



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL INFORMATICS

The Acting Director-General

Brussels, Date as Postmark  
DIGIT.A.3.001/MK

Mr Mathias Schindler  
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By email with acknowledgment of  
receipt to: [ask+request-8002-  
8d8ced76@asktheeu.org](mailto:ask+request-8002-8d8ced76@asktheeu.org)

**Subject: Your application for access to documents – GESTDEM 2020/3360**

Dear Mr Schindler,

We refer to your e-mail dated 2 June 2020 in which you make a request for access to documents, registered on 3 June 2020 under the above mentioned reference number.

You request access to the licensing agreements currently in force with Microsoft concerning the use of the Microsoft Windows operating system, as well as invoices, procurement documents and memos on bulk licensing and on all information concerning extended warranty and support for Microsoft Windows.

**1. Scope of your request**

In order to identify the documents relevant to your request, we have divided the documents falling within the scope of your application into the following categories. Please note that certain documents are mentioned below as part of the documents' package for the sake of completeness, even though they do not fall within the scope of your application.

**A. Licensing agreements, which include the following documents:**

#	Document	Date of signature	Ares reference
A1	DI 07670 Interinstitutional Licensing Agreement ("ILA")/ Master Business and Services Agreement Amendment ID CTM	07/05/2020	(2020)2392209 – 06/05/2020

A2	DI 07670 – ILA/ Enterprise Agreement Amendment ID CTM	07/05/2020	(2020)2392209 – 06/05/2020
A3	DI 07670 – ILA/ Online Services Terms Amendment ID CTM	07/05/2020	(2020)2392209 – 06/05/2020
A4	DI 07670 – ILA/ Data Protection Addendum Amendment ID CTM	07/05/2020	(2020)2392209 – 06/05/2020
A5	DI 07670 – ILA/ Program Signature Form	07/05/2020	(2020)2392209 – 06/05/2020
A6	DI 07670 – ILA/Select Plus Agreement Contract Tie Addition Amendment ID M486	13/12/2018	(2018)6426143 – 12/12/2018

Please note that there is no specific licensing agreement for the licensing of Microsoft Windows. The licensing of Microsoft Windows is governed within the ILA, together with the licensing of other products and services of Microsoft and such provisions cannot be separated. Also note, that as regards document A6 above (DI 07670 – ILA/Select Plus Agreement Contract Tie Addition Amendment ID M486), this agreement is not related to the licensing of any products from Microsoft and therefore, we consider that it does not fall under the scope of your request.

The majority of the agreements forming the ILA with Microsoft have been extensively renegotiated and amended in 2020 (4<sup>th</sup> Amendment of the ILA).

**B. Procurement documents**, which include the following documents according to Article 2(50) of the Financial Regulation<sup>1</sup>:

#	Document	Date	Ares reference	Comments
B1	Invitation to negotiate	28/07/2017	(2017)3808447 - 28/07/2017	-
B2	Tendering specifications - Microsoft licenses (DIGIT/A3/PN/2017/041) and high-level services (DIGIT/A3/PN/2017/040), including the following annexes:	28/07/2017	(2017)3808447 - 28/07/2017	-
B2a	Annex I-Ia: Declaration on honour			-
B2b	Annex I-Ib: Cover letter for tenderer			-

<sup>1</sup> Regulation (EU) Euratom 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014 and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012.

B2c	Annex I-2: Service level requirements			Outside of the scope of the request (refers only to Microsoft's services and not licenses of Windows)
B2d	Annex I-3: EMAS Environmental Policy			-
B2e	Annex I-4: Cloud Services Security Framework			Outside of the scope of the request (refers only to Microsoft's services and not licenses of Windows)
B2f	Annex I-5: Cloud Service Requirements			Outside of the scope of the request (refers only to Microsoft's services and not licenses of Windows)
B2g	Annex I-6: Cloud Services Questionnaire			Outside of the scope of the request (refers only to Microsoft's services and not licenses of Windows)
B3	Contract Award Notice	05/04/2018	-	Public document

Please note that the invitation to negotiate and the tendering specifications cover two separate negotiated procedures:

- Procedure ref. DIGIT/A3/PN/2017/041 concerns Microsoft licenses
- Procedure ref. DIGIT/A3/PN/2017/040 concerns the provision of related Microsoft high-level services

DIGIT/A3/PN/2017/040 for the provision of high-level professional services does not concern the licensing of Microsoft products and thus does not fall within the scope of your request. Nevertheless, since it is not possible to separate the documents in a practical way, we will provide you access to those combined documents as well.

C. Invoices on licensing and extended support and warranty, which include the following documents:

#	Document	Date of signature	Ares reference
C1	Order Form No OF 39-CE for the purchase of informatic equipment in execution of the Framework Contract DI/07470	08/01/2020	(2020)98490 - 08/01/2020
C2	Order Form No DI07722-OF-3827 for software products, maintenance and support in execution of the Framework Contract DI/07722	11/05/2020	(2020)2500676 – 11/05/2020

Please note that the Commission does not put its orders directly with Microsoft but through an authorised reseller, which has been contracted in a separate call for tenders. The Commission does not order single products, but subscribes to a license bundle (“scenario”), the composition and price of which is the result of commercial negotiations with Microsoft. The Commission orders this bundle for a yearly fee; the fee is calculated using a formula that involves a fixed price “per user” and a user number calculated on the basis of the staff figures published in the Official Journal of the EU. This relationship is depicted in the aforementioned documents.

I consider that the disclosure of the Order Forms instead of the invoices issued by the authorised reseller is preferable since (a) they include the same and even more elaborate information on the aforementioned ordering mechanism than the invoices and (b) they are not issued by the authorised reseller and therefore do not constitute documents of a “third party”, which would require the consultation of such third party prior to any disclosure.

#### **D. Memos on bulk licensing and extended support and warranty**

No documents have been identified under this category.

### **2. Assessment of your request**

Having examined the documents requested under the provisions of Regulation (EC) No 1049/2001 regarding public access to documents (“Regulation”), I have come to the following conclusions regarding each category of identified documents, **falling within the scope of your request**:

#### **2.1. Your request to access licensing agreements - Conclusion of the assessment**

Following assessment of the documents requested, I regret to inform you that the aforementioned agreements **cannot be disclosed to you in their final signed form**, as they are covered by the exception of Article 4(2) first indent of Regulation.

##### **2.1.1. Applicability of the exception concerning the protection of commercial interests**

According to Article 4(2) first indent of the Regulation, *“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”*.

The relevant legal provisions related to transparency about contracts awarded and expenditure incurred by the EU institutions confirm that such commercial interests exist in this area and need to be duly taken into account. More particularly:

- Article 90 of the Financial Regulation<sup>2</sup> lays down the Commission’s transparency requirements in relation to the publication of various types of procurement notices.

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<sup>2</sup> Regulation (EU) Euratom 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014 and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012.

However, Article 90(1) states that *“Publication of certain information after the contract has been awarded may be dropped where it would hinder the application of the law, would be contrary to the public interest or would harm the legitimate business interests of public or private undertakings or could distort fair competition between them.”*

- Article 30(3) of the Financial Regulation requires the Commission to make available information on the beneficiaries of funds deriving from the budget but *“with due observance of the requirements of confidentiality”*.

Against this background, two different commercial interests need to be considered: those of the Commission and the other EU Institutions, Agencies and other Bodies (“EUIs”), on the one hand, and those of the contractors on the other hand.

#### **2.1.1.1. Protection of the commercial interests of the Commission and the other EUIs**

In order to fulfil its own needs for goods and services, the Commission (together with other EUIs) needs to ensure that public money is spent in accordance with the principle of sound financial management, and to be able to preserve its capacity to benefit from the best conditions offered by economic operators.

The licensing agreements, as well as the Order Forms contain (a) information about the composition of the products and services developed by the contractor in order to tailor the needs of the Commission and other EUIs, (b) information about the prices quoted for such products and services and (3) the concessions made by the contractor as regards the standard contractual terms, taking into account the status of the Commission and the other EUIs, as major customers.

The disclosure to the general public of such sensitive information would clearly undermine the Commission’s capacity to ensure sound financial management by obtaining the best possible value for money in future procurement procedures and its credibility as a reliable business partner, which respects its confidentiality obligations towards its contractors.

#### **2.1.1.2. Protection of the commercial interests of the contractor**

The requested agreements contain details about the offers submitted by the contractors in the context of public procurement procedures, be it call for tenders or negotiations. These offers include specific input from the contractor, which reflects their technical and commercial know-how and the methodology they have put in place to deliver the products or to provide the services, as well as price information.

The exception concerning the protection of commercial interests of a third party, as laid down in the Regulation, is an expression of the Commission’s general obligation of professional secrecy, which originates from Article 330 of the Treaty of the Functioning of the EU and applies specifically to “information about undertakings, their business relations or their cost components”. This means that the Commission has to take all the necessary measures to protect such information. In addition to the above, contractual relationships are to be covered by the principle of good faith. Based on this principle, the parties shall expect from each other to respect the confidentiality about the performance of an agreement, where such confidentiality is necessary for the protection of the other party’s legitimate interests.

The disclosure to the general public of such information would clearly undermine the protection of the contractor’s expertise, strategy, creativity, capacity to innovate and thus

their commercial strength, not only as an undertaking but also as the contractor of the Commission.

### 2.1.1.3. Partial access to third party documents

Although the agreements cannot be described as third-party documents, to the extent that specific parts originate by third parties, Article 4(4) of the Regulation can be applied by analogy. Therefore, I have applied Article 4(4) in consideration of providing you with **partial access** to the ILA.

The Commission considers that it is possible to provide you with access to the initial versions of the agreements with Microsoft which constitute the ILA. These agreements constitute the templates provided by Microsoft to the Commission, on the basis of which the two parties negotiated specific terms. More particularly, access is provided to the following documents:

#	Disclosed document	Corresponding signed document (reference to the table of page 1)
1	Microsoft Business and Services Agreement (WW)(Feb2017)	DI 07670 Interinstitutional Licensing Agreement ("ILA")/ Master Business and Services Agreement Amendment ID CTM (A1)
2	Microsoft Enterprise Agreement EU-EFTA (July2016)	DI 07670 – ILA/ Enterprise Agreement Amendment ID CTM (A2)
3	Microsoft Online Services Terms (Sept2017)	DI 07670 – ILA/ Online Services Terms Amendment ID CTM (A3)
4	Microsoft Online Services – Data Protection Addendum (January 2020)	DI 07670 – ILA/ Data Protection Addendum Amendment ID CTM (A4)
5	Microsoft Enterprise and Enterprise Subscription Enrollment Product Selection Form (WW)(Sept2017)	DI 07670 – ILA/ Enrollment Agreement (A7)
6	Microsoft Enterprise Subscription Enrollment (Indirect) Corporate (July2016)	
7	Microsoft Product Terms (WW)(Sept2017)	Forms a part of DI 07670 – ILA/ Enterprise Agreement Amendment ID CTM (A2)
8	Service Level Agreement for Microsoft Online Services (Sept2017)	Referenced by DI 07670 – ILA/ Online Services Terms Amendment ID CTM (A3)
9	Microsoft Program Signature Form (EMEA)(Oct2013)	DI 07670 – ILA/Program Signature Form

The Commission has consulted Microsoft on the disclosure of the above listed template contracts and Microsoft did not object to such disclosure.

The differences between the documents listed above and the signed final ones are the result of the procurement procedure and the individual commercial negotiations with Microsoft. The final versions contain the information described under 2.2.1 and are therefore covered by the exception laid down in Article 4(2), 1<sup>st</sup> indent of the Regulation.

#### **2.1.1.4. Overriding public interest**

The exception under Article 4(2), 1<sup>st</sup> indent of the Regulation may only be waived if “*there is an overriding public interest in disclosure*”.

In your application you do not refer to any such interest and after examining the request, I have not identified any such interest that would outweigh the commercial interests of the Commission and the contractor.

#### **2.2. Your request to access procurement documents - Conclusion of the assessment**

After assessing your request, I would like to inform you that I can provide you with **full access** to the contract award notice (document B3), which is a public document and can be found here: <http://ted.europa.eu/udl?uri=TED:NOTICE:156359-2018:TEXT:EN:HTML>

I can also provide you with full access to the Annexes of the Tendering specifications (documents B2a, B2b and B2d).

As regards the rest of the documents, which fall within the scope of your request, I can provide you with **partial access**, as the exceptions laid down in Article 4(2) first indent and Article 4(1)(b) of the Regulation apply.

##### **2.2.1. Applicability of the exception concerning the protection of commercial interests**

With regard to the Tendering specifications, some parts of the document have been blanked out, as they include information the disclosure of which would undermine the commercial interests of the Commission and the contractor. In particular, the redacted parts include information on the parameters of the licensing agreement and the proposal of the tenderer, as set out by the Commission. The disclosure to the general public of such information would clearly undermine the protection of the contractor’s strategy and offer to meet the needs of the Commission

As in your application you do not refer to a public interest in the disclosure of such information and after examining the request, I have not identified any such interest that would outweigh the commercial interests of the Commission and the contractor, I consider that the exception cannot be waived.

##### **2.2.2. Applicability of the exception concerning the protection of privacy and integrity of the individuals**

With regard to the invitation to negotiate (document B1), a complete disclosure of the identified document is prevented by the exception concerning the protection of privacy and the integrity of the individual outlined in Article 4(1)(b) of Regulation (EC) No 1049/2001, because they contain the following personal data:

- the names/initials and contact information of Commission staff members not pertaining to the senior management;
- the names/initials and contact details of other natural persons;
- handwritten signatures/abbreviated signatures of natural persons

Article 9(1)(b) of the Data Protection Regulation<sup>3</sup> does not allow the transmission of these personal data, except if you prove that it is necessary to have the data transmitted to you for a specific purpose in the public interest and where there is no reason to assume that the legitimate interests of the data subject might be prejudiced. In your request, you do not express any particular interest to have access to these personal data nor do you put forward any arguments to establish the necessity to have the data transmitted for a specific purpose in the public interest.

Consequently, I conclude that, pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001, access cannot be granted to the personal data contained in the requested documents, as the need to obtain access thereto for a purpose in the public interest has not been substantiated and there is no reason to think that the legitimate interests of the individuals concerned would not be prejudiced by disclosure of the personal data concerned.

### **2.3. Your request to access invoices - Conclusion of the assessment**

With regard to the documents C1 and C2, I have concluded that I can provide you with **partial access** to such documents, as the exceptions of Article 4(2) 1<sup>st</sup> indent and Article 4(1)(b) apply, as further explained below.

#### **2.3.1. Applicability of the exception concerning the protection of commercial interests**

The Order Forms listed above include information on the prices paid by the Commission to the authorised reseller for the provision of Microsoft's products and services. The disclosure of such information would undermine the commercial interests of the Commission and Microsoft.

The analysis concluded under sections 2.1.1 (with the exception of sub-section 2.1.1.3) apply to documents C1 and C2 as well.

#### **2.3.2. Applicability of the exception concerning the protection of privacy and integrity of the individuals**

The documents C1 and C2 contain the following personal data:

- the names/initials and contact information of Commission staff members not pertaining to the senior management;
- the names/initials and contact details of other natural persons;
- handwritten signatures/abbreviated signatures of natural persons

The analysis under section 2.2.2. apply for these documents as well.

### **3. Further information on extended support and warranty**

In your application you requested access to documents concerning extended warranty and support for Microsoft Windows. In your reply to our clarification request as received on 15 June 2020, you mentioned that *“such extended warranty and support is relevant among other topics when it comes to the lack of proper support for existing Windows 7 computers after January 14, 2020. Other dates might apply for other software”*.

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<sup>3</sup> Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, OJ L 295, 21.11.2018, p. 39.



No further documents exist, which could include further information in relation to the above. For your information, please note that as regards extended support, the Commission orders extended support for Windows 7 for a limited number of devices running legacy systems, when a migration to Windows 10 is not (yet) possible for technical reasons. The vast majority of Commission devices, however, runs Windows 10.

You may reuse public documents, which have been produced by the European Commission or by public and private entities on its behalf based on the [Commission Decision on the reuse of Commission documents](#). You may reuse the document B3 disclosed free of charge and for non-commercial and commercial purposes provided that the source is acknowledged and that you do not distort the original meaning or message of the document. Please note that the Commission does not assume liability stemming from the reuse.

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#### **4. Means of redress**

In accordance with Article 7(2) of Regulation (EC) No 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

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

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

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

Yours faithfully,

E-signed  
Mário Campolargo

Enclosure:            See ANNEX 1 – LIST OF DISCLOSED DOCUMENTS

## ANNEX 1 – LIST OF DISCLOSED DOCUMENTS

Identified document		Access granted
1	Microsoft Business and Services Agreement (WW)(Feb2017)	Partial access
2	Microsoft Enterprise Agreement EU-EFTA (July2016)	Partial access
3	Microsoft Online Services Terms (Sept2017)	Partial access
4	Microsoft Online Services – Data Protection Addendum (January 2020)	Partial access
5	Microsoft Enterprise and Enterprise Subscription Enrollment Product Selection Form (WW)(Sept2017)	Partial access
6	Microsoft Enterprise Subscription Enrollment (Indirect) Corporate (July2016)	Partial access
7	Microsoft Product Terms (WW)(Sept2017)	Partial access
8	Service Level Agreement for Microsoft Online Services (Sept2017)	Partial access
9	Microsoft Program Signature Form (EMEA)(Oct2013)	Partial access
10	Invitation to negotiate, (Ares(2017)3808447 - 28/07/2017) (redacted)	Partial access
11	Tendering specifications for Microsoft licenses (DIGIT/A3/PN/2017/041) and high-level services (DIGIT/A3/PN/2017/040), (Ares(2017)3808447 - 28/07/2017) (redacted)	Partial access
12	Annex I-Ia: Declaration on honour, (Ares(2017)3808447 - 28/07/2017)	Full access
13	Annex I-Ib: Cover letter for tenderer, (Ares(2017)3808447 - 28/07/2017)	Full access
14	Annex I-3: EMAS Environmental Policy, (Ares(2017)3808447 - 28/07/2017)	Full access
15	Contract Award Notice (link under 2.2.)	Full access
16	Order Form No OF 39-CE for the purchase of informatic equipment in execution of the Framework Contract DI/07470, (Ares(2020)98490 - 08/01/2020) (redacted)	Partial access
17	Order Form No DI07722-OF-3827 for software products, maintenance and support in execution of the Framework Contract DI/07722 – (Ares(2020)2500676 – 11/05/2020) (redacted)	Partial access