DG TRADE

VADEMECUM ON ACCESS TO DOCUMENTS

Updated June 2009

This vademecum will be updated on a regular basis on the basis of the practical experience gained in handling requests for access to documents

Article 255 EC Treaty

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents (…).
Comment: this should be updated now of course with Article 15 of the treaty, see attached documents "Comments on Vademecum."

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10 things to remember on Access to Documents

1. **All documents**, including e-mails and documents we get from third parties, held by the Commission, are in principle subject to disclosure.
Comment: **this could be slightly clearer to cover all documents created by and received by the DG Trade. For example:** "All e-mails and documents created by us, and all e-mails and documents we receive from third parties and held by us are, in principle, subject to disclosure."

2. We must give reasons for any refusal to grant access; the only grounds are those set out in the **exceptions** in the Regulation (i.e. public security, defence and military matters; harm to international relations; economic policy; protection of privacy and integrity of individuals; protection of commercial interests, court proceedings and legal advice; investigations; and harm to decision making - which can include the negotiating process).

3. No type of documents held by DG Trade can be automatically excluded from access: each document has to be examined **case-by-case**, on the basis of its actual **content** (and not of its status), to see whether any exception applies. This includes negotiating directives, for example.

4. If only parts of a document are subject to an exception, the rest of the document must still be released ("**partial disclosure**").

5. It is **for the Commission to decide** whether a document is released or not. Third parties can be consulted in case of doubt – but the Commission has the last word.

6. **Deadlines** to reply are very tight, i.e. within 15 working days. Failure to reply is equivalent to refusing access.

7. **Remedies**: Refusals or partial disclosure can be appealed ("confirmatory application") to the Secretary General. If the refusal is upheld, the applicant can go to the Court of First Instance or complain to the Ombudsman.

8. When you request information from **third parties** (e.g. FTA questionnaires), do not forget to mention that the information they provide is subject to the EU rules on Access to Documents.

9. Make sure your **filing** is reliable so that it is easy to find documents, even after people have left the unit

10. Be aware that your documents, and especially meeting reports and e-mails can potentially be disclosed. This must be **kept in mind when writing such documents**.

Comment: This point should be deleted as the warning tone risks going against the spirit of the EU's transparency initiative and the general principle of good administration which is to keep a good and true record of all stages in the decision-making process.

I. OVERALL PRINCIPLES

A legal obligation

– Article 255 EC Treaty **Comment: update to Article 15.**

– Regulation No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (O.J. L 145, 31.5.2001, p. 43) (*in the process of review – currently first reading in EP)* **Suggestion: provide link**

– Implementing decision adopted by the Commission on 5 December 2001 (O.J. L 345, 29.12.2001, p. 94). **Suggestion: provide link**

  Suggestion: also add here reference to the Secretariat General, its role on access to documents and the relevant staff guidance, with links to the relevant documents.

Beneficiaries

– Any EU citizen or legal person residing or having its registered office in a Member State (Art. 1 of the Regulation), as well as

– Citizens of third countries not residing in an MS and legal persons not having their registered office in one of the MS (Art. 1 of the Implementing decision). The latter category does not have the possibility of appealing to the Ombudsman though. **Comment: but note that those not residing in the EU or with legal offices elsewhere still have access to the Court of First Instance and Court of Justice, so in effect, have a right of appeal against refusals to provide information. Otherwise this could discourage people replying to requests from outside the EU.**

What documents?

– The right of access applies to **all documents held by the Commission** (Art. 2(3)), i.e. not only those produced by it but also those received from third parties, **whatever the medium**[1].

– This also includes **e-mails**, in so far as they may be considered relevant. **Comment we suggest deleting the highlighted clauses. E-mails should be considered documents. The only exception to this is where the e-mail constitutes purely private correspondence. See attached comments and recommendations.** For instance: official exchanges between the Commission and outside organisations, institutions or business are Commission documents within the meaning of the Regulation. The same applies to e-mails depending on their content **[suggest delete]**, if they constitute an essential **[suggest delete]**, part for a given file. This can also include e-mails which we receive only in copy (*for example, one recent case covered detailed exchange between DG Development and outside organisations, where we were in copy. We contacted DG Development prior to releasing the documents*). However, day-to-day e-mail traffic representing contacts at desk level with short-lived and non-essential information can

[1] The Regulation (Art. 3) defines a document as "any content produced or received by the Commission and its departments, concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility in connection with its official duties and whatever its medium - written on paper or stored in electronic form or as a sound, visual or audiovisual recording";

be considered "personal" to desk officers. **[suggest delete as it confuses actual "personal" correspondence and with legitimate exception of personal data under Article 4 exceptions; we suggest you clarify for staff the rules about receiving personal correspondence at the work address, either postal or electronic]**, Hence the need for a proper filing system for e-mails. Comment**: not clear here what is meant by a "proper filing system" but this could be cross-referenced to the relevant EU rules and to the last section of the Vademecum.**

– **No category of documents is excluded a priori** from the right of access. This includes **classified documents**[2]. Each application for access, and each requested document, must be treated separately and examined thoroughly, **case by case**. This would include, for example, responses to public consultations or questionnaires. This implies that we cannot guarantee the confidentiality of information shared with us.

– **The right of access applies to existing documents**. This may sound obvious, but it means that there is no obligation, under the Regulation, to create documents to meet a given request (although we do normally provide, for example, simple lists of meetings or documents) nor reply under the Regulation to requests for information rather than documents per se. Such requests are to be handled under the terms of the Code of Good Administrative Behaviour[3]. Comment**: for public officials coming from access to information rather than access to documents countries (most European laws are actually access to information) this distinction may not be clear. It could be useful to have a section of this Vademecum explaining how DG Trade handles a request that does not specifically mention documents or the Regulation 1049/2001. It would also be positive to encourage good faith interpretation of the request. See Comments and Recommendations document.**

Exceptions (Article 4 of the Regulation)

– Access to a document can 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 an MS (Art. 4(1)(a));

- for reason of **protection of privacy and integrity of individuals** (i.e. Community legislation on protection of personal data) (Art. 4(1)(b));

- for reasons of **protection of commercial interests**, 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, (Art. 4(3)), i.e. for :

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[2] Documents classified as «sensitive» (top secret, secret or confidential according to the rules of Commission Decision 2001/844) are not excluded from the scope of the Regulation. However, there are specific rules as to the handling of such requests: they must be handled by authorised persons, using protected procedures (Art. 9). Moreover, a decision by the Commission to declassify a document is required before transmission can take place – this is a relatively straightforward process. However, only the lowest level of classification (EU Restricted) is used in DG Trade, mainly in the case of negotiating guidelines (see further).

[3] Published in OJ L 267 of 20.10.2000

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;

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.

- The **public interest test** in Arts. 4(2) and 4(3) implies that a refusal to disclose a document on the basis of the exceptions must be justified on a case-by-case basis according to the document's **content** and not its status. **Comment: the public interest test implies that the overriding public interest in knowing the information even if it were to cause some harm to a protected interest should be considered.** An unjustified refusal could give rise to a complaint on the grounds that the Commission is not meeting its commitments with regard to transparency (See Article 6 of the detailed rules for application annexed to the Commission's Rules of Procedure). **Question: is this the right reference, Article 6 is about Classified documents?**

- **Time-limit**: the exceptions only apply for the period during which protection is justified, on the basis of the content of the document, with a maximum limit of 30 years. However, this limit does not apply in the case of documents covered by exceptions relating to privacy or commercial interests and in the case of sensitive documents where exceptions can continue to apply after this period (Art. 4(7)).

- If a document has already been transmitted to a large number of people in the course of our usual contacts or put onto the Commission's web site, it is clearly out of the question to refuse access to it, even if the document may initially have been intended for internal use.

- Any **refusal** to grant access **must be based on one, or more, of the exceptions in the Regulation**. In case of refusal to grant access, the **applicant is informed** of the type of documents withheld and the **reasons for the refusal** must be properly stated (this is important for the Court in reviewing the legality of the decision). The reply is usually accompanied by a list of all the documents which have been considered in the context of the applicant's request – including those which have not been disclosed. Even in case of complete refusal, the reply should indicate the type of documents identified (and the reason why access is refused).

- If only part of the document requested is covered by one or more exceptions, the other parts of the documents must be disclosed ("**partial release**", Art. 4(6) – see below).

- **Refusals must effectively be based on the legal exceptions.** Bear in mind that refusals can not only be subject to a confirmatory request (handled by the SG) but that, at the end of the day, a party may seek the intervention of the **Ombudsman** and/or the **Court**, both of whom can verify whether the exceptions have been invoked in a justified manner, and possibly request the documents to be released. If it then appears that the Commission has used the exceptions in Art. 4 in an unjustified way, this may have serious consequences for the reputation of the DG and the institution.

Partial release of documents

- Under certain conditions, documents can be partially released. There are two different situations where partial disclosure is appropriate :

  - When the released document also covers issues which were not mentioned in the applicant's request, any parts that are **not relevant** to the request will not be disclosed. Note that the deletion of non relevant parts of a document is not a refusal to grant access. **Comment: see the attached Comments and Recommendations - We are unclear as to the legal basis of, and necessity for, this interpretation of partial access rules.**

  In order to ensure a consistent approach across different applications, including sometimes multiple requests from the same applicant, we try as closely as possible to match our reply to the specific request made rather than second-guessing what the applicant may have had in mind.

  For example : an applicant asked 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. **Comment: We are unclear as to the legal basis of deleting parts of the released documents if they were not directly mentioned in the applicant's request as only article 4 of the Regulation justifies partial disclosure.**

  The same may be true, for example, with regard to the organisations covered by a request; does the applicant refer to meetings with "*individual companies*" on our FTAs or to "*business federations*"? Does the request cover contacts with DG Trade officials, contacts with the Cabinet and/or with the Commissioner? **Comment: There is nothing in Regulation 1049/2001 which makes a distinction between "officials" and other persons associated with DG Trade or any other EU institution. The regulation applies to documents held, rather than who they are about. This sentence seems to encourage overly-narrow interpretations of requests - if a member of the public requests information on "all meetings held between DG Trade officials and outside interest groups" then clearly they are not specifically excluding the Commissioner and it is unreasonable to interpret the request overly-narrowly. The best advice is that when a request is received, if there is any doubt about the information being requested, then DG Trade should get back to the requestor and clarify the request. This is established by Article 6.2 of the Regulation which states:**

  > ***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.***

  For these reasons we recommend deleting this sentence and replacing it with constructive advice about clarifying requests.

  In case parts of the documents are covered by any of the exceptions, the remaining parts of the documents will be released. The deletions must be motivated on the basis of one or more exceptions under Article 4 of the Regulation. **Comment: this paragraph seems to mix two concepts, that of legitimate exceptions (which is permitted by Regulation 1049/2001) and that of "relevance" which does not seem to be permitted.**

- The parts that are not relevant to the request or which are covered by Article 4 should be **deleted** if the document is electronically available, with an **indication** that non-relevant text has been deleted, and for text covered by Article 4 an indication of the

length of the deleted text (e.g. "two lines deleted", "2 words deleted", "1 paragraph deleted"), or whitened out with a similar indication if the document is in paper format. Comment: **this practical advice seems fine. We note that in addition, there should be an accompanying document which justifies the application of exceptions.**

> ⇨ **This Box seems to encourage removal of comments, reflections and follow up points contained in documents from disclosure; this is not something permitted by Regulation 1049/2001. The box should therefore be deleted.** Practical experience shows that one of the more difficult elements is how to handle *personal comments or reflections in notes*, meeting reports or flash e-mails [what are these?], which may often fall under the exceptions foreseen in the Regulation.
>
> ⇨ In order to limit the deletions in released texts, you may wish to distinguish between elements that represent a lasting record for the DG from any personal assessment of the meeting for your own purposes or possible lists of follow up points to guide your work (see p. 16 of this vademecum). Comment: **this part seems to be out of context. It looks like it is introducing an additional exception not included in Regulation 1049/2001. See attached Comments document for more analysis.**

Third party documents

– Documents received from third parties "held" by the Commission are **also subject to the disclosure requirements**.

– There are no ***specific* exceptions** for third party documents other than those of Art. 4, *i.e.* the exceptions under Article 4 apply to Commission documents and to third party documents.

– It is **for the Commission to decide** whether a third party document can be disclosed or not. It does not have an obligation to consult a third party, except when there is a doubt as to whether the exceptions of Article 4(1) and 4(2) apply, in which case the third party shall be consulted.

  - Only reasons given by third parties which correspond to one of the exceptions of Art. 4 of the Regulation can be taken into consideration. In any event, **the Commission will have the final judgement** on the release of third party documents.

  - In practice, it is very rare for DG Trade to need to consult a third party formally regarding release – although as a matter of good practice we inform correspondents of the Commissioner before their letters and the Commissioner's replies are made public.

– When a third party is consulted, it should be given at least 5 working days to reply.

  - If the Commission intends to disregard the third-party author's refusal to disclose a document (because the ground for refusal was not based on Art. 4, or because, in the Commission's view, none of these grounds apply), it must inform the author 10 days before releasing the document. The deadline for reply will then need to be extended.

- The author can then bring an action before the Court of First Instance requesting the suspension of the Commission's decision and the deadline (see Article 5 of the Commission's detailed rules for application).

The **DG Trade practice** is that:

- ⇨ *When the third party is a third country, we will always ask its authorisation to disclose. If such authorisation is refused, the exception of Article 4(1)(a) (international relations) normally applies.* **Comment: a mere refusal by a third country is not enough. There needs to be demonstrable harm to one of the protected interests in Regulation 1049/2001.**

- ⇨ *When the third party is a private entity (an NGO or industry association, a company or a person), it will only be consulted in case the Commission has a doubt as to whether the conditions for exceptions under the regulation apply. You should avoid giving any impression that the third party has the final say in relation to those documents. (As a courtesy measure you can, if you wish, always inform this third party of the full or partial release of its correspondence, but bear in mind that this can cause delay to the answer).*

- ⇨ *In case of correspondence between the Commissioner and a private entity DG Trade on behalf of the Cabinet will, by way of courtesy, inform this third party of the full or partial release of its correspondence*.

- Documents originating from **Member States** can be treated in the same way as the "third-party" category. Nonetheless, Article 4(5) of the Regulation provides that *"a Member State may request the institution not to disclose a document originating from that Member State without its prior agreement".* However, in accordance with case law of the Court of Justice[4], such non-disclosure must be justified by one or more of the exception grounds of Article 4. The Commission consults the Member State concerned in cases where it intends to disclose a document originating from that Member State, unless the document has already been made public.

- Documents originating from **other Institutions** are also treated like all third-party documents, but the other institutions are always consulted (on the basis of the Memorandum of Understanding in this area).

Processing of applications and time limits

Comment: suggest having more info here about how Trade 01 handles requests, and how they arrive. See also comments on the DG Trade website and how requests can be filed.

- Applications for access must be **handled "promptly"**. Incoming requests are registered by the SG or Trade 01. An acknowledgment of receipt must be sent to the applicant, either by the SG (in case of applications via the Europa website) or by Trade 01, if the request is directly addressed to DG Trade.

- If a request is addressed to a Unit other than Trade 01, Trade 01 must be promptly informed, so it can duly register the application and send an acknowledgment of receipt (for model replies see annex).

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[4] Judgment of the Court of Justice of 18 December 2007 in case C-64/05 P, Kingdom of Sweden v Commission, ECR [2007] page I-11389

- **All replies** – even positive ones – **should be checked with Unit 01** before they are sent out to ensure coherence of our overall approach.

- **How to identify an application for access to documents?** Most applications carry a reference to Regulation 1049/2001, but there is no obligation for a request to mention the Regulation. Any request that refers to documents should therefore be considered as an application within the meaning of Regulation 1049/2001. In case of doubt, Trade 01 should be consulted. Applicants are not obliged to state the reasons for their application. **Comment: we refer to our comments above on how to distinguish between access to information and access to documents requests.**

- When an application is **insufficiently clear**, we can ask the applicant for a clarification or a narrowing down of the request, ask for clearer parameters for the period covered by the request, etc. (and if necessary, offer to help the applicant in defining these), in which case the 15 days term only starts when the request is clarified (Art. 6(2)). The request for clarification should be discussed with, and sent out via, Trade 01.

- Within **15 working days** (i.e. 3 weeks) from registration of the application, the Commission must either

  1) provide access; or,

  2) in a written reply state the reasons for the total or partial refusal. This implies giving a **fair explanation of why the invoked exception(s) apply** and not just indicating the legal ground for refusal.

- In **exceptional cases**, e.g. in case of an application for a very large document or for a very large number of documents, this time limit can be **extended** by 15 extra days.

  - For complex requests, for instance those which involve numerous documents and/or various files and/or concern different units and/or consultation of another DG and/or of third parties, we will usually leave the timeline for response open, after discussion with the applicant and giving the applicant an explanation why. In such cases, Art. 6.3. of the Regulation allows the Commission the possibility to confer with the applicant informally, with a view to finding a fair solution.

- Documents are made available to the applicant either in the form of a **copy** (if necessary in electronic format), and, in exceptional cases (if there is a very large volume of material or if documents are difficult to handle), the DG concerned may offer the possibility for the applicant to consult the documents on the spot.

- In case the Commission is consulted by another institution (as provided by the Memorandum of Understanding) further to a request to that institution for access to a Commission document, the Commission has 5 days to react. This can be done informally (simple e-mail) and is coordinated by Trade 01.

Remedies

- Refusal to provide access to all or part of a requested document gives the applicant the right to submit a **confirmatory application** to the Secretary General within 15 working days (3 weeks) of receiving DG Trade's reply.

- **Failure to reply** within the 15-day period or any extension of that period is **equivalent to refusing access**, giving the applicant the right to make a "confirmatory application" to the Secretary-General.

- In case of refusal of a confirmatory request, or failure to reply by the SG, the applicant is entitled to bring an action in the **Court** of First Instance or to make a complaint to the **Ombudsman.**

For further info, see the SG's Access to Documents website:
http://www.cc.cec/home/dgserv/sg/docinter/index_en.htm **- this link doesn't work for us; not sure if it's an internal link or not. Suggest updating with an external link.**

– II. Access to DG Trade Documents

- The basic rule is that **every document** has to be assessed on a **case by case basis**, on the basis of its **content**. No single type of DG Trade document is automatically excluded from the right to access. **Comment: this basic rule is good and clearly stated, although there do seem to be cases where the text seems to be encouraging application of exceptions without much thought being given to it.**

Negotiating directives

- Negotiating directives as such are not necessarily excluded.

- However, in practice in reviewing the **annexes** to the decision to authorise the opening of negotiations adopted by Council we have, until now, found that a refusal of access has been justified on the basis of the exceptions provided for the protection of the decision making process and of international relations. But this does not mean that this will necessarily always be the case: the assessment must be based on the content and context of those negotiations. (For instance, when negotiations are concluded and the agreement is being implemented there may be no reason to withhold access, unless, for example, negotiations in the context of rendez-vous clauses are still based on the original guidelines; – this needs to be examined on a case-by-case basis).

- The **Explanatory Memorandum** and the **recommendations** of any decision to authorise the opening of negotiations needs to be looked at carefully on a case-by-case basis: parts of these texts may be factual and already be public knowledge and therefore should be made available, while other parts may be covered, for example, by the exception of decision making process[5].

Negotiating documents

- Negotiating positions and documents exchanged between the Commission and negotiating partners, as well as information notes to the College on the state of play of negotiations can under certain circumstances also be covered by the exceptions of Art. 4(1) (protection of international relations) and Art. 4(3) (documents for internal use relating to a matter where the decision has not yet been taken), but this has to be assessed on a case-by-case basis for each document.

- In case of documents originating from negotiating partners, the exception of "international relations" applies if that country does not agree with its disclosure (see above on documents from other States). **Comment: a mere refusal by a negotiating partner is not enough. There needs to be demonstrable harm to one of the protected interests in Regulation 1049/2001. See also the attached comments under third party documents.**

- The **time factor** is very important here. Depending on the state of advancement of negotiations, past positions may already be publicly known in which case the impact of disclosure on decision-making or on our international relations may be reduced (i.e.

[5] Such decisions to open negotiations are normally classified on the basis of their content as "EU restricted". Where access is being given to parts of an EU restricted document, for COM documents, Trade 01 asks the SG to declassify those parts of the document. For SEC documents, 01 declassifies relevant parts and informs the SG which in turn updates SG Vista and the register.

you may want to ask yourself whether the release of the document in question will put **new information** into the public domain (this is sometimes described as the "*news value*" of the information in question) or reveal our negotiating strategy to the other side). **Comments: the concept "news value" is somewhat strange and doesn't seem to fit with the presumption of openness under Regulation 1049/2001. See attached comments.**

- On the other hand, the removal of the 30 years time-limit on the exception provided for in Art. 4.7 for sensitive documents may in certain exceptional circumstances also apply to negotiating documents, which can therefore be protected both before and after the conclusion of negotiations.

Reports and minutes of meetings

- **Reports or minutes of meetings are not excluded per se**: it has to be assessed on a case-by-case basis whether the exceptions apply to all or part(s) of the document. The full document must be considered, including comments, summaries, follow up points etc.

- **For the minutes of meetings** between the Commissioner and his opposite numbers: the same rules apply but we, of course, verify the approach with the Cabinet.

Content of documents: business secrets and names of persons

- **"Business secrets"** that industry shares with us fall under the protection of commercial interests; in the case of reports or minutes of meetings with industry, only those parts of the minutes that fall under one or more exceptions will be protected. Obviously, we will not always be in a position to determine whether something is a "business secret", in which case it is better to take a cautious approach [**Comment: the cautious approach should be in checking, not in not releasing the information**], and, in case of doubt, to cross check with the company concerned, but it is for the Commission to make the final assessment.

  The name of the company and its representative(s), date of the meeting and factual elements should normally be included, unless we can prove that releasing that information could affect their business interests.

- **Names of persons** (e.g. participants to a meeting, signatories to a letter etc…) are not deleted, unless we can show that revealing such name may harm that person's integrity (Art. **4(1)** (b) and Court Jurisprudence **Suggest: might be good to link to relevant case law here or give a bit more detail in a footnote**). For instance, there would be no reason to delete the names of persons whose daily business is to defend their company's or their industry's interests, nor the names of Commission staff copied in an e-mail. It is for the Commission to justify that revealing a name would be harmful to the person in question.

Industry consultations and other consultations

- As indicated above, the right of access applies to documents held by the Commission and received from third parties. Hence, **replies to industry consultations, or consultations of other stakeholders** (for instance in the context of Market Access, preparations of FTA negotiations, identification of offensive and defensive interests etc…) **also fall under the Regulation**.

- Such replies must be considered on a case by case basis, –but they may – particularly in the case of responses from business - be covered by the **exceptions**, and most notably **commercial interests** (Art. 4(2), first indent). This exception can potentially

apply to sensitive information provided in such consultations, and in cases where the disclosure of the fact that a given company has participated in a consultation and/or given specific information could harm their interests or their competitive position in the EU or in a trading partner. However, the bottom line is that we **can not offer a 100% guarantee** of confidentiality to third parties participating in consultations. **Comment: good advice.**

> ⇨ You may wish to add a **disclaimer** to **any** consultation document or questionnaire where the results are not intended to be public, explaining that contributions received are subject to EU rules on public access to documents and the exceptions provided within those rules. **Comment: this is good advice.**

Briefings / Information notes to the Commission

- Briefings also need to be assessed on a case-by-case basis. They may often fall under the decision making exception of Art. 4(3). Whether the release would put new information into the public domain or provide information not yet known to our negotiating partner is also a key element here in assessing whether an exception applies.**Comment: Article 4.3 has been subject to court action and it might be wise to include some more details on the jurisprudence here. It could otherwise be misleading to refer to "may often fall under the decision-making exception" when the language of that exception is very clearly limited by (a) requirement that "disclosure of the document would seriously undermine the institution's decision-making process" (emphasis added) and (b) "unless there is an overriding public interest in disclosure."**

- We often receive requests for information notes to the College, which are usually drafted by the Cabinet. There is no per se exclusion of such notes. A key factor will be whether the information contained in the note is still relevant to any decision the Commission still has to take or might impact our relations with third parties if released. As a general rule in the trade area, if information notes are more than a year old the exceptions may be less likely to apply. **Comment: it's good to note that documents over a year old are generally public. Again, mention of the specific exception and the limits in applying should be included here.**

Documents of the 133 Committee and other Council working parties

- Such documents are not per se excluded. 3 categories need to be considered :

  - (i) Documents **originating in the Commission** which are marked "public" or which are available on the internet can be considered public. For documents marked as "limited" or "EU restricted", disclosure of all or part of the documents must be assessed on a case-by-case basis.

  - (ii) Documents **originating in the Member States**: these are treated as third-party documents with the specific rule in Article 4(5): the Member State is consulted and any justification for non-release must be based on one of the grounds of Article 4.

  - (iii) **Reports of the 133 (or other Council or EP) Committees**: in principle these are likely to be covered by the exception under Article 4(3), subject to a case by case assessment. Once again the timing and issue of whether the release would put new information into the public domain ("news value") are important criteria here. **Comment: and once again the**

requirements of "serious harm" and "public interest" are essential and the news value criterion is not one permitted by Regulation 1049/2001!

Dispute settlement procedures and legal opinions

- **Legal opinions** on potential cases brought (compatibility of third-country measures with WTO rules or bilateral rules) or defended in the WTO (compatibility of Community measures with WTO rules or bilateral rules), automatically falls under the exception of Art. 4(2) only if it originates from the **Legal Service.** Notes from opinions by the DG Trade Unit on Legal Aspects of Trade Policy cannot be excluded on the basis of Art. 4(2). **Comment: This needs to be updated in line with the Turco case. Legal advice from the Legal service is not automatically excluded.**

- However, notes to prepare the **decision to seize the WTO**, or relating to **cases under way or concluded at the WTO** can fall under the exception of international relations (Art. 4(1)) and/or decision-making (Art. 4(3)). **Again, with 4.3 note that it has to be serious harm and the public interest should be considered. Access Info and Corporate Europe Observatory would also like to know whether in fact it would not be more appropriate to consider WTO cases under Article 4.2 on court proceedings. Given that the seizing of the WTO is something which is public, the potential harm to international relations has already happened. The question then is about which documents it is necessary to restrict in order to protect the court proceeding from harm. Suggest review of this point.**

- Submissions received from **other parties** to a dispute at the WTO are covered by the exception in Art. 4(1) (international relations) since they are governed by Article 18 of the WTO's Dispute Settlement Body (DSB) Regulation, which obliges us to maintain confidentiality.

Staff and budget issues

- Such documents are likely to be partly covered by the exception in Article 4(1) (protection of privacy), partly by the exceptions in Article 4(3) (documents for internal use relating to a matter where the decision has not yet been taken), and in very specific cases where retroactive transmission could seriously undermine the decision-making process. **Comment: this is a very broad section. Budget information should generally be public. Staff information will be private only where it affects the personal data of someone and cannot be seen as something which should legitimately be in the public domain. More information about public officials should be public than about private persons.**

- **Tender dossiers** are in principle covered by the exception in Article 4(2) (protection of commercial interests). Separate rules on tender files apply (see rules of DG for budgetary affairs). **Comment: suggest provide more guidance here on when such documents must be public.**

Anti-dumping, anti-subsidy, safeguard and Trade Barriers Regulation proceedings

- The documents received in this context are mainly covered [**comment: this kind of language is problematic**] by the exception in Article 4(2) (protection of commercial interests of a natural or legal person court proceedings and legal advice, and of the purpose of investigations) and partly by the exception in Article 4(1) (protection of public interest as regards international relations). **Comment: this para encourages blanket exception of all the documents falling into these categories.**

- Information received from a third-party during an investigation is covered by the exception in Article 4(2) which includes all the information received pursuant to regulations or decisions in the field of trade defence instruments throughout proceedings initiated in accordance with the basic Regulations in this field, and until the conclusion of any court proceedings and/or dispute settlements at the WTO which may result from these administrative procedures. This corresponds to the practice adopted since 1994. The exception in Article 4(3), first sub-paragraph, applies to internal or preparatory documents produced in the course of proceedings. The exception in Article 4(3), second sub-paragraph, may be applied to internal or preparatory documents produced in the course of proceedings which contain policy positions of a horizontal nature and are not case-specific. Information received from a third-party during an investigation is covered by the exception in Article 4(1) since it is governed by Article 6 of the WTO Anti-dumping Agreement, which obliges us to maintain confidentiality.

- Under Article 4(7), even after a proceeding is terminated, the exception can continue to apply to documents that might disclose business secrets, investigation practices or methods, or personal positions that could jeopardise the internal decision-making process, which are not to be disclosed.

- «Horizontal» documents (policy notes, procedural or investigation manuals) are closely linked to investigations and *can* be included in the general category of documents preparatory to a decision, but are not necessarily exempted from the Regulation: they have to be examined on a case-by-case basis. So far access to most policy notes and clarification papers has been rejected, and partial access has been granted to some. However, a case is now pending with the Ombudsman and the Court of First Instance.

- The same holds for all documents relating to the EU's defence against the actions of third countries. They can remain protected even after the initiation of court proceedings or dispute settlement and, if necessary, even longer after these procedures under one of the statutory exceptions in force (case-by-case decision).

- Where TDI cases are pending before the CFI/ECJ, the file related to that case is considered to fall fully under the exception in Article 4(2), second indent.

- **For the EU's trade barriers regulation**: the same type of exclusions apply.

Non-public Commission documents put on third party websites

- Requests for non-public documents which have been leaked to the public, or which have been put on web-sites by third parties, must be handled as if the documents were not yet public i.e. a case by case assessment must be made; nevertheless, the fact that the document is already in the public domain will be a factor in assessing whether their release under the Regulation would have any consequences beyond those already caused by the leak of the document, and hence whether the exemptions in the regulation apply. **Comment: this is fair.**

Studies

- Studies carried out for the Commission by an external consultant should be treated in the same way as any internal Commission document. The letter accompanying a positive reply to a request for access to a study must specify that the study was carried out by independent experts and that the Commission cannot be held responsible for its content. **Comment: this is fair.**

III. PRACTICAL IMPLICATIONS FOR DG TRADE

Drafting of documents

- Each official must be aware that all his/her documents, including meeting reports and e-mails can potentially be disclosed. You should **keep this in mind when writing such documents**. This is particularly the case for meeting reports and e-mails with third parties (e.g. industry), which are frequently subject to access requests. Comment: The warning tone risks going against the spirit of the EU's transparency initiative and the general principle of good administration which is to keep a good and true record of all stages in the decision-making process. It should be replaced by an assertion that the relations between third parties and DG Trade are conducted in public, that the public has a right to know, and that it will be only in very rare cases that information about these relations will be withheld from public disclosure.

- **Documents must be drafted with care, bearing in mind that they may be made public at some point**. Comment: The warning tone should be replaced by a formulation like "Documents must be drafted according to the general principle of good administration which is to keep a good and true record of all stages in the decision-making process." Moreover, in order to maximise the cases where we are able to give full rather than partial access to our documents, the following practical suggestions may be worth bearing in mind:

  - when writing a **meeting report**, you may want to distinguish between elements that represent a lasting record for DG Trade and those elements that are simply part of your personal working notes and day to day file, such as **personal/subjective comments or opinions** (e.g. your personal evaluation of the meeting, your opinion on the real intentions of one or more participants, your assessment of the situation etc…) as well as **follow-up points**. However, this should not be equated with any kind of system of double reporting, and in any event all documents have to be assessed under these rules.

  Comment: Despite the last sentence, we understand this paragraph as encouraging the creation of double reports and the removal of crucial information such as follow-up points from documents considered for release in case of an access to documents request. There is nothing in Regulation 1049/2001 which permits follow-up points and evaluations of meetings to be excluded from the right of access and it's inappropriate for the Vademecum to suggest that there might be. The paragraph should therefore be deleted.

  > ⇨ As a rule of thumb, those elements which would be needed by someone picking up the file in your absence should be considered as part of the lasting record needed by the DG.
  >
  > Consequently, this box should also be deleted.

  - Practice shows that when writing a report, you should be aware of how statements may look if taken out of context. For this reason:

    - You should limit giving personal as opposed to professional opinions.
      Access Info and Corporate Europe Observatory wonder about the necessity or origin of this advice. It seems to us that it is highly unlikely that a professional public official will write personal comments of the kind which really should not be in a meeting report (if this happens it poses a question the general professionalism of the person). The

remainder of "opinions" should be professional ones, e.g. "I believe it would be advisable to carry out more research in this area," which will of course be subject to potential disclosure. We therefore recommend deleting this sentence.

- You should separate **private from professional contacts**, for example in e-mails. It is not uncommon in Brussels for you to have professional contacts with a person whom you also happen to know in your private life (a friend, member of the same organisation, parents of children at the same school as your children, etc…), you may want to be careful in referring to such contacts in professional e-mail traffic given the risk of this being taken out of context. **Comment: this is what we recommended above, and could be linked to an explanation of what is defined as "private correspondence" and the circumstances when it is appropriate to receive it at the workplace.**

E-mails

E-mails can be considered as "documents from the Commission" in so far as they are relevant. **Comment: this phrase about relevance should again be clarified; maybe best to put it another way: all emails are documents for the purposes of Regulation 1049/2001 and may be requested if they relate to (are relevant to) a particular request they are likely to be disclosed.** The best way to determine whether an e-mail is relevant is to follow the Commission's guidelines for the registration and filing of e-mails[6]. **Comment: Access Info and Corporate Europe Observatory do not have a copy of these guidelines.**

Filing and registration of documents

Comment: this section seems reasonable. It might be useful to cross-reference from earlier sections and make clear what are the rules for keeping/deleting e-mails.

- Given the very short time frames in which documents have to be found and the request has to be handled, it is important that such documents can be easily identified and found. For example, requests relating to meetings or correspondence predating our reorganisation in 2006, where responsibilities shifted between units or where people have joined or left posts in the meantime, has required additional identification. Hence the importance of proper filing and registration of documents, according to the rules and guidelines of the Commission and of DG Trade (see: http://www.trade.cec.eu.int/intra/how/docmanag/index.cfm). The principal tools are likely to be Adonis/Ares, TSAR (where all records / reports of meetings should also be stored), Outlook (to establish possible meetings) and the unit's own filing system.

- **Registration** of key documents (incoming and outgoing letters, e-mails, notes) is done through the Adonis/Ares system.

- Non-registered documents (in particular meeting reports and certain e-mails) may also have to be disclosed: in that case, a **proper filing system**, which allows to trace back all types of documents, including e-mails, even after the official who has drafted them has left the unit, is key. As is the case for registration, criteria for filing of **e-mails** are the same as for any other document.

[6] Transmission of guidelines for the registration of e-mails in the Electronic Archiving and Document Management Policy of the Commission (e-Domec) (http://www.cc.cec./sg-vista/cgi-bin/repository/getdoc/COMM_PDF_SEC_2006_0353_1_EN_NOTE_ET_ANNEXE.pdf)

– In particular, it is important to ensure that files of colleagues which have left the unit remain accessible in the public folders.

– As far as **meeting reports** are concerned, putting reports of meetings in the TSAR database (where it was used to request the briefing) greatly facilitates the task of tracing meeting reports.

> ⇨ The Trade Coordination team has created a new functional mail box where you can copy records of meetings/phone calls where the Director General participates ("TRADE DOS MEETING REPORTS"). The DG's team will then attach these records to the corresponding TSAR request for future reference, while for meetings with the DDGs this box will act as a repository which can be accessed for searching in the future.

– In case of problems in tracing documents which have been written or received by an official who has left the unit or the DG, the normal practice is to consult those colleagues who are still in the Commission, but not those who have retired or left.

It is up to each Unit to ensure that its current filing and archiving system is reliable so that it is easy to find documents in the short time-limits laid down by the Regulation.

Internal handling of requests for Access to Documents in DG Trade

Comment: this section below seems to repeat that at the end of Part I of this Vademecum and perhaps they could be combined.

– Management of document access is coordinated by **Trade 01** (functional mail box TRADE ACCES DOCUMENT), which will pass on applications to the units concerned, collect the documents selected by them and advise, if necessary, on the proper application of the Regulation. Trade 01 ensures consistency of the DG Trade practices as regards access to documents maintains contacts with the SG service in charge of access to documents and keeps track of case law on access to documents.

– **Replies are prepared by the units in charge of the relevant file** (on the basis of the available templates). Heads of Units must ensure that these replies comply with the provisions of the Regulation and that the necessary justifications are set out clearly in cases of refusal or partial refusal of access.

  - **Replies** releasing documents in full or confirming that no relevant documents exist may be sent out directly by the unit concerned, after having checked with Trade 01 prior to sending these out.

  - **Replies** refusing access to all or parts of the requested documents, must be signed by the Director-General, as well as positive replies that are part of a wider request which includes some negative answers. The signataire should go via Trade 01.

  - **If a longer deadline is needed** because of the time needed to identify and review a large number of documents, Trade 01 must be consulted.

– In accordance with the Regulation, which provides for the protection of the Commission's copyright (Article 16), the draft reply shall contain the following wording: "*Documents that are transmitted may not be reproduced or disseminated for commercial purposes without the Commission's prior authorisation*."

- The **Secretariat General** is in charge of replying to confirmatory applications. In this case, Trade 01 is consulted and provides elements (including additional factual justifications for non-disclosure and where necessary copies of all the documents considered for release or partial release) for reply to the SG on the basis of the elements provided by the relevant unit, which is always consulted before replying to the SG.

- Trade 01 will be assisted by a network of "Access to Documents" contact point in the relevant units. **Comment: it might be helpful for staff to know who is in this network and how it functions.**

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Annex: templates for replies