

## **Reply of the European Commission on a request for information from the European Ombudsman - Strategic inquiry: OI/2/2022/MIG**

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### **I. BACKGROUND/SUMMARY OF THE FACTS/HISTORY**

The European Ombudsman's office has been monitoring whether the European Commission deals with requests for public access to documents within the deadlines laid down in Regulation 1049/2001.

The European Ombudsman observes that delays are increasingly being raised in complaints against the Commission's handling of access to documents applications and that the Commission does not always meet the statutory time limits under Regulation 1049/2001. In some cases, the Commission adopted decisions with a significant delay.

### **II. EUROPEAN OMBUDSMAN'S INQUIRY**

On 4 April 2022, the European Ombudsman launched an own-initiative inquiry on the time taken by the European Commission to deal with requests for public access to documents.

The European Ombudsman decided to open this own-initiative inquiry to try to identify if there are any issues that could be addressed by systemic solutions and considers that this would be helpful to the public but also to the Commission itself.

As a first step, the European Ombudsman considers that it would be useful to receive a written reply from the Commission to a set of questions and to provide her Office with the relevant data.

Based on the analysis of this information, the European Ombudsman will then select a sample of files for inspection.

#### **Initial access requests**

- 1) How many initial requests for public access to documents did the Commission receive in the year 2021?
- 2) What was the average duration (in working days) for the Commission to take a decision on an initial request for public access in that year? What was the median?
- 3) What was the duration in those five cases that took the longest? And in those five cases that took the shortest?
- 4) In how many cases did the Commission exceed the maximum time limit of 30 working days?

#### **Confirmatory requests**

- 5) How many confirmatory requests did the Commission receive in the year 2021?
- 6) What was the average duration (in working days) for the Commission to take a decision on a confirmatory request in that year? What was the median?
- 7) What was the duration in those five cases that took the longest? And in those five cases that took the shortest?
- 8) In how many cases did the Commission exceed the maximum time limit of 30 working days?

New Commission portal

- 9) A study on the public access portal the Commission is about to launch suggested that the new portal will “decrease the delays in providing replies to the requests”? How and at what stage in the procedure does the Commission consider that time will be saved?

### **III. THE REPLY OF THE EUROPEAN COMMISSION**

As a general comment, the Commission would like to emphasise that the conditions for providing access to documents under Regulation (EC) No 1049/2001 have changed significantly over time: the main reason behind delays in handling requests is the ever-growing number of initial and confirmatory applications, which also have an ever-wider scope. Besides, additional legal requirements resulting from recent case-law of the European Court of Justice have to be complied with. The Commission receives around 8000 initial requests and over 300 confirmatory requests per year, many of them concerning dozens, sometimes hundreds, of documents.

The rules of Regulation (EC) No 1049/2001 do not provide the exhaustive legal framework applicable to a specific request for access to documents. In certain cases, the Commission has to ensure that Regulation (EC) No 1049/2001 is applied in a manner, which is compatible with other pieces of relevant legislation, e.g. the Staff Regulations or the Financial Regulation, or with other legal obligations of the Commission, e.g. in the field of commercially sensitive information. In fact, as the activity of the Commission covers a very wide range of policy sectors, the Commission services in charge of replying to access to documents requests have to liaise closely with policy departments or units to ensure that the decisions on access to documents are factually and legally correct. They notably must check to which documents or parts of documents access can be given since every mistake can expose the Commission to legal challenges and can cause harm to third parties. In addition, in case of third-party documents, the Commission needs to consult the originators in accordance with Articles 4(4) and (5) of Regulation (EC) No 1049/2001 and often engage in follow-up discussion in order to clarify the procedural requirements and answer questions.

Additionally, the exception based on the protection of personal data pursuant to Article 4(1)(b) of Regulation (EC) No 1049/2001 requires to be applied in accordance with Regulation (EU) No 2018/1725 and the relevant case-law. This usually implies verifications of all documents that may contain personal data, and consultations in order to avoid data breaches. In this regard, the Commission is regularly confronted with the obligation to balance the data subjects' interests with the public interest stemming from Article 9(1)(b) of Regulation (EU) 2018/1725.

For each case, the Commission needs to search for documents, carefully assess them and when justified, redact them. The Commission increasingly receives wide scope or unclear requests, for instance for access to ‘*all documents including briefings, memos, reports of meetings, emails, etc.*’ in its possession related to a specific topic or policy which cannot be compared to the previously standard case of a citizen requesting access to one specific document. Therefore, the identification of relevant documents is often not straightforward in such cases; it is also time-consuming. The Commission often needs to clarify or come to an agreement with the applicant on the scope of the request pursuant to Articles 6(2) and (3) of Regulation (EC) No 1049/2001. The time taken to successfully conclude this process depends

on the applicant's responsiveness and the number, length and complexity of the documents concerned, which are elements not reflected by the mere statistics.

The European Commission accepts and processes, in accordance with Article 1 of the Detailed rules of application of Regulation (EC) No 1049/2001, requests from citizens of third countries not residing in a Member State, despite the lack of a specific obligation under Regulation 1049/2001 and the ever-increasing number of ATD requests.

The linguistic requirements of the procedure also cause delays, e.g. the translation of the reply into the language of the request. Given the workload of the Commission translation services, the translation requirements of confirmatory decisions may take up to 10 working days or more. The Commission would like to emphasise that even other correspondence, such as clarification requests, fair solution proposals and third-party consultations might require the use of the translation services, and that the authorities of some Member States have explicitly asked to be consulted only in their own language.

The following specific replies to the European Ombudsman's questions have to be seen in this context.

#### Initial access requests

- 1) How many initial requests for public access to documents did the Commission receive in the year 2021?

In 2021, the number of new initial applications reached 8,420. This figure reflects an increase of almost 5.2% in comparison with 2020.

- 2) What was the average duration (in working days) for the Commission to take a decision on an initial request for public access in that year? What was the median?

The average duration (in working days) for the Commission to take a decision on an initial request for public access in that year was 20 days. The median was 13 days.

- 3) What was the duration in those five cases that took the longest? And in those five cases that took the shortest?

The duration in those five cases that took the longest, was 319, 320, 322, 323 and 333 days<sup>1</sup>. The duration in the five cases that took the shortest, the reply was provided on the same day.

- 4) In how many cases did the Commission exceed the maximum time limit of 30 working days?

The Commission exceeded the maximum time limit of 30 working days in 1332 cases. These can be further detailed as follows: in 6% of the total number of cases, the response was provided within 31-40 days; in 4% of the cases, the response was

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<sup>1</sup> Please note that when the institution fails to provide the applicant with the initial reply within the statutory time limits, this is considered as an implicit negative reply. The data also include overdue initial cases for which the initial reply had not yet been provided at the time of the extraction of these data. These cases therefore amount to an implicit negative reply. This applies to all the five cases that took the longest.

provided within 41-60 days and in 5% of the cases, the response was provided after more than 60 days.

### Confirmatory requests

- 5) How many confirmatory requests did the Commission receive in the year 2021?

Similarly, the number of incoming confirmatory applications has risen to 355, which represents a 16% increase in comparison with 2020. These are the highest figures in the history of the Commission's implementation of Regulation (EC) No 1049/2001.

- 6) What was the average duration (in working days) for the Commission to take a decision on a confirmatory request in that year? What was the median?

The average duration (in working days) for the Commission to take a decision on a confirmatory request in that year was 93 days. The median was 79 days.

- 7) What was the duration in those five cases that took the longest? And in those five cases that took the shortest?

The duration in those five cases that took the longest was 265, 266, 268, 272 and 291 days<sup>2</sup>. The duration in those five cases that took the shortest was 1, 2, 3, 5 and 7 days.

- 8) In how many cases did the Commission exceed the maximum time limit of 30 working days?

The Commission exceeded the maximum time limit of 30 working days in 305 cases. Out of them, in 9% of the cases, the response was provided within 31-40 days, in 13% cases, the response was provided within 41-60 days and in 62% of the cases, the response was provided after more than 60 days.

The Commission would like to underline that, at confirmatory stage, every confirmatory decision involves internal consultations with the line Commission department(s) and, if necessary, re-consultation of the third parties concerned. Moreover, a consultation with the Legal Service is systematically carried out, as per standard Commission procedures for adoption of Commission decisions. This process can result in several exchanges on the applicability of the exceptions used for the (partial) refusal of access. The mere statistics on the average delays or medians do not provide any insight into this part of the process.

Confirmatory decisions are challengeable before the Court of Justice of the European Union pursuant to Article 263 of the Treaty on the Functioning of the European Union. Therefore, confirmatory decisions necessarily include a detailed argumentation of several pages. Such argumentation is of an increasingly complex nature due to the increasing amount of case-law on access to documents that the Commission is committed to fully implement, the new areas of work and activity of the Commission, etc. It requires careful legal assessments in order to

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<sup>2</sup> Please note that when the institution fails to provide the applicant with the confirmatory decision within the statutory time limits, this is considered as an implicit negative decision. The General Court has recognised this principle e.g., in judgment *AlzChem Group AG v European Commission*, T-569/19, paragraphs 26, 27 and 29. The data also include overdue confirmatory cases for which the confirmatory decision had not yet been provided at the time of the extraction of these data. These cases therefore amount to an implicit negative decision. This applies to four out of the five cases that took the longest.

ensure that all conflicting interests at stake are duly taken into consideration and balanced. A confirmatory decision also has to address all arguments raised by the applicants. It is noteworthy to mention that the requirements for the statement of reasons when refusing access to (parts of) documents set by the General Court and the Court of Justice has increased substantially over the years.

Finally, this procedure may require the Commission to overrule the objections of third parties to the disclosure, which involves additional steps such as the sending of a ten-day letter of notice to the third party overruled prior to disclosure. This step is required in order to safeguard the third party's rights of defence.

#### New Commission portal

- 9) A study on the public access portal the Commission is about to launch suggested that the new portal will “decrease the delays in providing replies to the requests”? How and at what stage in the procedure does the Commission consider that time will be saved?

The Commission is currently finalising the development of a new IT system for submitting and handling requests for access to Commission documents (EASE – Electronic Access to European Commission Documents). On the new public portal, applicants will get valuable information on access to documents, submit initial and confirmatory requests, have overview of their ongoing and closed cases, receive Commission replies electronically, manage their personal data, search for documents disclosed to other applicants etc.

An internal second module of the portal will be used by the Commission staff to handle such requests. It is expected that this internal module brings efficiency gains related to registration and attribution of cases, transfer of identified documents from initial to confirmatory stage, easier communication with the applicants etc. These efficiency gains can contribute to shortening the process.

#### **IV. CONCLUSION**

The Commission considers that, as the workload and complexity stemming from an application for access to a single document is not comparable to an application for access to multiple long complex documents originating from third parties with several exceptions applicable, the salience of the numbers concerning average or median time it took to provide replies to initial and confirmatory requests does not provide an accurate picture of the situation.

*For the Commission*

*Věra JOUROVÁ*  
*Vice-President*

