution lays down specific provisions regarding access to its documents in its rules of procedure. Council Decision 93/731/EC of 20 December 1993 on public access to Council documents <sup>(1)</sup>, Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents <sup>(2)</sup>, European Parliament Decision 97/632/EC, ECSC, Euratom of 10 July 1997 on public access to European Parliament documents <sup>(3)</sup>, and the rules on confidentiality of Schengen documents should therefore, if necessary, be modified or be repealed,

HAVE ADOPTED THIS REGULATION:

#### Article 1

##### Purpose

The purpose of this Regulation is:

- (a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as 'the institutions') documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents,

- (b) to establish rules ensuring the easiest possible exercise of this right, and
- (c) to promote good administrative practice on access to documents.

#### Article 2

##### Beneficiaries and scope

- 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, subject to the principles, conditions and limits defined in this Regulation.
- The institutions may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State.
- This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.
- Without prejudice to Articles 4 and 9, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register. In particular, documents drawn up or received in the course of a legislative procedure shall be made directly accessible in accordance with Article 12.
- Sensitive documents as defined in Article 9(1) shall be subject to special treatment in accordance with that Article.
- This Regulation shall be without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law or acts of the institutions implementing them.

#### Article 3

##### Definitions

For the purpose of this Regulation:

- (a) 'document' shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility;
- (b) 'third party' shall mean any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries.

<sup>(1)</sup> OJ L 340, 31.12.1993, p. 43. Decision as last amended by Decision 2000/527/EC (OJ L 212, 23.8.2000, p. 9).

<sup>(2)</sup> OJ L 46, 18.2.1994, p. 58. Decision as amended by Decision 96/567/EC, ECSC, Euratom (OJ L 247, 28.9.1996, p. 45).

<sup>(3)</sup> OJ L 263, 25.9.1997, p. 27.



*Article 4***Exceptions**

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

- (a) the public interest as regards:
  - public security,
  - defence and military matters,
  - international relations,
  - the financial, monetary or economic policy of the Community or a Member State;
- (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. 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.

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents,

the exceptions may, if necessary, continue to apply after this period.

*Article 5***Documents in the Member States**

Where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation.

The Member State may instead refer the request to the institution.

*Article 6***Applications**

1. Applications for access to a document shall be made in any written form, including electronic form, in one of the languages referred to in Article 314 of the EC Treaty and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application.

2. If an application is not sufficiently precise, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.

3. In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.

4. The institutions shall provide information and assistance to citizens on how and where applications for access to documents can be made.

*Article 7***Processing of initial applications**

1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.

2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.

3. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

4. Failure by the institution to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application.

#### Article 8

##### Processing of confirmatory applications

1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively.

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

3. Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.

#### Article 9

##### Treatment of sensitive documents

1. Sensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as 'TRÈS SECRET/TOP SECRET', 'SECRET' or 'CONFIDENTIEL' in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters.

2. Applications for access to sensitive documents under the procedures laid down in Articles 7 and 8 shall be handled only by those persons who have a right to acquaint themselves with those documents. These persons shall also, without prejudice to Article 11(2), assess which references to sensitive documents could be made in the public register.

3. Sensitive documents shall be recorded in the register or released only with the consent of the originator.

4. An institution which decides to refuse access to a sensitive document shall give the reasons for its decision in a manner which does not harm the interests protected in Article 4.

5. Member States shall take appropriate measures to ensure that when handling applications for sensitive documents the principles in this Article and Article 4 are respected.

6. The rules of the institutions concerning sensitive documents shall be made public.

7. The Commission and the Council shall inform the European Parliament regarding sensitive documents in accordance with arrangements agreed between the institutions.

#### Article 10

##### Access following an application

1. The applicant shall have access to documents either by consulting them on the spot or by receiving a copy, including, where available, an electronic copy, according to the applicant's preference. The cost of producing and sending copies may be charged to the applicant. This charge shall not exceed the real cost of producing and sending the copies. Consultation on the spot, copies of less than 20 A4 pages and direct access in electronic form or through the register shall be free of charge.

2. If a document has already been released by the institution concerned and is easily accessible to the applicant, the institution may fulfil its obligation of granting access to documents by informing the applicant how to obtain the requested document.

3. Documents shall be supplied in an existing version and format (including electronically or in an alternative format such as Braille, large print or tape) with full regard to the applicant's preference.

#### Article 11

##### Registers

1. To make citizens' rights under this Regulation effective, each institution shall provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without delay.

2. For each document the register shall contain a reference number (including, where applicable, the interinstitutional reference), the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. References shall be made in a manner which does not undermine protection of the interests in Article 4.

3. The institutions shall immediately take the measures necessary to establish a register which shall be operational by 3 June 2002.

*Article 12***Direct access in electronic form or through a register**

1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.
2. In particular, legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States, should, subject to Articles 4 and 9, be made directly accessible.
3. Where possible, other documents, notably documents relating to the development of policy or strategy, should be made directly accessible.
4. Where direct access is not given through the register, the register shall as far as possible indicate where the document is located.

*Article 13***Publication in the Official Journal**

1. In addition to the acts referred to in Article 254(1) and (2) of the EC Treaty and the first paragraph of Article 163 of the Euratom Treaty, the following documents shall, subject to Articles 4 and 9 of this Regulation, be published in the Official Journal:
  - (a) Commission proposals;
  - (b) common positions adopted by the Council in accordance with the procedures referred to in Articles 251 and 252 of the EC Treaty and the reasons underlying those common positions, as well as the European Parliament's positions in these procedures;
  - (c) framework decisions and decisions referred to in Article 34(2) of the EU Treaty;
  - (d) conventions established by the Council in accordance with Article 34(2) of the EU Treaty;
  - (e) conventions signed between Member States on the basis of Article 293 of the EC Treaty;
  - (f) international agreements concluded by the Community or in accordance with Article 24 of the EU Treaty.
2. As far as possible, the following documents shall be published in the Official Journal:
  - (a) initiatives presented to the Council by a Member State pursuant to Article 67(1) of the EC Treaty or pursuant to Article 34(2) of the EU Treaty;
  - (b) common positions referred to in Article 34(2) of the EU Treaty;

- (c) directives other than those referred to in Article 254(1) and (2) of the EC Treaty, decisions other than those referred to in Article 254(1) of the EC Treaty, recommendations and opinions.

3. Each institution may in its rules of procedure establish which further documents shall be published in the Official Journal.

*Article 14***Information**

1. Each institution shall take the requisite measures to inform the public of the rights they enjoy under this Regulation.
2. The Member States shall cooperate with the institutions in providing information to the citizens.

*Article 15***Administrative practice in the institutions**

1. The institutions shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by this Regulation.
2. The institutions shall establish an interinstitutional committee to examine best practice, address possible conflicts and discuss future developments on public access to documents.

*Article 16***Reproduction of documents**

This Regulation shall be without prejudice to any existing rules on copyright which may limit a third party's right to reproduce or exploit released documents.

*Article 17***Reports**

1. Each institution shall publish annually a report for the preceding year including the number of cases in which the institution refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register.
2. At the latest by 31 January 2004, the Commission shall publish a report on the implementation of the principles of this Regulation and shall make recommendations, including, if appropriate, proposals for the revision of this Regulation and an action programme of measures to be taken by the institutions.

*Article 18***Application measures**

1. Each institution shall adapt its rules of procedure to the provisions of this Regulation. The adaptations shall take effect from 3 December 2001.

2. Within six months of the entry into force of this Regulation, the Commission shall examine the conformity of Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community <sup>(1)</sup> with this Regulation in order to

ensure the preservation and archiving of documents to the fullest extent possible.

3. Within six months of the entry into force of this Regulation, the Commission shall examine the conformity of the existing rules on access to documents with this Regulation.

*Article 19***Entry into force**

This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Communities*.

It shall be applicable from 3 December 2001.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 30 May 2001.

*For the European Parliament*

*The President*

N. FONTAINE

*For the Council*

*The President*

B. LEJON

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<sup>(1)</sup> OJ L 43, 15.2.1983, p. 1.

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# COMMISSION DECISION 2001/937

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**COMMISSION DECISION**  
**of 5 December 2001**  
**amending its rules of procedure**  
*(notified under document number C(2001) 3714)*  
*(2001/937/EC, ECSC, Euratom)*

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 218(2) thereof,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 16 thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 131 thereof,

Having regard to the Treaty on European Union, and in particular Article 28(1) and Article 41(1) thereof,

HAS DECIDED AS FOLLOWS:

*Article 1*

The detailed rules for the application of 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 <sup>(1)</sup>, which are set out in the Annex to this Decision, are annexed to the Commission's Rules of Procedure.

*Article 2*

Commission Decision 94/90/ECSC, EC, Euratom <sup>(2)</sup> is repealed.

*Article 3*

The Decision shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Done at Brussels, 5 December 2001.

*For the Commission*  
*The President*  
Romano PRODI

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<sup>(1)</sup> OJ L 145, 31.5.2001, p. 43.

<sup>(2)</sup> OJ L 46, 18.2.1994, p. 58.

## ANNEX

**Detailed rules for the application of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents**

Whereas:

- (1) In accordance with Article 255(2) of the EC Treaty, the European Parliament and the Council adopted Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents. <sup>(1)</sup>
- (2) In accordance with Article 255(3) of the Treaty, Article 18 of the Regulation, which lays down general principles and limits for the exercise of the right of access to documents, provides that each institution is to adapt its Rules of Procedure to the provisions of the Regulation,

*Article 1***Beneficiaries**

Citizens of the Union and natural or legal persons residing or having their registered office in a Member State shall exercise their right of access to Commission documents under Article 255(1) of the Treaty and Article 2(1) of Regulation (EC) No 1049/2001 in accordance with these detailed rules. This right of access concerns documents held by the Commission, that is to say, documents drawn up or received by it and in its possession.

Pursuant to Article 2(2) of Regulation (EC) No 1049/2001, citizens of third countries not residing in a Member State and legal persons not having their registered in one of the Member States shall enjoy the right of access to Commission documents on the same terms as the beneficiaries referred to in Article 255(1) of the Treaty.

However, pursuant to Article 195(1) of the Treaty, they shall not have the option of laying a complaint before the European Ombudsman. But if the Commission wholly or partly refuses them access to a document after a confirmatory application, they may bring an action before the Court of First Instance of the European Communities in accordance with the fourth paragraph of Article 230 of the Treaty.

*Article 2***Access applications**

All applications for access to a document shall be sent by mail, fax or e-mail to the Secretariat-General of the Commission or to the relevant Directorate-General or department. The addresses to which applications are to be sent shall be published in the practical guide referred to in Article 8 of these Rules.

The Commission shall answer initial and confirmatory access applications within fifteen working days from the date of registration of the application. In the case of complex or bulky applications, the deadline may be extended by fifteen working days. Reasons must be given for any extension of the deadline and it must be notified to the applicant beforehand.

If an application is imprecise, as referred to in Article 6(2) of Regulation (EC) No 1049/2001, the Commission shall invite the applicant to provide additional information making it possible to identify the documents requested; the deadline for reply shall run only from the time when the Commission has this information.

Any decision which is even partly negative shall state the reason for the refusal based on one of the exceptions listed in Article 4 of Regulation (EC) No 1049/2001 and shall inform the applicant of the remedies available to him.

*Article 3***Treatment of initial applications**

Without prejudice to Article 9 of these Rules, as soon as the application is registered, an acknowledgement of receipt shall be sent to the applicant, unless the answer can be sent by return post.

The acknowledgement of receipt and the answer shall be sent in writing, where appropriate, by electronic means.

The applicant shall be informed of the response to his application either by the Director-General or the head of department concerned, or by a Director designated for this purpose in the Secretariat-General or by a Director designated in the OLAF where the application concerns documents concerning OLAF activities referred to in Article 2(1) and (2) of Commission Decision 1999/352/EC, ECSC, Euratom <sup>(2)</sup> establishing OLAF, or by a member of staff they have designated for this purpose.

<sup>(1)</sup> OJ L 145, 31.5.2001, p. 43.

<sup>(2)</sup> OJ L 136, 31.5.1999, p. 20.



Any answer which is even partly negative shall inform the applicant of his right to submit, within fifteen working days from receipt of the answer, a confirmatory application to the Secretary-General of the Commission or to the Director of OLAF where the confirmatory application concerns documents concerning OLAF activities referred to in Article 2(1) and (2) of Decision 1999/352/EC, ECSC, Euratom.

#### Article 4

##### **Treatment of confirmatory applications**

In accordance with Article 14 of the Commission's Rules of Procedure, the power to take decisions on confirmatory applications is delegated to the Secretary-General. However, where the confirmatory application concerns documents concerning OLAF activities referred to in Article 2(1) and (2) of Decision 1999/352/EC, ECSC, Euratom, the decision-making power is delegated to the Director of OLAF.

The Directorate-General or department shall assist the Secretariat-General in the preparation of the decision.

The decision shall be taken by the Secretary-General or by the Director of OLAF after agreement of the Legal Service.

The decision shall be notified to the applicant in writing, where appropriate by electronic means, and inform him of his right to bring an action before the Court of First Instance or to lodge a complaint with the European Ombudsman.

#### Article 5

##### **Consultations**

1. Where the Commission receives an application for access to a document which it holds but which originates from a third party, the Directorate-General or department holding the document shall check whether one of the exceptions provided for by Article 4 of Regulation (EC) No 1049/2001 applies. If the document requested is classified under the Commission's security rules, Article 6 of these Rules shall apply.

2. If, after that examination, the Directorate-General or department holding the document considers that access to it must be refused under one of the exceptions provided for by Article 4 of Regulation (EC) No 1049/2001, the negative answer shall be sent to the applicant without consultation of the third-party author.

3. The Directorate-General or department holding the document shall grant the application without consulting the third-party author where:

- (a) the document requested has already been disclosed either by its author or under the Regulation or similar provisions;
- (b) the disclosure, or partial disclosure, of its contents would not obviously affect one of the interests referred to in Article 4 of Regulation (EC) No 1049/2001.

4. In all the other cases, the third-party author shall be consulted. In particular, if the application for access concerns a document originating from a Member State, the Directorate-General or department holding the document shall consult the originating authority where:

- (a) the document was forwarded to the Commission before the date from which Regulation (EC) No 1049/2001 applies;
- (b) the Member State has asked the Commission not to disclose the document without its prior agreement, in accordance with Article 4(5) of Regulation (EC) No 1049/2001.

5. The third-party author consulted shall have a deadline for reply which shall be no shorter than five working days but must enable the Commission to abide by its own deadlines for reply. In the absence of an answer within the prescribed period, or if the third party is untraceable or not identifiable, the Commission shall decide in accordance with the rules on exceptions in Article 4 of Regulation (EC) No 1049/2001, taking into account the legitimate interests of the third party on the basis of the information at its disposal.

6. If the Commission intends to give access to a document against the explicit opinion of the author, it shall inform the author of its intention to disclose the document after a ten-working day period and shall draw his attention to the remedies available to him to oppose disclosure.

7. Where a Member State receives an application for access to a document originating from the Commission, it may, for the purposes of consultation, contact the Secretariat-General, which shall be responsible for determining the Directorate-General or department responsible for the document within the Commission. The issuing Directorate-General or department of the document reply to the application after consulting the Secretariat-General.

#### Article 6

##### **Treatment of applications for access to classified documents**

Where an application for access concerns a sensitive document as defined in Article 9(1) of Regulation (EC) No 1049/2001, or another document classified under the Commission's security rules, it shall be handled by officials entitled to acquaint themselves with the document.

Reasons shall be given on the basis of the exceptions listed in Article 4 of Regulation (EC) No 1049/2001 for any decision refusing access to all or part of a classified document. If it proves that access to the requested document cannot be refused on the basis of these exceptions, the official handling the application shall ensure that the document is declassified before sending it to the applicant.

The agreement of the originating authority shall be required if access is to be given to a sensitive document.

#### Article 7

##### **Exercise of the right of access**

Documents shall be sent by mail, fax or, if available, by e-mail, depending on the application. If documents are voluminous or difficult to handle, the applicant may be invited to consult the documents on the spot. This consultation shall be free.

If the document has been published, the answer shall consist of the publication references and/or the place where the document is available and where appropriate of its web address on the EUROPA site.

If the volume of the documents requested exceeds twenty pages, the applicant may be charged a fee of EUR 0,10 per page plus carriage costs. The charges for other media shall be decided case by case but shall not exceed a reasonable amount.

#### Article 8

##### **Measures facilitating access to the documents**

1. The coverage of the register provided for by Article 11 of Regulation (EC) No 1049/2001 shall be extended gradually. It shall be announced on the EUROPA homepage.

The register shall contain the title of the document (in the languages in which it is available), its serial number and other useful references, an indication of its author and the date of its creation or adoption.

A help page (in all official languages) shall inform the public how the document can be obtained. If the document is published, there shall be a link to the full text.

2. The Commission shall draw up a practical guide to inform the public of their rights under Regulation (EC) No 1049/2001. The guide shall be distributed in all official languages on the EUROPA site and in booklet form.

#### Article 9

##### **Documents directly accessible to the public**

1. This Article applies only to documents drawn up or received after the date from which Regulation (EC) No 1049/2001 applies.

2. The following documents shall be automatically provided on request and, as far as possible, made directly accessible by electronic means:

- (a) agendas for Commission meetings;
- (b) ordinary minutes of Commission meetings, after approval;
- (c) documents adopted by the Commission for publication in the *Official Journal of the European Communities*;
- (d) documents originating from third parties which have already been disclosed by their author or with his consent;
- (e) documents already disclosed following a previous application.

3. If it is clear that none of the exceptions provided for in Article 4 of Regulation (EC) No 1049/2001 is applicable to them, the following documents may be made available, as far as possible by electronic means, provided they do not reflect opinions or individual positions:

- (a) after the adoption of a proposal for an act of the Council or of the European Parliament and of the Council, preparatory documents for that proposal that were submitted to the College during the adoption process;
- (b) after the adoption of an act by the Commission under the implementing powers conferred on it, preparatory documents for that act submitted to the College during the adoption process;
- (c) after the adoption by the Commission of an act under its own powers, or of a communication, report or working document, preparatory documents for that document submitted to the College during the adoption process.

*Article 10***Internal organisation**

The Directors-General and heads of department shall have the power to decide on the action to be taken on initial applications. To this end, they shall designate an official to consider access applications and coordinate the response of his Directorate-General or department.

Answers to initial applications shall be sent to the Secretariat-General for information.

Confirmatory applications shall be sent for information to the Directorate-General or department which answered the initial application.

The Secretariat-General shall ensure coordination and uniform implementation of these rules by Commission Directorates-General and departments. To this end, it shall provide all necessary advice and guidelines.

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# **REGULATION (EC) NO 45/2001**

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## I

(Acts whose publication is obligatory)

**REGULATION (EC) No 45/2001 OF THE EUROPEAN PARLIAMENT AND 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**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE  
EUROPEAN UNION,

Having regard to the Treaty establishing the European  
Community, and in particular Article 286 thereof,

Having regard to the proposal from the Commission <sup>(1)</sup>,

Having regard to the opinion of the Economic and Social  
Committee <sup>(2)</sup>,

Acting in accordance with the procedure laid down in Article  
251 of the Treaty <sup>(3)</sup>,

Whereas:

- (5) A Regulation is necessary to provide the individual with legally enforceable rights, to specify the data processing obligations of the controllers within the Community institutions and bodies, and to create an independent supervisory authority responsible for monitoring the processing of personal data by the Community institutions and bodies.
- (6) The Working Party on the Protection of Individuals with regard to the Processing of Personal Data set up under Article 29 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data <sup>(4)</sup> has been consulted.
- (7) The persons to be protected are those whose personal data are processed by Community institutions or bodies in any context whatsoever, for example because they are employed by those institutions or bodies.
- (8) The principles of data protection should apply to any information concerning an identified or identifiable person. To determine whether a person is identifiable, account should be taken of all the means likely to be reasonably used either by the controller or by any other person to identify the said person. The principles of protection should not apply to data rendered anonymous in such a way that the data subject is no longer identifiable.
- (9) Directive 95/46/EC requires Member States to protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data, in order to ensure the free flow of personal data in the Community.
- (1) Article 286 of the Treaty requires the application to the Community institutions and bodies of the Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data.
- (2) A fully-fledged system of protection of personal data not only requires the establishment of rights for data subjects and obligations for those who process personal data, but also appropriate sanctions for offenders and monitoring by an independent supervisory body.
- (3) Article 286(2) of the Treaty requires the establishment of an independent supervisory body responsible for monitoring the application of such Community acts to Community institutions and bodies.
- (4) Article 286(2) of the Treaty requires the adoption of any other relevant provisions as appropriate.

<sup>(1)</sup> OJ C 376E, 28.12.1999, p. 24.

<sup>(2)</sup> OJ C 51, 23.2.2000, p. 48.

<sup>(3)</sup> Opinion of the European Parliament of 14 November 2000 and Council Decision of 30 November 2000.

<sup>(4)</sup> OJ L 281, 23.11.1995, p. 31.

- (10) Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector<sup>(1)</sup> specifies and adds to Directive 95/46/EC with respect to the processing of personal data in the telecommunications sector.
- (11) Various other Community measures, including measures on mutual assistance between national authorities and the Commission, are also designed to specify and add to Directive 95/46/EC in the sectors to which they relate.
- (12) Consistent and homogeneous application of the rules for the protection of individuals' fundamental rights and freedoms with regard to the processing of personal data should be ensured throughout the Community.
- (13) The aim is to ensure both effective compliance with the rules governing the protection of individuals' fundamental rights and freedoms and the free flow of personal data between Member States and the Community institutions and bodies or between the Community institutions and bodies for purposes connected with the exercise of their respective competences.
- (14) To this end measures should be adopted which are binding on the Community institutions and bodies. These measures should apply to all processing of personal data by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law.
- (15) Where such processing is carried out by Community institutions or bodies in the exercise of activities falling outside the scope of this Regulation, in particular those laid down in Titles V and VI of the Treaty on European Union, the protection of individuals' fundamental rights and freedoms shall be ensured with due regard to Article 6 of the Treaty on European Union. Access to documents, including conditions for access to documents containing personal data, is governed by the rules adopted on the basis of Article 255 of the EC Treaty the scope of which includes Titles V and VI of the Treaty on European Union.
- (16) The measures should not apply to bodies established outside the Community framework, nor should the European Data Protection Supervisor be competent to monitor the processing of personal data by such bodies.
- (17) The effectiveness of the protection of individuals with regard to the processing of personal data in the Union presupposes the consistency of the relevant rules and procedures applicable to activities pertaining to different legal contexts. The development of fundamental principles on the protection of personal data in the fields of
- judicial cooperation in criminal affairs and police and customs cooperation, and the setting-up of a secretariat for the joint supervisory authorities established by the Europol Convention, the Convention on the Use of Information Technology for Customs Purposes and the Schengen Convention represent a first step in this regard.
- (18) This Regulation should not affect the rights and obligations of Member States under Directives 95/46/EC and 97/66/EC. It is not intended to change existing procedures and practices lawfully implemented by the Member States in the field of national security, prevention of disorder or prevention, detection, investigation and prosecution of criminal offences in compliance with the Protocol on Privileges and Immunities of the European Communities and with international law.
- (19) The Community institutions and bodies should inform the competent authorities in the Member States when they consider that communications on their telecommunications networks should be intercepted, in keeping with the national provisions applicable.
- (20) The provisions applicable to the Community institutions and bodies should correspond to those provisions laid down in connection with the harmonisation of national laws or the implementation of other Community policies, notably in the mutual assistance sphere. It may be necessary, however, to specify and add to those provisions when it comes to ensuring protection in the case of the processing of personal data by the Community institutions and bodies.
- (21) This holds true for the rights of the individuals whose data are being processed, for the obligations of the Community institutions and bodies doing the processing, and for the powers to be vested in the independent supervisory authority responsible for ensuring that this Regulation is properly applied.
- (22) The rights accorded the data subject and the exercise thereof should not affect the obligations placed on the controller.
- (23) The independent supervisory authority should exercise its supervisory functions in accordance with the Treaty and in compliance with human rights and fundamental freedoms. It should conduct its enquiries in compliance with the Protocol on Privileges and Immunities and with the Staff Regulations of Officials of the European Communities and the conditions of employment applicable to Other Servants of the Communities.
- (24) The necessary technical measures should be adopted to allow access to the registers of processing operations carried out by Data Protection Officers through the independent supervisory authority.

<sup>(1)</sup> OJ L 24, 30.1.1998, p. 1.



- (25) The decisions of the independent supervisory authority regarding exemptions, guarantees, authorisations and conditions relating to data processing operations, as defined in this Regulation, should be published in the activities report. Independently of the publication of an annual activities report, the independent supervisory authority may publish reports on specific subjects.
- (26) Certain processing operations likely to present specific risks with respect to the rights and freedoms of data subjects are subject to prior checking by the independent supervisory authority. The opinion given in the context of such prior checking, including the opinion resulting from failure to reply within the set period, should be without prejudice to the subsequent exercise by the independent supervisory authority of its powers with regard to the processing operation in question.
- (27) Processing of personal data for the performance of tasks carried out in the public interest by the Community institutions and bodies includes the processing of personal data necessary for the management and functioning of those institutions and bodies.
- (28) In certain cases the processing of data should be authorised by Community provisions or by acts transposing Community provisions. Nevertheless, in the transitional period during which such provisions do not exist, pending their adoption, the European Data Protection Supervisor may authorise processing of such data provided that adequate safeguards are adopted. In so doing, he should take account in particular of the provisions adopted by the Member States to deal with similar cases.
- (29) These cases concern the processing of data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade-union membership and the processing of data concerning health or sex life which are necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law or for reasons of substantial public interest. They also concern the processing of data relating to offences, criminal convictions or security measures and authorisation to apply a decision to the data subject which produces legal effects concerning him or her or significantly affects him or her and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him or her.
- (30) It may be necessary to monitor the computer networks operated under the control of the Community institutions and bodies for the purposes of prevention of unauthorised use. The European Data Protection Supervisor should determine whether and under what conditions that is possible.
- (31) Liability arising from any breach of this Regulation is governed by the second paragraph of Article 288 of the Treaty.
- (32) In each Community institution or body one or more Data Protection Officers should ensure that the provisions of this Regulation are applied and should advise controllers on fulfilling their obligations.
- (33) Under Article 21 of Council Regulation (EC) No 322/97 of 17 February 1997 on Community statistics <sup>(1)</sup>, that Regulation is to apply without prejudice to Directive 95/46/EC.
- (34) Under Article 8(8) of Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank <sup>(2)</sup>, that Regulation is to apply without prejudice to Directive 95/46/EC.
- (35) Under Article 1(2) of Council Regulation (Euratom, EEC) No 1588/90 of 11 June 1990 on the transmission of data subject to statistical confidentiality to the Statistical Office of the European Communities <sup>(3)</sup>, that Regulation does not derogate from the special Community or national provisions concerning the safeguarding of confidentiality other than statistical confidentiality.
- (36) This Regulation does not aim to limit Member States' room for manoeuvre in drawing up their national laws on data protection under Article 32 of Directive 95/46/EC, in accordance with Article 249 of the Treaty,
- HAVE ADOPTED THIS REGULATION:

## CHAPTER I

### GENERAL PROVISIONS

#### Article 1

#### Object of the Regulation

1. In accordance with this Regulation, the institutions and bodies set up by, or on the basis of, the Treaties establishing the European Communities, hereinafter referred to as 'Community institutions or

<sup>(1)</sup> OJ L 52, 22.2.1997, p. 1.

<sup>(2)</sup> OJ L 318, 27.11.1998, p. 8.

<sup>(3)</sup> OJ L 151, 15. 6.1990, p. 1. Regulation as amended by Regulation (EC) No 322/97 (OJ L 52, 22.2.1997, p. 1).

bodies', shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data and shall neither restrict nor prohibit the free flow of personal data between themselves or to recipients subject to the national law of the Member States implementing Directive 95/46/EC.

2. The independent supervisory authority established by this Regulation, hereinafter referred to as the European Data Protection Supervisor, shall monitor the application of the provisions of this Regulation to all processing operations carried out by a Community institution or body.

## Article 2

### Definitions

For the purposes of this Regulation:

- (a) 'personal data' shall mean any information relating to an identified or identifiable natural person hereinafter referred to as 'data subject'; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity;
- (b) 'processing of personal data' hereinafter referred to as 'processing' shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;
- (c) 'personal data filing system' hereinafter referred to as 'filing system' shall mean any structured set of personal data which are accessible according to specific criteria, whether centralised, decentralised or dispersed on a functional or geographical basis;
- (d) 'controller' shall mean the Community institution or body, the Directorate-General, the unit or any other organisational entity which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by a specific Community act, the controller or the specific criteria for its nomination may be designated by such Community act;
- (e) 'processor' shall mean a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller;
- (f) 'third party' shall mean a natural or legal person, public authority, agency or body other than the data subject, the controller, the processor and the persons who, under the direct authority of the controller or the processor, are authorised to process the data;
- (g) 'recipient' shall mean a natural or legal person, public authority, agency or any other body to whom data are disclosed, whether a third party or not; however, authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients;
- (h) 'the data subject's consent' shall mean any freely given specific and informed indication of his or her wishes by which the data subject signifies his or her agreement to personal data relating to him or her being processed.

## Article 3

### Scope

1. This Regulation shall apply to the processing of personal data by all Community institutions and bodies insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law.

2. This Regulation shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.

## CHAPTER II

### GENERAL RULES ON THE LAWFULNESS OF THE PROCESSING OF PERSONAL DATA

#### SECTION 1

##### PRINCIPLES RELATING TO DATA QUALITY

###### *Article 4*

###### **Data quality**

1. Personal data must be:
  - (a) processed fairly and lawfully;
  - (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of personal data for historical, statistical or scientific purposes shall not be considered incompatible provided that the controller provides appropriate safeguards, in particular to ensure that the data are not processed for any other purposes or used in support of measures or decisions regarding any particular individual;
  - (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
  - (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;
  - (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. The Community institution or body shall lay down that personal data which are to be stored for longer periods for historical, statistical or scientific use should be kept either in anonymous form only or, if that is not possible, only with the identity of the data subjects encrypted. In any event, the data shall not be used for any purpose other than for historical, statistical or scientific purposes.
2. It shall be for the controller to ensure that paragraph 1 is complied with.

#### SECTION 2

##### CRITERIA FOR MAKING DATA PROCESSING LEGITIMATE

###### *Article 5*

###### **Lawfulness of processing**

Personal data may be processed only if:

- (a) processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or in the legitimate exercise of official authority vested in the Community institution or body or in a third party to whom the data are disclosed, or

- (b) processing is necessary for compliance with a legal obligation to which the controller is subject, or
- (c) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract, or
- (d) the data subject has unambiguously given his or her consent, or
- (e) processing is necessary in order to protect the vital interests of the data subject.

#### *Article 6*

##### **Change of purpose**

Without prejudice to Articles 4, 5 and 10:

1. Personal data shall only be processed for purposes other than those for which they have been collected if the change of purpose is expressly permitted by the internal rules of the Community institution or body.
2. Personal data collected exclusively for ensuring the security or the control of the processing systems or operations shall not be used for any other purpose, with the exception of the prevention, investigation, detection and prosecution of serious criminal offences.

#### *Article 7*

##### **Transfer of personal data within or between Community institutions or bodies**

Without prejudice to Articles 4, 5, 6 and 10:

1. Personal data shall only be transferred within or to other Community institutions or bodies if the data are necessary for the legitimate performance of tasks covered by the competence of the recipient.
2. Where the data are transferred following a request from the recipient, both the controller and the recipient shall bear the responsibility for the legitimacy of this transfer.

The controller shall be required to verify the competence of the recipient and to make a provisional evaluation of the necessity for the transfer of the data. If doubts arise as to this necessity, the controller shall seek further information from the recipient.

The recipient shall ensure that the necessity for the transfer of the data can be subsequently verified.

3. The recipient shall process the personal data only for the purposes for which they were transmitted.

#### *Article 8*

##### **Transfer of personal data to recipients, other than Community institutions and bodies, subject to Directive 95/46/EC**

Without prejudice to Articles 4, 5, 6 and 10, personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC,

- (a) if the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority, or
- (b) 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.

*Article 9***Transfer of personal data to recipients, other than Community institutions and bodies, which are not subject to Directive 95/46/EC**

1. Personal data shall only be transferred to recipients, other than Community institutions and bodies, which are not subject to national law adopted pursuant to Directive 95/46/EC, if an adequate level of protection is ensured in the country of the recipient or within the recipient international organisation and the data are transferred solely to allow tasks covered by the competence of the controller to be carried out.

2. The adequacy of the level of protection afforded by the third country or international organisation in question shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the recipient third country or recipient international organisation, the rules of law, both general and sectoral, in force in the third country or international organisation in question and the professional rules and security measures which are complied with in that third country or international organisation.

3. The Community institutions and bodies shall inform the Commission and the European Data Protection Supervisor of cases where they consider the third country or international organisation in question does not ensure an adequate level of protection within the meaning of paragraph 2.

4. The Commission shall inform the Member States of any cases as referred to in paragraph 3.

5. The Community institutions and bodies shall take the necessary measures to comply with decisions taken by the Commission when it establishes, pursuant to Article 25(4) and (6) of Directive 95/46/EC, that a third country or an international organisation ensures or does not ensure an adequate level of protection.

6. By way of derogation from paragraphs 1 and 2, the Community institution or body may transfer personal data if:

- (a) the data subject has given his or her consent unambiguously to the proposed transfer; or
- (b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken in response to the data subject's request; or
- (c) the transfer is necessary for the conclusion or performance of a contract entered into in the interest of the data subject between the controller and a third party; or
- (d) the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims; or
- (e) the transfer is necessary in order to protect the vital interests of the data subject; or
- (f) the transfer is made from a register which, according to Community law, is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate a legitimate interest, to the extent that the conditions laid down in Community law for consultation are fulfilled in the particular case.

7. Without prejudice to paragraph 6, the European Data Protection Supervisor may authorise a transfer or a set of transfers of personal data to a third country or international organisation which does not ensure an adequate level of protection within the meaning of paragraphs 1 and 2, where the controller adduces adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights; such safeguards may in particular result from appropriate contractual clauses.

8. The Community institutions and bodies shall inform the European Data Protection Supervisor of categories of cases where they have applied paragraphs 6 and 7.

## SECTION 3

**SPECIAL CATEGORIES OF PROCESSING***Article 10***The processing of special categories of data**

1. The processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and of data concerning health or sex life, are prohibited.
2. Paragraph 1 shall not apply where:
  - (a) the data subject has given his or her express consent to the processing of those data, except where the internal rules of the Community institution or body provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject's giving his or her consent, or
  - (b) processing is necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law insofar as it is authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof, or, if necessary, insofar as it is agreed upon by the European Data Protection Supervisor, subject to adequate safeguards, or
  - (c) processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his or her consent, or
  - (d) processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims, or
  - (e) processing is carried out in the course of its legitimate activities with appropriate safeguards by a non-profit-seeking body which constitutes an entity integrated in a Community institution or body, not subject to national data protection law by virtue of Article 4 of Directive 95/46/EC, and with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of this body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects.
3. Paragraph 1 shall not apply where processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, and where those data are processed by a health professional subject to the obligation of professional secrecy or by another person also subject to an equivalent obligation of secrecy.
4. Subject to the provision of appropriate safeguards, and for reasons of substantial public interest, exemptions in addition to those laid down in paragraph 2 may be laid down by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by decision of the European Data Protection Supervisor.
5. Processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by the European Data Protection Supervisor, subject to appropriate specific safeguards.
6. The European Data Protection Supervisor shall determine the conditions under which a personal number or other identifier of general application may be processed by a Community institution or body.

## SECTION 4

**INFORMATION TO BE GIVEN TO THE DATA SUBJECT***Article 11***Information to be supplied where the data have been obtained from the data subject**

1. The controller shall provide a data subject from whom data relating to himself/herself are collected with at least the following information, except where he or she already has it:

- (a) the identity of the controller;
- (b) the purposes of the processing operation for which the data are intended;
- (c) the recipients or categories of recipients of the data;
- (d) whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply;
- (e) the existence of the right of access to, and the right to rectify, the data concerning him or her;
- (f) any further information such as:
  - (i) the legal basis of the processing operation for which the data are intended,
  - (ii) the time-limits for storing the data,
  - (iii) the right to have recourse at any time to the European Data Protection Supervisor,

insofar as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject.

2. By way of derogation from paragraph 1, the provision of information or part of it, except for the information referred to in paragraph 1(a), (b) and (d), may be deferred as long as this is necessary for statistical purposes. The information must be provided as soon as the reason for which the information is withheld ceases to exist.

*Article 12***Information to be supplied where the data have not been obtained from the data subject**

1. Where the data have not been obtained from the data subject, the controller shall at the time of undertaking the recording of personal data or, if a disclosure to a third party is envisaged, no later than the time when the data are first disclosed, provide the data subject with at least the following information, except where he or she already has it:

- (a) the identity of the controller;
- (b) the purposes of the processing operation;
- (c) the categories of data concerned;
- (d) the recipients or categories of recipients;
- (e) the existence of the right of access to, and the right to rectify, the data concerning him or her;
- (f) any further information such as:
  - (i) the legal basis of the processing operation for which the data are intended,
  - (ii) the time-limits for storing the data,
  - (iii) the right to have recourse at any time to the European Data Protection Supervisor,

- (iv) the origin of the data, except where the controller cannot disclose this information for reasons of professional secrecy,

insofar as such further information is necessary, having regard to the specific circumstances in which the data are processed, to guarantee fair processing in respect of the data subject.

2. Paragraph 1 shall not apply where, in particular for processing for statistical purposes or for the purposes of historical or scientific research, the provision of such information proves impossible or would involve a disproportionate effort or if recording or disclosure is expressly laid down by Community law. In these cases the Community institution or body shall provide for appropriate safeguards after consulting the European Data Protection Supervisor.

## SECTION 5

### RIGHTS OF THE DATA SUBJECT

#### *Article 13*

##### **Right of access**

The data subject shall have the right to obtain, without constraint, at any time within three months from the receipt of the request and free of charge from the controller:

- (a) confirmation as to whether or not data related to him or her are being processed;
- (b) information at least as to the purposes of the processing operation, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed;
- (c) communication in an intelligible form of the data undergoing processing and of any available information as to their source;
- (d) knowledge of the logic involved in any automated decision process concerning him or her.

#### *Article 14*

##### **Rectification**

The data subject shall have the right to obtain from the controller the rectification without delay of inaccurate or incomplete personal data.

#### *Article 15*

##### **Blocking**

1. The data subject shall have the right to obtain from the controller the blocking of data where:

- (a) their accuracy is contested by the data subject, for a period enabling the controller to verify the accuracy, including the completeness, of the data, or;
- (b) the controller no longer needs them for the accomplishment of its tasks but they have to be maintained for purposes of proof, or;
- (c) the processing is unlawful and the data subject opposes their erasure and demands their blocking instead.

2. In automated filing systems blocking shall in principle be ensured by technical means. The fact that the personal data are blocked shall be indicated in the system in such a way that it becomes clear that the personal data may not be used.

3. Personal data blocked pursuant to this Article shall, with the exception of their storage, only be processed for purposes of proof, or with the data subject's consent, or for the protection of the rights of a third party.



4. The data subject who requested and obtained the blocking of his or her data shall be informed by the controller before the data are unblocked.

#### *Article 16*

##### **Erasure**

The data subject shall have the right to obtain from the controller the erasure of data if their processing is unlawful, particularly where the provisions of Sections 1, 2 and 3 of Chapter II have been infringed.

#### *Article 17*

##### **Notification to third parties**

The data subject shall have the right to obtain from the controller the notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking pursuant to Articles 13 to 16 unless this proves impossible or involves a disproportionate effort.

#### *Article 18*

##### **The data subject's right to object**

The data subject shall have the right:

- (a) to object at any time, on compelling legitimate grounds relating to his or her particular situation, to the processing of data relating to him or her, except in the cases covered by Article 5(b), (c) and (d). Where there is a justified objection, the processing in question may no longer involve those data;
- (b) to be informed before personal data are disclosed for the first time to third parties or before they are used on their behalf for the purposes of direct marketing, and to be expressly offered the right to object free of charge to such disclosure or use.

#### *Article 19*

##### **Automated individual decisions**

The data subject shall have the right not to be subject to a decision which produces legal effects concerning him or her or significantly affects him or her and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him or her, such as his or her performance at work, reliability or conduct, unless the decision is expressly authorised pursuant to national or Community legislation or, if necessary, by the European Data Protection Supervisor. In either case, measures to safeguard the data subject's legitimate interests, such as arrangements allowing him or her to put his or her point of view, must be taken.

### SECTION 6

#### **EXEMPTIONS AND RESTRICTIONS**

#### *Article 20*

##### **Exemptions and restrictions**

1. The Community institutions and bodies may restrict the application of Article 4(1), Article 11, Article 12(1), Articles 13 to 17 and Article 37(1) where such restriction constitutes a necessary measure to safeguard:

- (a) the prevention, investigation, detection and prosecution of criminal offences;
- (b) an important economic or financial interest of a Member State or of the European Communities, including monetary, budgetary and taxation matters;
- (c) the protection of the data subject or of the rights and freedoms of others;

- (d) the national security, public security or defence of the Member States;
- (e) a monitoring, inspection or regulatory task connected, even occasionally, with the exercise of official authority in the cases referred to in (a) and (b).

2. Articles 13 to 16 shall not apply when data are processed solely for purposes of scientific research or are kept in personal form for a period which does not exceed the period necessary for the sole purpose of compiling statistics, provided that there is clearly no risk of breaching the privacy of the data subject and that the controller provides adequate legal safeguards, in particular to ensure that the data are not used for taking measures or decisions regarding particular individuals.

3. If a restriction provided for by paragraph 1 is imposed, the data subject shall be informed, in accordance with Community law, of the principal reasons on which the application of the restriction is based and of his or her right to have recourse to the European Data Protection Supervisor.

4. If a restriction provided for by paragraph 1 is relied upon to deny access to the data subject, the European Data Protection Supervisor shall, when investigating the complaint, only inform him or her of whether the data have been processed correctly and, if not, whether any necessary corrections have been made.

5. Provision of the information referred to under paragraphs 3 and 4 may be deferred for as long as such information would deprive the restriction imposed by paragraph 1 of its effect.

#### SECTION 7

### CONFIDENTIALITY AND SECURITY OF PROCESSING

#### *Article 21*

#### **Confidentiality of processing**

A person employed with a Community institution or body and any Community institution or body itself acting as processor, with access to personal data, shall not process them except on instructions from the controller, unless required to do so by national or Community law.

#### *Article 22*

#### **Security of processing**

1. Having regard to the state of the art and the cost of their implementation, the controller shall implement appropriate technical and organisational measures to ensure a level of security appropriate to the risks represented by the processing and the nature of the personal data to be protected.

Such measures shall be taken in particular to prevent any unauthorised disclosure or access, accidental or unlawful destruction or accidental loss, or alteration, and to prevent all other unlawful forms of processing.

2. Where personal data are processed by automated means, measures shall be taken as appropriate in view of the risks in particular with the aim of:

- (a) preventing any unauthorised person from gaining access to computer systems processing personal data;
- (b) preventing any unauthorised reading, copying, alteration or removal of storage media;
- (c) preventing any unauthorised memory inputs as well as any unauthorised disclosure, alteration or erasure of stored personal data;

- (d) preventing unauthorised persons from using data-processing systems by means of data transmission facilities;
- (e) ensuring that authorised users of a data-processing system can access no personal data other than those to which their access right refers;
- (f) recording which personal data have been communicated, at what times and to whom;
- (g) ensuring that it will subsequently be possible to check which personal data have been processed, at what times and by whom;
- (h) ensuring that personal data being processed on behalf of third parties can be processed only in the manner prescribed by the contracting institution or body;
- (i) ensuring that, during communication of personal data and during transport of storage media, the data cannot be read, copied or erased without authorisation;
- (j) designing the organisational structure within an institution or body in such a way that it will meet the special requirements of data protection.

#### *Article 23*

### **Processing of personal data on behalf of controllers**

1. Where a processing operation is carried out on its behalf, the controller shall choose a processor providing sufficient guarantees in respect of the technical and organisational security measures required by Article 22 and ensure compliance with those measures.
2. The carrying out of a processing operation by way of a processor shall be governed by a contract or legal act binding the processor to the controller and stipulating in particular that:
  - (a) the processor shall act only on instructions from the controller;
  - (b) the obligations set out in Articles 21 and 22 shall also be incumbent on the processor unless, by virtue of Article 16 or Article 17(3), second indent, of Directive 95/46/EC, the processor is already subject to obligations with regard to confidentiality and security laid down in the national law of one of the Member States.
3. For the purposes of keeping proof, the parts of the contract or the legal act relating to data protection and the requirements relating to the measures referred to in Article 22 shall be in writing or in another equivalent form.

#### SECTION 8

### **DATA PROTECTION OFFICER**

#### *Article 24*

### **Appointment and tasks of the Data Protection Officer**

1. Each Community institution and Community body shall appoint at least one person as data protection officer. That person shall have the task of:
  - (a) ensuring that controllers and data subjects are informed of their rights and obligations pursuant to this Regulation;
  - (b) responding to requests from the European Data Protection Supervisor and, within the sphere of his or her competence, cooperating with the European Data Protection Supervisor at the latter's request or on his or her own initiative;
  - (c) ensuring in an independent manner the internal application of the provisions of this Regulation;

- (d) keeping a register of the processing operations carried out by the controller, containing the items of information referred to in Article 25(2);
- (e) notifying the European Data Protection Supervisor of the processing operations likely to present specific risks within the meaning of Article 27.

That person shall thus ensure that the rights and freedoms of the data subjects are unlikely to be adversely affected by the processing operations.

2. The Data Protection Officer shall be selected on the basis of his or her personal and professional qualities and, in particular, his or her expert knowledge of data protection.

3. The selection of the Data Protection Officer shall not be liable to result in a conflict of interests between his or her duty as Data Protection Officer and any other official duties, in particular in relation to the application of the provisions of this Regulation.

4. The Data Protection Officer shall be appointed for a term of between two and five years. He or she shall be eligible for reappointment up to a maximum total term of ten years. He or she may be dismissed from the post of Data Protection Officer by the Community institution or body which appointed him or her only with the consent of the European Data Protection Supervisor, if he or she no longer fulfils the conditions required for the performance of his or her duties.

5. After his or her appointment the Data Protection Officer shall be registered with the European Data Protection Supervisor by the institution or body which appointed him or her.

6. The Community institution or body which appointed the Data Protection Officer shall provide him or her with the staff and resources necessary to carry out his or her duties.

7. With respect to the performance of his or her duties, the Data Protection Officer may not receive any instructions.

8. Further implementing rules concerning the Data Protection Officer shall be adopted by each Community institution or body in accordance with the provisions in the Annex. The implementing rules shall in particular concern the tasks, duties and powers of the Data Protection Officer.

#### *Article 25*

#### **Notification to the Data Protection Officer**

1. The controller shall give prior notice to the Data Protection Officer of any processing operation or set of such operations intended to serve a single purpose or several related purposes.

2. The information to be given shall include:

- (a) the name and address of the controller and an indication of the organisational parts of an institution or body entrusted with the processing of personal data for a particular purpose;
- (b) the purpose or purposes of the processing;
- (c) a description of the category or categories of data subjects and of the data or categories of data relating to them;
- (d) the legal basis of the processing operation for which the data are intended;
- (e) the recipients or categories of recipient to whom the data might be disclosed;
- (f) a general indication of the time limits for blocking and erasure of the different categories of data;
- (g) proposed transfers of data to third countries or international organisations;
- (h) a general description allowing a preliminary assessment to be made of the appropriateness of the measures taken pursuant to Article 22 to ensure security of processing.

3. Any change affecting information referred to in paragraph 2 shall be notified promptly to the Data Protection Officer.

#### *Article 26*

##### **Register**

A register of processing operations notified in accordance with Article 25 shall be kept by each Data Protection Officer.

The registers shall contain at least the information referred to in Article 25(2)(a) to (g). The registers may be inspected by any person directly or indirectly through the European Data Processing Supervisor.

#### SECTION 9

##### **PRIOR CHECKING BY THE EUROPEAN DATA PROTECTION SUPERVISOR AND OBLIGATION TO COOPERATE**

#### *Article 27*

##### **Prior checking**

1. Processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes shall be subject to prior checking by the European Data Protection Supervisor.

2. The following processing operations are likely to present such risks:

- (a) processing of data relating to health and to suspected offences, offences, criminal convictions or security measures;
- (b) processing operations intended to evaluate personal aspects relating to the data subject, including his or her ability, efficiency and conduct;
- (c) processing operations allowing linkages not provided for pursuant to national or Community legislation between data processed for different purposes;
- (d) processing operations for the purpose of excluding individuals from a right, benefit or contract.

3. The prior checks shall be carried out by the European Data Protection Supervisor following receipt of a notification from the Data Protection Officer who, in case of doubt as to the need for prior checking, shall consult the European Data Protection Supervisor.

4. The European Data Protection Supervisor shall deliver his or her opinion within two months following receipt of the notification. This period may be suspended until the European Data Protection Supervisor has obtained any further information that he or she may have requested. When the complexity of the matter so requires, this period may also be extended for a further two months, by decision of the European Data Protection Supervisor. This decision shall be notified to the controller prior to expiry of the initial two-month period.

If the opinion has not been delivered by the end of the two-month period, or any extension thereof, it shall be deemed to be favourable.

If the opinion of the European Data Protection Supervisor is that the notified processing may involve a breach of any provision of this Regulation, he or she shall where appropriate make proposals to avoid such breach. Where the controller does not modify the processing operation accordingly, the European Data Protection Supervisor may exercise the powers granted to him or her under Article 47(1).

5. The European Data Protection Supervisor shall keep a register of all processing operations that have been notified to him or her pursuant to paragraph 2. The register shall contain the information referred to in Article 25 and shall be open to public inspection.

*Article 28***Consultation**

1. The Community institutions and bodies shall inform the European Data Protection Supervisor when drawing up administrative measures relating to the processing of personal data involving a Community institution or body alone or jointly with others.
2. When it adopts a legislative proposal relating to the protection of individuals' rights and freedoms with regard to the processing of personal data, the Commission shall consult the European Data Protection Supervisor.

*Article 29***Obligation to provide information**

The Community institutions and bodies shall inform the European Data Protection Supervisor of the measures taken further to his or her decisions or authorisations as referred to in Article 46(h).

*Article 30***Obligation to cooperate**

At his or her request, controllers shall assist the European Data Protection Supervisor in the performance of his or her duties, in particular by providing the information referred to in Article 47(2)(a) and by granting access as provided in Article 47(2)(b).

*Article 31***Obligation to react to allegations**

In response to the European Data Protection Supervisor's exercise of his or her powers under Article 47(1)(b), the controller concerned shall inform the Supervisor of its views within a reasonable period to be specified by the Supervisor. The reply shall also include a description of the measures taken, if any, in response to the remarks of the European Data Protection Supervisor.

## CHAPTER III

**REMEDIES***Article 32***Remedies**

1. The Court of Justice of the European Communities shall have jurisdiction to hear all disputes which relate to the provisions of this Regulation, including claims for damages.
2. Without prejudice to any judicial remedy, every data subject may lodge a complaint with the European Data Protection Supervisor if he or she considers that his or her rights under Article 286 of the Treaty have been infringed as a result of the processing of his or her personal data by a Community institution or body.  
  
In the absence of a response by the European Data Protection Supervisor within six months, the complaint shall be deemed to have been rejected.
3. Actions against decisions of the European Data Protection Supervisor shall be brought before the Court of Justice of the European Communities.
4. Any person who has suffered damage because of an unlawful processing operation or any action incompatible with this Regulation shall have the right to have the damage made good in accordance with Article 288 of the Treaty.

*Article 33***Complaints by Community staff**

Any person employed with a Community institution or body may lodge a complaint with the European Data Protection Supervisor regarding an alleged breach of the provisions of this Regulation governing the processing of personal data, without acting through official channels. No-one shall suffer prejudice on account of a complaint lodged with the European Data Protection Supervisor alleging a breach of the provisions governing the processing of personal data.

## CHAPTER IV

**PROTECTION OF PERSONAL DATA AND PRIVACY IN THE CONTEXT OF INTERNAL TELECOMMUNICATIONS NETWORKS***Article 34***Scope**

Without prejudice to the other provisions of this Regulation, this Chapter shall apply to the processing of personal data in connection with the use of telecommunications networks or terminal equipment operated under the control of a Community institution or body.

For the purposes of this Chapter, 'user' shall mean any natural person using a telecommunications network or terminal equipment operated under the control of a Community institution or body.

*Article 35***Security**

1. The Community institutions and bodies shall take appropriate technical and organisational measures to safeguard the secure use of the telecommunications networks and terminal equipment, if necessary in conjunction with the providers of publicly available telecommunications services or the providers of public telecommunications networks. Having regard to the state of the art and the cost of their implementation, these measures shall ensure a level of security appropriate to the risk presented.

2. In the event of any particular risk of a breach of the security of the network and terminal equipment, the Community institution or body concerned shall inform users of the existence of that risk and of any possible remedies and alternative means of communication.

*Article 36***Confidentiality of communications**

Community institutions and bodies shall ensure the confidentiality of communications by means of telecommunications networks and terminal equipment, in accordance with the general principles of Community law.

*Article 37***Traffic and billing data**

1. Without prejudice to the provisions of paragraphs 2, 3 and 4, traffic data relating to users which are processed and stored to establish calls and other connections over the telecommunications network shall be erased or made anonymous upon termination of the call or other connection.

2. If necessary, traffic data as indicated in a list agreed by the European Data Protection Supervisor may be processed for the purpose of telecommunications budget and traffic management, including the verification of authorised use of the telecommunications systems. These data shall be erased or made anonymous as soon as possible and no later than six months after collection, unless they need to be kept for a longer period to establish, exercise or defend a right in a legal claim pending before a court.

3. Processing of traffic and billing data shall only be carried out by persons handling billing, traffic or budget management.

4. Users of the telecommunication networks shall have the right to receive non-itemised bills or other records of calls made.

*Article 38***Directories of users**

1. Personal data contained in printed or electronic directories of users and access to such directories shall be limited to what is strictly necessary for the specific purposes of the directory.

2. The Community institutions and bodies shall take all the necessary measures to prevent personal data contained in those directories, regardless of whether they are accessible to the public or not, from being used for direct marketing purposes.

#### *Article 39*

##### **Presentation and restriction of calling and connected line identification**

1. Where presentation of calling-line identification is offered, the calling user shall have the possibility via a simple means, free of charge, to eliminate the presentation of the calling-line identification.
2. Where presentation of calling-line identification is offered, the called user shall have the possibility via a simple means, free of charge, to prevent the presentation of the calling-line identification of incoming calls.
3. Where presentation of connected-line identification is offered, the called user shall have the possibility via a simple means, free of charge, to eliminate the presentation of the connected-line identification to the calling user.
4. Where presentation of calling or connected-line identification is offered, the Community institutions and bodies shall inform the users thereof and of the possibilities set out in paragraphs 1, 2 and 3.

#### *Article 40*

##### **Derogations**

Community institutions and bodies shall ensure that there are transparent procedures governing the way in which they may override the elimination of the presentation of calling-line identification:

- (a) on a temporary basis, upon application of a user requesting the tracing of malicious or nuisance calls;
- (b) on a per-line basis for organisational entities dealing with emergency calls, for the purpose of answering such calls.

#### CHAPTER V

##### **INDEPENDENT SUPERVISORY AUTHORITY: THE EUROPEAN DATA PROTECTION SUPERVISOR**

#### *Article 41*

##### **European Data Protection Supervisor**

1. An independent supervisory authority is hereby established referred to as the European Data Protection Supervisor.
2. With respect to the processing of personal data, the European Data Protection Supervisor shall be responsible for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to privacy, are respected by the Community institutions and bodies.

The European Data Protection Supervisor shall be responsible for monitoring and ensuring the application of the provisions of this Regulation and any other Community act relating to the protection of the fundamental rights and freedoms of natural persons with regard to the processing of personal data by a Community institution or body, and for advising Community institutions and bodies and data subjects on all matters concerning the processing of personal data. To these ends he or she shall fulfil the duties provided for in Article 46 and exercise the powers granted in Article 47.

#### *Article 42*

##### **Appointment**

1. The European Parliament and the Council shall appoint by common accord the European Data Protection Supervisor for a term of five years, on the basis of a list drawn up by the Commission following a public call for candidates.

An Assistant Supervisor shall be appointed in accordance with the same procedure and for the same term, who shall assist the Supervisor in all the latter's duties and act as a replacement when the Supervisor is absent or prevented from attending to them.



2. The European Data Protection Supervisor shall be chosen from persons whose independence is beyond doubt and who are acknowledged as having the experience and skills required to perform the duties of European Data Protection Supervisor, for example because they belong or have belonged to the supervisory authorities referred to in Article 28 of Directive 95/46/EC.
3. The European Data Protection Supervisor shall be eligible for reappointment.
4. Apart from normal replacement or death, the duties of the European Data Protection Supervisor shall end in the event of resignation or compulsory retirement in accordance with paragraph 5.
5. The European Data Protection Supervisor may be dismissed or deprived of his or her right to a pension or other benefits in its stead by the Court of Justice at the request of the European Parliament, the Council or the Commission, if he or she no longer fulfils the conditions required for the performance of his or her duties or if he or she is guilty of serious misconduct.
6. In the event of normal replacement or voluntary resignation, the European Data Protection Supervisor shall nevertheless remain in office until he or she has been replaced.
7. Articles 12 to 15 and 18 of the Protocol on the Privileges and Immunities of the European Communities shall also apply to the European Data Protection Supervisor.
8. Paragraphs 2 to 7 shall apply to the Assistant Supervisor.

#### *Article 43*

#### **Regulations and general conditions governing the performance of the European Data Protection Supervisor's duties, staff and financial resources**

1. The European Parliament, the Council and the Commission shall by common accord determine the regulations and general conditions governing the performance of the European Data Protection Supervisor's duties and in particular his or her salary, allowances and any other benefits in lieu of remuneration.
2. The budget authority shall ensure that the European Data Protection Supervisor is provided with the human and financial resources necessary for the performance of his or her tasks.
3. The European Data Protection Supervisor's budget shall be shown in a separate budget heading in Section VIII of the general budget of the European Union.
4. The European Data Protection Supervisor shall be assisted by a Secretariat. The officials and the other staff members of the Secretariat shall be appointed by the European Data Protection Supervisor; their superior shall be the European Data Protection Supervisor and they shall be subject exclusively to his or her direction. Their numbers shall be decided each year as part of the budgetary procedure.
5. The officials and the other staff members of the European Data Protection Supervisor's Secretariat shall be subject to the rules and regulations applicable to officials and other servants of the European Communities.
6. In matters concerning the Secretariat staff, the European Data Protection Supervisor shall have the same status as the institutions within the meaning of Article 1 of the Staff Regulations of Officials of the European Communities.

#### *Article 44*

#### **Independence**

1. The European Data Protection Supervisor shall act in complete independence in the performance of his or her duties.
2. The European Data Protection Supervisor shall, in the performance of his or her duties, neither seek nor take instructions from anybody.
3. The European Data Protection Supervisor shall refrain from any action incompatible with his or her duties and shall not, during his or her term of office, engage in any other occupation, whether gainful or not.

4. The European Data Protection Supervisor shall, after his or her term of office, behave with integrity and discretion as regards the acceptance of appointments and benefits.

*Article 45*

**Professional secrecy**

The European Data Protection Supervisor and his or her staff shall, both during and after their term of office, be subject to a duty of professional secrecy with regard to any confidential information which has come to their knowledge in the course of the performance of their official duties.

*Article 46*

**Duties**

The European Data Protection Supervisor shall:

- (a) hear and investigate complaints, and inform the data subject of the outcome within a reasonable period;
- (b) conduct inquiries either on his or her own initiative or on the basis of a complaint, and inform the data subjects of the outcome within a reasonable period;
- (c) monitor and ensure the application of the provisions of this Regulation and any other Community act relating to the protection of natural persons with regard to the processing of personal data by a Community institution or body with the exception of the Court of Justice of the European Communities acting in its judicial capacity;
- (d) advise all Community institutions and bodies, either on his or her own initiative or in response to a consultation, on all matters concerning the processing of personal data, in particular before they draw up internal rules relating to the protection of fundamental rights and freedoms with regard to the processing of personal data;
- (e) monitor relevant developments, insofar as they have an impact on the protection of personal data, in particular the development of information and communication technologies;
- (f)
  - (i) cooperate with the national supervisory authorities referred to in Article 28 of Directive 95/46/EC in the countries to which that Directive applies to the extent necessary for the performance of their respective duties, in particular by exchanging all useful information, requesting such authority or body to exercise its powers or responding to a request from such authority or body;
  - (ii) also cooperate with the supervisory data protection bodies established under Title VI of the Treaty on European Union particularly with a view to improving consistency in applying the rules and procedures with which they are respectively responsible for ensuring compliance;
- (g) participate in the activities of the Working Party on the Protection of Individuals with regard to the Processing of Personal Data set up by Article 29 of Directive 95/46/EC;
- (h) determine, give reasons for and make public the exemptions, safeguards, authorisations and conditions mentioned in Article 10(2)(b),(4), (5) and (6), in Article 12(2), in Article 19 and in Article 37(2);
- (i) keep a register of processing operations notified to him or her by virtue of Article 27(2) and registered in accordance with Article 27(5), and provide means of access to the registers kept by the Data Protection Officers under Article 26;
- (j) carry out a prior check of processing notified to him or her;
- (k) establish his or her Rules of Procedure.

*Article 47***Powers**

1. The European Data Protection Supervisor may:
  - (a) give advice to data subjects in the exercise of their rights;
  - (b) refer the matter to the controller in the event of an alleged breach of the provisions governing the processing of personal data, and, where appropriate, make proposals for remedying that breach and for improving the protection of the data subjects;
  - (c) order that requests to exercise certain rights in relation to data be complied with where such requests have been refused in breach of Articles 13 to 19;
  - (d) warn or admonish the controller;
  - (e) order the rectification, blocking, erasure or destruction of all data when they have been processed in breach of the provisions governing the processing of personal data and the notification of such actions to third parties to whom the data have been disclosed;
  - (f) impose a temporary or definitive ban on processing;
  - (g) refer the matter to the Community institution or body concerned and, if necessary, to the European Parliament, the Council and the Commission;
  - (h) refer the matter to the Court of Justice of the European Communities under the conditions provided for in the Treaty;
  - (i) intervene in actions brought before the Court of Justice of the European Communities.
2. The European Data Protection Supervisor shall have the power:
  - (a) to obtain from a controller or Community institution or body access to all personal data and to all information necessary for his or her enquiries;
  - (b) to obtain access to any premises in which a controller or Community institution or body carries on its activities when there are reasonable grounds for presuming that an activity covered by this Regulation is being carried out there.

*Article 48***Activities report**

1. The European Data Protection Supervisor shall submit an annual report on his or her activities to the European Parliament, the Council and the Commission and at the same time make it public.
2. The European Data Protection Supervisor shall forward the activities report to the other Community institutions and bodies, which may submit comments with a view to possible examination of the report in the European Parliament, in particular in relation to the description of the measures taken in response to the remarks made by the European Data Protection Supervisor under Article 31.

## CHAPTER VI

**FINAL PROVISIONS***Article 49***Sanctions**

Any failure to comply with the obligations pursuant to this Regulation, whether intentionally or through negligence on his or her part, shall make an official or other servant of the European Communities liable to disciplinary action, in accordance with the rules and procedures laid down in the Staff Regulations of Officials of the European Communities or in the conditions of employment applicable to other servants.

*Article 50***Transitional period**

Community institutions and bodies shall ensure that processing operations already under way on the date this Regulation enters into force are brought into conformity with this Regulation within one year of that date.

*Article 51***Entry into force**

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 18 December 2000.

*For the European Parliament*

*The President*

N. FONTAINE

*For the Council*

*The President*

D. VOYNET

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**ANNEX**

1. The Data Protection Officer may make recommendations for the practical improvement of data protection to the Community institution or body which appointed him or her and advise it and the controller concerned on matters concerning the application of data protection provisions. Furthermore he or she may, on his or her own initiative or at the request of the Community institution or body which appointed him or her, the controller, the Staff Committee concerned or any individual, investigate matters and occurrences directly relating to his or her tasks and which come to his or her notice, and report back to the person who commissioned the investigation or to the controller.
  2. The Data Protection Officer may be consulted by the Community institution or body which appointed him or her, by the controller concerned, by the Staff Committee concerned and by any individual, without going through the official channels, on any matter concerning the interpretation or application of this Regulation.
  3. No one shall suffer prejudice on account of a matter brought to the attention of the competent Data Protection Officer alleging that a breach of the provisions of this Regulation has taken place.
  4. Every controller concerned shall be required to assist the Data Protection Officer in performing his or her duties and to give information in reply to questions. In performing his or her duties, the Data Protection Officer shall have access at all times to the data forming the subject-matter of processing operations and to all offices, data-processing installations and data carriers.
  5. To the extent required, the Data Protection Officer shall be relieved of other activities. The Data Protection Officer and his or her staff, to whom Article 287 of the Treaty shall apply, shall be required not to divulge information or documents which they obtain in the course of their duties.
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# **REGULATION (EC) NO 1367/2006**

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**REGULATION (EC) No 1367/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL  
of 6 September 2006**

**on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 175(1) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee <sup>(1)</sup>,

After consulting the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty, in the light of the joint text approved by the Conciliation Committee on 22 June 2006 <sup>(2)</sup>,

Whereas:

- (1) Community legislation in the field of the environment aims to contribute *inter alia* to preserving, protecting and improving the quality of the environment and protecting human health, thereby promoting sustainable development.
- (2) The Sixth Community Environment Action Programme <sup>(3)</sup> stresses the importance of providing adequate environmental information and effective opportunities for public participation in environmental decision-making, thereby increasing accountability and transparency of decision-making and contributing to public awareness and support for the decisions taken. It furthermore encourages, as did its predecessors <sup>(4)</sup>, more effective implementation and application of Community legislation on environmental protection, including the enforcement of Community rules and the taking of action against breaches of Community environmental legislation.

- (3) On 25 June 1998 the Community signed the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter the Aarhus Convention). The Community approved the Aarhus Convention on 17 February 2005 <sup>(5)</sup>. Provisions of Community law should be consistent with that Convention.

- (4) The Community has already adopted a body of legislation, which is evolving and contributes to the achievement of the objectives of the Aarhus Convention. Provision should be made to apply the requirements of the Convention to Community institutions and bodies.

- (5) It is appropriate to deal with the three pillars of the Aarhus Convention, namely access to information, public participation in decision-making and access to justice in environmental matters, in one piece of legislation and to lay down common provisions regarding objectives and definitions. This contributes to rationalising legislation and increasing the transparency of the implementation measures taken with regard to Community institutions and bodies.

- (6) As a general principle, the rights guaranteed by the three pillars of the Aarhus Convention are without discrimination as to citizenship, nationality or domicile.

- (7) The Aarhus Convention defines public authorities in a broad way, the basic concept being that wherever public authority is exercised, there should be rights for individuals and their organisations. It is therefore necessary that the Community institutions and bodies covered by this Regulation be defined in the same broad and functional way. Under the Aarhus Convention, Community institutions and bodies can be excluded from the scope of application of the Convention when acting in a judicial or legislative capacity. However, for reasons of consistency with 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 <sup>(6)</sup>, the provisions on access to environmental information should apply to Community institutions and bodies acting in a legislative capacity.

<sup>(1)</sup> OJ C 117, 30.4.2004, p. 52.

<sup>(2)</sup> Opinion of the European Parliament of 31 March 2004 (OJ C 103 E, 29.4.2004, p. 612), Council Common Position of 18 July 2005 (OJ C 264 E, 25.10.2005, p. 18), and Position of the European Parliament of 18 January 2006 (not yet published in the Official Journal). Legislative resolution of the European Parliament of 4 July 2006 (not yet published in the Official Journal) and Decision of the Council of 18 July 2006.

<sup>(3)</sup> Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme (OJ L 242, 10.9.2002, p. 1).

<sup>(4)</sup> Fourth Community Action Programme for the Environment (OJ C 328, 7.12.1987, p. 1), Fifth Community Action Programme for the Environment (OJ C 138, 17.5.1993, p. 1).

<sup>(5)</sup> Council Decision 2005/370/EC (OJ L 124, 17.5.2005, p. 1).

<sup>(6)</sup> OJ L 145, 31.5.2001, p. 43.

- (8) The definition of environmental information in this Regulation encompasses information in any form on the state of the environment. This definition, which has been aligned to the definition adopted for Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC <sup>(1)</sup>, has the same content as the one laid down in the Aarhus Convention. The definition of 'document' in Regulation (EC) No 1049/2001 encompasses environmental information as defined in this Regulation.
- (9) It is appropriate for this Regulation to provide for a definition of plans and programmes taking into account the provisions of the Aarhus Convention, in parallel with the approach followed in relation to the Member States' obligations under existing EC law. 'Plans and programmes relating to the environment' should be defined in relation to their contribution to the achievement, or to their likely significant effect on the achievement, of the objectives and priorities of Community environmental policy. For the ten-year period starting from 22 July 2002, the Sixth Community Environment Action Programme establishes the objectives of Community environmental policy and the actions planned to attain these objectives. At the end of this period, a subsequent environmental action programme should be adopted.
- (10) In view of the fact that environmental law is constantly evolving, the definition of environmental law should refer to the objectives of Community policy on the environment as set out in the Treaty.
- (11) Administrative acts of individual scope should be open to possible internal review where they have legally binding and external effects. Similarly, omissions should be covered where there is an obligation to adopt an administrative act under environmental law. Given that acts adopted by a Community institution or body acting in a judicial or legislative capacity can be excluded, the same should apply to other inquiry procedures where the Community institution or body acts as an administrative review body under provisions of the Treaty.
- (12) The Aarhus Convention calls for public access to environmental information either following a request or by active dissemination by the authorities covered by the Convention. Regulation (EC) No 1049/2001 applies to the European Parliament, the Council and the Commission, as well as to agencies and similar bodies set up by a Community legal act. It lays down rules for these institutions that comply to a great extent with the rules laid down in the Aarhus Convention. It is necessary to extend the application of Regulation (EC) No 1049/2001 to all other Community institutions and bodies.
- (13) Where the Aarhus Convention contains provisions that are not, in whole or in part, to be found also in Regulation (EC) No 1049/2001, it is necessary to address those, in particular with regard to the collection and dissemination of environmental information.
- (14) For the right of public access to environmental information to be effective, environmental information of good quality is essential. It is therefore appropriate to introduce rules that oblige Community institutions and bodies to ensure such quality.
- (15) Where Regulation (EC) No 1049/2001 provides for exceptions, these should apply subject to any more specific provisions in this Regulation concerning requests for environmental information. The grounds for refusal as regards access to environmental information should be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions in the environment. The term 'commercial interests' covers confidentiality agreements concluded by institutions or bodies acting in a banking capacity.
- (16) Pursuant to Decision No 2119/98/EC of the European Parliament and the Council of 24 September 1998 setting up a network for the epidemiological surveillance and control of communicable diseases in the Community <sup>(2)</sup>, a network at Community level has already been set up to promote cooperation and coordination between the Member States, with the assistance of the Commission, with a view to improving the prevention and control in the Community of a number of communicable diseases. Decision No 1786/2002/EC of the European Parliament and of the Council <sup>(3)</sup> adopts a programme of Community action in the field of public health that complements national policies. Improving information and knowledge for the development of public health and enhancing the capability to respond rapidly and in a coordinated fashion to threats to health, both of which are elements of this programme, are objectives that are equally fully in line with the requirements of the Aarhus Convention. This Regulation should therefore apply without prejudice to Decision No 2119/98/EC and Decision No 1786/2002/EC.

<sup>(1)</sup> OJ L 41, 14.2.2003, p. 26.

<sup>(2)</sup> OJ L 268, 3.10.1998, p. 1. Decision as last amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1).

<sup>(3)</sup> OJ L 271, 9.10.2002, p. 1. Decision as amended by Decision No 786/2004/EC (OJ L 138, 30.4.2004, p. 7).



(17) The Aarhus Convention requires Parties to make provisions for the public to participate during the preparation of plans and programmes relating to the environment. Such provisions are to include reasonable timeframes for informing the public of the environmental decision-making in question. To be effective, public participation is to take place at an early stage, when all options are open. When laying down provisions on public participation, Community institutions and bodies, should identify the public which may participate. The Aarhus Convention also requires that, to the extent appropriate, Parties shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.

(18) Article 9(3) of the Aarhus Convention provides for access to judicial or other review procedures for challenging acts and omissions by private persons and public authorities which contravene provisions of law relating to the environment. Provisions on access to justice should be consistent with the Treaty. It is appropriate in this context that this Regulation address only acts and omissions by public authorities.

(19) To ensure adequate and effective remedies, including those available before the Court of Justice of the European Communities under the relevant provisions of the Treaty, it is appropriate that the Community institution or body which issued the act to be challenged or which, in the case of an alleged administrative omission, omitted to act, be given the opportunity to reconsider its former decision, or, in the case of an omission, to act.

(20) Non-governmental organisations active in the field of environmental protection which meet certain criteria, in particular in order to ensure that they are independent and accountable organisations that have demonstrated that their primary objective is to promote environmental protection, should be entitled to request internal review at Community level of acts adopted or of omissions under environmental law by a Community institution or body, with a view to their reconsideration by the institution or body in question.

(21) Where previous requests for internal review have been unsuccessful, the non-governmental organisation concerned should be able to institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty.

(22) This Regulation respects the fundamental rights and observes the principles recognised by Article 6 of the Treaty on the European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Article 37 thereof,

HAVE ADOPTED THIS REGULATION:

## TITLE I

### GENERAL PROVISIONS

#### Article 1

#### Objective

1. The objective of this Regulation is to contribute to the implementation of the obligations arising under the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, hereinafter referred to as 'the Aarhus Convention', by laying down rules to apply the provisions of the Convention to Community institutions and bodies, in particular by:

- (a) guaranteeing the right of public access to environmental information received or produced by Community institutions or bodies and held by them, and by setting out the basic terms and conditions of, and practical arrangements for, the exercise of that right;
- (b) ensuring that environmental information is progressively made available and disseminated to the public in order to achieve its widest possible systematic availability and dissemination. To that end, the use, in particular, of computer telecommunication and/or electronic technology, where available, shall be promoted;
- (c) providing for public participation concerning plans and programmes relating to the environment;
- (d) granting access to justice in environmental matters at Community level under the conditions laid down by this Regulation.

2. In applying the provisions of this Regulation, the Community institutions and bodies shall endeavour to assist and provide guidance to the public with regard to access to information, participation in decision-making and access to justice in environmental matters.

#### Article 2

#### Definitions

1. For the purpose of this Regulation:

- (a) 'applicant' means any natural or legal person requesting environmental information;
- (b) 'the public' means one or more natural or legal persons, and associations, organisations or groups of such persons;

- (c) 'Community institution or body' means any public institution, body, office or agency established by, or on the basis of, the Treaty except when acting in a judicial or legislative capacity. However, the provisions under Title II shall apply to Community institutions or bodies acting in a legislative capacity;
- (d) 'environmental information' means any information in written, visual, aural, electronic or any other material form on:
- (i) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
  - (ii) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in point (i);
  - (iii) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in points (i) and (ii) as well as measures or activities designed to protect those elements;
  - (iv) reports on the implementation of environmental legislation;
  - (v) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in point (iii);
  - (vi) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures in as much as they are or may be affected by the state of the elements of the environment referred to in point (i) or, through those elements, by any of the matters referred to in points (ii) and (iii);
- (e) 'plans and programmes relating to the environment' means plans and programmes,
- (i) which are subject to preparation and, as appropriate, adoption by a Community institution or body;
  - (ii) which are required under legislative, regulatory or administrative provisions; and
  - (iii) which contribute to, or are likely to have significant effects on, the achievement of the objectives of Community environmental policy, such as laid down in the Sixth Community Environment Action Programme, or in any subsequent general environmental action programme.

General environmental action programmes shall also be considered as plans and programmes relating to the environment.

This definition shall not include financial or budget plans and programmes, namely those laying down how particular projects or activities should be financed or those related to the proposed annual budgets, internal work programmes of a Community institution or body, or emergency plans and programmes designed for the sole purpose of civil protection;

- (f) 'environmental law' means Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems;
- (g) 'administrative act' means any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects;
- (h) 'administrative omission' means any failure of a Community institution or body to adopt an administrative act as defined in (g).

2. Administrative acts and administrative omissions shall not include measures taken or omissions by a Community institution or body in its capacity as an administrative review body, such as under:

- (a) Articles 81, 82, 86 and 87 of the Treaty (competition rules);
- (b) Articles 226 and 228 of the Treaty (infringement proceedings);
- (c) Article 195 of the Treaty (Ombudsman proceedings);
- (d) Article 280 of the Treaty (OLAF proceedings).

## TITLE II

### ACCESS TO ENVIRONMENTAL INFORMATION

#### Article 3

#### Application of Regulation (EC) No 1049/2001

Regulation (EC) No 1049/2001 shall apply to any request by an applicant for access to environmental information held by Community institutions and bodies without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

For the purposes of this Regulation, the word 'institution' in Regulation (EC) No 1049/2001 shall be read as 'Community institution or body'.

#### Article 4

##### Collection and dissemination of environmental information

1. Community institutions and bodies shall organise the environmental information which is relevant to their functions and which is held by them, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology in accordance with Articles 11(1) and (2), and 12 of Regulation (EC) No 1049/2001. They shall make this environmental information progressively available in electronic databases that are easily accessible to the public through public telecommunication networks. To that end, they shall place the environmental information that they hold on databases and equip these with search aids and other forms of software designed to assist the public in locating the information they require.

The information made available by means of computer telecommunication and/or electronic technology need not include information collected before the entry into force of this Regulation unless it is already available in electronic form. Community institutions and bodies shall as far as possible indicate where information collected before entry into force of this Regulation which is not available in electronic form is located.

Community institutions and bodies shall make all reasonable efforts to maintain environmental information held by them in forms or formats that are readily reproducible and accessible by computer telecommunications or by other electronic means.

2. The environmental information to be made available and disseminated shall be updated as appropriate. In addition to the documents listed in Article 12(2) and (3) and in Article 13(1) and (2) of Regulation (EC) No 1049/2001, the databases or registers shall include the following:

- (a) texts of international treaties, conventions or agreements, and of Community legislation on the environment or relating to it, and of policies, plans and programmes relating to the environment;
- (b) progress reports on the implementation of the items referred to under (a) where prepared or held in electronic form by Community institutions or bodies;
- (c) steps taken in proceedings for infringements of Community law from the stage of the reasoned opinion pursuant to Article 226(1) of the Treaty;
- (d) reports on the state of the environment as referred to in paragraph 4;
- (e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment;
- (f) authorisations with a significant impact on the environment, and environmental agreements, or a reference to the place where such information can be requested or accessed;
- (g) environmental impact studies and risk assessments concerning environmental elements, or a reference to the place where such information can be requested or accessed.

3. In appropriate cases, Community institutions and bodies may satisfy the requirements of paragraphs 1 and 2 by creating links to Internet sites where the information can be found.

4. The Commission shall ensure that, at regular intervals not exceeding four years, a report on the state of the environment, including information on the quality of, and pressures on, the environment is published and disseminated.

#### Article 5

##### Quality of the environmental information

1. Community institutions and bodies shall, insofar as is within their power, ensure that any information that is compiled by them, or on their behalf, is up-to-date, accurate and comparable.

2. Community institutions and bodies shall, upon request, inform the applicant of the place where information on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information can be found, if it is available. Alternatively, they may refer them to the standardised procedure that was used.

#### Article 6

##### Application of exceptions concerning requests for access to environmental information

1. As regards Article 4(2), first and third indents, of Regulation (EC) No 1049/2001, with the exception of investigations, in particular those concerning possible infringements of Community law, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment. As regards the other exceptions set out in Article 4 of Regulation (EC) No 1049/2001, the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.

2. In addition to the exceptions set out in Article 4 of Regulation (EC) No 1049/2001, Community institutions and bodies may refuse access to environmental information where disclosure of the information would adversely affect the protection of the environment to which the information relates, such as the breeding sites of rare species.

## Article 7

**Requests for access to environmental information which is not held by a Community institution or body**

Where a Community institution or body receives a request for access to environmental information and where this information is not held by that Community institution or body, it shall, as promptly as possible, but within 15 working days at the latest, inform the applicant of the Community institution or body or the public authority within the meaning of Directive 2003/4/EC to which it believes it is possible to apply for the information requested or transfer the request to the relevant Community institution or body or the public authority and inform the applicant accordingly.

## Article 8

**Cooperation**

In the event of an imminent threat to human health, life or the environment, whether caused by human activities or due to natural causes, Community institutions and bodies shall, upon request of public authorities within the meaning of Directive 2003/4/EC, collaborate with and assist those public authorities in order to enable the latter to disseminate immediately and without delay to the public that might be affected all environmental information which could enable it to take measures to prevent or mitigate harm arising from the threat, to the extent that this information is held by or on behalf of Community institutions and bodies and/or those public authorities.

The first subparagraph shall apply without prejudice to any specific obligation laid down by Community legislation, in particular by Decision No 2119/98/EC and by Decision No 1786/2002/EC.

## TITLE III

**PUBLIC PARTICIPATION CONCERNING PLANS AND PROGRAMMES RELATING TO THE ENVIRONMENT**

## Article 9

1. Community institutions and bodies shall provide, through appropriate practical and/or other provisions, early and effective opportunities for the public to participate during the preparation, modification or review of plans or programmes relating to the environment when all options are still open. In particular, where the Commission prepares a proposal for such a plan or programme which is submitted to other Community institutions or bodies for decision, it shall provide for public participation at that preparatory stage.

2. Community institutions and bodies shall identify the public affected or likely to be affected by, or having an interest in, a

plan or programme of the type referred to in paragraph 1, taking into account the objectives of this Regulation.

3. Community institutions and bodies shall ensure that the public referred to in paragraph 2 is informed, whether by public notices or other appropriate means, such as electronic media where available, of:

- (a) the draft proposal, where available;
- (b) the environmental information or assessment relevant to the plan or programme under preparation, where available; and
- (c) practical arrangements for participation, including:
  - (i) the administrative entity from which the relevant information may be obtained,
  - (ii) the administrative entity to which comments, opinions or questions may be submitted, and
  - (iii) reasonable time-frames allowing sufficient time for the public to be informed and to prepare and participate effectively in the environmental decision-making process.

4. A time limit of at least eight weeks shall be set for receiving comments. Where meetings or hearings are organised, prior notice of at least four weeks shall be given. Time limits may be shortened in urgent cases or where the public has already had the opportunity to comment on the plan or programme in question.

5. In taking a decision on a plan or programme relating to the environment, Community institutions and bodies shall take due account of the outcome of the public participation. Community institutions and bodies shall inform the public of that plan or programme, including its text, and of the reasons and considerations upon which the decision is based, including information on public participation.

## TITLE IV

**INTERNAL REVIEW AND ACCESS TO JUSTICE**

## Article 10

**Request for internal review of administrative acts**

1. Any non-governmental organisation which meets the criteria set out in Article 11 is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act.

Such a request must be made in writing and within a time limit not exceeding six weeks after the administrative act was adopted, notified or published, whichever is the latest, or, in the case of an alleged omission, six weeks after the date when the administrative act was required. The request shall state the grounds for the review.

2. The Community institution or body referred to in paragraph 1 shall consider any such request, unless it is clearly unsubstantiated. The Community institution or body shall state its reasons in a written reply as soon as possible, but no later than 12 weeks after receipt of the request.

3. Where the Community institution or body is unable, despite exercising due diligence, to act in accordance with paragraph 2, it shall inform the non-governmental organisation which made the request as soon as possible and at the latest within the period mentioned in that paragraph, of the reasons for its failure to act and when it intends to do so.

In any event, the Community institution or body shall act within 18 weeks from receipt of the request.

#### *Article 11*

##### **Criteria for entitlement at Community level**

1. A non-governmental organisation shall be entitled to make a request for internal review in accordance with Article 10, provided that:

- (a) it is an independent non-profit-making legal person in accordance with a Member State's national law or practice;
- (b) it has the primary stated objective of promoting environmental protection in the context of environmental law;
- (c) it has existed for more than two years and is actively pursuing the objective referred to under (b);
- (d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 6 September 2006.

*For the European Parliament*  
*The President*  
 J. BORRELL FONTELLES

*For the Council*  
*The President*  
 P. LEHTOMÄKI

2. The Commission shall adopt the provisions which are necessary to ensure transparent and consistent application of the criteria mentioned in paragraph 1.

#### *Article 12*

##### **Proceedings before the Court of Justice**

1. The non-governmental organisation which made the request for internal review pursuant to Article 10 may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty.

2. Where the Community institution or body fails to act in accordance with Article 10(2) or (3) the non-governmental organisation may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty.

#### TITLE V

##### **FINAL PROVISIONS**

#### *Article 13*

##### **Application measures**

Where necessary, Community institutions and bodies shall adapt their rules of procedure to the provisions of this Regulation. These adaptations shall take effect from 28 June 2007.

#### *Article 14*

##### **Entry into force**

This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 28 June 2007.



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# **CODE OF GOOD ADMINISTRATIVE BEHAVIOUR**

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**COMMISSION DECISION**  
**of 17 October 2000**  
**amending its Rules of Procedure**

(2000/633/EC, ECSC, Euratom)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular Article 218(2) thereof,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Article 16 thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 131 thereof,

Having regard to the Treaty on the European Union, and in particular Articles 28(1) and 41(1) thereof,

HAS DECIDED AS FOLLOWS:

*Article 1*

The rules of Procedure of the Commission are hereby amended as follows:

1. In Article 23, the following paragraph is added:

‘The Commission may adopt supplementary measures relating to the functioning of the Commission and of its

departments, which shall be annexed to these Rules of Procedure.’

2. The Code of Good Administrative Behaviour contained in the Annex to this Decision is annexed.

*Article 2*

This Decision shall enter into force on 1 November 2000.

*Article 3*

This Decision shall be published in the *Official Journal of the European Communities*.

Done at Brussels, 17 October 2000.

*For the Commission*

*The President*

Romano PRODI

## ANNEX

## 'ANNEX

**CODE OF GOOD ADMINISTRATIVE BEHAVIOUR FOR STAFF OF THE EUROPEAN COMMISSION IN THEIR RELATIONS WITH THE PUBLIC****Quality service**

The Commission and its staff have a duty to serve the Community interest and, in so doing, the public interest.

The public legitimately expects quality service and an administration that is open, accessible and properly run.

Quality service calls for the Commission and its staff to be courteous, objective and impartial.

**Purpose**

In order to enable the Commission to meet its obligations of good administrative behaviour and in particular in the dealings that the Commission has with the public, the Commission undertakes to observe the standards of good administrative behaviour set out in this Code and to be guided by these in its daily work.

**Scope**

The Code is binding on all staff covered by the Staff Regulations of officials of the European Communities and the Conditions of employment of other servants of the European Communities (hereinafter referred to as the "Staff Regulations") and the other provisions on relations between the Commission and its staff that are applicable to officials and other servants of the European Communities. However, persons employed under private law contracts, experts on secondment from national civil services and trainees, etc. working for the Commission should also be guided by it in their daily work.

Relations between the Commission and its staff are governed exclusively by the Staff Regulations.

**1. GENERAL PRINCIPLES OF GOOD ADMINISTRATION**

The Commission respects the following general principles in its relations with the public.

*Lawfulness*

The Commission acts in accordance with the law and applies the Rules and Procedures laid down in Community legislation.

*Non-discrimination and equal treatment*

The Commission respects the principle of non-discrimination and in particular, guarantees equal treatment for members of the public irrespective of nationality, gender, racial or ethnic origin, religion or beliefs, disability, age or sexual orientation. Thus, differences in treatment of similar cases must be specifically warranted by the relevant features of the particular case in hand.

*Proportionality*

The Commission ensures that the measures taken are proportional to the aim pursued.

In particular, the Commission will ensure that the applications of this Code never leads to the imposition of administrative or budgetary burdens out of proportion to the benefit expected.

*Consistency*

The Commission shall be consistent in its administrative behaviour and shall follow its normal practice. Any exceptions to this principle must be duly justified.

**2. GUIDELINES FOR GOOD ADMINISTRATIVE BEHAVIOUR***Objectivity and impartiality*

Staff shall always act objectively and impartially, in the Community interest and for the public good. They shall act independently within the framework of the policy fixed by the Commission and their conduct shall never be guided by personal or national interest or political pressure.

*Information on administrative procedures*

Where a member of the public requires information relating to a Commission administrative procedure, staff shall ensure that this information is provided within the deadline fixed for the relevant procedure.

### 3. INFORMATION ON THE RIGHTS OF INTERESTED PARTIES

*Listening to all parties with a direct interest*

Where Community law provides that interested parties should be heard, staff shall ensure that an opportunity is given to them to make their views known.

*Duty of justify decisions*

A Commission decision should clearly state the reasons on which it is based and should be communicated to the persons and parties concerned.

As a general rule, full justification for decisions should be given. However, where it may not be possible, for example because of the large number of persons concerned by similar decisions, to communicate in detail the grounds of individual decisions, standard replies may be given. These standard replies should include the principal reasons justifying the decision taken. Furthermore, an interested party who expressly requests a detailed justification shall be provided with it.

*Duty to state arrangements for appeals*

Where Community law so provides, decisions notified shall clearly state that an appeal is possible and describe how to submit it, (the name and office address of the person or department with whom the appeal must be lodged and the deadline for lodging it).

Where appropriate, decisions should refer to the possibility of starting judicial proceedings and/or of lodging a complaint with the European Ombudsman in accordance with Article 230 or 195 of the Treaty establishing the European Community.

### 4. DEALING WITH ENQUIRIES

The Commission undertakes to answer enquiries in the most appropriate manner and as quickly as possible.

*Requests for documents*

If a document has already been published, the person making the enquiry should be directed to the sales agents of the Office for Official Publications of the European Communities or to the documentation or information centres which provide free access to documents, such as Info-Points, European documentation centres, etc. Many documents are also easily accessible in electronic form.

The rules on access to documents are laid down in a specific measure.

*Correspondence*

In accordance with Article 21 of the Treaty establishing the European Community, the Commission shall reply to letters in the language of the initial letter, provided that it was written in one of the official languages of the Community.

A reply to a letter addressed to the Commission shall be sent within 15 working days from the date of receipt of the letter by the responsible Commission department. The reply should identify the person responsible for the matter and state how he or she may be contacted.

If a reply cannot be sent within 15 working days, and in all cases where the reply requires other work on it, such as interdepartmental consultation or translation, the member of staff responsible should send a holding reply, indicating a date by which the addressee may expect to be sent a reply in the light of this additional work, taking into account the relative urgency and complexity of the matter.

If the reply is to be drawn up by a department other than the one to which the initial correspondence is addressed, the person making the enquiry should be informed of the name and office address of the person to whom the letter has been passed.

These rules do not apply to correspondence which can reasonably be regarded as improper, for example, because it is repetitive, abusive and/or pointless. Then the Commission reserves the right to discontinue any such exchanges of correspondence.

*Telephone communication*

When answering the telephone, staff shall identify themselves or their department. They shall return telephone calls as promptly as possible.

Staff replying to enquiries shall provide information on subjects for which they have direct responsibility and should direct the caller to the specific appropriate source in other cases. If necessary, they should refer callers to their superior or consult him or her before giving the information.

Where enquiries concern areas for which staff are directly responsible, they shall establish the identity of the caller and check whether the information has already been made public before giving it out. If this is not the case, the member of staff may consider that it is not in the Community interest for the information to be disclosed. In this case he or she should explain why they are unable to disclose it and refer in appropriate cases to the obligation to exercise discretion as laid down in Article 17 of the Staff Regulations.

When appropriate, staff should request confirmation in writing of the enquiries made by telephone.

#### *Electronic mail*

Staff shall reply to e-mail messages promptly following the guidelines described in the section on telephone communication.

However, where the e-mail message is, by its nature, the equivalent of a letter, it shall be handled according to the guidelines for handling correspondence and shall be subject to the same deadlines.

#### *Requests from the media*

The Press and Communication Service is responsible for contacts with the media. However, when requests for information concern technical subjects falling within their specific areas of responsibility, staff may answer them.

### 5. PROTECTION OF PERSONAL DATA AND CONFIDENTIAL INFORMATION

The Commission and its staff shall respect, in particular:

- the rules on the protection of personal privacy and personal data,
- the obligations set out in Article 287 of the Treaty establishing the European Community and in particular those which relate to professional secrecy,
- the rules on secrecy in criminal investigations,
- the confidentiality of matters falling within the ambit of the various committees and bodies provided for in Article 9 of and Annexes II and III to the Staff Regulations.

### 6. COMPLAINTS

#### *The European Commission*

Complaints may be lodged concerning a possible breach of the principles set out in this Code directly with the Secretariat-General of the European Commission, which shall forward it to the relevant department.

The Director-General or head of Department shall reply to the complainant in writing, within two months. The complainant then has one month in which to apply to the Secretary-General of the European Commission to review the outcome of the complaint. The Secretary-General shall reply to the request for a review within one month.

#### *The European Ombudsman*

Complaints may also be lodged with the European Ombudsman in accordance with Article 195 of the Treaty establishing the European Community and the Statute of the European Ombudsman.'

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## **EXAMPLE OF A NEGATIVE REPLY**

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## EUROPEAN COMMISSION

Directorate-General for Trade

The Director General

Brussels,  
USA and Canada



Dear [REDACTED],

**Subject: Your application for access to documents request GestDem 2015/1885**

Thank you for your request for access to documents under Regulation No 1049/2001<sup>1</sup> regarding public access to European Parliament, Council and Commission documents ("Regulation No 1049/2001") registered on 28 March 2015.

### 1. SCOPE OF YOUR REQUEST

In your request submitted to the Directorate General for Trade you have asked for internal TTIP communication documents. After the phone conversation you had with my services on 28 April 2015 you have further clarified in an email of 30 April 2015 that you would like to receive the latest version (from round 9) of the document entitled 'TTIP Communications Toolkit', as well as all the supporting documents referred to in the toolkit.

I note that in your exchanges with my services you have been informed that the version of the document requested (update after round 9) was not yet available, as the work on the update was still ongoing.

The supporting documents on key figures on EU-US trade relations, SME stories that show the benefits of TTIP, speeches, factsheets and videos on TTIP that had been used to prepare this toolkit or referred within the toolkit are publicly available and can be found on DG Trade's website dedicated to TTIP. For your convenience, you will find the links to these documents in an annex attached to this reply.

Therefore this reply only concerns the document entitled 'TTIP Communications Toolkit - June 2015 edition'.

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<sup>1</sup> OJ L 145, 31.5.2001, p. 43.

## 2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

Please note that, in accordance with settled case law, when an institution is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents of the institutions set out in Article 4 of Regulation No 1049/2001<sup>2</sup>. Such assessment is carried out in a multi-stage approach:

- first, the institution must satisfy itself that the document relates to one of the exceptions, and if so, decide which parts of it are covered by that exception;
- second, it must examine whether disclosure of the parts of the document in question would undermine the protection of the interest covered by the exception;
- third, the risk of that interest being undermined must be “*reasonably foreseeable and not purely hypothetical*”.<sup>3</sup>

Having carried out the above mentioned assessment of the document under Regulation No 1049/2001, we have come to the conclusions that the document is covered by the exceptions laid down in Article 4(1)(b) and Article 4(3) first paragraph of Regulation No 1049/2001. The reasons for our decision are set out below.

### 2.1. Protection of the privacy and integrity of the individual

Article 4(1)(b) of Regulation 1049/2001 provides that *[t]he institutions shall refuse access to a document where disclosure would undermine the protection of privacy and the integrity of the individual in particular in accordance with Community legislation regarding the protection of personal data.*

The document you have requested contains personal data, such as names and emails of Commission officials.

Pursuant to Article 4(1) (b) of Regulation (EC) No 1049/2001, access to a document has to be refused if its disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data. The applicable legislation in this field is Regulation No 45/2001<sup>4</sup> of the European Parliament and 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.

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<sup>2</sup> Judgment in *Kingdom of Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 35.

<sup>3</sup> *Id.*, paragraphs 37-43. See also Judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraphs 52 and 64.

<sup>4</sup> Regulation (EC) No 45/2001 of the European Parliament and 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, Official Journal L 8 of 12.1.2001



I would like to inform you in this regard that in its judgment in the *Bavarian Lager case*<sup>5</sup> the Court of Justice has ruled that when a request is submitted for access to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable. The names of individuals and their emails undoubtedly constitute personal data in the meaning of Article 2(a) of the Data Protection Regulation. As the Court of Justice confirmed in case C-465/00 (*Rechnungshof*)<sup>6</sup>, *there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of 'private life'*.

When access is requested to documents containing personal data, Regulation (EC) No 45/2001 becomes fully applicable<sup>7</sup>.

According to Article 8(b) of this Regulation, personal data shall only be transferred to recipients if they establish the necessity of having the data transferred to them and if there is no reason to assume that the legitimate rights of the persons concerned might be prejudiced.

We consider that, with the information available, the necessity of disclosing the aforementioned personal data to you has not been established and/or that it cannot be assumed that such disclosure would not prejudice the legitimate rights of the persons concerned.

## **2.2. Protection of the decision-making process**

Article 4(3) of Regulation 1049/2001 provides that *[a]ccess 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.*

The document you have requested ('TTIP Communications Toolkit) relates to the ongoing Transatlantic Trade and Investment Partnership (TTIP) negotiations between the European Union and the United States.

Since the launch of the negotiations the agreement has attracted an unprecedented level of interest from various stakeholders (i.e. NGOs, trade unions, consumer organisations, business, the general public, etc.) in a number of Member States and beyond.

To respond to this demand and to permit its staff members across Europe to engage with the public in a meaningful way, and in an ever-changing, highly political context of the negotiations, DG Trade has developed the TTIP Communications Toolkit. It is an internal

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5 Judgment of the Court of Justice of 29 June 2010, Case C-28/08P, Commission v. Bavarian Lager Co. Ltd, European Court reports 2010, page I-6051.

6 Judgment of the Court of 20 May 2003 in joined cases C-465/00, C-138/01 and C-139/01, preliminary rulings in proceedings between Rechnungshof and Österreichischer Rundfunk, paragraph 73.

7 Judgment of the Court of Justice of the EU of 29 June 2010 in case 28/08 P, Commission/The Bavarian Lager Co. Ltd, ECR 2010 I-06055.

document to be used only by selected staff members engaged in communicating with stakeholders on TTIP.

In a single place it contains the lines to take, as well as providing arguments and supporting evidence enabling the Commission staff to react to concerns raised by the public. Some of the information contained in the toolkit has already been made public through our various communications efforts to keep the public informed about the negotiations. For instance, the key figures on EU-US trade relations and the potential impact of TTIP<sup>8</sup>, the SME stories<sup>9</sup>, the speeches<sup>10</sup>, the links to factsheets and videos on TTIP<sup>11</sup> referred to above are publically available in the TTIP dedicated website. However, it is the disclosure of its structure and the strategic approach to the various communication issues that the Commission aims to preserve in this case.

As a single tool it reflects the Commission's thinking process in relation to its communication activities, which are changing as negotiations progress. The thinking process can also be witnessed by the 'living' nature of the document which is updated after every round, with new and adapted lines to take, that are evolving as the negotiation advances. In the context of international negotiations this equates to the possibility to consider different negotiating scenarios or outcomes with a view to adhering the best overall outcome in the EU interest. Some of these approaches may not finally be tabled or if tabled may not necessarily be taken up in the final deal. These considerations also apply to the approach to communications with regard to a negotiation.

The release of this document before the negotiations have been concluded would seriously undermine the Commission's decision-making process as it would unduly expose the Commission's deliberative process in its communication activities (i.e. assessment of stakeholder views and possible responses to these views at a particular point in time) to external pressure<sup>12</sup>. It also entails the risk of leading to premature and/or unfounded conclusions from the public as well as having the potential to prejudice the institution's margin of manoeuvre and severely reduce its capacity to engage with the public, the Council and the European Parliament.

The risk of interference by external parties and undue pressure is not hypothetical in this case, given that the requested disclosure concerns negotiations which have attracted a lot of outside interest from stakeholders. With the aim of completing the agreement, the institution should remain free from external pressure to explore all possible options in the negotiation and on the related public communication.

It should be noted that while the document to which you request access do not relate to a "legislative" procedure, they concern the conduct of negotiations to conclude an international agreement. As such – and as also acknowledged by the EU Courts – they

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8 [http://europa.eu/rapid/press-release\\_MEMO-13-211\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-211_en.htm)

[http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc\\_113465.pdf](http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113465.pdf)

9 [http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index\\_en.htm#/economic-benefits](http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#/economic-benefits)  
[http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc\\_152266.pdf](http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152266.pdf)

10 [http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index\\_en.htm#/speeches](http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#/speeches)

11 [http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index\\_en.htm#/videos](http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#/videos)  
[http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index\\_en.htm#/eu-position](http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#/eu-position)

12 Sweden v MyTravel and Commission C-506/08



*“fall within the domain of the executive”, which entails that “public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations”.*<sup>13</sup> This is also valid for strategic communication surrounding this negotiation.

#### *2.2.1. No overriding public interest*

The exception laid down in Article 4(3), first paragraph of Regulation 1049/2001 must be waived if there is an overriding public interest in disclosure. Such an interest must, first, be public and, secondly, outweigh the harm caused by disclosure.

We have not been able to identify any such public interest capable of overriding the Commission’s decision making process in this case.

### **2.3. Partial access**

In accordance with Article 4(6) of Regulation 1049/2001, I have considered the possibility of granting partial access to the document requested. However, for the reasons explained above, no meaningful partial access (going beyond the provision of the list of links in annex) is possible without undermining the interests described above. Consequently, I have come to the conclusion that the documents requested are covered in their entirety by the invoked exception to the right of public access. Moreover case law supports a decision to withhold access completely where partial access is not meaningful<sup>14</sup> and if the public's right to be informed is adequately protected by its right of access to publicly available information<sup>15</sup>.

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<sup>13</sup> Judgment in *Sophie in 't Veld v European Commission*, T-301/10, EU:T:2013:135, paragraphs 120 and 181; see also Judgment in *Sophie in 't Veld v Council*, T-529/09, EU:T:2012:215, paragraph 88.

<sup>14</sup> *Mattila v Council and Commission* T-204/99, § 69 and *Reagens v Commission* T-181/10, §161-175

<sup>15</sup> *Mattila v Council and Commission* T-204/99, § 73

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In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission  
Secretary-General  
Transparency unit SG-B-4  
BERL 5/327  
B-1049 Bruxelles

or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

Yours sincerely,

*p.a.*

Jean-Luc DEMARTY

## **Annex:**

TTIP website:

<http://ec.europa.eu/trade/policy/in-focus/ttip/>

TTIP explained:

[http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc\\_152462.pdf](http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152462.pdf)

TTIP and transparency:

[http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc\\_152276.pdf](http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152276.pdf)

Structure of the agreement and EU proposals in the negotiations

<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>

TTIP State of Play

[http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc\\_153394.pdf](http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153394.pdf)

[http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153437.pdf](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153437.pdf)

Economic analysis + facts and figures

[http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc\\_151787.pdf](http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf)

[http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc\\_150737.pdf](http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf)

[http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc\\_113465.pdf](http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113465.pdf)

Speeches

[http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index\\_en.htm#speeches](http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#speeches)

Frequently asked questions on TTIP:

[http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/questions-and-answers/index\\_en.htm](http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/questions-and-answers/index_en.htm)

Small and Medium Sized Enterprises

<http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/helping-smaller-firms/>

[http://trade.ec.europa.eu/doclib/cfm/doclib\\_results.cfm?docid=152266](http://trade.ec.europa.eu/doclib/cfm/doclib_results.cfm?docid=152266)

[http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc\\_153348.pdf](http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153348.pdf)

<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1292>

Concept paper on Investment protection:

[http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF)

TTIP and the rest of the world:

[http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc\\_151787.pdf#world](http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf#world)

Joint statement on public services issued on 20 March by Commissioner Malmström and US Trade Representative Froman.

[http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc\\_153264.pdf](http://trade.ec.europa.eu/doclib/docs/2015/march/tradoc_153264.pdf)

Audiovisuals:

#### BENEFITS OF TTIP

EN: <http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=I096954>

FR:

<http://ec.europa.eu/avservices/video/player.cfm?ref=I096954&sitelang=en&videolang=fr>

DE:

<http://ec.europa.eu/avservices/video/player.cfm?ref=I096954&sitelang=en&videolang=de>

#### TRANSPARENCY IN TTIP

EN: <http://ec.europa.eu/avservices/video/player.cfm?ref=I096956&sitelang=en>

FR:

<http://ec.europa.eu/avservices/video/player.cfm?ref=I096956&sitelang=en&videolang=fr>

DE:

<http://ec.europa.eu/avservices/video/player.cfm?ref=I096956&sitelang=en&videolang=de>

#### UPHOLDING STANDARDS IN TTIP

EN: <http://ec.europa.eu/avservices/video/player.cfm?ref=I096955&sitelang=en>

FR:

<http://ec.europa.eu/avservices/video/player.cfm?ref=I096955&sitelang=en&videolang=fr>

DE:

<http://ec.europa.eu/avservices/video/player.cfm?ref=I096955&sitelang=en&videolang=de>

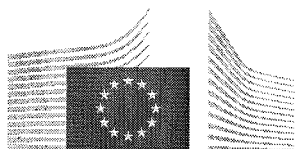
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# **EXAMPLES OF PARTIALLY NEGATIVE REPLIES**

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EUROPEAN COMMISSION  
Directorate-General for Trade

The Director General

Brussels, **14 DEC. 2015**  
trade.a.3.dir(2015)5934345

*By registered letter with acknowledgment of receipt*



*Advance copy by email:*



**Subject: Your application for access to documents – Ref GestDem No 2015/0365**

Dear [REDACTED],

I refer to your e-mail dated 15 January 2015 in which you make a request for access to documents under Regulation (EC) No 1049/2001 ("Regulation 1049/2001"),<sup>1</sup> registered on the same date under the above mentioned reference number.

**1. SCOPE OF YOUR REQUEST**

You requested access to the following documents:

*"all relevant documents (such as minutes of meetings, emails, SWDs, memoranda, fact sheets) relating to the European Commission's public and media communication strategy concerning the Transatlantic Trade and Investment Partnership (TTIP). The request covers the period 1 January 2013 – 31 December 2014."*

You further clarified that your request concerns *"in particular documents prepared/circulated/drafted by the media/press team within DG Trade concerning TTIP"*.

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<sup>1</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 20 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43.

Given the wide scope of your request and the considerable number of documents identified, we agreed in accordance with Article 6.3 of Regulation 1049/2001 that we would deal with these documents in successive stages. In particular:

- On 11 May 2015, we provided you with a first batch containing 32 fully or partially released documents.
- On 2 July 2015, we provided you with a second batch covering in total 33 documents, out of which 8 were fully disclosed, 10 partially disclosed and 15 withheld. On 22 July 2015, you submitted a confirmatory application asking the Secretary General of the Commission to reconsider the position of DG Trade with regard to the documents covered by the reply of 2 July 2015. The Secretary General adopted a decision on 20 October 2015 in which it partially granted your request by providing wider access to some of the documents concerned.

The present reply covers the third and last batch of documents falling within the scope of your request, as follows:

- the programme and list of participants of a journalist seminar organized by DG Trade on 27 November 2013 in Brussels with the cooperation of the European Journalism Centre ("EJC") ("**document 1**");
- the programme and list of participants of a journalist seminar organized by DG Trade on 2-3 April 2014 in Brussels with the cooperation of the EJC ("**document 2**");
- the programme and list of participants of a journalist seminar organized by DG Trade on 3-4 December 2014 in Brussels with the cooperation of the EJC ("**document 3**");
- a summary report dated 22 July 2013 of a TTIP communication strategy coordination meeting on 19 July 2013 ("**document 4**");
- a summary report dated 6 September 2013 of a TTIP communication strategy coordination meeting on 6 September 2013 ("**document 5**");
- an internal e-mail dated 28 October 2013 containing the summary of a communication meeting on 25 October 2013 ("**document 6**");
- an internal e-mail dated 11 November 2013 containing the summary of a communication meeting on 8 November 2013 ("**document 7**");
- an internal document containing follow-up points from a TTIP communications coordination meeting on 10 January 2014 ("**document 8**");
- an internal document containing follow-up actions from a TTIP communications coordination meeting on 24 January 2014, and an annexed calendar ("**document 9**");

- an internal document containing follow-up actions from a TTIP communications meeting on 16 May 2014 ("**document 10**");
- an internal document containing the summary report of a TTIP communications meeting on 11 July 2014 ("**document 11**");
- an internal document containing the summary report of a TTIP communications meeting on 3 October 2014 ("**document 12**");
- an internal document containing the summary report of a TTIP communications meeting on 17 October 2014 ("**document 13**");
- an internal briefing in preparation for a meeting on 24 October 2014 with the then Commissioner designate Malmström on "*Communications on TTIP*" ("**document 14**");
- an internal e-mail of 22 December 2014 containing the summary report of a meeting of the Trade Policy Committee ("TPC") on 12 December 2014 ("**document 15**");
- an internal e-mail of 20 October 2014 containing the summary report of a meeting of the Council Working Party on Information ("WPI") on 17 October 2014 and an attached slides presentation ("**document 16**");
- an internal e-mail of 18 November 2014 containing the report of a meeting with the cabinet of the French Minister for external trade ("**document 17**");
- the programme of a workshop for TTIP contact points in Commission Representations which took place on 17 and 18 September 2014 ("**document 18**");
- an internal e-mail of 17 June 2013 and annexes containing media monitoring reports ("**document 19**");
- an internal e-mail of 4 July 2013 and annexes containing media monitoring reports ("**document 20**");
- an internal e-mail of 18 July 2013 and annexes containing media monitoring reports ("**document 21**");
- an internal e-mail of 26 September 2013 and annexes containing media monitoring reports ("**document 22**").
- an internal e-mail of 6 March 2014 and annexes containing media monitoring reports ("**document 23**");
- an internal e-mail of 15 May 2014 and annexes containing media monitoring reports ("**document 24**");

- an internal e-mail of 10 July 2014 and annexes containing media monitoring reports ("**document 25**");
- an internal e-mail of 25 September 2014 and annexes containing media monitoring reports ("**document 26**");
- an internal e-mail of 4 December 2014 and annexes containing media monitoring reports ("**document 27**");
- an internal document entitled "*TTIP Communications analysis / next steps*" ("**document 28**");
- an internal document entitled "*TTIP Communications: Objectives, Challenges and Action Points*" ("**document 29**").

We enclose for ease of reference a list of these documents in Annex I. For each of the documents, the list provides a description and indicates whether parts are withheld and if so, under which ground pursuant to Regulation 1049/2001. Copies of the accessible documents are enclosed in Annex II.

## 2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law,<sup>2</sup> when an institution is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents set out in Article 4 of Regulation 1049/2001. Such assessment is carried out in a multi-step approach: first, the institution must satisfy itself that the document relates to one of the exceptions, and if so, decide which parts of it are covered by that exception; second, it must examine whether disclosure of the parts of the document in question pose a "*reasonably foreseeable and not purely hypothetical*" risk of undermining the protection of the interest covered by the exception; third, if it takes the view that disclosure would undermine the protection of any of the interests defined under Articles 4.2 and 4.3 of Regulation 1049/2001, the institution is required "*to ascertain whether there is any overriding public interest justifying disclosure*".<sup>3</sup>

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents,<sup>4</sup> "*the exceptions to that right [...] must be interpreted and applied strictly*".<sup>5</sup>

Having carefully examined the documents identified above in light of the applicable legal framework:

<sup>2</sup> Judgment in *Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 35.

<sup>3</sup> *Id.*, paragraphs 37-43. See also judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraphs 52 and 64.

<sup>4</sup> See Regulation (EC) No 1049/2001, recital (4).

<sup>5</sup> Judgment in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66.

- I am pleased to inform you that **full access is granted to document 18 and partial access is granted to documents 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 28.**

Please note that as regards documents 1, 2 and 3, only the names of certain individuals have been redacted, pursuant to Article 4.1(b) of Regulation 1049/2001 and in accordance with Regulation (EC) No 45/2001 ("Regulation 45/2001").<sup>6</sup> Hence, the main content of these documents is entirely accessible.

As regards documents 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16, in addition to personal data covered by the exception of Article 4.1(b) of Regulation 1049/2001,<sup>7</sup> other information has been redacted as it is covered by the exceptions set out in Articles 4.1(a) third indent and 4.3 first subparagraph of Regulation 1049/2001. Parts of documents 28 have been redacted under the exception set out in Article 4.3 first subparagraph of Regulation 1049/2001.

- I regret to inform you that **no access can be granted to documents 17,<sup>8</sup> 19-27 and 29** as these documents are entirely covered by the exceptions to the right of access to documents set out in Articles 4.1(a) third indent, 4.1(b) and 4.3 first subparagraph of Regulation 1049/2001.

The reasons justifying the application of the abovementioned exceptions are set out below in Sections 2.1, 2.2 and 2.3. Section 3 contains an assessment of whether there exists an overriding public interest in the disclosure.

## **2.1. Protection of international relations (documents 4, 5, 6, 10, 13, 29)**

Article 4.1(a) third indent, of Regulation 1049/2001 provides that "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: the public interest as regards: [...] international relations."

The Court of Justice has acknowledged that the institutions enjoy "*a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by [the] exceptions [under Article 4.1(a)] could undermine the public interest*".<sup>9</sup> More specifically, the General Court has stated that "*it is possible that the disclosure of*

<sup>6</sup> 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.

<sup>7</sup> Please note that, where applicable, the names of Commissioners, members of Cabinet, and senior management of the Commission starting from the Director level, have been disclosed. See by analogy Commission decisions C(2014) 9051 and C(2014) 9048 of 25 November 2014 on the publication of information on meetings held between Members and Directors-General of the Commission and organisations or self-employed individuals, respectively available at [http://ec.europa.eu/news/2014/docs/c\\_2014\\_9051\\_en.pdf](http://ec.europa.eu/news/2014/docs/c_2014_9051_en.pdf) and [http://ec.europa.eu/news/2014/docs/c\\_2014\\_9048\\_en.pdf](http://ec.europa.eu/news/2014/docs/c_2014_9048_en.pdf)

<sup>8</sup> It should be added that certain parts of document 17 have been considered as outside of scope of your request as they concern matters other than those specified in your request.

<sup>9</sup> Judgment in *Council v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

*European Union positions in international negotiations could damage the protection of the public interest as regards international relations" and "have a negative effect on the negotiating position of the European Union" as well as "reveal, indirectly, those of other parties to the negotiations".<sup>10</sup> It added that "in the context of international negotiations, unilateral disclosure by one negotiating party of the negotiating position of one or more other parties [...] may be likely to seriously undermine, for the negotiating party whose position is made public and, moreover, for the other negotiating parties who are witnesses to that disclosure, the mutual trust essential to the effectiveness of those negotiations."<sup>11</sup>*

Documents 4, 5, 6, 10, 13 and 29 contain summary reports of internal meetings covering various aspects of the Commission's communication activities in relation to the ongoing TTIP negotiations. Certain redacted parts reveal opinions, perceptions and expectations of Commission staff members regarding the position of either the US or the EU in the ongoing negotiations. Other redacted passages may reveal details of the US strategy and activities in the field of communication.<sup>12</sup>

The public release of this information in the current circumstances would harm the international relations of the EU with the US in a real and foreseeable way by undermining the mutual trust between the negotiating parties, prejudicing their respective margins of manoeuvre and leading to negative repercussions on their collaboration and public opinion. It would also weaken the position of the EU in the context of the TTIP negotiations by exposing the internal assessments and views of its staff, thus jeopardising the effectiveness of the Commission's communication activities and negotiation strategies. Finally, public disclosure of these passages may put at risk the success of the TTIP negotiations altogether, thus undermining the objectives of the EU and ultimately the protection of the public interest as regards international relations.

## **2.2. Protection of privacy and integrity of the individual (documents 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19-27)**

Article 4.1(b) of Regulation 1049/2001 provides that "[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data."

The Court of Justice has ruled that "where an application based on Regulation 1049/2001 seeks to obtain access to documents containing personal data" "the provisions of

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<sup>10</sup> Judgment in *Sophie in 't Veld v Commission*, T-301/10, EU:T:2013:135, paragraphs 123-125.

<sup>11</sup> *Id.*, paragraph 126.

<sup>12</sup> More details cannot be revealed without revealing the contents of the withheld documents or parts of documents, and without thereby depriving the exception of its very purpose.

*Regulation 45/2001, of which Articles 8(b) and 18 constitute essential provisions, become applicable in their entirety".*<sup>13</sup>

Article 2(a) of Regulation 45/2001 provides that *"personal data' shall mean any information relating to an identified or identifiable natural person [...]".* The Court of Justice has confirmed that *"there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of 'private life'"*<sup>14</sup> and that *"surnames and forenames may be regarded as personal data",*<sup>15</sup> including names of the staff of the institutions.<sup>16</sup>

According to Article 8(b) of this Regulation, personal data shall only be transferred to recipients if they establish *"the necessity of having the data transferred"* and additionally *"if there is no reason to assume that the legitimate interests of the data subjects might be prejudiced"*. The Court of Justice has clarified that *"it is for the person applying for access to establish the necessity of transferring that data".*<sup>17</sup>

Documents 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19-27 all contain generally names, e-mail addresses, job titles, telephone numbers and other personal information that allows the identification of natural persons.

I note that you have not established the necessity of having these personal data transferred to you. Moreover, it cannot be assumed on the basis of the information available, that disclosure of such personal data would not prejudice the legitimate interests of the persons concerned. Therefore, these personal data shall remain undisclosed in order to ensure the protection of the privacy and integrity of the individuals concerned.

**2.3. Protection of the institution's decision-making process (documents 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19-27, 28 and 29)**

Article 4.3 first subparagraph, of Regulation 1049/2001 provides that *"[a]ccess 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."*

The jurisprudence of the EU Courts has recognized that *"the protection of the decision-making process from targeted external pressure may constitute a legitimate ground for*

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<sup>13</sup> Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 101; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraphs 63 and 64.

<sup>14</sup> Judgment in *Rechnungshof v Rundfunk and Others*, Joined cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

<sup>15</sup> Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

<sup>16</sup> Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

<sup>17</sup> Judgment in C-127/13 P *Guido Strack v Commission*, EU:C:2014:2250, paragraph 107 and judgment in C-28/08 P *Commission v Bavarian Lager*, EU:C:2010:378, paragraph 77.

*restricting access to documents relating to the decision-making process"*<sup>18</sup> and that the capacity of its staff to express their opinions freely must be preserved<sup>19</sup> so as to avoid the risk that the disclosure would lead to future self-censorship. As the General Court has recognized, the result of such self-censorship *"would be that the Commission could no longer benefit from the frankly-expressed and complete views required of its agents and officials and would be deprived of a constructive form of internal criticism, given free of all external constraints and pressures and designed to facilitate the taking of decisions [...]"*<sup>20</sup>

Documents 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19-27, 28 and 29 all contain internal views, analyses, opinions, proposals and ideas of Commission staff members on the principles, goals and objectives that could form part of potential communication initiatives on TTIP, and reflections on possible actions for implementation. They reveal individual positions, divergent views, internal priorities and planned initiatives that were or were not eventually pursued, or that may still be pursued in the future. In addition, some of these documents reveal internal comments and views regarding the economic and political situation in the Member States, the positions of relevant public and private actors in the national contexts and possible joint communication activities of the Commission with the Member States. In particular, documents 19 to 27 contain internal analyses and assessments regarding the coverage of TTIP negotiations in the media.

Some of the documents also reflect exchanges of views with representatives of the Member States on the subject of communication in the context of the TTIP negotiations and related activities, and reveal the individual position of certain Member States with regard to communication initiatives discussed with the Commission. Document 19, in particular, contains the report of a meeting between Commission staff members and members of the cabinet of the French Minister for external trade, in which the French representatives presented certain communication initiatives envisaged by the French government at the time, and expressed personal views and ideas regarding TTIP communication activities in general.

All this information was meant for internal use of the Commission as a basis to inform its decision-making process in relation to communication activities related to the TTIP negotiations. This deliberative process is not entirely concluded. As the TTIP negotiations unfold the Commission is continuously reflecting on the best possible means to enhance the understanding of the public and adapting its communication activities accordingly.

As you are aware, there have been a number of controversies and divergent opinions in relation to the Commission's initiatives in relation to the TTIP negotiations, including on its communication initiatives. Publicly releasing the internal opinions and initial ideas of Commission staff members on the envisaged TTIP communication activities (some of which do not reflect the final position of the Commission), and the positions of the

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<sup>18</sup> Judgment in *MasterCard and Others v Commission*, T-516/11, EU:T:2014:759, paragraph 71

<sup>19</sup> Judgment in *Muñiz v Commission*, T-144/05, EU:T:2008:596, paragraph 89.

<sup>20</sup> Judgment in *MyTravel v Commission*, T-403/05, EU:T:2008:316, paragraph 52.



Member States in this context, would pose a “*reasonably foreseeable and not purely hypothetical*” risk of undermining the protection of the Commission's decision-making process. In particular, public disclosure of the documents and passages mentioned above would unduly expose the Commission's deliberative process to external pressure, potential manipulation and unfounded conclusions and would restrict the free exchange of views within the Commission staff and between the Commission and the Member States. Protecting the confidentiality of these passages allows for the individuals involved in the decision-making process to speak frankly and freely. Reducing this degree of confidentiality would give rise to a risk of self-censorship of those involved, which would deprive the Commission's deliberative process of that “*constructive form of internal criticism, given free of all external constraints and pressures*” which is “*designed to facilitate the taking of decisions*”.<sup>21</sup> Ultimately, this would affect the quality of the internal consultations and deliberations, and seriously undermine the Commission's decision making process.

### 3. OVERRIDING PUBLIC INTEREST IN DISCLOSURE

The exception laid down in Article 4.3 first subparagraph, of Regulation 1049/2001 applies unless there is an overriding public interest in disclosure of the documents. Such an interest must, first, be public and, secondly, outweigh the harm caused by disclosure. The Court of Justice has acknowledged that it is for the institution concerned by the request for access to balance the particular interest to be protected by non-disclosure of the document against the public interest. In this respect, – the Court has stated – the public interest is of particular relevance where the institution “*is acting in its legislative capacity*”<sup>22</sup> as transparency and openness of the legislative process strengthen the democratic right of European citizens to scrutinise the information which has formed the basis of a legislative act.<sup>23</sup>

The negotiations of international agreements as such “*fall within the domain of the executive*”, which entails that “*public participation in the procedure relating to the negotiation and the conclusion of an international agreement is necessarily restricted, in view of the legitimate interest in not revealing strategic elements of the negotiations*”.<sup>24</sup> Documents 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19-27, 28 and 29 all pertain to the domain of the executive functions of the EU, as they concern internal discussions on the communication activities of the Commission in relation to the negotiation and conclusion of an international agreement.

We have carefully assessed the public interest in the disclosure of these documents against the interest of protecting the decision making process of the EU and we have concluded that on balance, preserving the Commission's decision-making from external pressure and risks of self-censorship in the specific circumstances of the TTIP

<sup>21</sup> See *supra*, case-law cited in footnote 20.

<sup>22</sup> Judgment in *Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 46.

<sup>23</sup> *Id.*, paragraph 67.

<sup>24</sup> Judgment in *Sophie in 't Veld v European Commission*, T-301/10, EU:T:2013:135, paragraphs 120 and 181; see also Judgment in *Sophie in 't Veld v Council*, T-529/09, EU:T:2012:215, paragraph 88.

negotiations, prevail over the public interest in transparency. In particular, disclosure at this stage of certain contents of documents 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19-27, 28 and 29, would undermine the decision-making processes of the Commission and reduce the possibility of achieving the best possible outcome in the public interest. Such public interest would instead be better served by the possibility for the Commission to complete the decision-making processes in question without any external pressure.

Therefore, on the basis of the considerations made above, we have not been able to identify a public interest capable of overriding the Commission's decision making process in this case.

#### 4. PARTIAL ACCESS

Pursuant to Article 4.6 of Regulation (EC) No 1049/2001 "*[i]f only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released*". We have carefully analysed the content of documents 17, 19-27 and 29 with a view to determining whether parts of these documents could be released. We have however concluded that these documents are to be withheld in their entirety as their content is wholly covered by some of the exceptions set out in Article 4 of Regulation 1049/2001 as explained above, and it would be impossible to disclose any part without undermining the protection of the interests covered by those exceptions.

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In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission  
Secretary-General  
Transparency unit SG-B-4  
BERL 5/327  
B-1049 Bruxelles

or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

Yours sincerely,



Jean-Luc DEMARTY

Enclosures (2)

- Annex I: list of documents
- Annex II: documents disclosed

*Please note that the documents disclosed – except for documents 1, 2, 3 and 18 – are either preliminary drafts or record opinions of individual staff members which do not necessarily reflect the final position of the Commission. They cannot be quoted as reflecting the Commission's position and cannot be reproduced or disseminated for commercial purposes without prior consent given by the Commission.*

**Annex I - List of documents identified on the basis of the request for access to documents with reference GestDem No 2015/0365**

No	Date	Description	Disclosure	Justification under Regulation 1049/2001	Ares registration number
1	27/11/2013	Programme + list of participants of a journalist seminar organized by DG Trade on 27 November 2013 in Brussels in cooperation with the European Journalism Centre ("EJC")	Partial disclosure	Article 4.1(b)	Ares(2015)5559971
2	2-3/04/2014	Programme + list of participants of a journalist seminar organized by DG Trade on 2-3 April 2014 in Brussels in cooperation with the ECJ	Partial disclosure	Article 4.1(b)	Ares(2015)5560236
3	3-4/12/2014	Programme + list of participants of a journalist seminar organized by DG Trade on 3-4 December 2014 in Brussels in cooperation with the ECJ	Partial disclosure	Article 4.1(b)	Ares(2015)5561849
4	22/07/2013	Summary report dated 22 July 2013 of a TTIP communication strategy coordination meeting on 19 July 2013	Partial disclosure	Article 4.1(a) third indent, Article 4.1(b), Article 4.3 first subparagraph	Ares(2015)5561966
5	6/09/2013	Summary report dated 6 September 2013 of a TTIP communication strategy coordination meeting on 6 September 2013	Partial disclosure	Article 4.1(a) third indent, Article 4.1(b), Article 4.3 first subparagraph	Ares(2015)5562026
6	28/10/2013	Internal e-mail dated 28 October 2013 containing the summary of a communication meeting on 25 October 2013	Partial disclosure	Article 4.1(a) third indent, Article 4.1(b), Article 4.3 first subparagraph	Ares(2015)5562124
7	11/11/2013	Internal e-mail dated 11 November 2013 containing the summary of a communication meeting on 8 November 2013	Partial disclosure	Article 4.1(b), Article 4.3 first subparagraph	Ares(2015)5562460
8	10/01/2014	Internal document containing follow-up points from a TTIP communications coordination meeting on 10 January 2014	Partial disclosure	Article 4.1(b), Article 4.3 first subparagraph	Ares(2015)5562175
9	23/01/2014	Internal document containing follow-up actions from a TTIP communications coordination meeting on 24 January 2014 + an annexed calendar	Partial disclosure	Article 4.1(b), Article 4.3 first subparagraph	Ares(2015)5562662
10	20/05/2014	Internal document containing follow-up actions from a TTIP communications meeting on 16 May 2014	Partial disclosure	Article 4.1(a) third indent, Article 4.1(b), Article 4.3 first subparagraph	Ares(2015)5562739
11	10/07/2014	Internal document containing the summary report of a TTIP communications meeting on 11 July 2014	Partial disclosure	Article 4.1(b), Article 4.3 first subparagraph	Ares(2015)5562797
12	06/10/2014	Internal document containing the summary report of a TTIP communications meeting on 3 October 2014	Partial disclosure	Article 4.1(b), Article 4.3 first subparagraph	Ares(2015)5562845
13	21/10/2014	Internal document containing the summary report of a TTIP communications meeting on 17 October 2014	Partial disclosure	Article 4.1(a) third indent, Article 4.1(b), Article 4.3 first subparagraph	Ares(2015)5559721
14	24/10/2014	Internal briefing in preparation for a meeting on 24 October 2014 with the then Commissioner designate Malmström on "Communications on TTIP"	Partial disclosure	Article 4.1(b), Article 4.3 first subparagraph	Ares(2015)5559953
15	22/12/2014	Internal e-mail of 22 December 2014 containing the summary report of a meeting of the	Partial disclosure	Article 4.1(b), Article 4.3 first	Ares(2015)5560085

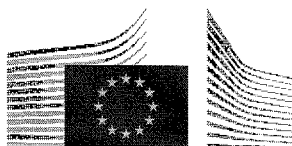
		Trade Policy Committee ("TPC") on 12 December 2014			subparagraph	
16	20/10/2014	Internal e-mail of 20 October 2014 containing the summary report of a meeting of the Council Working Party on Information ("WPI") on 17 October 2014 + attached slides presentation	Partial disclosure		Article 4.1(b), Article 4.3 first subparagraph	Ares(2015)5562114
17	18/11/2014	Internal e-mail of 18 November 2014 containing the report of a meeting with the cabinet of the French Minister for external trade	Withheld		Article 4.1(b), Article 4.3 first subparagraph	Ares(2015)5562214
18	17-18/09/2014	Programme of a workshop for TTIP contact points in Commission Representations which took place on 17 and 18 September 2014	Full disclosure		n/a	Ares(2015)5562605
19	17/06/2013	Internal e-mail of 17 June 2013 and annexes containing media monitoring reports	Withheld		Article 4.1.(b), Article 4.3 first subparagraph	Ares(2015)5562730
20	04/07/2013	Internal e-mail of 4 July 2013 and annexes containing media monitoring reports	Withheld		Article 4.1.(b), Article 4.3 first subparagraph	Ares(2015)5562843
21	18/07/2013	Internal e-mail of 18 July 2013 enclosing and annexes containing media monitoring reports	Withheld		Article 4.1.(b), Article 4.3 first subparagraph	Ares(2015)5562919
22	26/09/2013	Internal e-mail of 26 September 2013 and annexes containing media monitoring reports	Withheld		Article 4.1.(b), Article 4.3 first subparagraph	Ares(2015)5562987
23	6/3/2014	Internal e-mail of 6 March 2014 and annexes containing media monitoring reports	Withheld		Article 4.1.(b), Article 4.3 first subparagraph	Ares(2015)5563256
24	15/05/2014	Internal e-mail of 15 May 2014 and annexes containing media monitoring reports	Withheld		Article 4.1.(b), Article 4.3 first subparagraph	Ares(2015)5563397
25	10/07/2014	Internal e-mail of 10 July 2014 and annexes containing media monitoring reports	Withheld		Article 4.1.(b), Article 4.3 first subparagraph	Ares(2015)5563423
26	25/09/2014	Internal e-mail of 25 September 2014 and annexes containing media monitoring reports	Withheld		Article 4.1.(b), Article 4.3 first subparagraph	Ares(2015)5563482
27	4/12/2014	Internal e-mail of 4 December 2014 and annexes containing media monitoring reports	Withheld		Article 4.1.(b), Article 4.3 first subparagraph	Ares(2015)5579725
28	06-07/2014	Internal document entitled "TTIP Communications analysis / next steps"	Partial disclosure		Article 4.3 first subparagraph	Ares(2015)5579820
29	09/2014	Internal document entitled "TTIP Communications: Objectives, Challenges and Action Points"	Withheld		Article 4.1(a) third indent, Article 4.3 first subparagraph	Ares(2015)5562952











**EUROPEAN COMMISSION**

Directorate-General for Trade

The Director General

Brussels, **04 MARS 2016**  
trade.dgal.b.2(2015)5749137

***By registered letter with acknowledgment of receipt***



***Advance copy by email:***



**Subject: Your application for access to documents – Ref GestDem No 2015/5130**

Dear ,

I refer to your e-mail dated 30 September 2015 in which you make a request for access to documents under Regulation (EC) No 1049/2001 ("Regulation 1049/2001"),<sup>1</sup> registered on the same date under the above mentioned reference number.

**1. SCOPE OF YOUR REQUEST**

You requested access to the following documents:

- "1) a list of meetings of DG Trade officials and/ or representatives (including the Commissioner and the Cabinet) with stakeholders, including individual companies, law firms, arbitrators and industry associations, in which the EU-China investment relations, including the EU's negotiations for an investment agreement with China, were discussed (between 1 May 2015 and today [i.e. 30 September 2015]);*
- 2) minutes and other reports of these meetings;*

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<sup>1</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 20 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43.

- 3) *all correspondence (including emails) between DG Trade officials and/or representatives (including the Commissioner and the Cabinet) and stakeholders, including representatives of companies, business associations, law firms and individual arbitrators, in which the EU-China investment relations, including the EU's negotiations for an investment agreement with China, were discussed (between 1 May 2015 and today [i.e. 30 September 2015])."*

We apologize for the delay in sending this reply which is the consequence of a number of large requests received simultaneously on investment issues in the past few months.

We have identified the following documents falling under the scope of your request:

- An e-mail dated 23 June 2015 regarding a meeting with the European Trade Union Confederation (ETUC) and national trade unions on 22 June 2015 (Ares (2015)5783144) ("**document 1**");
- An e-mail dated 10 July 2015 regarding a meeting with representatives from the European Federation of Pharmaceutical Industries and Associations (EFPIA), King & Spalding and GlaxoSmithKline, on 9 July 2015 (Ares (2015)5783330) ("**document 2**");
- The report of a meeting with the European Union Chamber of Commerce in China (EUCCC), held on 14 September 2015 (Ares (2015)5005988) ("**document 3**");
- Correspondence between the European Commission and EFPIA from 26 June to 29 July 2015, and an enclosed attachment (Ares (2015)6096741) ("**document 4**");
- A letter from the EUCCC to the European Commission dated September 2015 (Ares (2015)4164700) ("**document 5**").<sup>2</sup>

## 2. ASSESSMENT AND CONCLUSIONS UNDER REGULATION 1049/2001

In accordance with settled case law,<sup>3</sup> when an institution is asked to disclose a document, it must assess, in each individual case, whether that document falls within the exceptions to the right of public access to documents set out in Article 4 of Regulation 1049/2001. Such assessment is carried out in a multi-step approach: first, the institution must satisfy itself that the document relates to one of the exceptions, and if so, decide which parts of it are covered by that exception; second, it must examine whether disclosure of the parts of the document in question pose a "*reasonably foreseeable and not purely hypothetical*" risk of undermining the protection of the interest covered by the exception; third, if it takes the

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<sup>2</sup> In our email of 30 November 2015, we informed you that eight documents had been identified as falling under the scope of your request. However, further to a closer review it became apparent that three of them fell outside the time scope of your request. Therefore, these three documents are not covered by this initial reply.

<sup>3</sup> Judgment in *Sweden and Maurizio Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 35.

view that disclosure would undermine the protection of any of the interests defined under Articles 4.2 and 4.3 of Regulation 1049/2001, the institution is required *"to ascertain whether there is any overriding public interest justifying disclosure"*.<sup>4</sup>

In view of the objectives pursued by Regulation 1049/2001, notably to give the public the widest possible right of access to documents,<sup>5</sup> *"the exceptions to that right [...] must be interpreted and applied strictly"*.<sup>6</sup>

Having carefully examined the documents identified above in light of the applicable legal framework, **we are pleased to release document 5 in full and grant partial release of the other four documents.** Copies of the accessible documents are enclosed in Annex I.

The information removed in documents 1, 2, 3 and 4 falls under the exceptions set out in Articles 4.1(a) third indent, 4.1(b) and 4.2 first indent of Regulation 1049/2001. The reasons justifying the application of these exceptions are set out below in Sections 2.2, 2.3 and 2.4. Section 3 contains an assessment of whether there exists an overriding public interest in the disclosure.

## **2.1. Context of the documents**

As part of the EU common commercial policy, the Commission negotiates investment rules in the context of free trade agreements with third countries. The EU's investment policy focuses on providing EU investors and investments with market access, legal certainty and a stable, predictable, fair and properly regulated environment in which to conduct their business.

In the context of these negotiations and reflections on the EU investment policy the Commission meets with, and seeks input from, a wide range of stakeholders, including civil society, NGOs, trade unions, consumer groups, companies and trade associations. This process allows the Commission to better understand the stakeholders' interests and concerns in the third country markets, and to identify strategic objectives to pursue in the negotiations, thus obtaining positive outcomes in the agreements in the public interest. The documents covered by this request were drawn up in the course of this process, and with a view of reaching the objectives set by the EU in its investment negotiations with China.

## **2.2. Protection of international relations (documents 2 and 3)**

Article 4.1(a) third indent, of Regulation 1049/2001 provides that *"[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: the public interest as regards: [...] international relations."*

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<sup>4</sup> *Id.*, paragraphs 37-43. See also judgment in *Council v Sophie in 't Veld*, C-350/12 P, EU:C:2014:2039, paragraphs 52 and 64.

<sup>5</sup> See Regulation (EC) No 1049/2001, recital (4).

<sup>6</sup> Judgment in *Sweden v Commission*, C-64/05 P, EU:C:2007:802, paragraph 66.

According to settled case-law, *"the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) of Regulation No 1049/2001, combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care. Such a decision therefore requires a margin of appreciation"*.<sup>7</sup> In this context, the Court of Justice has acknowledged that the institutions enjoy *"a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by [the] exceptions [under Article 4.1(a)] could undermine the public interest"*.<sup>8</sup>

The General Court found that *"it is possible that the disclosure of European Union positions in international negotiations could damage the protection of the public interest as regards international relations" and "have a negative effect on the negotiating position of the European Union" as well as "reveal, indirectly, those of other parties to the negotiations"*.<sup>9</sup> Moreover, the *"the positions taken by the Union are, by definition, subject to change depending on the course of those negotiations and on concessions and compromises made in that context by the various stakeholders. The formulation of negotiating positions may involve a number of tactical considerations on the part of the negotiators, including the Union itself. In that context, it cannot be precluded that disclosure by the Union, to the public, of its own negotiating positions, when the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating capacity of the Union"*.<sup>10</sup>

Some of the withheld parts of documents 2 and 3 reveal the positions of stakeholders in relation to certain aspects of the Chinese foreign investment policy and their input on specific issues that they would like to be reflected in a possible future investment agreement with China. The disclosure of this information could reveal to our negotiating partners strategic interests that the EU may be pursuing in the negotiations, and thus indirectly the negotiating position of the EU. Exposure of such position could weaken the negotiating power of the EU and reduce its margin of manoeuvre, thus undermining in a reasonably foreseeable manner the protection of the public interest as regards international relations.

### **2.3. Protection of the privacy and the integrity of the individual (documents 1, 2, 3 and 4)**

Article 4.1(b) of Regulation 1049/2001 provides that *"[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data."*

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<sup>7</sup> Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 36

<sup>8</sup> Judgment in *Council v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

<sup>9</sup> Judgment in *Sophie in't Veld v Commission*, T-301/10, EU:T:2013:135, paragraphs 123-125.

<sup>10</sup> *Id.*, paragraph 125.

The Court of Justice has ruled that *"where an application based on Regulation 1049/2001 seeks to obtain access to documents containing personal data" "the provisions of Regulation 45/2001, of which Articles 8(b) and 18 constitute essential provisions, become applicable in their entirety"*.<sup>11</sup>

Article 2(a) of Regulation 45/2001 provides that *"'personal data' shall mean any information relating to an identified or identifiable natural person [...]"*. The Court of Justice has confirmed that *"there is no reason of principle to justify excluding activities of a professional [...] nature from the notion of 'private life'"*<sup>12</sup> and that *"surnames and forenames may be regarded as personal data"*,<sup>13</sup> including names of the staff of the institutions.<sup>14</sup>

According to Article 8(b) of this Regulation, personal data shall only be transferred to recipients if they establish *"the necessity of having the data transferred"* and additionally *"if there is no reason to assume that the legitimate interests of the data subjects might be prejudiced"*. The Court of Justice has clarified that *"it is for the person applying for access to establish the necessity of transferring that data"*.<sup>15</sup>

Documents 1, 2, 3 and 4 contain names and other personal information that allow the identification of natural persons.

I note that that you have not established the necessity of having these personal data transferred to you. Moreover, it cannot be assumed on the basis of the information available, that disclosure of such personal data would not prejudice the legitimate interests of the persons concerned. Therefore, these personal data shall be removed in order to ensure the protection of the privacy and integrity of the individuals concerned.

We do however disclose the names of senior management of the Commission starting from the Director level (included), and names of public figures.

#### **2.4. Protection of commercial interests (documents 1, 2 and 3)**

Article 4.2 first indent, of Regulation 1049/2001 provides that *"[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: [...] commercial interests of a natural or legal person, including intellectual property [...] unless there is an overriding public interest in disclosure"*.

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<sup>11</sup> Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 101; see also judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraphs 63 and 64.

<sup>12</sup> Judgment in *Rechnungshof v Rundfunk and Others*, Joined cases C-465/00, C-138/01 and C-139/01, EU:C:2003:294, paragraph 73.

<sup>13</sup> Judgment in *Commission v Bavarian Lager*, C-28/08 P, EU:C:2010:378, paragraph 68.

<sup>14</sup> Judgment in *Guido Strack v Commission*, C-127/13 P, EU:C:2014:2250, paragraph 111.

<sup>15</sup> *Id.*, paragraph 107; see also judgment in *C-28/08 P Commission v Bavarian Lager*, EU:C:2010:378, paragraph 77.

While not all information concerning a company and its business relations can be regarded as falling under the exception of Article 4.2 first indent,<sup>16</sup> it appears that the type of information covered by the notion of commercial interests would generally be of the kind protected under the obligation of professional secrecy.<sup>17</sup> Accordingly, it must be information that is *"known only to a limited number of persons", "whose disclosure is liable to cause serious harm to the person who has provided it or to third parties"* and for which *"the interests liable to be harmed by disclosure must, objectively, be worthy of protection."*<sup>18</sup>

Document 1 contains the preliminary internal assessments of individual Commission staff members regarding a study conducted by an independent consultant, Syndex, contracted out by the association of European trade unions, ETUC, to conduct a study on the costs and benefits of the EU-China investment agreement. The disclosure of this information could affect the commercial interests of Syndex by indirectly revealing elements of its preliminary analysis in the study.

Documents 2 and 3 reveal the specific views, concerns and interests raised by the business associations in relation to investment and regulatory issues in foreign markets. They also contain the assessments of the economic situation and market access problems in third countries as well as commercial priorities, strategies and concerns that a company or the members of a business association pursue in the third country markets. These were shared with the Commission in confidence in order to support the EU's objectives in the ongoing investment negotiations. This information, if released, would harm the relations that these organisations have with the governments and regulators, at the same time exposing EU investors to the risk of retaliation. Moreover the commercial interests of the EU investors in the conclusion, implementation and enforcement of trade agreements as well as the negotiation of future agreements could be undermined by revealing the positions taken in the course of the negotiations of such agreements. Finally, there is a reasonably foreseeable and not purely hypothetical risk that the commercial interests of the members of the business association be undermined by revealing their commercial strategies and priorities as well as their commercially sensitive business information.

### **3. OVERRIDING PUBLIC INTEREST**

The exception laid down in Article 4.2 first indent of Regulation 1049/2001 applies unless there is an overriding public interest in disclosure of the documents. Such an interest must, first, be public and, secondly, outweigh the harm caused by disclosure. Accordingly, we have also considered whether the risks attached to the release of the withheld parts of documents 1, 2 and 3 are outweighed by the public interest in accessing the requested documents. We have not been able to identify any such public interest capable of overriding the commercial interests of the companies concerned.

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<sup>16</sup> Judgment in *Terezakis v Commission*, T-380/04, EU:T:2008:19, paragraph 93.

<sup>17</sup> See Article 339 of the Treaty on the Functioning of the European Union.

<sup>18</sup> Judgment in *Bank Austria v Commission*, T-198/03, EU:T:2006:136, paragraph 29.

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In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission  
Secretary-General  
Transparency unit SG-B-4  
BERL 5/327  
B-1049 Bruxelles  
[sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

Yours sincerely,



P.O. R.M. PETRICCIONE  
Jean-Luc DEMARTY

Encl.:

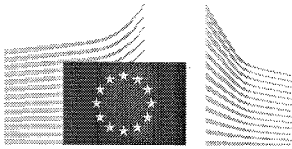
Annex I: documents (partially) disclosed











**EUROPEAN COMMISSION**

Directorate-General for Trade

The Director General

Brussels, **12 FEB. 2016**  
trade.dga1.b.2/AS/am(2015)6315424

*By registered letter with acknowledgment of receipt*



*Advance copy by email:*



**Subject: Your application for access to documents – Ref. GestDem No 2015/6055**

Dear ,

I refer to your request for access to documents under Regulation (EC) No 1049/2001<sup>1</sup> ("Regulation 1049/2001"), received and registered on 19 November 2015 under the above mentioned reference number.

I would like first to apologise for the time it has taken to reply to your request. The Directorate-General for Trade is currently processing a large number of requests for access to documents while at the same time pursuing a busy trade agenda. Although we make our best effort to reply to applicants within the deadline of Regulation 1049/2001, a delay in these circumstances has unfortunately been unavoidable.

I understand from your request that you would like to receive access to the following document:

- *"COM(2013)297/1 - Recommendation for a Council Decision authorising the Commission to open negotiations for the conclusion of an investment agreement between the European Union and the Republic of China"*

As a starting point, I note that the recent Communication of the Commission entitled *"Trade for All: Towards a more responsible trade and investment policy"* provides that the

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<sup>1</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 20 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43.

Commission will in relation to future decisions of the Council authorising the opening of negotiations of free trade agreements, at launch invite the Council to disclose the negotiating directives immediately after their adoption.<sup>2</sup>

As regards existing Council authorisations relating to ongoing 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, further to a case-by-case assessment, whether to publish these documents.

Recommendations for Council decisions authorising the opening of the negotiations of free trade agreements, such as the one which is the subject of your request, are Commission documents, and any request for access pertaining to them needs to be assessed by the Commission in accordance with Regulation 1049/2001 and the applicable case law. In particular, the Commission would have to assess, in each individual case, whether that document or parts thereof, fall within any of the exceptions to the right of public access to documents set out in Article 4 of Regulation 1049/2001, and whether their public disclosure would pose a “*reasonably foreseeable and not purely hypothetical*” risk of undermining the protection of the interest covered by the exception.<sup>3</sup>

After careful examination in light of the applicable legal framework, I am glad to inform you that partial access can be granted to the requested document. The document was originally entirely classified as “EU Restricted”. Following the partial access granted as a result of your request, the parts of the document that continue to be classified are: Section 3 of the Explanatory Memorandum, the text of the recommended Council decision and the proposed draft negotiating directives. These classified parts are covered by the exceptions to the right of access to documents set out in Article 4.1(a) third indent of Regulation 1049/2001. A copy of the partially declassified version is enclosed in Annex 1.

Article 4.1(a) third indent provides that “[t]he institutions shall refuse access to a document where disclosure would undermine the protection of: the public interest as regards: [...] international relations.”

According to settled case-law, “*the particularly sensitive and essential nature of the interests protected by Article 4(1)(a) of Regulation No 1049/2001, combined with the fact that access must be refused by the institution, under that provision, if disclosure of a document to the public would undermine those interests, confers on the decision which must thus be adopted by the institution a complex and delicate nature which calls for the exercise of particular care. Such a decision therefore requires a margin of appreciation*”.<sup>4</sup> In this context, the Court of Justice has acknowledged that the institutions enjoy “*a wide discretion for the purpose of*

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<sup>2</sup> 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](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf).

<sup>3</sup> Judgment in *Sweden and Turco v Council*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraphs 37-43. See also judgment in *Council v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraphs 52 and 64.

<sup>4</sup> Judgment in *Sison v Council*, C-266/05 P, EU:C:2007:75, paragraph 36

*determining whether the disclosure of documents relating to the fields covered by [the] exceptions [under Article 4.1(a)] could undermine the public interest".<sup>5</sup>*

As regards in particular the public disclosure of Council decisions authorising the opening of negotiations for international agreements, the General Court ruled 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."*<sup>6</sup> Furthermore, with respect to the preparatory nature of negotiating directives, the General Court noted that *"the positions taken by the Union are, by definition, subject to change depending on the course of those negotiations and on concessions and compromises made in that context by the various stakeholders. The formulation of negotiating positions may involve a number of tactical considerations on the part of the negotiators, including the Union itself. In that context, it cannot be precluded that disclosure by the Union, to the public, of its own negotiating positions, when the negotiating positions of the other parties remain secret, could, in practice, have a negative effect on the negotiating capacity of the Union".*<sup>7</sup>

The classified sections in the document contain details of the legal elements of the proposal, the text of the recommended Council decision, and the proposed draft negotiating directives in relation to the investment agreement with China. These set out the envisaged scope, nature, objectives and content of a possible future investment agreement with China, as well as procedural elements of the negotiations. Placing this information in the public domain poses a reasonably foreseeable and not purely hypothetical risk of undermining the position of the EU and the outcome of the negotiations – which are currently ongoing – by providing *inter alia* its negotiating partners in this and other ongoing and future negotiations, with elements of the EU's strategy, tactical approaches and objectives, as well as a benchmark against which to assess the outcome of the negotiations.

In addition, the public disclosure of the draft negotiating directives as initially proposed by the Commission would, in the event that the Council decides to publish the final version of the negotiating directives incorporated in its decision, reveal by comparison the possible shifts of positions in the decision-making process and the internal debates of the Council in relation to the envisaged negotiations. This information may confer an undue advantage to the negotiating partners of the EU in the context of this and other current or future negotiations covering similar areas, thus undermining the public interest of the EU as regards international relations.

Should you wish this position to be reviewed, you should write to the Commission's Secretary-General at the address below, confirming your initial request. Following receipt of this letter you have fifteen working days to do so, after which your initial request will be deemed to have been withdrawn.

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<sup>5</sup> Judgment in *Council v Sophie in't Veld*, C-350/12 P, EU:C:2014:2039, paragraph 63.

<sup>6</sup> Judgment in *Leonard Besselink v. Council of the European Union*, T-331/11, EU:T:2013:419, paragraph 71.

<sup>7</sup> *Id.*, paragraph 72. See also Judgment in *Sophie in't Veld v Commission*, T-301/10, EU:T:2013:135, paragraph 125.

The Secretary-General will inform you of the result of this review within 15 working days from the registration of your request, either granting you access to the documents or confirming the refusal.

All correspondence should be sent to the following address:

European Commission  
Secretary-General  
Transparency unit SG-B-4  
BERL 5/327  
B-1049 Bruxelles

or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

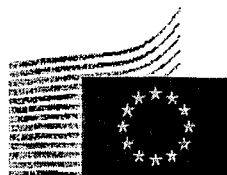
Yours sincerely,



Jean-Luc DEMARTY

Encl.: Annex 1 (partially declassified document)

**RESTREINT UE/EU RESTRICTED**



**EUROPEAN  
COMMISSION**

Brussels, 23.5.2013  
COM(2013) 297 final

Recommendation for a

**COUNCIL DECISION**

**authorising the Commission to open negotiations on an investment agreement between  
the European Union and the People's Republic of China**

{SWD(2013) 184 final}  
{SWD(2013) 185 final}

**DECLASSIFIED PART**

on 08 FEB 2016

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**RESTREINT UE/EU RESTRICTED**

# RESTREINT UE/EU RESTRICTED

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

The Lisbon Treaty provides for the European Union to contribute to the progressive abolition of restrictions on foreign direct investment. Articles 3(1)(e), 206 and 207 of the Treaty on the Functioning of the European Union confer exclusive competence to the European Union in the field of foreign direct investment.

The Commission Communication<sup>1</sup> of 3 March 2010 "*A strategy for smart, sustainable and inclusive growth – Europe 2020*" emphasises the need to build strategic relationships with emerging economies. Trade and investment are a crucial component of the triple growth objective of the Europe 2020 Strategy. The Commission Communication<sup>2</sup> of 7 July 2010 "*Towards a comprehensive European international investment policy*" identifies China as a potential partner for an investment agreement, given the shortcomings of the current legal framework and climate for investment between the EU and China.

In April 2010 the European Commission President José Manuel Barroso and Chinese Premier Wen Jiabao agreed to look into ways of deepening and enhancing the EU-China bilateral investment relationship. European Trade Commissioner Karel De Gucht and the Chinese Minister for Trade, Chen Deming agreed at the EU-China Joint Committee in May 2010 to launch a Joint EU-China Investment Taskforce to study the options for enhancing bilateral investment and evaluate the desirability and feasibility of potential negotiations of an EU-China investment agreement.

At the EU-China Summit in February 2012 leaders emphasised that "*a rich in substance EU-China investment agreement would promote and facilitate investment in both directions. Negotiations towards this agreement would include all issues of interest to either side, without prejudice to the final outcome. They agreed to work towards the start of the negotiation as soon as possible.*"

This statement echoes a basic mutual understanding that the negotiations will encompass all key issues of interest to either side – namely an acknowledgement that this agreement should deal with both investment protection as well as improved access to the market for investors from the EU and China.

The EU-China Summit in September 2012 "*reconfirmed both sides' commitment to launching negotiations of an EU-China Investment Agreement as soon as possible to promote and facilitate investment in both directions*".

### 2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

As a consequence of this mutual political intent and in order to guide next steps, the European Commission undertook an in depth impact assessment to analyse the underlying problems in the current EU-China investment relationship, the different options to address these and their respective impacts from an economic, social, labour, environmental, human rights and financial perspective.

<sup>1</sup> Commission (2010) 2020 final

<sup>2</sup> Commission (2010) 343 final.

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on 08 FEB 2016

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Civil society, Member States and the European Parliament were consulted and informed of the reflections on an investment agreement and the draft negotiating directives in the framework of the impact assessment carried out by the European Commission.

China is the world's third largest economy and the biggest exporter, but also an increasingly important outward investor. EU-China trade has increased dramatically in recent years. China is now the EU's second trading partner behind the United States and the EU's biggest source of imports by far. International estimates predict China may be on track to become the world's biggest economy within the next 5-10 years. China's rise as a major global economy was boosted by its accession to the World Trade Organisation (WTO) in 2001, which integrated China into the multilateral trading system. WTO accession brought substantial reform and opening up of China's market in many respects but has not resulted in a sufficiently open investment environment.

China is regarded as one of the most strategic destinations for foreign direct investment (FDI) by European companies – both at present and for the future. This was confirmed by DG TRADE's public consultation in 2011 on the future of the EU-China investment relationship, as well as through other business surveys conducted.<sup>3</sup>

Yet while FDI between the EU and China has become a more visible factor of the bilateral relationship, there remains an important discrepancy between, on the one hand, the EU-China overall trade relationship, and investment on the other. Compared with those of other key trading partners such as the United States and particularly other emerging economies such as Brazil and India, EU-China FDI flows and stocks are clearly lagging behind in both directions.

Despite the growing attraction and strategic importance of China as an FDI destination, the lack of an open, predictable and secure environment negatively affects EU outward FDI flows to China. The result is not only an untapped potential, but also a growing imbalance, given the relative absence of barriers in the EU towards increasing Chinese inward investment. Market access limitations for EU investors in China are a major concern and exist at various administrative levels (national, regional, municipal) and in manifold forms (foreign ownership prohibitions and equity limitations, joint venture requirements, screening mechanisms, capital and licensing requirements to name but a few). These market access barriers increase the costs and/or prevent investing in China. Particularly SMEs which dispose of fewer resources are thereby prevented from entering China.

EU investors already established in China complain about discriminatory treatment in form of more burdensome administrative rules and requirements for foreign investors, insufficient protection of intellectual property rights and key technologies, subsidies to Chinese competitors and the conduct of state-owned enterprises (SOEs).

Chinese outward FDI has increased dramatically in the past years and also its investment into the EU is increasing. Yet, while the increases seem very large looking at the growth percentage (100 per cent increase from 2010 to 2011), having started from a very low base the total Chinese FDI into the EU remains comparatively low at a time when the EU is looking to attract even more FDI to counterbalance the economic crisis.

<sup>3</sup> See public consultation; also reflected in: European Chamber of Commerce in China (EUCCC) (2011) *Business Confidence Survey 2011*.

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on 08 FEB 2016

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As regards protection of investors and their investments, a patchwork of agreements exists. China has concluded 25 Bilateral Investment Treaties (BITs) with 26 EU Member States. However, these BITs provide for widely discrepant levels of investment protection and post-establishment treatment while not addressing barriers to market access. China has been particularly interested in replacing this patchwork with a coherent EU level framework to increase certainty for Chinese investors in Europe.

On the basis of the analysis undertaken and given the strong calls received from stakeholders, the European Commission believes that there is a clear need to actively remedy the current shortcomings of the framework for EU-China investment relations through the negotiations of an ambitious investment agreement.

### **3. LEGAL ELEMENTS OF THE PROPOSAL**

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on 08 FEB 2016

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**RESTREINT UE/EU RESTRICTED**

Recommendation for a

**COUNCIL DECISION**

**authorising the Commission to open negotiations on an investment agreement between  
the European Union and the People's Republic of China**

**DECLASSIFIED PART**

on 08 FEB 2016

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**RESTREINT UE/EU RESTRICTED**

**ANNEX**

**DECLASSIFIED PART**  
**on 08 FEB 2016**

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**RESTREINT UE/EU RESTRICTED**

**DECLASSIFIED PART**

on 08 FEB 2016

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on 08 FEB 2016

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**on 08 FEB 2016**

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10/10/10



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# **EXAMPLE OF A NO DOCUMENTS FOUND REPLY**

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EUROPEAN COMMISSION  
Directorate-General for Trade

The Director General

Brussels, 30.03.2016  
Trade/B1/MZ/lj/6549169

*By registered letter with acknowledgment  
of receipt*



*Advance copy by email:*



**Subject: Your application for access to documents – Ref GestDem No 2015/5582**

Dear [REDACTED],

Thank you for your request for access to documents, registered on 27 October 2015 under the above mentioned reference number.

You request, under Regulation (EC) No 1049/2001<sup>1</sup> regarding public access to European Parliament, Council and Commission documents, a "*document handed in by HSBC to DG Trade on the issue of market access difficulties in Turkey*". You indicate that "*[i]n a minute of a meeting between ESF and TCP SI on 17 June 2014 it is noted in this context that 'Input will be provided written' by HSBC.*"

We regret to inform you that no documents were found that would correspond to the description given in your application. Although HSBC indicated during this meeting that they would provide additional information, this was not, in fact, the case.

As specified in Article 2(3) of Regulation 1049/2001, the right of access as defined in that regulation applies only to existing documents in the possession of the institution.

Given that no such documents have been identified, the Commission is not in a position to handle your request.

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<sup>1</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 20 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43 ("Regulation 1049/2001").

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission  
Secretary-General  
Transparency unit SG-B-4  
BERL 5/327  
B-1049 Bruxelles

or by email to: [sg-acc-doc@ec.europa.eu](mailto:sg-acc-doc@ec.europa.eu)

Yours sincerely,



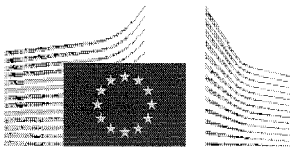
P.O. R.M. PETRICCIONE  
Jean-Luc DEMARTY

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## EXAMPLES OF POSITIVE REPLIES

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## EUROPEAN COMMISSION

Directorate-General for Trade

Directorate A - Resources, Information and Policy Coordination  
Information, Communication and Civil Society

Brussels, **05 FEB. 2016**  
trade.a.3.dir(2016)685767



**Email:**



**Subject: Your application for access to documents – Ref GestDem No 2015/6212**

Dear 

I refer to your e-mail sent to the Secretariat General on 27 November 2015 in which you make a request for access to documents under Regulation (EC) No 1049/2001 ("Regulation 1049/2001"),<sup>1</sup> distributed to DG TRADE and registered on the same day under the above mentioned reference number.

You requested access to "*information and documentation concerning national TTIP impact studies*", namely "*the impact studies of all 28 member states with regards to TTIP (e.g. Estimating the Economic Impact on the UK of a TTIP Agreement etc.)*".

As we informed you by email of 17 December 2015, the Commission has been collecting information from the EU Member States regarding national economic impact studies on TTIP. We provide in the table below a list of publicly available studies that the Commission is currently aware of, together with their corresponding web links.

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<sup>1</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 20 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43.

MS	Study name	Link
CZ	Amoz 2013	<a href="http://www.amo.cz/editor/image/produkty1_soubory/amocz-pp-2013-04.pdf">http://www.amo.cz/editor/image/produkty1_soubory/amocz-pp-2013-04.pdf</a>
DE	Cesifo 2013	<a href="https://www.bmwi.de/BMWi/Redaktion/PDF/Publikationen/Studien/dimensionen-auswirkungen-freihandelsabkommens-zwischen-eu-usa-summary.property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf">https://www.bmwi.de/BMWi/Redaktion/PDF/Publikationen/Studien/dimensionen-auswirkungen-freihandelsabkommens-zwischen-eu-usa-summary.property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf</a>
IE	Copenhagen Economics 2015	<a href="http://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/5/15/1429776797/1888-01-ttip-impact-in-ireland-26feb2015_front-page.pdf">http://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/5/15/1429776797/1888-01-ttip-impact-in-ireland-26feb2015_front-page.pdf</a>
ES	Latorre 2015	<a href="http://www.ieemadrid.es/userfiles/OtrosInformes/ttip_completo1.pdf">http://www.ieemadrid.es/userfiles/OtrosInformes/ttip_completo1.pdf</a>
FR	Fontagné 2013	<a href="http://www.cepii.fr/PDF_PUB/pb/2013/pb2013-01.pdf">http://www.cepii.fr/PDF_PUB/pb/2013/pb2013-01.pdf</a>
NL	Ecorys 2012	<a href="http://www.ecorys.com/sites/default/files/files/EU-US%20HLWG%20Ecorys%20Final%20report.pdf">http://www.ecorys.com/sites/default/files/files/EU-US%20HLWG%20Ecorys%20Final%20report.pdf</a>
AT	Fiw 2012	<a href="http://www.fiw.ac.at/fileadmin/Documents/Publikationen/Studien_2012_13/03-ResearchReport-FrancoisPindyuk.pdf">http://www.fiw.ac.at/fileadmin/Documents/Publikationen/Studien_2012_13/03-ResearchReport-FrancoisPindyuk.pdf</a>
PL	Analiza Wpływu i Efektów Umowy O Swh Ue Z Usa Na Gospodarkę Polski 2013	<a href="http://www.mg.gov.pl/files/upload/20622/IBRKK%20analiza%20UE_USA%20TTIP-%20lipiec%202013.pdf">http://www.mg.gov.pl/files/upload/20622/IBRKK%20analiza%20UE_USA%20TTIP-%20lipiec%202013.pdf</a>
SI	Center Poslovne Odličnosti 2014	<a href="http://www.vlada.si/fileadmin/dokumenti/si/projekti/2015/TTIP/TTIP_Analiza_1.pdf">http://www.vlada.si/fileadmin/dokumenti/si/projekti/2015/TTIP/TTIP_Analiza_1.pdf</a>
SK	Business Alliance Of Slovakia 2014	<a href="http://alianciapas.sk/wp-content/uploads/2014/07/TTIP-Analysis-PAS-20140717.pdf">http://alianciapas.sk/wp-content/uploads/2014/07/TTIP-Analysis-PAS-20140717.pdf</a>
SE	Kommerskollegium 2013	<a href="http://www.kommers.se/Documents/In_English/Publications/PDF/Potential-effects-from-an-EU-US%20-free-trade-agreement.pdf">http://www.kommers.se/Documents/In_English/Publications/PDF/Potential-effects-from-an-EU-US%20-free-trade-agreement.pdf</a>
UK	Cepr 2013	<a href="https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/198115/bis-13-869-economic-impact-on-uk-of-transatlantic-trade-and-investment-partnership-between-eu-and-us.pdf">https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/198115/bis-13-869-economic-impact-on-uk-of-transatlantic-trade-and-investment-partnership-between-eu-and-us.pdf</a>

In addition, national studies on the economic impact of TTIP appear at the moment to be either undergoing or completed but not yet published, in other Member State, such as Bulgaria, Italy, Cyprus and Hungary. At this stage no further information on these studies is available to the Commission.

I would like also to inform you that the Commission is currently carrying out a Sustainability Impact Assessment (SIA) to support its ongoing TTIP negotiations. The purpose of the SIA is to provide the Commission with an in-depth analysis of the potential economic, social, human rights, and environmental consequences of the ongoing trade negotiations. An inception report is already available on the website of DG Trade at [http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc\\_152512.pdf](http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152512.pdf). A draft SIA



interim report is currently in preparation, and is expected to be made public in 2016.<sup>2</sup> I therefore invite you to regularly check the website of DG Trade.

The information contained in this letter is provided in accordance with the Code of Good Administrative Behaviour.<sup>3</sup> I consider that this information satisfies your request for access to documents under reference GestDem No 2015/6212.

Yours sincerely,



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<sup>2</sup> See also the page of DG Trade on Sustainability Impact Assessments at <http://ec.europa.eu/trade/policy/policy-making/analysis/sustainability-impact-assessments/>

<sup>3</sup> Code of Good Administrative Behaviour, OJ L267, 20.10.2000, p.64, available at [http://ec.europa.eu/transparency/code/docs/code\\_en.pdf](http://ec.europa.eu/transparency/code/docs/code_en.pdf).







**From:** TRADE ACCES DOCUMENTS  
**Sent:** 18 March 2016 15:25  
**To:** [REDACTED]  
**Cc:** TRADE ACCES DOCUMENTS  
**Subject:** atd requests DG TRADE

Dear Sir,

**Subject: Your applications for access to documents – Ref GestDem No 2016/767, 2016/768 and 2016/769**

We refer to your requests for access to documents, registered under the above mentioned reference numbers.

We enclose the links to the documents requested.

You may reuse the documents requested free of charge for non-commercial and commercial purposes provided that the source is acknowledged and that you do not distort the original message. Please note that the Commission does not assume liability stemming from the reuse.

With regard to ATD request ref.No 767, please find the link of the published document below:  
[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL\\_2016\\_073\\_R\\_0001&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2016_073_R_0001&from=EN)

With regard to ATD request ref.No768, please find below the link of the published document:  
[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL\\_2016\\_073\\_R\\_0002&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2016_073_R_0002&from=EN)

With regard to ATD request ref.No769, please find below the link of the published document:  
[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL\\_2016\\_052\\_R\\_0012&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2016_052_R_0012&from=EN)

Faithfully,

[REDACTED]



European Commission

DG TRADE

Unit A3 - Information, communication and civil society

CHAR [REDACTED]

B-1049 Brussels/Belgium

+32 2 29 [REDACTED]  
[REDACTED]



