



EUROPEAN COMMISSION
LEGAL SERVICE

INST Team (Institutions)

Brussels 27 April 2020
sj f(2020)2572816

**NOTE FOR THE ATTENTION OF TATJANA VERRIER,
DIRECTOR SG - C**

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

I would like to make reference to your Note of the 7 April 2020 (ARES (2020)1968909) wherein you asked the Legal Service, in the context of the ongoing business analysis of the EASE project, guidance concerning the notification by electronic means of initial replies to applicants for access to documents submitted on the basis of Regulation (EC) No 1049/2001. This note exposes the views of the Legal Service to the specific questions you raised.

General remarks

In your note, you refer to some of the technical features of the proposed EASE portal, however, the modalities for the use of the EASE portal by the applicants are not described in detail. One could assume, however, that similar to other electronic portals, access to the EASE Portal would be granted to members of the public only after a registration procedure through individual accounts. As both questions relate to the legal effects of the transmission of documents through the dedicated EASE Portal to the applicants, I would like to recall that the *terms and conditions* which the users of the EASE system will be asked to accept during the registration procedure are relevant to provide an accurate reply to the questions you raise. These conditions normally contain specific provisions with regard to the sending and receipt of documents and alternative arrangements for the submission of applications and delivery of documents in case of technical failure of the IT system.

Additionally, I note that, whilst you state “*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*”, it remains unclear what kind of proof (if any) the EASE Portal would retain for the receipt of the transmitted document(s) in case the recipient user would not take any positive action i.e. open or download the file. In these cases, it is essential, for the correct and unambiguous application of the timelines provided for in the applicable legislation, that the terms and conditions for the use of the EASE Portal specify when users will be deemed to have received the documents transmitted. In fact, the Commission would need to be in

possession of a proof of *the receipt* of the transmitted documents in all cases, not only when the user downloads the document from the system but when the recipient remains inactive and does not manually open the file transmitted through the EASE Portal.

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?”

I would like to confirm that, in accordance with the provisions of Regulation (EC) No 1049/2001, it is possible to envisage the use of a digital platform such as the proposed EASE Portal. In fact, the legislation does not mandate any specific modalities for the submission of the application for access to documents (cf.: Article 6(1) “...*applications for access to documents can be made in any written form, including electronic form...*”). Article 10(1) of Regulation (EC) No 1049/2001 provides that the applicant shall have access to the requested documents either “*by consulting them on the spot or by receiving a copy, including, where available, an electronic copy*”.

Therefore, a digital platform such as the EASE Portal could be used in order to receive requests for access to documents and also to deliver to the applicants electronic copies of the requested documents, *provided that it ensured legal certainty as to the date in which the initial reply was received by the applicant*. In fact, the provisions of the legislation establish a set deadline for the submission of a confirmatory application and therefore the period in which the applicant can challenge the initial reply with a confirmatory application starts running from the date in which the applicant has received the reply.

As highlighted above, in the context of the EASE Portal, it is important to clarify that the date in which a document/reply was delivered or made available through the IT platform to the applicant cannot be understood as the “date of receipt”. Such a proof of receipt would entail a record showing that the documents have been delivered at a specific date from which the time-limits set out in Regulation (EC) No 1049/2001 for submitting a confirmatory application can unequivocally start to run (for example, this can be an electronic acknowledgment of receipt generated when the document is downloaded or after a certain period of time indicated in the terms and conditions).

In addition, if the EASE Portal, and its conditions of use, were to be designed in such a way as to guarantee that the Commission can maintain a record of the acknowledgment of receipt of documents transmitted via the Portal, we consider problematic the coexistence of two notifications dates regarding confirmatory decisions – a first date following the downloading of the decisions on the EASE portal and the date of the DHL notification - and suggest considering a synchronized extension of the use of the EASE Portal also to the submission of confirmatory applications by users and to notify them of confirmatory decisions. In the current configuration, the system runs the risk of creating uncertainties as to the date of the notification of confirmatory decisions, which is a matter determined by reference to the factual circumstances in which the decision is received by the applicant. Moreover, in practice, the systematic notification via DHL will probably become largely superfluous since it may be assumed that, in most cases, applicants will download confirmatory decisions on the EASE portal before receiving the documents by DHL.

It should be also flagged that the EASE project offers an innovative way for citizens to submit applications under Regulation (EC) No 1049/2001 and to have access to the documents requested by using a dedicated IT platform. It is therefore recommended that, once the technical aspects of the EASE Portal are finalized and in any case before it is

made available for use, the detailed rules for the application of Regulation (EC) No 1049/2001 as defined in Commission Decision No 2001/937 of 5 December 2001 are to be fully reviewed in order to ensure that all processes described therein are fully in line with the proposed new IT tool and the way in which responsibilities for the handling of requests with the new IT tool are divided between the various Commission services and the Secretary General. This would be also an occasion to lay down rules concerning the transmission of documents through the IT tool, for example with regard to the date in which decisions take effect.

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

In your Note, if the answer to the first question is positive, you ask an additional question, concerning the need for the applicant to submit the details of a “postal address”. I would like to confirm that, given the intended proposal to digitise the procedure for submitting application for access to documents and for notifying applicants of the initial replies, there seems to be no justification for requesting from the applicant to submit details of a “postal address” which would remain necessary only for those applications submitted outside the EASE Portal in order to send documents by mail/DHL.

Having said that, a different issue relates to the exceptional cases in which the applicant would be able, in the framework of a disclosure of documents under Regulation (EC) No 1049/2001, to establish the necessity for the disclosure of personal data under Article 9 under Regulation (EU) No 2018/1725. Only in such cases it is still relevant to establish where the applicant as recipient of personal data is located for the correct application of the provisions on transfer of personal data to third countries as laid down in Chapter V of Regulation (EU) No 2018/1725. For those cases, you should adopt appropriate measures for verifying the location of the recipient of the personal data transferred.

Legal certainty as to the identity of the applicant should be guaranteed by ensuring a correspondence between the holder of the account and the individual legal or natural person applying for the documents throughout the administrative procedure.

I hope that this is helpful, and I remain available for any additional clarification and assistance.

c.c.:

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