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on the application in 2018 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents

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INTRODUCTION

In 2018, the European Commission took important steps to proactively deliver on its strong commitment to increased transparency and accountability, in order to enhance the trust of European citizens in the processes of the EU institutions.

A cornerstone in the framework of this endeavour is the European Commission's fostering of the citizens' effective exercise of their right of access to documents held by the EU institutions[1].

This right is enshrined in Article 42 of the Charter of Fundamental Rights of the EU, Article 15(3) of the Treaty on the Functioning of the EU, and Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents[2].

Article 17(1) of the said Regulation provides that each institution publish an annual report on the implementation of the Regulation for the preceding year.

The present annual report for the year 2018 first summarises the European Commission's broader transparency initiatives (*Infra* I). Secondly, the report identifies the key trends and features of requests for access to documents submitted within the framework of Regulation (EC) No 1049/2001, as well as their respective replies from the institution. The report further reviews the rulings handed down by the European Courts, and the findings of the European Ombudsman concerning the European Commission's implementation of the Regulation (*Infra* II).

I. Broader Transparency Agenda

Strongly determined in its resolve to bring citizens closer to its decision-making process, the European Commission is constantly exploring new methods and measures to achieve enhanced transparency.

In 2018, the European Commission deployed targeted efforts to further enhance the transparency of all its core activities, ranging from law making and policy implementation to contacts with stakeholders and lobbyists. A few examples illustrative of this widespread endeavour follow below.

Better Regulation

In line with the aim to bring more transparency into the work of the EU institutions and its long-standing efforts to bring EU decision-making closer to citizens, the European Commission has actively contributed in 2018 to the growth of the *Interinstitutional Register of Delegated Acts* launched on 12 December 2017[3].

[1] Beneficiaries of the right of access to documents are EU citizens and persons residing or having their registered office in a Member State. In addition, citizens and legal persons of third countries not residing or having their registered office in a Member State also enjoy that right.

[2] Official Journal L 145, 31 May 2001, p. 43 (hereinafter referred to as 'Regulation (EC) No 1049/2001').

[3] Following the agreement of the European Parliament, the Council and the Commission on the Interinstitutional Agreement on Better Law-making on 15 March 2016.

The institution has also endorsed the ongoing efforts to make the legislative procedure more transparent and accessible via, *inter alia*, improvements to EUR-Lex and pursuant to the Interinstitutional Agreement on Better Law-Making (such as the joint legislative database). The European Commission's 'Have Your Say' portal provides a single web-based point of entry for citizens and interested parties to learn about the institution's policy-making activities and to leave their comments, views and other information.

Finally, the European Commission conducted a *stocktaking exercise* of its better regulation policies throughout 2018. The conclusions of the exercise were presented in a Communication in April 2019, which identified areas for further improvement[4].

The new Data Protection Regulation for the EU Institutions and Bodies

In 2018, transparency was further elevated to a guiding principle under the new data protection rules for the EU institutions and bodies.

The adoption of Regulation (EU) 2018/1725[5] represents another vital step forward in the development of a comprehensive EU framework ensuring transparency.

Regulation (EU) 2018/1725, which entered into force on 11 December 2018, includes a whole section dedicated to transparency. Within this framework, transparency requires that the EU institutions and bodies process personal data in a transparent manner, by providing information and communication relating to the processing of personal data to the individuals concerned in a concise, transparent, intelligible and easily accessible form.

The new Regulation considerably strengthens the rights of individuals as data subjects. Under its rules, the EU institutions and bodies not only have to ensure compliance with the principle of transparency, but are also accountable for demonstrating such compliance.

The new Code of Conduct for the Members of the European Commission

In 2018, the European Commission formally adopted a new Code of Conduct for its Members.[6] The new Code came into force on 1 February 2018. It replaces the previous Code of Conduct for Commissioners of 20 April 2011.

[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 'Better regulation: taking stock and sustaining our commitment', COM(2019)178 available at: https://ec.europa.eu/info/sites/info/files/better-regulation-taking-stock_en_0.pdf

[5] Regulation of the European Parliament and of the Council of 23 October 2018, on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (Official Journal L 295 of 21 November 2018, p. 39, hereinafter 'Regulation (EU) 2018/1725').

[6] Commission Decision of 31 January 2018 on a Code of Conduct for the Members of the European Commission, C(2018) 700 final, Official Journal C 65 of 21 February 2018, p. 7; hereinafter 'the Code of conduct for the Members of the European Commission'.

The Code contains features designed to increase transparency in relation to Commissioners in specific areas. The Code provides for *specific rules regarding external meetings of Commissioners*. Accordingly[7], the Commissioners and their members of Cabinet only meet organisations and self-employed individuals registered in the Transparency Register[8]. Moreover, the taking place of such meetings must be made public[9].

The new Code also introduces a new provision whereby the European Commission will publish *an overview of travel expenses per Commissioner* every two months[10]. The first such publication took place at the end of February 2018 and travel expenses of each Commissioner have since then been proactively published every two months.

Besides, and in line with the requirements of the new Code of Conduct, the *new declarations of interests* of all Commissioners are now published at the same time in a signed PDF version on the respective website of each Commissioner and a machine-readable version on the Europa website[11].

Finally, in the spirit of transparency and accountability, the European Commission committed to publish *annual reports* on the application of the new Code of Conduct.

From a more general perspective, transparency regarding ethics of Commissioners and former Commissioners is ensured through a *dedicated Europa webpage*[12].

The Transparency Register

The Transparency Register has continued to grow steadily, and in December 2018 contained over 11,900 entries: 5,000 more than when President Juncker took office, and with 2,762 new entities having joined during the course of the year[13]. All registrants are signed up to a common Code of Conduct, since the beginning of the mandate of the Juncker Commission.

Efforts to improve the overall quality of data contained in the Transparency Register intensified in 2018 and have brought tangible results. A new feature was added automatically providing a list of any meetings the registered entities held with Commissioners, members of their Cabinet or Director-Generals since December 2014. A series of internal training and external communication activities took place aimed at raising awareness about the Transparency Register and promoting its use.

[7] Article 7(1) of the Code of conduct for the Members of the European Commission.
[8] Established pursuant to the Interinstitutional agreement on this matter between the European Parliament and the Commission of 16 April 2014.
[9] Article 7(2) of the Code of conduct for the Members of the European Commission. (Such publication must take place in accordance with the Commission Decision of 25 November 2014 on the publication of information on Meetings held between Members of the Commission and organisations or self-employed individuals.)
[10] Article 6(2) of the Code of conduct for the Members of the European Commission.
[11] https://ec.europa.eu/info/files/machine-readable-versions-all-declarations-interests_en.
[12] https://ec.europa.eu/info/about-european-commission/service-standards-and-principles/codes-conduct/ethics-and-integrity-eu-commissioners_en
[13] http://ec.europa.eu/transparencyregister/public/openFile.do?fileName=ar_2018_en.pdf

The discussions between the three institutions on the European Commission's proposal for an Interinstitutional Agreement to make the Transparency Register mandatory continued.

No agreement however was reached on making meetings between decision-makers and interest representatives conditional upon registration in the Transparency Register – a point which is considered crucial by the Commission. The institution has therefore urged the European Parliament and the Council to explore options enabling them to apply the rule 'no registration, no meeting'.

EU Brexit transparency

In 2018, the European Commission continued to deliver on its commitment to ensure a maximum amount of openness in respect of the unprecedented negotiations concerning the withdrawal of the United Kingdom from the EU[14].

The unprecedented level of transparency reached by the European Commission was such that it was commended by the European Ombudsman, upon closing her two-year long strategic initiative on the negotiations on the United Kingdom's withdrawal from the European Union. The European Ombudsman concluded that, aside from good administrative practice, the high level of transparency increased legitimacy of the EU negotiators and contributed to keep the unity of the European Union[15].

Overall, from 2017 to 2018, the European Commission proactively published on its website *more than 100 negotiating documents* in order to ensure public scrutiny and inclusivity of the stakeholders' views. These documents tracked the progress of the negotiations and allowed the public to follow the evolving versions of the documents.

Reflecting on this unprecedented endeavour, the European Commission's Chief Negotiator, M. Barnier acknowledged that such transparency was owed 'to citizens, businesses, regions and all those affected by the UK's decision to leave the EU'. It was the 'key to build[ing] clear, strong and united positions with the 27 Member States and the Parliament.'

Additional transparency: Pilot Projects and initiatives

In 2018, the European Commission explored additional innovative pilot projects designed to further transparency. For instance, in April 2018, the *Directorate General for Health and Food Safety* of the European Commission launched a pilot project that aims at increasing transparency of its activities. Within the framework of the project, electronic documents on pesticides and biocides that are (fully or partially) disclosed following a request under Regulation (EC) No 1049/2001 are published online. Therefore, such documents are no longer physically sent to the individual applicants who made the request, who receive instead a hyperlink to a webpage.

[14] In accordance with the European Council's guidelines.

[15] Closing note on the strategic initiative with the European Commission on the negotiations on the UK withdrawal from the EU, https://www.ombudsman.europa.eu/en/correspondence/en/109825.

This webpage created specifically for the publication of documents that are disclosed under Regulation (EC) No 1049/2001 is accessible to all[16], thus making the released documents available instantaneously to the general public and the applicant.

The pilot project is expected to continue also in the first half of 2019.

In 2018, transparency and engagement with the public remained essential features within the *trade policy* in order to ensure democracy, public trust and accountability. In the framework of the European Commission's pledge to transparency made in the EU's new trade strategy 'Trade for All', the European Commission continued in 2018 to publish on a dedicated website negotiating texts as well as latest round reports relating to the EU's existing trade agreements and ongoing trade negotiations with non-EU countries[17].

Another important element of outreach to civil society is the so-called 'Sustainability Impact Assessment' process. This trade-specific tool was developed to support trade negotiations. It is led by independent external consultants providing analysis of the potential economic, social, human rights and environmental impacts of the potential trade agreements. The sustainability impact assessment is highly participatory.

Moreover, in 2018, the European Commission continued to organise initiatives and actions in the framework of the '*Europe for Citizens'* programme. This programme set for the period 2014-2020 is an important instrument encouraging EU citizens to be better informed, take part in the debate and play a stronger role in the development of the EU.

Furthermore, on 12 December 2018, the European Commission's proposal to revise the *European Citizens' Initiative* received the political agreement of the European Parliament and the Council. A political priority of the Juncker Commission, the European Citizens' Initiative is a unique and innovative way for citizens to shape Europe by calling on the European Commission to make a legislative proposal once it gathers one million signatures. The reformed Citizens' Initiative will be more user-friendly so as to promote enhanced democratic participation at the European Union level.

In conclusion, in 2018 the European Commission continued to publish a wide range of information and documents proactively and in user-friendly way. Simultaneously, the institution constantly sought to explore new tools designed to further the transparency of its overall activities and involve citizens in the democratic process. The above-mentioned examples constitute only a few instances illustrative of the institution's efforts to boost transparency within the broader meaning of the term.

[16] See https://webgate.ec.europa.eu/dyna/extdoc/
[17] See http://trade.ec.europa.eu/doclib/press/index.cfm?id=1395

II. Access to documents

The right of access to documents, laid down in Article 15(3) of the Treaty on the Functioning of the European Union and Regulation 1049/2001 continued in 2018 to be one of the cornerstones of the European Commission's transparency agenda.

The right of public access to documents of the institutions is related to the democratic nature of those institutions[18]. Regulation (EC) No 1049/2001 reflects the intention expressed in the second paragraph of Article 1 of the EU Treaty of marking a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen[19]. This goal is reiterated in Article 10 of the EU Treaty.

Within this framework, in 2018, the European Commission provided access to a wide range of documents in its possession, following specific requests submitted under the Regulation. This access complemented the institution's proactive publication of a wealth of information and documentation on its various registers and webpages.

This report provides an overview of how the European Commission implemented the Regulation in the year 2018. It is based on statistical data, which are summarised in Annex[20].

The statistics reflect the number of applications received and replies provided in 2018. They further provide more accurate data as regards the statistics retrieved for the previous years, following subsequent regular encoding corrections[21].

As in the previous years, the statistics do not reflect the number of documents requested or (partially) disclosed, which were far more numerous. Whereas applicants may ask for access to a single document, they more frequently request access to a multitude of documents, or even to entire files concerning a specific subject or procedure.

In brief, the statistics show that the requested documents were fully or partially disclosed in more than 80% of the 6,912 cases at the initial stage, and wider or even full access was granted in almost 41% of the 288 cases reviewed at the confirmatory stage. The data not only confirm the openness of the European Commission, but also the importance of the right of access to documents as part of the institution's overall transparency policy.

Resources

In the European Commission, the treatment of initial access to documents requests is handled on a decentralised basis by the various Commission Directorates-General and services. Each Directorate-General and service appoints at least one legal expert for this task, acting as 'access to documents coordinator'.

[18] See Second recital in the preamble to Regulation (EC) No 1049/2001.
[19] See First recital in the preamble to Regulation (EC) No 1049/2001.
[20] Unless otherwise indicated, the statistics presented in this Report are based on figures extracted from the European Commission IT applications on 31 December 2018, as updated following subsequent encoding corrections. Percentages in the narrative part of the Report are rounded to the closest decimal.
[21] For this reason, the figures provided in this report and the previous ones may slightly differ.

Depending on the size of the service and the number of requests received, 'access to documents coordinators' are usually assisted by some support staff and are entrusted with the coordination of the draft replies with the units in charge of the underlying policy areas.

Confirmatory requests are dealt with by the Secretariat-General, so as to ensure an independent administrative review of the reply given at the initial stage.

A specific team within the Secretariat-General's Unit for Transparency, Document Management and Access to Documents is exclusively dedicated to the task of ensuring the coordination and uniform implementation of the detailed rules for application of Regulation (EC) No 1049/2001. It is composed of several case handlers and administrative support staff. In addition to its responsibility for reviewing initial replies, the Unit provides horizontal guidance, training and advice to all Directorates-General and services of the European Commission on the implementation of the Regulation. It also manages the European Commission-wide IT system for handling initial and confirmatory requests for access to documents, which is currently being modernised.

The steadily rising number of new applications for access to documents since the entry into force of Regulation (EC) No 1049/2001 and the demand for increased transparency in the area of public access to documents highlight the need to allocate sufficient human and IT resources to the European Commission in order to ensure the efficient handling of access to documents requests and achieve the best outcomes for citizens.

1. REGISTERS AND INTERNET SITES

In 2018, 19,582 new documents were added to the register of Commission documents[22] (see Annex – Table 1), falling within the C, COM, JOIN, OJ, PV, SEC or SWD categories[23].

In 2018, the 'Access to Documents' website on *Europa*[24] recorded 6,458 visitors and 8,652 pages viewed (see Annex – Table 2)[25].

Both platforms remain useful search tools enabling citizens to participate more closely and actively in the European Commission's decision-making process as well as promoting the policy on access to documents.

[22] A similar number as in 2016 (18,523).

[23] Namely, C: Autonomous acts of the Commission; COM: Commission legislative proposals and other documents communicated to other institutions, with their preparatory papers; JOIN: Commission and High Representative Joint Acts; OJ: Agendas of Commission meetings; PV: Minutes of Commission meetings; SEC: Commission documents which cannot be classified in any of the other series; SWD: Commission staff working documents.

[24] Access to documents: http://ec.europa.eu/transparency/access_documents/index_en.htm.

[25] Those data result from the use in 2018 of a new algorithm, which provides more accurate statistics. Therefore, they are not comparable to the ones retrieved for the previous years.

2. COOPERATION WITH OTHER INSTITUTIONS SUBJECT TO REGULATION (EC) NO 1049/2001

Article 15(1) of Regulation (EC) No 1049/2001 provides that the institutions shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by the Regulation. Article 15(2) further organises the establishment of an interinstitutional committee to examine best practices, address possible conflicts and discuss future developments on public access to documents.

In accordance with the two above-mentioned provisions, in 2018, the European Parliament, the Council of the European Union and the European Commission continued to hold regular technical meetings at an administrative level. In the framework of such meetings, the institutions share experiences, develop best practices and ensure the consistent application of Regulation (EC) No 1049/2001 in light of the case law of the European Court of Justice.

3. ANALYSIS OF THE APPLICATIONS FOR ACCESS

3.1. The number of applications (see Annex – Tables 3 and 4)

As illustrated by the graph below, in 2018, the number of **initial applications** reached **6,912.** This figure reflects a striking increase of approximately 9.5% in comparison with 2017 and almost 10% in comparison with 2014[26]. The European Commission issued 7,257 initial replies in comparison with 6,716 in 2017, showing a rise of almost 7.5 %.

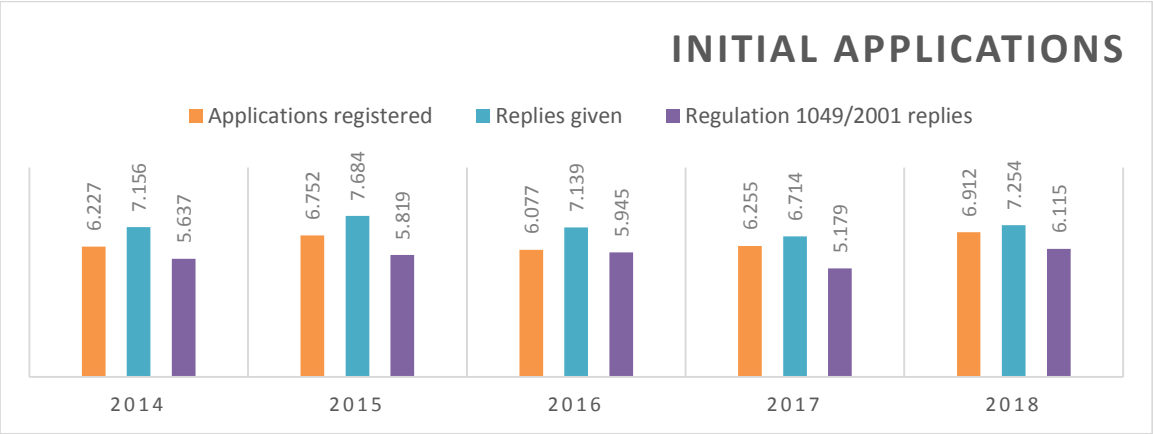
Amongst those initial replies, 6,117 were issued on the basis of Regulation (EC) No 1049/2001 (compared to 5,181 in 2017). This number illustrates an increase of around 15.3% in one year.

It is noteworthy that a single request can concern several documents and can consequently give rise to several different replies. On the other hand, several requests can be grouped together in some cases and give rise only to one single reply. The number of 'replies given', as extracted from the database, encompasses all types of follow-ups provided by the European Commission, extending from:

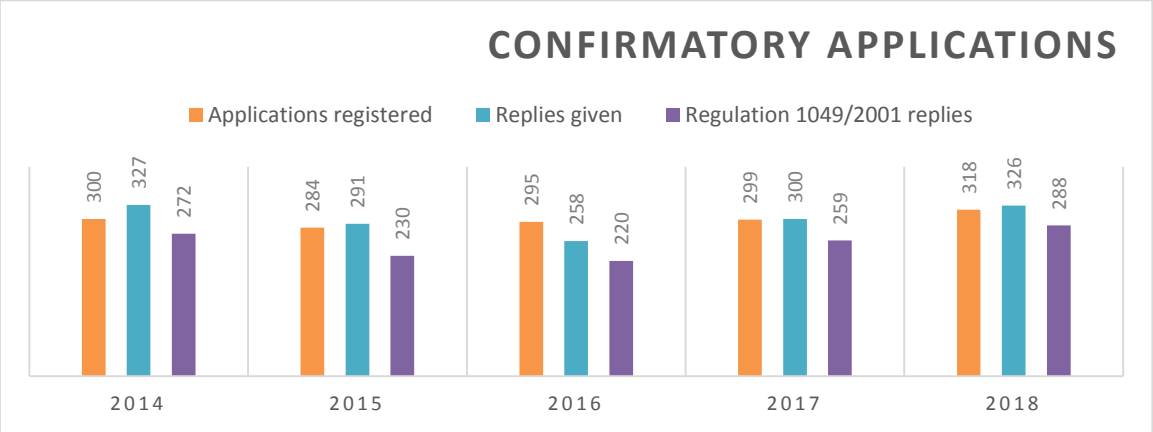
- replies provided under Regulation (EC) No 1049/2001 (including where no documents are held); to
- responses provided under different legal frameworks (due to the contents of the application or status of the applicant[27], etc.); or even
- closures following the applicants' failure to provide requested clarifications or to fulfil procedural requirements.

[26] In 2017 the number of initial applications amounted to 6,255, whereas in 2014, they amounted to 6,227 (Data extracted from the previous annual reports).

[27] For instance, replies provided under the principle of sincere cooperation with Member States or other institutions; or replies on the basis of the Code of Good Administrative Behaviour, etc.



As regards **confirmatory applications** requesting a review by the European Commission, of initial replies fully or partially refusing access, their number amounted to **318**, reflecting an increase of almost 4.4% in comparison with 2017. The data confirm the steadily upward trend observed since 2016. The number of confirmatory replies based on Regulation (EC) No 1049/2001 increased significantly by around 10 %, from 259 in 2017 to 288 in 2018[28]. The increase in such replies since 2014 is nevertheless of approximately 5.6%, as illustrated by the graph below.



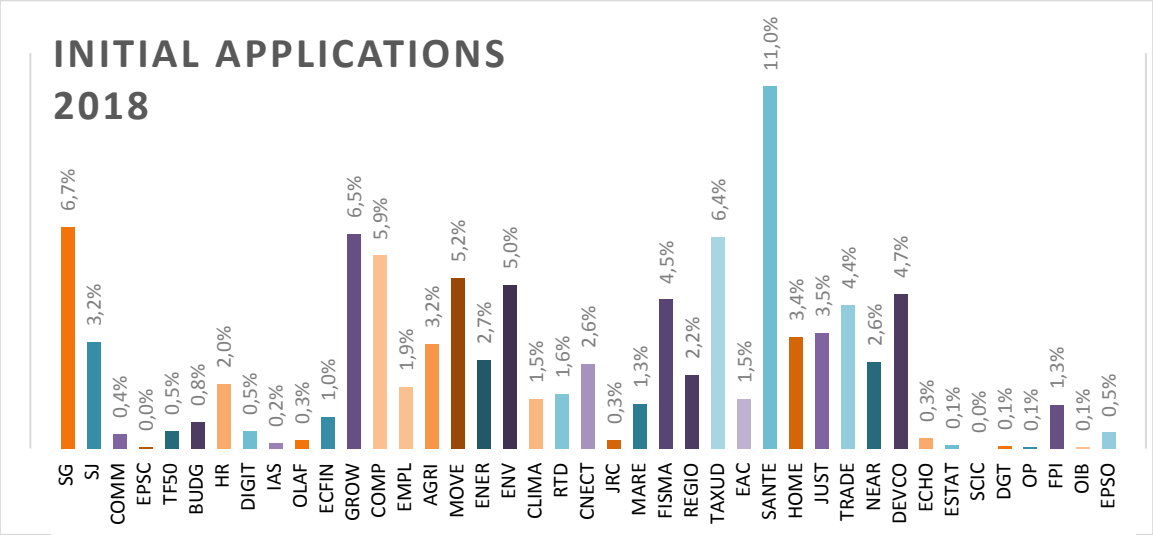
3.2. Proportion of applications per European Commission Directorate-General/Service (see Annex – Table 5)

In 2018, the Directorate-General for Health and Food Safety[29] received the highest proportion of **initial applications** (11%), followed by the Secretariat-General (6.7%)[30], and the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs[31] (6.5%).

[28] *Ibid.*
[29] Referred to as 'SANTE' in the two graphs below.
[30] Referred to as 'SG' in the two graphs below.
[31] Referred to as 'GROW' in the two graphs below.

The Directorate-General for Taxation and Customs Union[32] (6.4%), the Directorate-General for Competition[33] (5.9%), and the Directorate-General for Mobility and Transport[34] (5.2%) were the only other services receiving more than 5% of all initial applications each.

The remaining European Commission departments each accounted for 5% or less of all initial applications.

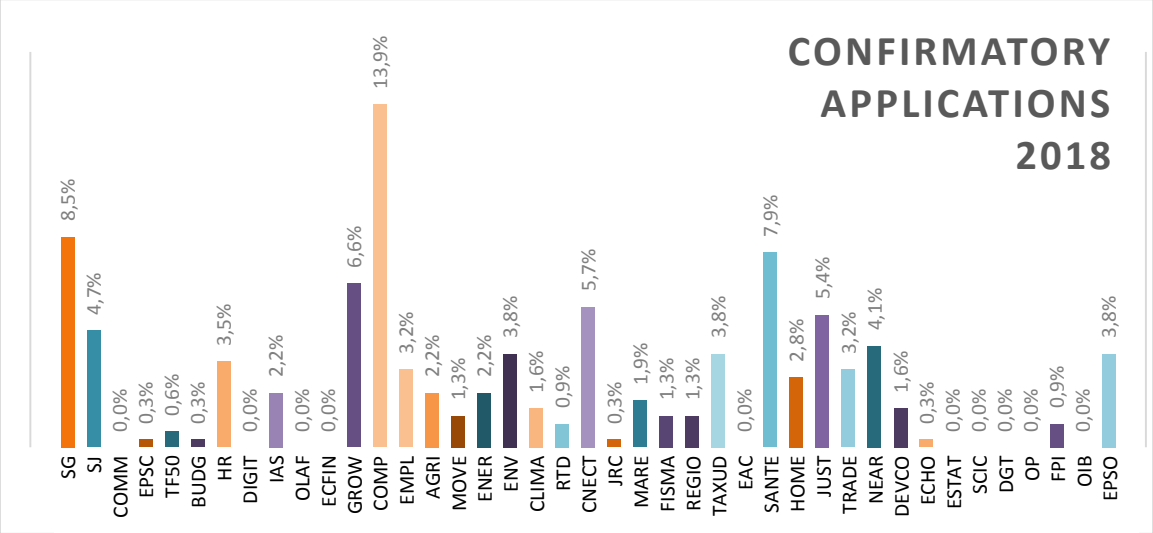


As regards **confirmatory applications** received by the Secretariat-General, the highest proportion related to initial replies provided by the Directorate-General for Competition (13.8% compared to 19.7% in 2017), followed by the Secretariat-General (almost 8.5%), and the Directorate-General for Health and Food Safety (almost 7.9%).

The initial replies of three other European Commission departments formed the subject of more than 5% of all confirmatory applications each (the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, the Directorate-General for Communications Networks, Content and Technology[35], and the Directorate-General for Justice and Consumers[36]).

The initial replies provided by the remaining European Commission departments accounted for less than 5% of requests for a confirmatory review each.

[32] Referred to as 'TAXUD' in the two graphs below.
[33] Referred to as 'COMP' in the two graphs below.
[34] Referred to as 'MOVE' in the two graphs below.
[35] Referred to as 'CNECT' in the graph below.
[36] Referred to as 'JUST' in the graph below.

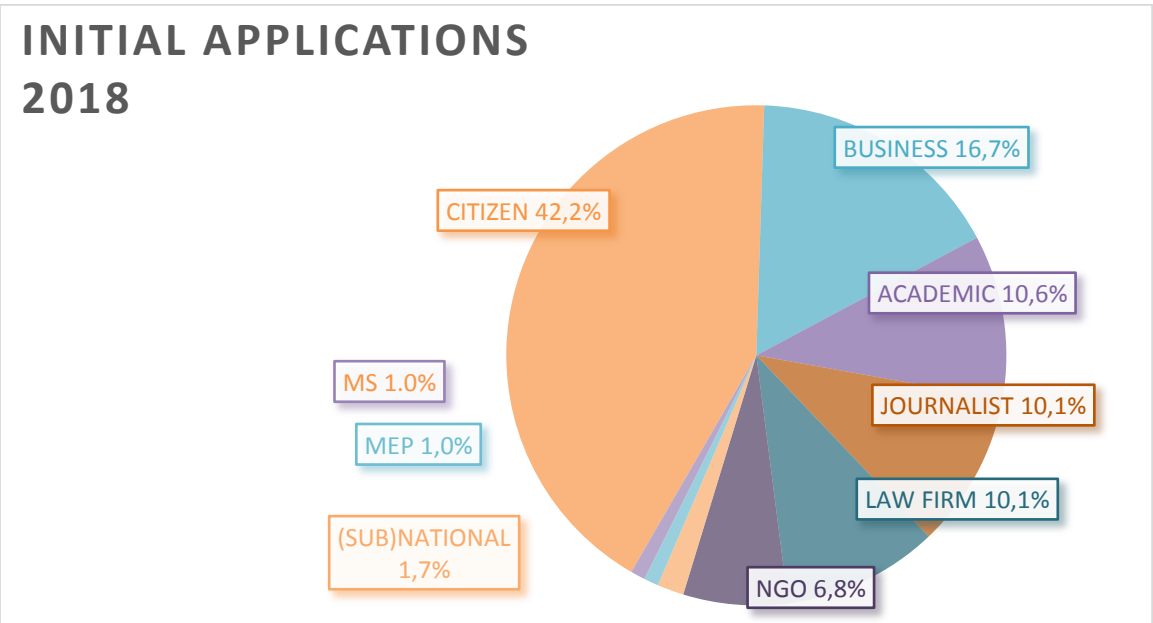


3.3. Social and occupational profile of applicants (Annex – Table 6)

Applicants may indicate on the application form of the Europa Website, their social/occupational profile by selecting one of the nine following categories: citizen, academic, lawyer, journalist, non-governmental organisation, company, Member of the European Parliament, subnational or Member State authorities[37]. For statistical purposes, the profile of 'citizens' covers the applicants who indicated their profile as such, together with the applicants who did not select any social/occupational category.

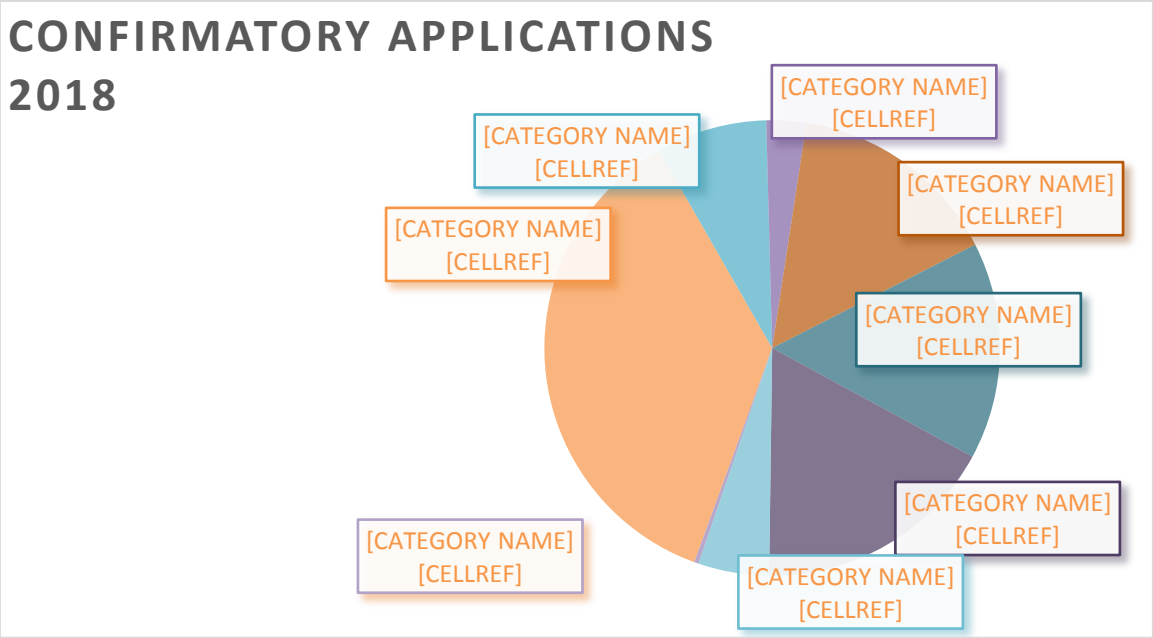
In 2018, most **initial applications** originated, as in the previous years from *citizens*. This category of applicant submitted indeed approximately 42.2% of the requests.

The second place amongst the most prolific applicants was no longer occupied by *academics* as in 2017, but by *companies*, which accounted for almost 16.7 % of the initial applications. The former were relegated to the third place (with around 10.6%), closely followed by *law firms* and *journalists* (with approximately 10.1% each).



[37] The latter is a new category introduced in 2018, in order to reflect the fact that national authorities of Member States are entitled to submit applications for access to documents in the framework of Regulation (EC) No 1049/2001.

Most **confirmatory applications** in 2018 originated from *citizens*, who accounted for almost 36.2% of such applications (compared to 24.7% in 2017). *Non-governmental organisations* reached the second position, by submitting a large number of confirmatory applications, accounting for no less than 17.3% in 2018 (in comparison to 13.2% in 2017). The third position is occupied by *legal professionals* who submitted more than 15.4% of the confirmatory applications. *Journalists* saw also a striking increase of their confirmatory applications, making them jump to the fourth most active category in 2018, accounting for 15.1% of the confirmatory applications (compared to 7.2% in 2017). They were remotely followed by *companies* (accounting for nearly 7.9% of such applications), *Members of the European Parliament* (5%), *academic institutions and think tanks* (2.8%), and *Member States* (0.3%).



3.4. The geographical origin of applicants (Annex – Table 7)

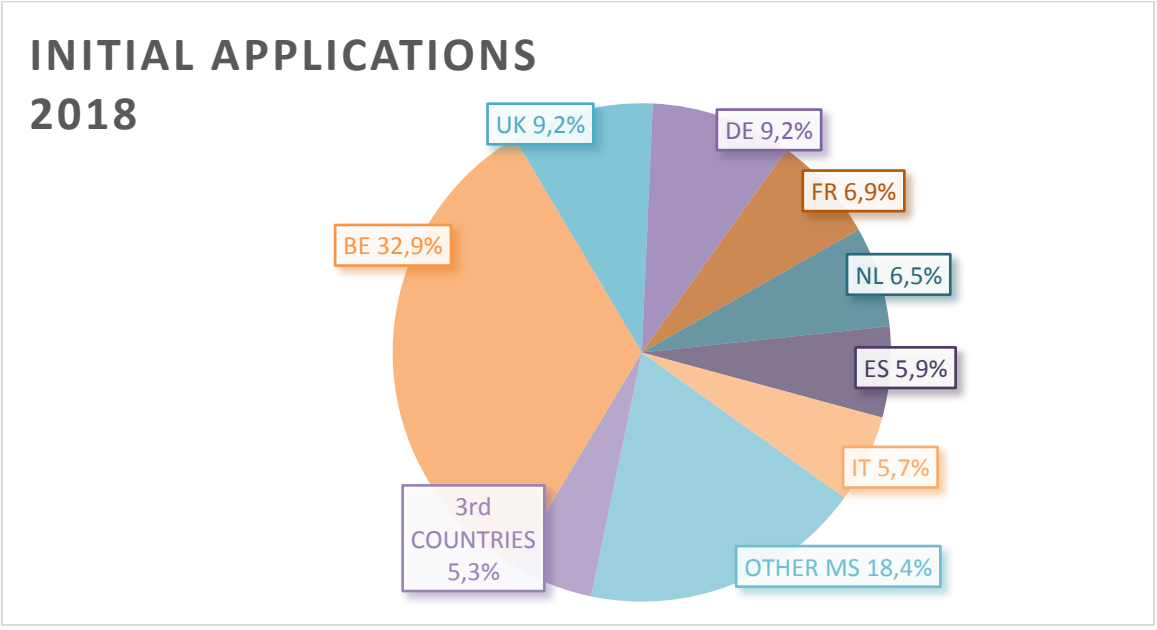
Regarding the geographical breakdown of **initial applications**, Belgium, the United Kingdom and Germany continued to remain, as in 2017, the three main countries from which most of the applications for access to documents originate. Indeed, approximately 51.3% of the initial applications originated from these three countries in 2018. More specifically, the largest proportion of initial applications continued to originate from applicants residing or based in Belgium (around 32.9%, compared to approximately 25.7% in 2017).

Second came the United Kingdom from which more than 9.2% of the initial applications originated. This amount evidences a significant decrease compared to 2017, where the United Kingdom represented the source of almost 15.2% of the initial applications.

Third came Germany, from which almost 9.2% of the initial applications originated (compared to almost 12% in 2017).

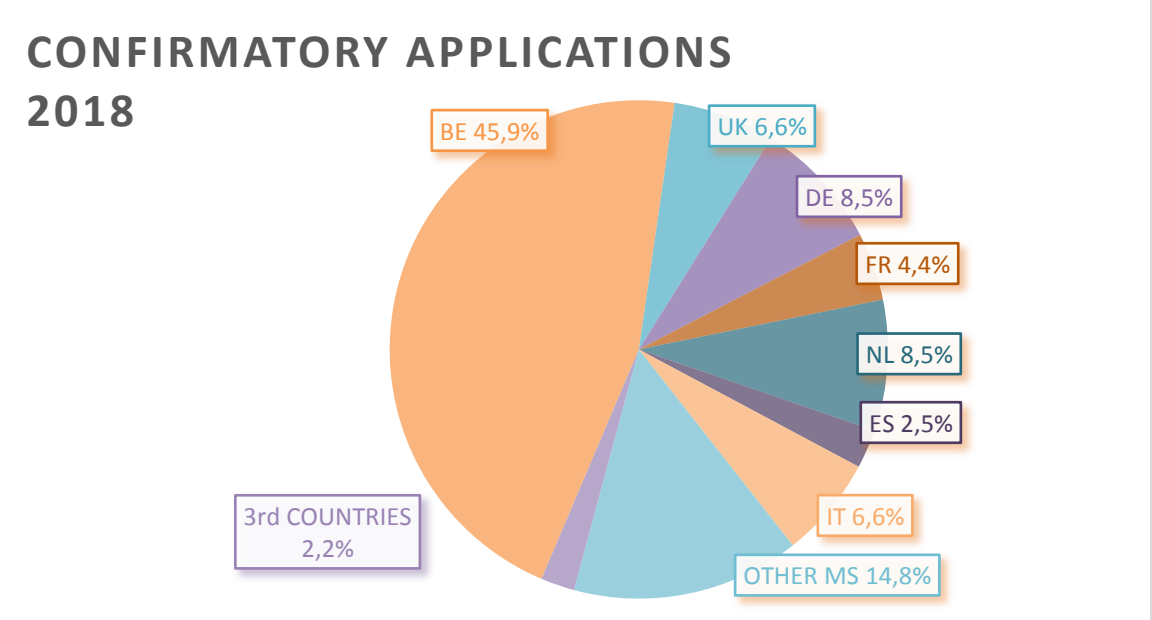
Fourth, came France (with 6.9% of the initial applications), closely followed by the Netherlands (6.5%), Spain (almost 5.9%) and Italy (5.7%).

The applications originating from the remaining 21 Member States accounted for less than 3% per Member State. The right of access to documents also continued to be exercised by applicants residing or having their registered offices in third countries. Their initial applications remained stable, accounting for more than 5.3% of all initial applications (a similar amount was recorded in 2017, namely almost 5%).



Regarding the geographical breakdown of **confirmatory applications**, the largest proportion by far originated, as in the previous years, from applicants within Belgium (showing a net increase with more than 45.9% of such applications, compared to almost 30.6% in 2017), followed by Germany and the Netherlands (both around 8.5%). The United Kingdom, Italy (both 6.6% each), and France (4.4%) were the only other Member States from where more than 4% of applications originated.

Applications originating from the remaining 21 Member States accounted for 2.5%, or less, each. Finally, confirmatory applications from applicants residing or having their registered office in third countries accounted for almost 2.2% of all applications (compared to 3.6% in 2017).



4. APPLICATION OF EXCEPTIONS TO THE RIGHT OF ACCESS

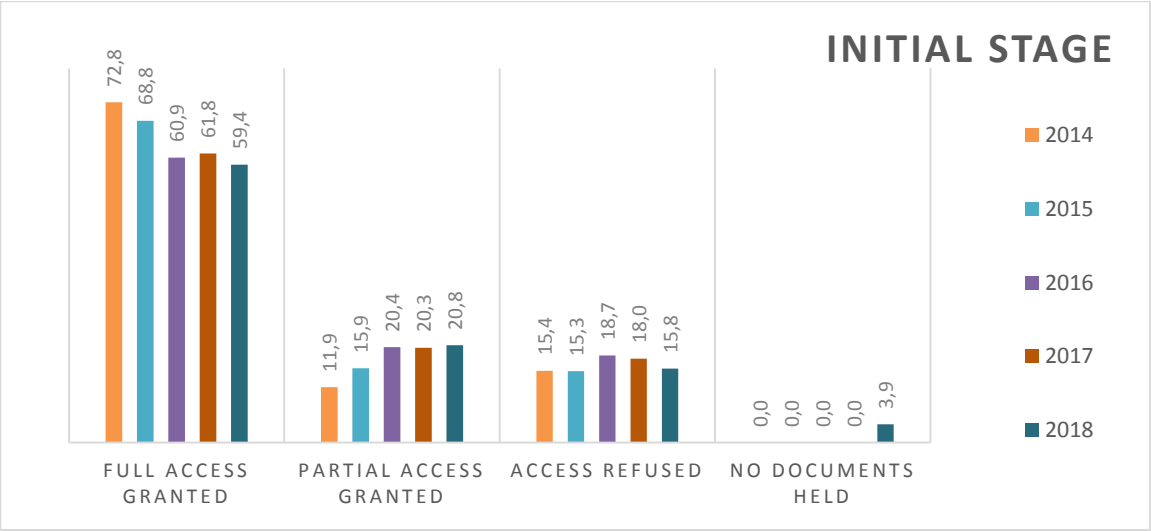
The right of access provided in Regulation (EC) No 1049/2001 is subject to a number of specific exceptions, which are set forth in Article 4 of the Regulation. Any refusal, whether full or partial, must be justified under at least one of these exceptions.

4.1. Types of access provided (Annex – Tables 8 and 9)

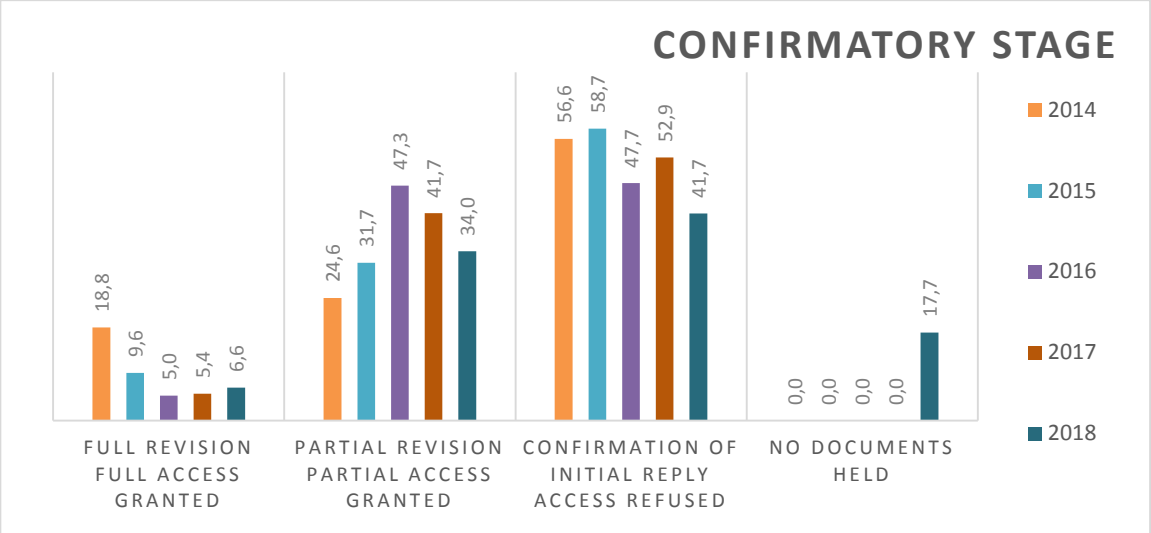
In 2018, full or partial access to documents was granted in more than 80.2% of cases at the **initial stage** (showing thereby a slight decrease since 2017, where it reached 82%).

Similarly, the percentage of fully positive replies slightly diminished from 61.8% in 2017 to 59.4% in 2018. Nevertheless, the percentage of partially positive replies showed a slight increase (from 20.3% in 2017, to more than 20.8% in 2018).

In parallel, the slight steady decrease in the percentage of fully rejected access, observed since 2016, continued (around 15.8% of the total applications against less than 18% and 19%, respectively in 2017 and 2016).



In 2018, approximately 41.7% of the initial replies challenged by confirmatory applications were confirmed at the **confirmatory stage** (compared to 52.9% in 2017). A close percentage (40.6 %) of initial replies were fully or partially reversed (against around 47.1% in 2017).

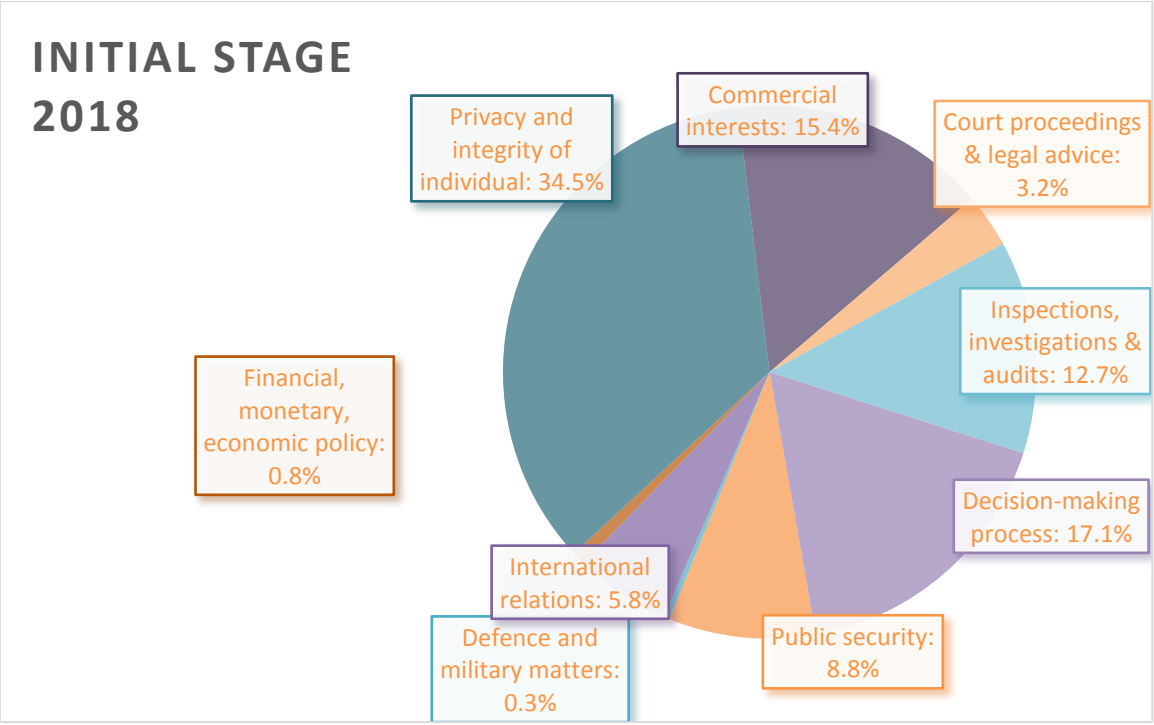


4.2. Invoked exceptions to the right of access[38] (Annex – Table 10)

4.2.1. Initial stage

In 2018, the protection of *privacy and the integrity of the individual*[39] continued to be the most frequently relied upon exception by the European Commission for (fully or partially) refusing access at the initial stage. It was invoked in 34.5% of the refusals, compared to almost 31.4% in 2017. As in previous years, a large amount of those refusals resulted from the need to redact the names of non-senior staff members or third-party representatives appearing in the documents, in accordance with the applicable data protection legislation.

[38] On the basis of Article 4 of Regulation (EC) No 1049/2001.
[39] This exception is provided under Article 4(1)(b) of Regulation (EC) No 1049/2001.



The second most invoked exception concerns the protection of *commercial interests*[40]. This exception was relied upon in more than 15.4% of the (partial or full) refusals[41].

The exception aimed at protecting the *ongoing decision-making process*[42], followed closely, at the third place, with a percentage of use of also more than 15.1%[43].

The European Commission also relied upon the exception related to the protection of the *purpose of inspections, investigations and audits*[44], albeit in less than 12.7% of its (full or partial) negative replies (compared to almost 17.7% in 2017). The minor but constant decrease reflected by the data, illustrates a more limited use of this exception by the institution.

The relative use of the exception protecting *public security*[45] notably increased (from 5.4% in 2017 to almost 8.8% in 2018).

The exception providing for the protection of *international relations*[46] was relied upon in almost 5.8% of the negative initial replies compared to 4% in 2017 and 3.4% in 2016, showing thereby a slight but steady increase in its use by the European Commission.

The remaining exceptions provided by Regulation (EC) No 1049/2001, were invoked by the institution in less than 4% each, for refusing partially or fully access to requested documents at the initial stage.

[40] This exception is provided under Article 4(2), first indent of Regulation (EC) No 1049/2001.
[41] Compared to 16.8% in 2017.
[42] This exception is provided under Article 4(3), first subparagraph of Regulation (EC) No 1049/2001.
[43] Compared to 16.3% in 2017.
[44] This exception is provided under Article 4(2), third indent of Regulation (EC) No 1049/2001.
[45] This exception is provided under Article 4(1), first indent of Regulation (EC) No 1049/2001.
[46] This exception is provided under Article 4(1), third indent of Regulation (EC) No 1049/2001.

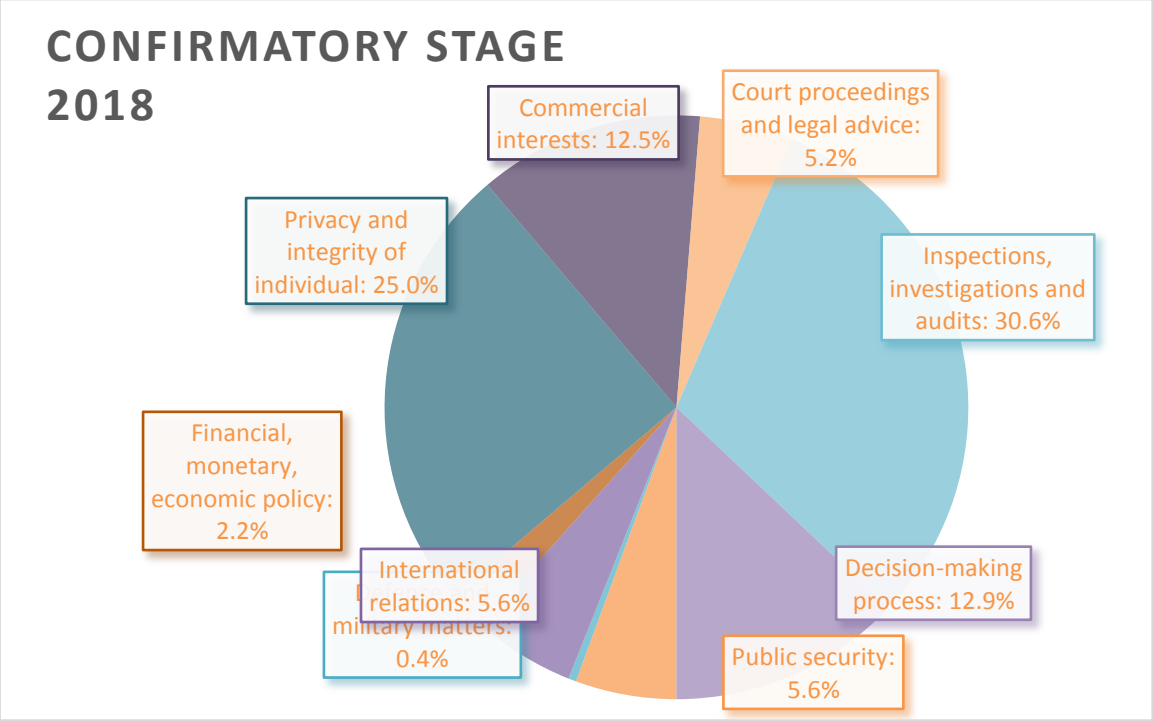
4.2.2. Confirmatory stage

The most frequently invoked, main ground for confirming a (full or partial) refusal of access was, as in 2017, the protection of the *purpose of inspections, investigations and audits* (30.6% in 2018 compared to almost 35% in 2017).

The exception protecting *privacy and the integrity of the individual* came second (25%, compared to almost 26.1% in 2017). The exception protecting *commercial interests* was invoked less frequently (12.5% in 2018, compared to 13.2% in 2017), putting it in the third place and confirming the steady decrease in its use observed since 2016 (where it was relied upon in 15.9% of the confirmatory refusals).

The exception protecting the *decision-making process* of the institution came in fourth position with a percentage of reliance of 12.9% (including almost 10.8% for the ongoing decision-making process). This figure shows that the exception seems invoked less steadily (with its use having already decreased from around 12.2% in 2017 and 20.2% in 2016).

The exceptions protecting the public interest as regards, respectively *international relations* and *public security* came as fifth most relied upon by the institution (amounting to 5.6% each).



5. COMPLAINTS TO THE EUROPEAN OMBUDSMAN

In 2018, the European Ombudsman closed 29 complaints about the European Commission's handling of requests for access to documents[47]. The large majority of these complaints (namely, 22) was closed without a finding of maladministration[48]. In comparison, in the last two years, the European Ombudsman had closed a lower number of complaints, (namely 25 in 2017 and 21 in 2016), but a similar number (six for both years) was closed with further or critical remarks[49].

In 2018, the European Ombudsman opened 29 new inquiries where access to documents was either the main or a subsidiary part of the complaint, compared to 25 in 2017 and 12 in 2016.

These statistics confirm the significant increase observed since 2017 regarding the number of new enquiries[50], and reflect the accrued importance given by the European Ombudsman to this specific area of activity.

Such importance is further illustrated by the fact that the European Ombudsman has launched since February 2018 a new so-called 'fast-track procedure' for access to documents complaints. Pursuant to this new procedure, the European Ombudsman committed to take on decisions on whether or not she can open an inquiry within five working days, and decisions on 'access to documents' inquiries within 40 working days upon receipt of the complaints[51].

6. JUDICIAL REVIEW

In 2018, the EU Courts have further developed, in the framework of various judicial proceedings, the already considerable body of case law pertaining to access to documents of the EU institutions. This newly generated case law will further guide the European Commission's practice under Regulation (EC) No 1049/2001.

6.1. The Court of Justice

The Court of Justice handed down in 2018 only one major judgment on appeal concerning the right of public access to documents under Regulation (EC) No 1049/2001, where the European Commission was a party to the proceedings, compared to eight in 2017.

This judgment was handed down in the framework of the *ClientEarth v Commission* case[52]. It is significant insofar as it clarifies the scope of the concept of 'legislative documents', which requires a wider threshold of openness.

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[47] The statistics concern the European Ombudsman cases for all European Commission departments except the European Anti-Fraud Office.

[48] The four cases with remarks: 682/2014/JF, 351/2016/OV, 5/2016/OI, 7/2016/PL. 21 cases were closed without any remark/further action.

[49] See Report of from the Commission on the application in 2017 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, p.11: https://ec.europa.eu/info/sites/info/files/com_2018_663_f1_report_from_commission_en_v3_p1_988979.pdf, hereinafter 'the 2017 Annual Report on access to documents'.

[50] In 2017, 25 new enquiries were opened, against 12 in 2016, see the 2017 Annual Report on access to documents, *op.cit.*, p11.

[51] https://www.ombudsman.europa.eu/en/letter/en/89730.

[52] Judgment of 4 September 2018, C-57/16 P, EU:C:2018:660, hereinafter 'ClientEarth judgment'.

Whilst acknowledging the fact that the European Commission needs a space for deliberation in order to be able to decide as to the policy choices to be made and the potential proposals to be submitted, the Court of Justice found that documents drawn up in the context of an impact assessment qualify as legislative documents. Consequently, the Court held that such documents cannot be protected under a general presumption against public disclosure resulting from the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001, especially when they contain environmental information[53].

The Court of Justice further stressed that the sole provisional nature of documents cannot justify *per se* the application of Article 4(3), first subparagraph of Regulation (EC) No 1049/2001, without any specific and individual examination[54].

6.2. The General Court

In 2018, the General Court handed down 27 judgments involving the European Commission in relation to the right of access to documents under Regulation (EC) No 1049/2001. The European Commission was a party to the proceedings in 26 of them and it intervened in one of them. In the vast majority of these cases, the position of the institution prevailed.

Out of the above mentioned 27 cases, only six of them resulted in the (partial) annulment of the contested institution's decision[55], one of which originated from the Parliament.

Moreover, amongst the five cases involving a (partial) annulment of European Commission decision, only four of them involved (partial) refusals of the institution to grant access to some documents. The remaining judgment of (partial) annulment concerned a positive decision of the institution to grant public access to some documents, which the General Court held to be protected under a different legal framework.

Furthermore, 19 of these cases resulted in a full or partial dismissal of the action against the European Commission's decision.

In three cases, the General Court ruled that there was no need to adjudicate and in one case[56], the action for annulment of the European Commission was held inadmissible. Finally, another case consisted of an order of removal from the Register.

In the framework of this body of case law developed in 2018, the General Court clarified issues extending from procedural aspects to more substantive points arising from the implementation of Regulation (EC) No1049/2001.

[53] *Ibid*, Paragraph 101.
[54] *Ibid*, Paragraph 111.
[55] Judgments of 5 December 2018, *Falcon Technologies International LLC* v *European Commission*, T-875/16, EU:T:2018:877; of 3 May 2018, *Republic of Malta* v *European Commission*, T-653/16, EU:T:2018:241, of 27 November 2018 *VG, as heir of MS* v *European Commission*, Joined Cases T-314/16 and T-435/16, EU:T:2018:841; of 22 March 2018, *De Capitani* v *European Parliament*, T-540/15, EU:T:2018:167; of 4 October 2018, *Daimler AG* v *European Commission*, T-128/14, EU:T:2018:643; and of 7 February 2018, *Access Info Europe* v *European Commission*, T-852/16, EU:T:2018:69.
[56] Order of 15 May 2018, *Commune de Fessenheim and Others* v *European Commission*, T-726/17, EU:T:2018:291.

6.2.1. Clarifications of some procedural rules

As regards procedural rules, the General Court reiterated its finding that an initial reply within the meaning of Article 7(1) of the Regulation is not actionable in principle, except in exceptional circumstances: where it is vitiated by a defect such as the failure to inform the applicant of its *means of redress* or where it constitutes the institution's definitive position[57].

Only the confirmatory decision is capable of producing legal effects susceptible to affect the interests of the applicant and, therefore, of being the subject of an action for annulment under Article 263 of the Treaty on the Functioning of the European Union[58].

In the framework of the confirmatory decision, the failure to inform the applicant of the legal remedies available against it, does not constitute an infringement of essential procedural requirements capable of leading to its annulment, where such a failure has no effect on the applicant's legal situation. This is the case where the applicant is able to ascertain what those remedies were and bring an action for annulment against the contested confirmatory decision, notwithstanding the lack of information on the legal remedies available therein[59]. Moreover, the institution may at any stage of the processing of an application, including for the first time, identify further documents potentially related to the request[60].

Whilst the institution cannot legitimately be criticised for granting access to documents on the basis of an allegedly imprecise application without asking the applicant to clarify his application, it cannot however, reject a request as insufficiently precise without having first requested the applicant to provide further clarifications[61].

In addition, the General Court stressed that *time limits* laid down under Articles 7 and 8 of Regulation (EC) No1049/2001, are merely intended to ensure the prompt processing of applications for access to documents[62].

Consequently, the General Court reiterated that failure to comply with the time limit laid down in Articles 7 and 8 of Regulation (EC) No 1049/2001 does not divest the institution from the power of adopting a decision and does not constitute a valid ground justifying its annulment[63].

Such a conclusion does not have any bearing on the fact that, by contrast, the time limit set for the commencing of an action for annulment is compulsory and triggers the inadmissibility of the proceedings introduced after its expiry[64].

The General Court also reiterated that the declaration by an institution regarding the *lack of existing documents*, benefits from a presumption of lawfulness[65]. Besides, the legality

[57] See judgment of 11 December 2018, *Arca Capital Bohemia a.s.* v *European Commission*, T-441/17, EU:T:2018:899, paragraphs 18-20.
[58] See judgment of 9 October 2018, *Pint* v *European Commission*, T-634/17, EU:T:2018:662, paragraph 17.
[59] See judgment of 5 February 2018, *Edeka-Handelsgesellschaft Hessenring mbH* v *European Commission*, T-611/15, EU:T:2018:63, paragraphs 47-50.
[60] See judgment in *Republic of Malta* v *European Commission, op.cit*, paragraph 84.
[61] *Ibid*, paragraph 82.
[62] *Ibid*, paragraph 85.
[63] *Ibid*, paragraph 86; judgment of 11 July 2018, *Rogesa* v *European Commission*, T-643/17, EU:T:2018:423, paragraphs 43 and 48.
[64] See Order in *Commune de Fessenheim and Others* v *European Commission, op. cit.*, paragraphs 30-31.

of the institution's decision must be assessed under the elements of facts and law existing at the time of its adoption[66], and therefore, new arguments concerning its lawfulness cannot be raised at the judicial stage[67].

As regards the *statement of reasons* to be provided by the institution, the General Court confirmed that it may consist of a description of the nature and content of the refused documents, the context in which they were drawn up, and the grounds for refusal[68].

The purpose of the statement of reasons is to disclose in a clear and unequivocal fashion the reasoning followed by the institution so as to enable the applicant to ascertain the reasons for it and the competent court to exercise its power of review[69].

Therefore, the statement of reasons is adequate when it enables the applicant to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, second, whether the need for protection relating to that exception is genuine[70].

The institution is thus not required to provide a specific justification for each aspect of the assessment underlying that reasoning[71], or to go into all the relevant facts and points of law[72], and may provide reasons per categories of documents[73].

Furthermore, the reference in a decision to the reasons contained in a previous decision communicated to the applicant can be sufficient in some cases[74].

Regarding the assessment as to *partial access*, the General Court reiterated that it must be carried out in light of the principle of proportionality. Therefore, partial access must be granted if the aim pursued by the institution in refusing access to a document can be achieved by merely redacting the parts which might harm the public interest to be protected[75].

It is not for the institution to determine what is meaningful or meaningless to the applicant[76]. Accordingly, the institution is required to disclose parts of documents which qualify as 'purely descriptive', insofar as they do not contain any legal or strategic position coming within the exceptions referred to by the latter[77]. Nevertheless, partial

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[65] See judgment of 23 April 2018, *Verein Deutsche Sprache eV* v *European Commission*, T-468/16, EU:T:2018:207, paragraph 35.
[66] See judgment in *Rogesa v European Commission*, *op.cit.*, paragraph 91; judgment of 5 December 2018, *Sumner* v *European Commission*, T-152/17, EU:T:2018:875, paragraph 42.
[67] See judgment of 27 February 2018, *CEE Bankwatch Network* v *European Commission*, T-307/16, paragraphs 133 and 140.
[68] See judgment in *Access Info Europe* v *European Commission*, *op.cit.*, paragraph 89.
[69] See judgment in *CEE Bankwatch Network* v *European Commission*, *op.cit.*, paragraph 80.
[70] See judgment of 8 February 2018, *Pagkyprios organismos ageladotrofon (POA) Dimosia Ltd* v *European Commission*, T-74/16, EU:T:2018:75, paragraph 77.
[71] See judgment in *Falcon Technologies International LLC* v *European Commission*, *op. cit.*, paragraph 69.
[72] See judgment in *CEE Bankwatch Network* v *European Commission*, *op.cit.*, paragraph 80.
[73] See judgment in *Pagkyprios organismos ageladotrofon (POA) Dimosia Ltd* v *European Commission*, *op.cit.*, paragraph 78.
[74] See judgment in E*deka-Handelsgesellschaft Hessenring mbH* v *European Commission, op.cit.*, paragraphs 37-38.
[75] See judgment in *Access Info Europe* v *European Commission*, *op.cit.*, paragraphs 110-111.
[76] See judgment in *Falcon Technologies International LLC* v *European Commission*, *op. cit.*, paragraph 102.
[77] See judgment of 7 February 2018, *Access Info Europe* v *European Commission*, T-851/16, EU:T:2018:69 paragraph 120.

access is not required where it would result in emptying the document of almost all of its contents[78].

In relation to the *consultation of the Member States* from which the documents originate, the General Court recalled that this requirement is not necessary where obviously one exception applies[79]. However, in the framework of the said consultation, a *prima facie* assessment of the Member State's objections is sufficient and the institution does not need to carry out an exhaustive assessment of the latter[80].

Nevertheless, the Member State does not hold a general and unconditional right of veto, insofar as it is required to provide proper reasoning under Article 4 of Regulation (EC) No 1049/2001[81].

It is noteworthy in that respect, that a Member State, unlike other third parties, can rely on the exception concerning the protection of the decision-making process of the institution in order to request that the latter refuse access to a document originating from it[82]. Moreover, in order to be entitled to lodge an objection, a Member State, which is the author of the document at issue, is not required to make a specific formal request in advance[83].

Against this background, the institution's decision must not merely record the fact that the Member State concerned objected to the disclosure of the requested document, but also set out the reasons submitted by that Member State to show that one of the exceptions to the right of access provided under Article 4 of Regulation (EC) No 1049/2001 applies[84].

It is also noteworthy that a Member State can raise any plea calling into question the legality of an institution's decision, as a corollary of the right of the Member State concerned to an effective remedy as provided for by Article 263 of the Treaty on the Functioning of the EU[85].

[78] Judgment in *Falcon Technologies International LLC* v *European Commission*, *op. cit.*, paragraph 104.
[79] Judgment of 19 September 2018, *Chambre de commerce et d'industrie métropolitaine Bretagne-Ouest (port de Brest)* v *European Commission*, T-39/17, EU:T:2018:560, paragraph 110.
[80] Judgment of 8 February 2018, *Pagkyprios organismos ageladotrofon (POA) Dimosia Ltd* v *European Commission*, T-74/16, EU:T:2018:75, paragraphs 66-67.
[81] Judgment of 21 November 2018, *Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe)* v *European Commission*, T-545/11 RENV, EU:T:2018:817, paragraphs 40 and 41.
[82] See judgment in *Pagkyprios organismos ageladotrofon (POA) Dimosia Ltd* v *European Commission*, *op.cit.*, paragraphs 36 to 38 and 40 to 42.
[83] *Ibid*, paragraph 33.
[84] *Ibid*, paragraph 56.
[85] Judgment of 3 May 2018, *Republic of Malta* v *European Commission*, T-653/16, EU:T:2018:241, paragraphs 41-42.

However, a Member State cannot, in respect of the decision granting access to documents, rely on procedural irregularities pertaining to the institution's handling of initial or confirmatory applications, including time limits that were introduced solely for the benefit of the applicant[86].

The General Court also confirmed that the infringement of the *duty of cooperation* owed by the institution to a Member State in this context, is liable to affect the legality of the institution's decision granting access to documents originating from that Member State[87].

The European Court of Justice does not have jurisdiction to issue an injunctive order in the framework of its review of the legality of an Act under Article 263 of the Treaty on the Functioning of the European Union. Against this background, it cannot impose on the institution the decision to grant access to the requested documents[88].

Furthermore, the General Court confirmed its earlier case law, pursuant to which there is no longer any need to adjudicate on an action for annulment of a negative decision, once the institution, without formally withdrawing the contested decision, adopted a new positive decision granting access to the documents requested, and thereby satisfied the applicant's claim in full[89].

6.2.2. Clarifications of some substantive rules

In 2018, the General Court also addressed several substantive rules of Regulation (EC) No 1049/2001.

As regards the exception for the *protection of international relations*[90], the General Court acknowledged in several cases, the wide margin of appreciation held by the institution in its framework[91].

Such a broad discretion is due to the particularly sensitive and essential nature of the interests protected and the necessity for the institution to exercise a particular care in the adoption of a decision, which is by nature complex and delicate[92].

According to the General Court, such a wide margin of appreciation conferred upon the institution is consistent with the principle of strict interpretation of the exceptions set out in Article 4 of the Regulation[93].

[86] *Ibid*, paragraphs 87 and 88.
[87] *Ibid*, paragraph 100.
[88] Judgment of 9 October 2018 *Sárossy* v *European Commission*, T-633/17, EU:T:2018:663, paragraphs 19-20. See also *Pint v European Commission*, *op.cit.,* paragraph 19.
[89] Order of 19 July 2018, *Izba Gospodarcza Producentów i Operatorów Urządzeń Rozrywkowych* v *European Commission*, T-750/17, EU:T:2018:506, paragraph 15-17.
[90] Laid down in Article 4(1)(a), third indent of Regulation (EC) No 1049/2001.
[91] See judgment in *Access Info Europe* v *European Commission*, *op.cit.,* paragraphs 40-41. See also judgment of 11 July 2018, *ClientEarth* v *European Commission*, T-644/16, EU:T:2018:429, paragraphs 23-24, currently under appeal; judgment in *CEE Bankwatch Network* v *European Commission*, *op.cit.,* paragraph 77.
[92] See judgments in *ClientEarth* v *European Commission*, *op.cit.,* paragraph 23; and *CEE Bankwatch Network* v *European Commission*, *op.cit.,* paragraph 79.
[93] *Ibid*, paragraph 25.

The General Court concluded that the exception for the protection of international relations is therefore subject to a limited judicial review of legality that is circumscribed to verifying the compliance with the procedural rules and the duty to state reasons, the accuracy of the statement of facts, and the lack of a manifest error of assessment or a misuse of powers[94].

The General Court also emphasised the mandatory nature of the exception for the protection of international relations, which, unlike other exceptions provided in Article 4(2) and (3) of Regulation (EC) No 1049/2001, cannot be set aside by any overriding public interest in disclosure of the requested documents[95].

In the framework of the exception for the protection of *privacy and the integrity of the individual*[96], the General Court recalled that the concept of privacy encompasses personal data in a professional context[97]. Personal data from staff of the EU institutions are thus, in principle, protected by this exception, regardless of a 'right of interpellation of the civil servant'[98].

The General Court stressed that, in any case, such a right should not be exercised within the framework of the mechanisms for access to documents provided under Regulation (EC) No 1049/2001[99]. The General Court further confirmed that the rights of protection of an individual's reputation and honour were inherent parts of the right of privacy[100].

The reputation of an entity, regardless of its public or private nature, is also entitled to some protection, albeit within the scope of the exception concerning the protection of *commercial interests*[101]. In the framework of this exception, the General Court held that a private undertaking entrusted with a mission of a public interest could be entitled to the protection of its reputation as part of its commercial interests, insofar as the reputation of any operator active on a market is essential for the performance of its economic activities on the market[102].

The General Court also reiterated that a state-owned undertaking may be deemed as holding commercial interests within the meaning of Article 4(2), first indent of Regulation (EC) No 1049/2001[103].

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[94] *Ibid.*
[95] *Ibid*, paragraph 98.
[96] Laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001.
[97] See judgments in *Chambre de commerce et d'industrie métropolitaine Bretagne-Ouest (port de Brest)* v *European Commission*, *op. cit.*, paragraph 38 ; and *VG, as heir of MS* v *European Commission*, *op.cit.*, paragraph 64.
[98] *Ibid*, paragraphs 43 and 44.
[99] *Ibid*, paragraph 46.
[100] *Ibid*, paragraph 100. The General Court handed down another interesting judgment in respect to the exception pertaining to the right privacy and the integrity of the individual under Article 4(1)b of Regulation (EC) No 1049/2001, namely the judgment of 25 September 2018, *Maria Psara and Others* v *European Parliament*, T-639/15 to T-666/15 and T-94/16, EU:T:2018:602. The present report, which pertains to the European Commission's implementation of the Regulation, does not however review this judgment, as the institution was neither a direct nor an intervening party in the framework of its proceedings.
[101] Laid down in Article 4(2), first indent of Regulation (EC) No1049/2001.
[102] See judgment in *Falcon Technologies International LLC* v *European Commission*, *op.cit.*, paragraphs 51 and 53.
[103] See judgment in *CEE Bankwatch Network* v *European Commission*, *op.cit.*, paragraph 108.

The General Court ruled moreover that sensitive commercial information provided by undertakings to the European Commission, such as data pertaining to their commercial strategies in order to comply with the regulatory framework, could be protected as 'commercial interests'[104].

Besides, the protection of such interests, (similarly to that of the right of privacy and integrity of the individual) may possibly be invoked for a period longer than the maximum period of 30 years provided by Regulation (EC) No 1049/2001 regarding the other exceptions to public disclosure[105].

As regards the exception for the protection of *court proceedings*, the General Court reiterated that it can be invoked in relation to documents not specifically drawn up in connection within pending court proceedings[106].

Furthermore, the General Court stressed that the exception pertaining to *legal advice* could apply to preliminary internal positions of the Legal Service of the European Commission, drawn up for the purpose of political dialogue between the institution and representatives of a Member State and a third State[107].

This is especially the case where the preparatory position is drafted in a context of urgency, in relation to an area of certain high political sensitivity. Indeed, in such circumstances, disclosure would actually undermine, in a foreseeable manner, the institution's interest in seeking and receiving frank, objective and comprehensive advice from its various departments in order to prepare its final position[108].

In relation to the exception for the protection of the *purpose of investigations*[109], the General Court recalled that the concept of 'investigation' is an autonomous concept of EU law. Accordingly, it must be interpreted by taking into account, inter alia, its usual meaning as well as the context in which it occurs[110].

Thus, a structured and formalised European Commission procedure aimed at collecting and analysing information in order to enable the institution to take a position in the context of its functions provided for by the treaties must be considered an 'investigation'.

However, such a procedure does not necessarily need to have the purpose of detecting or pursuing an offence or irregularity. The concept of 'investigation' may also cover a European Commission activity intended to establish facts in order to assess a given situation[111].

[104] See judgment of 12 December 2018, *Deutsche Umwelthilfe eV* v *European Commission*, T-498/14, EU:T:2018:913, paragraph 133.
[105] See judgment in *Rogesa* v *European Commission*, *op.cit.*, paragraph 90.
[106] See judgment in *Access Info Europe* v *European Commission*, *op. cit.*, paragraphs 69 to 72.
[107] *Ibid.*, paragraphs 87-88.
[108] *Ibid.*
[109] Laid down in Article 4(2), third indent of Regulation (EC) No 1049/2001.
[110] See judgment in *Daimler AG* v *European Commission*, *op. cit*., paragraph 130.
[111] *Ibid.*, paragraphs 131-132.

The General Court further ruled that the exception may remain appropriate, by application of a general presumption of confidentiality, in light of an *EU pilot procedure*, notwithstanding its (long) temporary suspension, following the submission of a request for a preliminary ruling[112].

As regards the application of the exception in relation to *State aid files*, the General Court confirmed the existence of a presumption of confidentiality of documents contained therein and clarified that such a presumption applies not only in respect to individuals but also to sectoral investigations[113]. The fact that the documents in question are not marked as confidential is irrelevant in that regard[114].

In relation to the *infringement procedure* under Article 258 of the Treaty on the Functioning of the European Union, the General Court reiterated its 'special position within the system of access to documents' already acknowledged by the Court of Justice[115].

The General Court thus recalled that the characteristics of the infringement procedure preclude full transparency from being granted, even in such sensitive fields such as the environment[116].

The General Court therefore confirmed the application of a general presumption of confidentiality in relation to documents forming part of infringement files[117], regardless of the applicability of any specific regulation providing for a more restrictive framework than that of Regulation (EC) No 1049/2001[118]. Such a general presumption relieves the institution from any partial disclosure[119].

As far as investigations pertaining to *cartels* are concerned[120], the General Court confirmed that the general presumption of confidentiality acknowledged in the framework of earlier case law applies irrespective of the number of documents covered by the request for access, including when just one document is the subject of the request[121].

The General Court emphasised in that respect, that it is a qualitative criterion, namely whether the documents relate to the same proceeding, and not a quantitative criterion (or in other words the number of documents, larger or smaller, covered by the request) for access, that is relevant[122].

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[112] See judgments in *Pint* v *European Commission*, *op.cit.*, paragraph 38; and *Sárossy* v *European Commission*, *op.cit.*, paragraph 41.
[113] See judgment in *Chambre de commerce et d'industrie métropolitaine Bretagne-Ouest (port de Brest)* v *European Commission*, *op. cit.*, paragraphs 64 and 91.
[114] *Ibid*,paragraph 106.
[115] Judgment of 5 December 2018, *Liam Campbell* v *European Commission*, T-312/17, EU:T:2018:876, paragraph 32.
[116] *Ibid*.
[117] *Ibid*, paragraph 29.
[118] *Ibid*, paragraph 33.
[119] *Ibid*, paragraph 49.
[120] Pursuant to Article 101 of the Treaty on the Functioning of the European Union.
[121] See judgment in *Edeka-Handelsgesellschaft Hessenring mbH* v *European Commission*, *op.cit.*, paragraph 71.
[122] *Ibid*, paragraph 72-73.

Therefore, the general presumption of confidentiality applies also with respect to the table of contents of the file, notwithstanding the special characteristic that it does not have specific content of its own[123].

There are four main reasons for this presumption. First, the table of contents organises the file relating to the proceeding at issue and thus forms part of the set of documents concerning that proceeding. Secondly, it lists, names and identifies all the documents in the file. Thirdly, it is a document which, by nature, refers to and thereby reflects all the documents in the file as well as certain information on the content of those documents. Fourthly, it shows all the steps taken by the European Commission in the cartel proceeding. Consequently, the table of contents of the cartel file may contain relevant and specific information relating to the content of the file[124].

Against this background, the General Court confirmed that the underlying criterion for the application of the general presumption of confidentiality is whether the document, to which access is sought, is part of the administrative file relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union[125].

Regarding the exception for the protection of the *decision-making process*, the General Court clarified that the provisional agreements reached between the European Parliament, the Council and the Commission in the course of trilogue meetings do not fall under a general presumption of non-disclosure, regardless of whether the legislative procedure is still ongoing[126].

The General Court stressed, however, that the institution is not precluded from refusing access to legislative documents, including trilogues, in duly justified cases on the basis of the exception concerning the protection of the decision-making process. The General Court noted indeed that the latter does not exclude the legislative process from its scope[127].

In 2018, the General Court had also the opportunity to clarify the concept of *overriding public interest*. The latter plays a crucial role in the framework of Regulation (EC) No 1049/2001, insofar as it is susceptible of prevailing over some of the exceptions justifying the refusal to grant access to requested documents[128].

In this context, the General Court recalled that it is for the applicant requesting access to establish its existence[129]. All arguments in that respect must be raised by the applicant, at the latest at the confirmatory stage (prior to the adoption by the institution of the confirmatory decision). New arguments cannot be relied upon at the judicial stage[130].

[123] *Ibid*, paragraph 76-78.
[124] *Ibid*, paragraph 76.
[125] *Ibid*, paragraph 85.
[126] See judgment in *De Capitani* v *European Parliament*, *op.cit.*, paragraph 84.
[127] *Ibid.*, paragraph 112.
[128] Namely, the exceptions provided under Article 4(2) and (3) of Regulation (EC) No 1049/2001.
[129] See judgments in *Access Info Europe* v *European Commission*, *op.cit.*, paragraph 97; and *CEE Bankwatch Network v European Commission*, *op.cit.*, paragraph 127.
[130] See judgment in *CEE Bankwatch Network* v *European Commission*, *op.cit.*, paragraph 133.

Moreover, the applicant who relies upon an undeniable overriding public interest, must also demonstrate how disclosure of the requested documents would contribute to the protection of such an interest in the case at hand[131].

The General Court also restated that general considerations such as 'an interest in building the confidence of citizens in their governmental institutions'[132], or 'the right of the public to be informed about the work of the institutions'[133] cannot, by themselves, substantiate the existence of an overriding public interest. This is particularly so in areas where the institution publishes regular press releases[134].

Nevertheless, the General Court acknowledged that applicants could rely upon the principle of transparency to substantiate the existence of an overriding public interest, provided that they demonstrate how 'especially pressing' it is in the cases at stake[135].

Pursuant to settled case law, the principle of transparency does not carry, however, the same weight depending on whether the requested document relates to a legislative or an administrative area of activity of the institution[136].

The General Court further reiterated that the concept of 'overriding public interest' is objective and general in nature. Accordingly, any interest that applicants might have in producing documentary evidence before a national court does not represent an overriding public interest within the meaning of the Regulation. Such an interest constitutes a private interest[137]. The European Commission should not be instrumentalised by applicants, in order to obtain access to evidence that is not available through other channels[138].

Applicants are thus required to pursue legal remedies that are recognised by the national legal order and adhere to the methods for obtaining evidence that are prescribed by that legal order[139]. Similarly, the purpose to assess the viability of national proceedings also constitutes a private interest[140].

[131] Judgment of 9 October 2018, *Éva Erdősi Galcsikné* v *European Commission*, T-632/17, EU:T:2018:664, paragraphs 44-45.
[132] Judgment of 11 December 2018, *Arca Capital Bohemia a.s.* v *European Commission*, T-440/17, EU:T:2018:898, paragraph 76.
[133] See judgments in *Liam Campbell* v *European Commission*, *op.cit.*, paragraph 64; and *Sumner* v *European Commission*, *op.cit.*, paragraph 64.
[134] See judgment in *Liam Campbell* v *European Commission*, *op.cit.*, paragraph 64.
[135] See judgments in *Access Info Europe* v *European Commission*, *op.cit.*, paragraph 105; and *Éva Erdősi Galcsikné* v *European Commission*, *op.cit.*,paragraph 49.
[136] Judgment *Arca Capital Bohemia a.s.* v *European Commission*, T-441/17, EU:T:2018:899, paragraph 75.
[137] See judgment in *Sárossy* v *European Commission*, *op.cit.*, paragraph 32.
[138] See earlier case law: *inter alia*, judgment of 25 September 2014, *Darius Nicolai Spirlea and Mihaela Spirlea* v *European Commission*, T-306/12, EU:T:2014:816, paragraph 99.
[139] *Ibid.*
[140] See judgment in *Sumner* v *European Commission*, *op.cit.*, paragraph 62.

6.2.3. Clarifications on the interaction of the Regulation with other instruments

In 2018, the General Court also addressed the issue of the interaction of Regulation (EC) No 1049/2001 with other specific instruments.

First, the General Court clarified the respective scopes of Regulation (EC) No 1049/2001 and the so-called *Common Fisheries Policy Regulation*[141]. The latter pursues a different objective from the former: namely to ensure a system for control, inspection and enforcement ensuring compliance with the rules of the common fisheries policy[142].

As no provision of both regulations expressly gives one instrument priority over the other, each of those regulations must be applied in a manner compatible with the other and which enables a joint coherent application[143].

Consequently, where a request based on Regulation (EC) No 1049/2001 seeks to obtain access to documents containing data within the meaning of Common Fisheries Policy Regulation, the provisions of the latter pertaining to the confidentiality of the data collected and exchanged in its framework become applicable in their entirety[144].

Those provisions do not constitute a *lex specialis* derogating from the general rules on public access to documents laid down in Regulation (EC) No 1049/2001, but provide specific rules ensuring enhanced protection of certain data[145]. Accordingly, the General Court confirmed that prior consent of the Member State is an absolute condition for the disclosure of data communicated by that Member State in the framework of the Common Fisheries Policy Regulation[146].

Secondly, the General Court clarified the interplay between Regulation (EC) No 1049/2001 and the *Aarhus Regulation*[147]. The latter introduces into the general system of public access to documents detailed rules pertaining to access to environmental information. The General Court confirmed in that respect that the Aarhus Regulation, which is purported to apply the Aarhus Convention to the institutions and bodies of the European Union, does not apply in the framework of the European Atomic Energy Community[148].

The General Court's finding was based, *inter alia*, on the title of the Aarhus Regulation which refers specifically to the 'institutions and bodies of the European Community' (without contemplating its application to other entities, such as the institutions or bodies

[141] Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006, Official Journal L 343, 22 December 2009, page 1. (Hereinafter 'Common Fisheries Policy Regulation').

[142] See judgment in *Republic of Malta* v *European Commission*, *op. cit.*, paragraph 136.

[143] *Ibid*, paragraphs 137 and 140.

[144] *Ibid*, paragraph 142.

[145] *Ibid*, paragraph 139.

[146] *Ibid*, paragraphs 150, 162 and 173.

[147] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, Official Journal L 264, 25 September 2006, p. 13. (Hereinafter 'Aarhus Regulation').

[148] See judgment in *CEE Bankwatch Network* v *European Commission*, *op.cit.*, paragraphs 48-50.

under the European Atomic Energy Community) and its preamble which refers to the EC Treaty only[149]. Indeed, the measures adopted under the European Atomic Energy Community Treaty are not necessarily subject to the obligations applicable within the framework of the European Union, as the European Atomic Energy Community and the European Community, now the European Union, are distinct organisations established by different treaties, with separate legal personalities[150].

Moreover, the General Court stressed that the Aarhus Regulation does not have any incidence on the applicability of a general presumption of confidentiality in the framework of an investigation[151]. Nor does this instrument impose a requirement to restrictively interpret the grounds for refusal of access mentioned in the exception pertaining to investigations provided under Regulation (EC) No 1049/2001, in relation to documents containing information relating to emissions into the environment[152].

Furthermore, the General Court elaborated on the definition of the scope of the concept of 'information relating to emissions into the environment' under the Aarhus Regulation[153]. This notion is at the core of an enhanced right of access, insofar as it triggers the presumption of an overriding public interest in disclosure (except for documents pertaining to investigations and in particular, infringements)[154].

Accordingly, the concept of 'information relating to emissions into the environment' does not encompass all information presenting a link with emissions into the environment[155].

Thus, information on the quantity of CO^2 emissions per tonne of products manufactured, whilst having a link with emissions into the environment, does not qualify as 'information relating to emissions into the environment' within the meaning of the Aarhus Regulation *per se*.

Such an information on carbon efficiency has not been deemed as an information relating to emission into the environment since it does not enable the public to know the total amount effectively released (or sufficiently foreseeable) into the environment by a specific installation, or the chemical composition or geographic location of those emissions[156].

[149] *Ibid*, paragraph 50.
[150] *Ibid.*, paragraph 47.
[151] See judgment in *Daimler* v *Commission*, *op.cit.*, paragraphs 104-105.
[152] *Ibid*, paragraph 99-103.
[153] See Article 6(1) of the Aarhus Regulation.
[154] *Ibid.*
[155] See judgment in *Deutsche Umwelthilfe eV* v *European Commission*, *op.cit.*, paragraph 113.
[156] See judgment in *Rogesa* v *European Commission*, *op.cit.*, paragraphs 102-106, currently under appeal.

Similarly, information pertaining to the approval of an active substance in some products evaluated at EU level does not necessarily relate to emissions whose release into the environment is foreseeable. The use, conditions of use and composition of the products authorised by a Member State on its territory may be very different. Accordingly, such data do not qualify as 'information relating to emissions into the environment' within the meaning of the Aarhus Regulation[157].

Likewise, documents reflecting opinions, appreciations and proposals from car manufacturers in relation to the availability of a given substance do not constitute, as such, information relating to environmental emissions within the meaning of the Aarhus Regulation[158]. This is particularly the case, where such documents do not detail the extent and the period of time of the use of the substance, or how the latter would contribute to an increased risk of environmental emission[159].

In conclusion, the European Commission followed attentively the developments of the case law of the European Courts, and took good note of all above-mentioned clarifications provided in 2018. In particular, the institution made sure to adjust its administrative practice in order to abide by the latter whenever necessary. For this purpose, as in the previous years, the Secretariat-General regularly organised, jointly with the Legal Service, seminars to update the staff of the European Commission on the recent major developments of the case law on access to documents.

6.3. New pending Court cases[160]

In 2018, 11 new cases involving the European Commission were brought before the General Court under Regulation (EC) No 1049/2001[161]. In parallel, five appeals were introduced before the Court of Justice against judgments of the General Court, in cases where the European Commission was a party to the proceedings[162].

[157] See judgment in *Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe)* v *European Commission*, *op.cit.*, paragraph 90.
[158] See judgment in *Deutsche Umwelthilfe eV* v *European Commission*, *op.cit.*, paragraph 111.
[159] *Ibid.*
[160] As of 31 December 2018.
[161] Namely, cases: *Umweltinstitut München* v *Commission*, T-712/18; *Bronckers* v *Commission*, T-746/18; *Bonnafous v Commission*, T-646/18; *TUIfly* v *Commission*, T-619/18; *Compañia de Tranvías de la Coruña* v *Commission*, T-485/18; *RATP* v *Commission*, T-422/18 ; *RATP* v *Commission*, T-250/18 ; *Bruel* v *Commission*, T-202/18 ; *Batchelor* v *Commission*, T-85/18 ; *Planet* v *Commission*, T-29/18 ; and *Pesticide Action Network Europe (PAN Europe)* v *European Commission*, T-25/18.
[162] Namely, cases *Pint* v *Commission and Hungary*, C-770/18 P (Appeal Case before the General Court T – 634 / 17); *ClientEarth* v *Commission*, C-612/18 P (Appeal Case before the General Court T - 644/ 16); *Verein Deutsche Sprache eV* v *European Commission*, C-440/18 P (Appeal Case before the General Court T-468/16); *Rogesa* v *Commission*, C-568/18 P (Appeal Case before the General Court T-643/13); and *Izba Gospodarcza Producentów i Operatorów Urządzeń Rozrywkowych* v *Commission*, C-560/18 P (Appeal Case before the General Court T-514/15).

CONCLUSIONS

In 2018, the right to access documents upon request, as provided for in the Charter of Fundamental Rights of the European Union, the European Union Treaties and Regulation (EC) No 1049/2001, continued to play a key role in the European Commission's implementation of its transparency commitment.

The low rates of actions and judgments in annulment of its decisions in that area, seems to illustrate that the European Commission generally strikes the proper balance between the right of access and the other public or private interests protected under the exceptions laid down in Regulation (EC) No 1049/2001.

The European Commission remains by far the EU institution handling the largest number of requests for access to documents under Regulation (EC) No 1049/2001. In 2018, it reached its highest number of requests ever since the entry into force of the Regulation in 2001, having received no less than 6,912 initial applications. Most of these applications pertained each to a range of documents, if not entire files.

On the one hand, this rise in the number of applications and their complexity have increasingly confronted the institution with the difficult challenge of reconciling the principle of transparency with balanced and efficient policy-making.

On the other hand, it has undeniably resulted in a high number of documents becoming available to the public, subject to some exceptions. These released documents came to complement the considerable amount of information and documents, already available via the European Commission's website thanks to the institution's policy of constantly increasing its proactive publication and strong commitment to transparency.

The European Commission welcomes this growing general public interest generated by its activities and continuously undertakes new initiatives aimed at proactively developing transparency in its decision-making processes.

In 2018, this was illustrated, *inter alia*, by the entry into force of the new Code of Conduct for the Members of the European Commission and the Regulation for the protection of personal data, but also by the unprecedented level of transparency in the framework of the sensitive Brexit negotiations.

Last but not least, in 2018, the European Commission became increasingly confronted with a new pervasive challenge to transparency, namely online disinformation. Disinformation is the antithesis of transparency. The institution therefore engaged with all stakeholders to define a clear, comprehensive and broad-based action plan[163] to tackle its spread and impact in Europe, so as to ensure the protection of European values and democratic systems.

[163] Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan against Disinformation, JOIN(2018) 36, 5 December 2018, available at https://ec.europa.eu/digital-single-market/en/news/action-plan-against-disinformation.