



EUROPEAN COMMISSION
SECRETARIAT-GENERAL

Directorate C - Transparency, Efficiency & Resources
The Director

Brussels, 07/04/2020
SG.C/

NOTE FOR THE ATTENTION OF [REDACTED], [REDACTED]
ÉQUIPE INST (INSTITUTIONS)

Subject: Electronic notification of replies to initial requests for access to documents

1. Background information

Right of access to Commission documents is defined in 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 (hereafter ‘Regulation (EC) No 1049/2001’)¹.

Detailed rules for the application of Regulation (EC) No 1049/2001 are defined in Commission Decision No 2001/937 of 5 December 2001 amending its rules of procedure (hereafter ‘Detailed Rules for the Application of Regulation (EC) No 1049/2001’)².

The Secretariat General is currently working on the EASE project (*Electronic Access to European Commission Documents*). The aim of this project is to design and develop a one-stop-shop, fully-integrated and electronic IT system that will be used for submitting and handling requests for access to Commission documents. The project consists of:

- a) A new online portal allowing the citizens to submit and have an overview of their applications for access to Commission documents, to communicate with the Commission and receive final replies as well as to search for the previously disclosed documents;
- b) New case-management system allowing the Commission staff to register, attribute and handle applications for access to documents.

The project team completed the business analysis for the case-management system on 1 March 2020 and started with its development.

The business analysis of the online portal started on 1 March 2020 and will end on 1 June 2020. Both parts are planned to be in production in early 2021.

¹ Official Journal L 145 of 31.5.2001, p. 43.

² Official Journal L 345 of 29.12.2001, p. 94.

2. Purpose of the Note

In the context of the business analysis of the EASE online portal, the Secretariat-General would like to consult the Legal Service on two questions concerning the electronic notification of initial replies. Please note that the current administrative practice for handling requests for access to documents is explained in Annex I. **Question 1: if the initial application is submitted via future online EASE portal, can the *initial* reply be sent to the applicant only via the EASE portal, that is, without the postal notification?**

The proposed change consists of using the electronic notification of *initial* replies as an alternative to the current notification via registered post with the acknowledgment of receipt. This would concern only the initial requests submitted via EASE portal.

The electronic notification offered by the new EASE portal would allow the Commission to know the exact time when the applicant not only received the initial reply on the EASE portal but also when he/she opened the file containing the initial reply and became aware of it. For a visual representation of this process, please see Annex II.

This proposal is in line with the Detailed Rules for the Application of Regulation (EC) No 1049/2001 which, in its Article 3, says that ‘the acknowledgement of receipt and the answer shall be sent in writing, where appropriate, by electronic means.’

It is also in line with what the EU Court of Justice defined as a proper notification of the administrative decisions (see excerpts from the relevant case-law in Annex III). In short, the EU case law says that the e-mail is not an adequate means of notification precisely because the e-mail (unlike electronic notification offered by EASE) does not allow to know when the applicant became aware of it. The e-mail can be received on one day but opened/read on another.

On the other hand, if the applicant sends the initial request via e-mail, and not via the EASE portal, the Commission would continue to send the initial reply via e-mails (accompanied by postal notification in case of a negative/partial reply). Electronic notification would therefore be a more user-friendly alternative to the postal notification, while offering equivalent legal guarantees concerning the date of notification.

Finally, under this proposal, the notification of the *confirmatory* decisions will continue via DHL, whether submitted via EASE portal or e-mail. This will remain the only way of notifying the confirmatory decisions as these are formal Commission legal acts governed by corporate policy of transmission and notification that cannot be changed for the moment (even though the relevant services are also exploring electronic notification).

If the response to the above question is affirmative, then we would like to clarify further the issue related to place of residence of the applicant.

Question 2: Can the Commission stop asking for the postal address of the applicant for the initial requests submitted via EASE portal?

Today, for *all* initial requests, whatever the means for submission, Commission systematically requires the applicants to provide their postal address, otherwise it does not register and handle the application.

This practice has been criticized as a disproportionate requirement by the European Ombudsman and MEPs on multiple occasions³. In the Ombudsman case 682/2014/JF⁴, the Commission⁵ explained that there are three main reasons for asking this information:

- a) Legal validity: Postal address is necessary to notify the initial replies and confirmatory decisions via post. In the absence of an acknowledgement of receipt, it is not possible to know the legal deadline for redress;
- b) Transfer of personal data: When the document requested contains personal data, establishing whether the applicant is an EU resident or not is necessary to correctly apply the exception of the protection of the privacy and the integrity of the individual;
- c) Efficient use of Commission's scarce resources to deal only with requests submitted by 'real' applicants and discourage applicants from inventing identity;

If the Legal Service confirms that the electronic notification constitutes, in terms of legal certainty, a suitable alternative to postal notification ('Question 1'), this would entail that it will no longer be necessary for the Commission to ask for a postal address for purposes of handling initial applications for access to documents (argument from point a) above).

Secondly, under Regulation (EU) 2018/1725, the Commission needs to be in line with the data minimisation and data protection by design and by default obligations.⁶ According to these principles, the applicant's personal data must be limited to what is necessary in relation to the purposes for which they are processed. Therefore, if the electronic notification of initial reply is confirmed by the Legal Service to be a suitable option, asking for the postal address for the purpose of data protection transfer would become a disproportionate requirement.

Instead, when submitting the initial request via the EASE portal, the applicant could simply indicate their country of residence. This would be a reasonable and proportionate requirement for the applicant while allowing the Commission to demonstrate its compliance with the specific rules applying to transfers of personal data to recipients established in (non-EU/EEA) third countries under data protection law⁷. In this way, argument from point b) above would also be taken into account.

Thirdly, concerning point c) above, it first has to be mentioned that it is extremely rare that applicants 'forge' their identity. Secondly, postal address in any case is not a reliable way to check the identity of the applicant as it can be invented like any other metadata.⁸ Finally, the postal address does not guarantee that it is the applicant himself/herself who received the reply as in some countries anyone living or working on the indicated postal address can receive the mail on behalf of someone else.

³ See <https://www.ombudsman.europa.eu/en/solution/en/74051> or <https://www.access-info.org/blog/2015/04/15/pressure-mounts-as-two-more-meps-question-commission-on-postal-addresses-policy/>

⁴ See <https://www.ombudsman.europa.eu/en/decision/en/87636>

⁵ Previously, in 2014, the European Data Protection Supervisor found that postal address requirement is not in breach of the Data Protection Regulation.

⁶ See Article 4(1)(c) and Article 27(1) and (2) of Regulation (EU) 2018/1725.

⁷ The Commission may need to examine whether the conditions for transferring personal data to a recipient established in a third country or an international organisation pursuant to Chapter V of Regulation (EU) 2018/1725 apply. It should moreover be able to invoke the inadmissibility of a complaint before the European Ombudsman pursuant to Article 228 TFEU where an applicant has indicated a third country as its country of establishment.

⁸ Today, the confirmatory requests are not registered without a prior postal notification. This means that rare occurrences of 'fake identities' could normally be identified at that stage.

As today, in those rare situations where there is a suspicion about the applicant's identity, the Commission can ask for the ID proof of the applicant on the case-by-case basis.

However, in this regard, it has to be stressed that, apart from the case of obvious abuse and fake identities, the identity of the applicant is not of importance as the access is granted not only to the applicant but to the public at large ('erga omnes' rule).

Finally, it has to be mentioned that the Commission would continue to systematically ask for the postal address for the initial requests received via e-mail, as in such cases the (negative and partial) initial replies will continue to be notified via post. Also, the Commission would ask for the postal address for all *confirmatory* requests submitted via EASE portal, since the notification of the confirmatory decisions will need to continue to be notified only via DHL in the foreseeable future, as explained above, for which it is necessary to know the applicant's postal address.⁹

3. Additional considerations

Apart from legal aspects, there is a number of political, business and practical issues that the electronic notification of initial replies would address.

First, the citizens and Commission access-to-document staff consulted before the start of EASE project identified electronic communication and transmission of replies as one of the key requirements of the new IT system.

Secondly, the postal transmission of initial replies and documents disclosed is costly and time consuming. In case of negative and partial initial replies, the Commission sends not only the reply itself but also documents (partially) disclosed via the post. This can range from a couple of pages to a couple of hundreds of pages.

Thirdly, Regulation (EC) No 1049/2001 ensures the widest and the *easiest* access to documents possible. This is not the case if the Commission systematically asks for the postal address for each initial request and notifies its partial and negative replies via post.

Last but not least, the postal notification has proved especially burdensome during the exceptional situation that are arising due to COVID-19 pandemic, during which most Commission staff are working from home. Notwithstanding the business continuity measures put in place, it is not always possible to send the replies via registered post.

4. Conclusions

The Commission needs to go digital and follow the steps of other institutions and agencies that have been electronically notifying their decisions for years.¹⁰

⁹ The Council of the EU also requires the postal address only if the applicants decides to submit a confirmatory request. However, note that in the case of Council, the date of sending of the e-mail is considered as the date of the notification as they have no proper means of electronic notification.

¹⁰ The European Medicine Agency has been sending their access-to-document decisions electronically for years now (see [here](#)). EPSO is communicating the test results to the applicant exclusively via their portal. Other similar access to information/documents websites in the world ask for postal address but it is not mandatory as the replies are sent via e-mails or dedicated portals (e.g. [UK freedom of information request](#) or [Australian freedom of information request](#)).

The proposed change concerns only the initial replies and only the requests submitted via the new EASE portal.

Under the proposed change, the applicant's choice would not be reduced as they would still be allowed to submit requests and receive initial replies via e-mails (accompanied by postal notification in case of partial/negative reply). The Commission would simply offer a more user-friendly, efficient and digital alternative, all while respecting the legal requirements concerning the notification of initial replies.

Consequently, by no longer asking systematically for the postal address for initial requests submitted by EASE portal, the Commission would encourage the use of EASE portal, promote its image as a digital and modern public administration and respond to the criticism levelled against this practice in the past.

The electronic notification is one of the key improvements to be implemented in the new EASE system. The timely reply of the Legal Service on the two questions above is therefore crucial in order to proceed with this part of the project.

I thank you and your services for your collaboration.

Tatjana VERRIER

c.c.:

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ANNEX I: Current administrative practice concerning the handling of applications for access to documents

4.1. Concerning the submission of the applications

Article 6 of Regulation (EC) No 1049/2001 says that ‘applications for access to a document shall be made in any written form, including electronic form’.¹¹ Today, applicants can submit their initial application either via an online web form available on the Register of Commission Documents¹² or via e-mail or mail. On the other hand, currently, confirmatory applications can only be sent to the e-mail or postal address of the Secretariat-General. In other words, today it is not possible to submit confirmatory applications via the online web form on the Register of Commission Documents.

4.2. Concerning the transmission and notification of replies/decisions

4.2.1. Replies to initial applications

Concerning initial replies, in around 60% of the cases, the Commission grants full access to the document(s) requested. Such positive replies are sent to the applicant only via e-mail (or only via mail, if the initial application arrived via mail and the applicant did not provide their e-mail address).

In the remaining 40% of the cases, the Commission either refuses the access or grants partial access to the document(s) requested. Such partial and negative replies are letters signed by Directors-General and are sent to the applicant via recommended post. In addition, the Commission sends a ‘courtesy’ e-mail with the reply and, if applicable, documents (partially) disclosed. However, since the e-mail offers no way of knowing the date of reception or notification, but only the date of sending, it is the postal notification that triggers the 15-working days countdown for submitting a confirmatory application.

Frequently, the applicant, having received the e-mail in the meantime, does not make the effort to pick up the hard copy sent via post, meaning that the initial reply formally remains not notified. However, the Secretariat-General does not register a confirmatory application unless the (negative/partial) initial reply has been notified to the applicant via post.

4.2.2. Confirmatory decisions

As opposed to the initial replies, confirmatory decisions are final and official Commission decisions in the meaning of the third subparagraph of Article 297(2) of Treaty on the Functioning of the EU¹³. These are legal acts adopted by the Secretary-General by delegation and are challengeable in the EU Court of Justice and subject to Ombudsman complaints. Like all other Commission formal acts, their transmission and

¹¹ See also the first paragraph of Article 2 of the Detailed rules for the application of Regulation (EC) No 1049/2001.

¹² <https://ec.europa.eu/transparency/regdoc/index.cfm?fuseaction=fmb&>

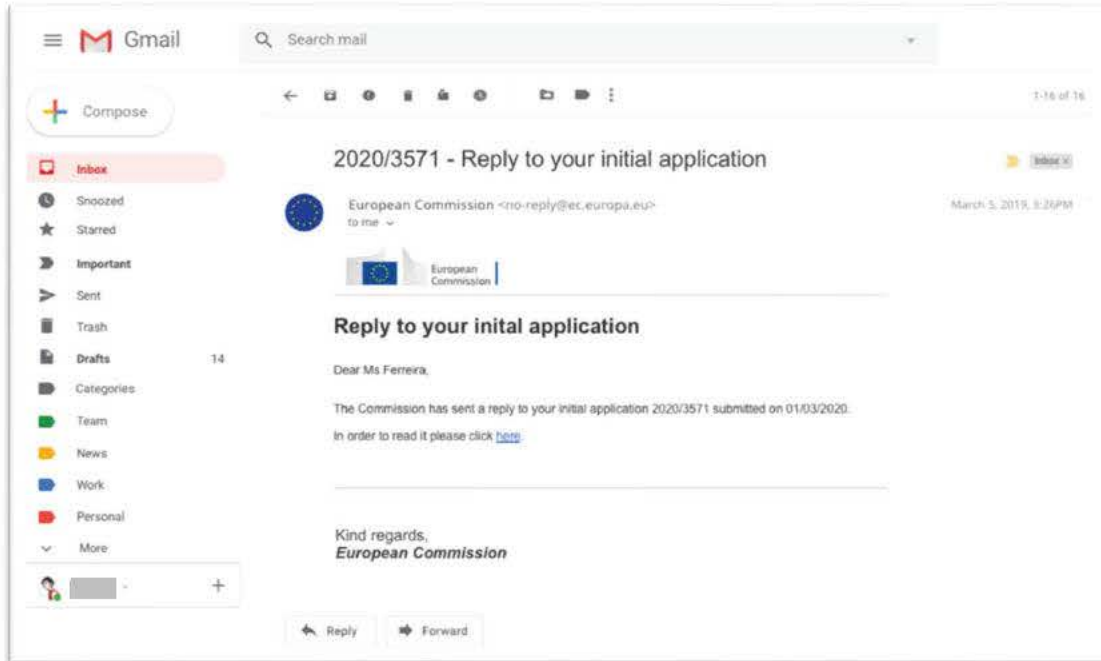
¹³ Confirmatory decisions are decisions of the type ‘C’.

notification is governed by corporate policy and is managed by Unit SG.B.2 - Written, Empowerment & Delegation Procedures. The postal notification of confirmatory decisions is done via DHL, which counts as the official notification of the decision and triggers the deadline for going to the EU Court of Justice or Ombudsman.

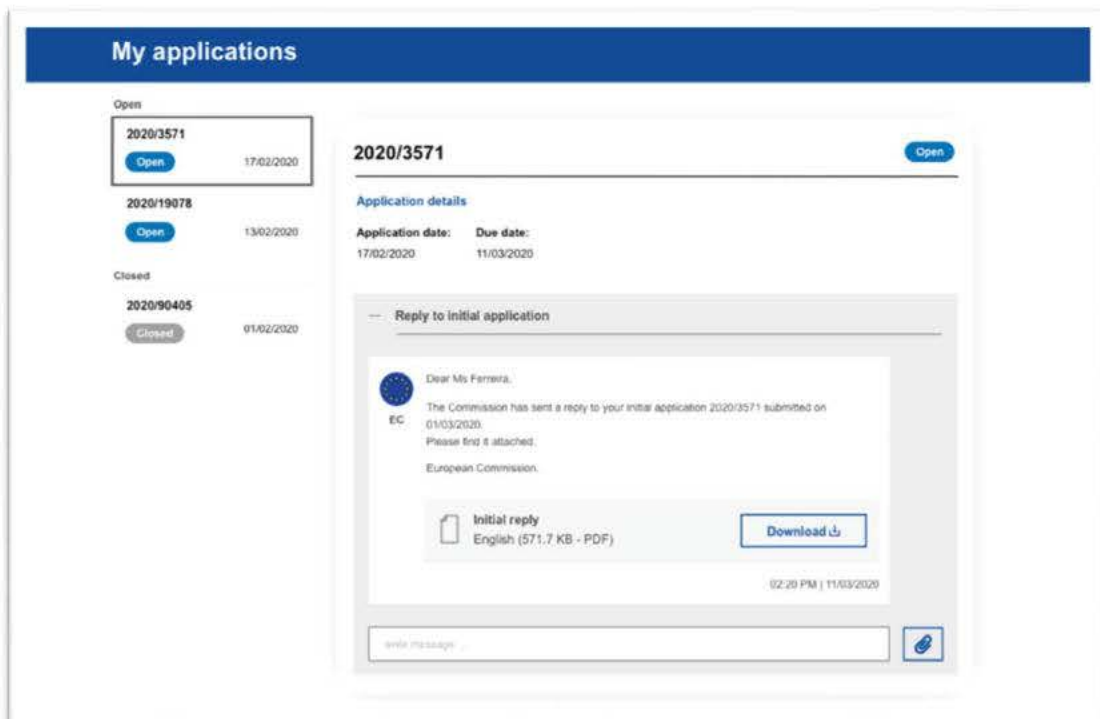
The confirmatory decision and, if applicable, documents disclosed are sent also via curtesy e-mail to the applicant (if the e-mail address was provided). As with the initial replies, it sometimes happens that the applicant never gets notified via post, since the applicant has received e-mail transmission in the meantime. Consequently, such confirmatory decisions never take effect in practice.

ANNEX II: Visual representation of the proposed electronic notification of initial replies

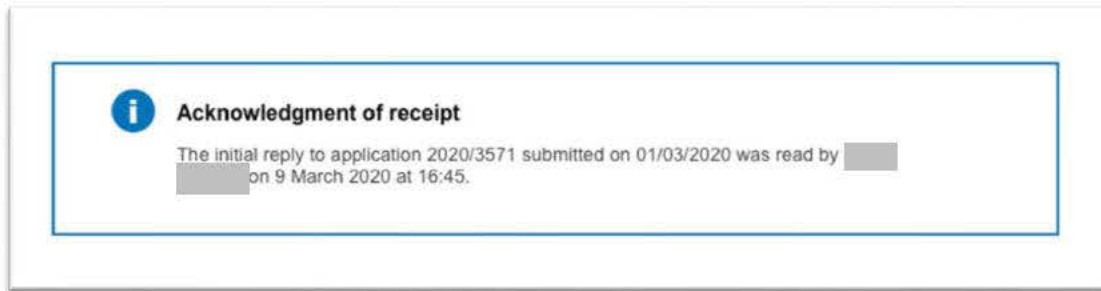
1. The applicant receives an e-mail in her/personal mailbox informing them that they have a new message on their personal space on the EASE portal.



2. The applicant goes to his/her personal space on EASE portal and sees the initial reply received from the Commission. The reply is not yet considered as notified.



3. When the applicant clicks on the 'Download' button, the system generates automatic acknowledgment of receipt. This date of notification serves to start counting the 15-working days deadline to submit the confirmatory application.



ANNEX III: Excerpts from the relevant EU case law concerning the notification

In the judgment in case T-411/06, the General Court clarified the reasons why e-mails are not adequate means of notification of decisions: ‘it is clear that sending an e-mail does not guarantee that it is actually received by the person to whom it is addressed. An e-mail may not reach him for technical reasons. Even if, in the present case, the EAR did not receive a ‘not received’ message, that does not necessarily mean that the e-mail did actually reach the person to whom it was addressed. Furthermore, even where an e-mail actually reaches the person to whom it is addressed, it may not be received on the day on which it was sent.’

Similarly, in the judgment in case T-167/10, the General Court held that the delivery report automatically generated by the applicant’s IT system was not capable of providing the same guarantees as those offered by the intended recipient’s signature or by the signature of a person recognised as competent for that purpose in the event of a notification carried out by an express delivery service with acknowledgment of receipt. It held that ‘there are strong indications that the document mentioned above comes from the Commission’s IT system and there is no evidence enabling it to be established that the applicant’s IT system guarantees proper receipt of the e-mail by its intended recipient in the same way as, for example, the intended recipient’s signature or the signature of a person recognised as competent for that purpose in the event of a notification carried out by an express delivery service with acknowledgment of receipt. In the present case, such proof could have been provided by, for example, a reply by e-mail sent by the intended recipient of the document’ .

In addition, in the judgment in case T-280/17, the Court of Justice stated that even though certified postal transmission remains a particularly safe method of notification, it is by no means the only option: ‘a cet égard, il y a lieu d’observer que, si la notification par lettre recommandée avec accusé de réception n’est pas le seul mode de notification possible des décisions administratives, elle n’en demeure pas moins, grâce aux garanties particulières qu’elle présente tant pour la personne concernée que pour l’administration, une solution particulièrement sûre (...) Une de ces garanties est, notamment, l’assurance, grâce à l’apposition de la signature du destinataire sur l’accusé de réception, que ledit destinataire sait qu’une lettre lui est destinée et nécessite son attention. Or, il ressort du dossier que, à la différence de l’accusé de réception postal, le rapport de lecture n’offre pas une telle garantie. Contrairement à la signature d’un accusé de réception par le destinataire d’une lettre ou à la rédaction et l’envoi d’une confirmation de la réception d’un courriel par son destinataire, le rapport de lecture en cause, du fait de sa génération et de son envoi automatique par le système informatique du destinataire tels que déjà décrits au point 61 ci-dessus, ne permet pas d’établir sans aucun doute que la requérante a eu connaissance ou a été mise en mesure de prendre connaissance de la lettre litigieuse le jour de l’envoi dudit rapport’.