

Fiche 11 Access to documents relating to inspections, investigations and audits

Main issues:

Investigations, inspections and audits are part of the core administrative activities carried out by Commission services. The number of related requests for access to documents is correspondingly high.

The notion of inspections, investigations and audits encompasses a large and diverse number of tasks, sometimes overlapping (for instance, inspections may form part of or feed into investigations), falling under various legal frameworks, and carried out by different actors (e.g. IAS, IDOC, operational desks of the respective Directorates-General, the Court of Auditors, etc.).

Current administrative practice:

General approach

- Unless a general presumption of non-accessibility applies (cf. following section: no individual assessment of documents necessary), a case-by-case assessment must be carried out.
- Access has to be granted as long as the (full or partial) disclosure would not undermine any interests protected by one or several of the exceptions of Article 4 of Regulation 1049/2001. This principle applies to:
 - documents in the case file, including the final inspection, investigation or audit report, without prejudice to the possibility to apply specific exceptions to (parts of the) report, as for instance personal data or commercially sensitive passages;
 - documents not directly linked to any specific inspections, investigations or audits (such as audit manuals, guidebooks, or documents describing general investigation or audit strategies)¹;
- Refusal to release documents *erga omnes* under Regulation 1049/2001 does not prejudice the possibility to request privileged access to the documents on the basis, and within the limits, of the applicable specific legal framework (where relevant)².

General presumption of inaccessibility

- The case law of the Court of Justice/the General Court has established a general presumption of non-accessibility based on the exception under Article 4(2), third indent (protection of the purpose of investigations, inspections and audits) of Regulation 1049/2001, for documents belonging to the file of:
 - financial audits,
 - EU Pilot³ and infringement investigations,
 - State aid, merger, antitrust/anti-cartel investigations, and
 - OLAF investigations,which are **ongoing**
- The reasoning is supplemented, if relevant, with the exceptions provided for in Article 4(1)(b) (protection of privacy and integrity of individual), Article 4(2), first indent (protection of commercial interests) and Article 4(3), first subparagraph (protection of the decision-making process) of Regulation 1049/2001.

¹ Inspection, investigation and audit manuals describing the general workflow and principles are normally released. On the other hand, documents (or parts thereof) describing the inspection, investigation or audit approach, strategy and criteria to be used in a particular exercise, focused on a particular topic and encompassing a limited number of inspections, investigations or audits, would be refused.

² E.g. right of access of an individual to his/her own disciplinary proceedings file; right of interested parties, ect.

³ "EU Pilot" is a scheme designed to resolve compliance problems without having to resort to infringement proceedings.

- The general presumption applies both to the entirety of documents in the case file, to the table of contents and to individual documents.
- While the general presumption may normally not be invoked after case closure and the documents in the file need to be assessed individually, in certain cases, the timeframe during which the presumption can be invoked goes beyond the closure of the investigation, for instance:
 - In case of infringement investigations, the presumption can normally be invoked up until the EU Court judgment on a Commission action based on Article 258 TFEU (where applicable);
 - In case of OLAF investigations. Use of the presumption after the investigation is closed can be based on the exception pertaining to the decision-making process defined in Article 4(3), second subparagraph of Regulation 1049/2001, in particular if the documents contain opinions for internal use;
 - In case of anti-cartel, State aid and merger investigations, as the files of these investigations, by their very nature, contain business-sensitive information, which needs to be protected even after the closure of the investigation. Moreover, the prospect of publishing business-sensitive information after the closure of the investigations could jeopardise the willingness of undertakings to cooperate with the Commission.

General presumption of inaccessibility based on the **Commission's administrative practice**:

- The General Court/Court of Justice has not (yet) established the existence of a similar general presumption of non-accessibility for documents pertaining to other types of inspections, investigations and audits (other than financial audits), such as anti-dumping investigations or investigations carried out by IDOC, the Court of Auditors or the Internal Audit Service (IAS).
- However, as the risks associated with the potential disclosure of such documents are similar, it is the Commission's practice to refuse access without an individual assessment of the documents concerned, at least as long as the inspections, investigations or audits are ongoing.
- The justification lies in the need to protect, both the confidential character of the inspection, investigation and audit process (as guaranteed by the specific rules governing the latter, where applicable) and the trust of the inspected, investigated or audited entities. This to encourage the full cooperation of the latter and to safeguard the purpose and effectiveness of similar future exercises, based on the exception of Article 4(2), third indent of Regulation 1049/2001.
- In case of internal audit documents, it is the Commission's practice to also refuse, even after an internal audit is closed, access to underlying documents forming part of the file, such as preliminary audit findings, internal meeting minutes and raw, unprocessed data. The Commission has taken the view that their disclosure would undermine the purpose of (ongoing or future) internal audits protected by Article 4(2), third indent, read in conjunction with the specific provisions in the Financial Regulation pertaining to internal audits; the Commission's decision-making process protected by Article 4(3), second subparagraph; and personal data or third parties' commercial interests protected respectively by Article 4(1)(b) and Article 4(2), first indent of the Regulation.
- Personal data included in the documents are normally covered by the exception of Article 4(1)(b) protecting the privacy and integrity of the individual. In case of IDOC investigations, and without prejudice to the applicability of the above-mentioned investigations exception, the whole (or at least a significant part of the) case file can normally, by its very nature, also be considered as personal data, and access thereto has to be refused accordingly.
- The name of the entity (company, association, NGO, etc.) audited or investigated might in some cases need to be protected under the exception in Article 4(2), first indent of Regulation 1049/2001 in order to protect its reputation, in particular where the opening of the investigation with regard to that entity has not (yet) been made public.
- After the closure of the inspection, investigation or audit (not followed by a court case), the general presumption may not be invoked and the documents in the file need to be individually assessed.

Overriding public interest:

- The existence of a presumption of inaccessibility does not exclude the possibility to establish the existence of an overriding public interest outweighing that presumption. The burden of proof in this respect is put on the applicant. This applies also in cases where no presumption of inaccessibility has been established by the case law.

- In any case, the institution needs to carry out the balance test, based on the justification provided by the applicant and/or the available information (in case the applicant does not provide any justification) and include its outcome in the reply.

Case-law:

- Judgment of the General Court of 11 December 2001 in case T-191/99, *Petrie and Others v Commission*,
- Judgment of the Court of 29 June 2010 in case C-139/07, *Commission v Technische Glaswerke Ilmenau*,
- Judgment of the General Court of 22 May 2012 in case T-344/08, *EnBW Energie Baden-Württemberg v Commission*,
- Judgment of the Court of 28 June 2012 in case C-404/10 P, *Commission v Éditions Odile Jacob*,
- judgment of the General Court of 13 September 2013 in case T-111/11, *ClientEarth v European Commission*,
- Judgment of the Court of 14 November 2013 in case C-514/11 P and C-605/11 P, *LPN and Finland v Commission*,
- Judgment of the General Court of 21 May 2014 in case T-447/11, *Catinis v Commission*,
- Judgment of the General Court of 21 May 2014 in case T-221/08, *Strack v Commission*,
- Judgment of the General Court of 25 September 2014 in case T-306/12, *Spirlea v Commission*,
- Judgement of the General Court of 25 March 2015 in case T-456/13, *Sea Handling SpA v Commission*,
- Judgment of the General Court of 21 May 2015 in case T-480/11, *Technion v Commission*.
- Judgment of the General Court of 7 July 2015 in case T-677/13, *Axa v Commission*,
- Judgment of the Court of 11 May 2017 in case C-562/14 P, *Sweden and Spirlea v Commission* (this judgment confirms the position of the General Court in the above-mentioned case T-306/12, *Spirlea v Commission*),

Reference documents/links:

- Examples of confirmatory decisions and a summary of relevant case-law are available on the Commission's access-to-documents webpages on *My Intracomm*⁴;
- The full text of judgments of the EU Courts can be consulted on the website of the ECJ: www.curia.eu.

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⁴ <https://myintracomm.ec.europa.eu/sg/docinter/Pages/tools.aspx>.