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## COVER NOTE

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From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2020) 561 final
Subject:	REPORT FROM THE COMMISSION on the application in 2019 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents

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Delegations will find attached document COM(2020) 561 final.

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Brussels, 15.9.2020  
COM(2020) 561 final

## **REPORT FROM THE COMMISSION**

**on the application in 2019 of Regulation (EC) No 1049/2001 regarding public access to  
European Parliament, Council and Commission documents**

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## INTRODUCTION

The year 2019 marked a transition for the European institutions with the parliamentary elections<sup>1</sup>, a new strategic agenda of the European Council for 2019-2024<sup>2</sup> and a new European Commission.

In 2019, the European Commission took further steps to deliver on its strong commitment to increased transparency, accountability, and the trust of European citizens in the EU institutions.

In July 2019, Ms von der Leyen presented her Political guidelines of the Commission 2019-2024: ‘A Union that strives for more – My Agenda for Europe’<sup>3</sup>. One of the six headline ambitions for Europe consists in the priority for ‘a new push for democracy’. That includes the need for more transparency, in particular with regard to the legislative process<sup>4</sup>.

On 27 November 2019, during the plenary session in Strasbourg, a large majority of members of the European Parliament voted in favour of the von der Leyen Commission.

On 1 December 2019, the von der Leyen Commission came into office. Transparency, together with collegiality and efficiency became one of the guiding principles for the functioning of the new Commission<sup>5</sup>. The Working Methods expressly refer to the right of public access to documents as governed under Regulation (EC) No 1049/2001<sup>6</sup>.

Safeguarding the effectiveness of the citizens’ right of access to documents held by the institutions is a cornerstone of the European Commission’s pledge for transparency.<sup>7</sup>

This right is enshrined in Article 42 of the Charter of Fundamental Rights of the European Union and Article 15(3) of the Treaty on the Functioning of the European Union, and Regulation (EC) No 1049/2001. It reflects the principle of openness in the activities of the institutions which is provided for under both Article 1 of the Treaty on European Union and Article 298 of the Treaty on the Functioning of the European Union.

Regulation (EC) No 1049/2001 ‘crystallises’ this principle of openness stated in the EU Treaties<sup>8</sup>.

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<sup>1</sup> In May 2019, the European elections resulted in a record participation rate of 50.66%, see <https://europarl.europa.eu/election-results-2019/en/turnout/>.

<sup>2</sup> In June 2019, the European Council agreed on an agenda for the EU for the next five years. ‘A new strategic agenda 2019-2024’ sets out the priority areas that will steer the work of the European Council and provide guidance for the work programmes of other EU institutions, see <https://www.consilium.europa.eu/en/european-council/role-setting-eu-political-agenda/>.

<sup>3</sup> [https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf).

<sup>4</sup> *Ibid.* p.21.

<sup>5</sup> See Communication from the President to the Commission of 1 December 2019, ‘The Working Methods of the European Commission’, P(2019) 2, available at: <https://ec.europa.eu/info/sites/info/files/working-methods.pdf>.

<sup>6</sup> *Ibid.* p.17. Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents Official Journal L 145, 31 May 2001, p.43 (hereinafter referred to as ‘Regulation (EC) No 1049/2001’).

<sup>7</sup> 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 this right.

Pursuant to Recital 2 of that Regulation, ‘[o]penness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system [...]’.

Article 17(1) of Regulation (EC) No 1049/2001 further provides that each institution must publish an annual report on the implementation of the Regulation for the preceding year.

The present annual report for the year 2019 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 corresponding 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*).

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<sup>8</sup> Judgment of 28 June 2012, *European Commission v Agrofert Holding a.s.*, C- 477/10 P, EU:C:2012:394, paragraph 88.

## **I. Broader Transparency Agenda**

The European Union is made up of its citizens and operates for its citizens. Encouraging and facilitating citizens' wider involvement in the European Union and what it stands for is a top priority of the European Commission.

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 2019, 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.

### ***Better Regulation***<sup>9</sup>

Throughout the year 2019, better regulation continued to be at the heart of the European Commission's policy-making. In early 2019, the institution pursued its exercise of taking stock of the Better Regulation Agenda of 2015, so as to assess both its positive and problematic aspects.

On 15 April 2019, the College of Commissioners adopted a Communication entitled 'Better regulation: taking stock and sustaining our commitment' which summarised the findings of the stocktaking<sup>10</sup>. The public consultation showed that there was still a relatively low level of knowledge about the opportunities to participate in the Commission's policymaking.

The Communication concluded in the widespread demand for better regulation to continue as an integral part of the Commission's way of working. The Communication also included a pledge to achieving further improvements in the future<sup>11</sup>.

A key aim of the European Commission has been to promote the participation of Europeans and civil society in its policymaking activities. The institution has therefore invested extensively to provide the tools for such an involvement, creating opportunities for stakeholders to contribute throughout the policy cycle.

In 2019, the number of public consultations translated into all EU languages has continued to increase<sup>12</sup>. Moreover, the 'Have Your Say' portal<sup>13</sup>, which provides for a single web-based point of entry for interested parties to learn about the Commission's policymaking activities and to leave their comments, views and other information, registered in 2019 more than

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<sup>9</sup> Better regulation consists of measures introduced by the European Commission to deliver better results for EU citizens and businesses through more open, transparent and evidence-based policy-making.

<sup>10</sup> This Communication was accompanied by a staff working document and a note summarising the views of the consulted Commission officials, all available at: [https://ec.europa.eu/info/sites/info/files/better-regulation-taking-stock\\_en\\_0.pdf](https://ec.europa.eu/info/sites/info/files/better-regulation-taking-stock_en_0.pdf).

<sup>11</sup> See Communication, *op.cit.* p.6.

<sup>12</sup> *Ibid.* p.8.

<sup>13</sup> Portal available at: <https://ec.europa.eu/info/law/better-regulation/have-your-say>.

800,000 visits. The average number of responses to public consultations and feedback vary widely, but the overall trend is increasing.

In conclusion, the European Commission's efforts to put better regulation at the heart of the decision-making process have been successful. Consultations and transparency are the two areas where interested parties believe the European Commission has made the most progress since 2015. The Communication acknowledges that better regulation is increasingly an integral part of the institutional culture of the European Commission and is widely supported by stakeholders who want to be further involved in the institution's policymaking in a more meaningful way.

In parallel to these developments, the Commission continued its work together with the European Parliament and the Council on the planned Joint Legislative Portal with the aim of launching as soon as possible, as per the commitment in the 2016 Interinstitutional Agreement on Better Law-making. The Portal will provide a database of information covering the entire legislative process in a way that is easily accessible for a general audience without specialist background.

Finally, the European Commission welcomed the initiatives of the Finnish Presidency of the **European Council** in the second half of 2019, which aimed at promoting the legislative transparency and proactively publishing certain negotiation-related documents.

### ***The European Citizens' initiative***

The European Citizens' Initiative (ECI) is a right enshrined in Article 11(4) of the Treaty on European Union and in the first paragraph of Article 24 of the Treaty on the Functioning of the European Union<sup>14</sup>.

The European Citizens' Initiative is an instrument designed to enhance citizens' participation in the democratic life of the European Union by allowing them to directly request the European Commission to submit a proposal for legal acts of the Union for implementing the Treaties<sup>15</sup>.

In 2019, the Regulation of the European Parliament and of the Council on the European Citizens' Initiative was adopted by the co-legislators<sup>16</sup> and published on 17 May 2019<sup>17</sup>. This

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<sup>14</sup> Both provisions were introduced with the Treaty of Lisbon. Article 11(4) of the Treaty on European Union provides that '[n]ot less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties'. The first paragraph of Article 24 of the Treaty on the Functioning of the European Union states that '[t]he European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of Article 11 of the Treaty on European Union, including the minimum number of Member States from which such citizens must come.'

<sup>15</sup> European Citizens' Initiatives were launched as an agenda-setting tool in the hands of citizens on 1 April 2012, upon the entry into force of the European Citizens' Initiative Regulation which implemented the Treaty provisions and provided for the applicable procedural framework.

<sup>16</sup> COM(2017)482 final.

new Regulation brings a number of structural and technical improvements to make the European Citizens' Initiative more user-friendly and accessible, less burdensome and easier to use for organisers and supporters so as to facilitate increased participation of European citizens in the democratic process of the Union. Moreover, the new regulatory instrument seeks to strengthen the follow-up of European Citizens' Initiatives as a tool to foster democratic debate within the European Union<sup>18</sup>.

### ***Ethics and transparency of the Members of the European Commission***

In her Political Guidelines, the President supported the creation of an independent ethics body common to all EU institutions. The President committed to engage and work closely with the other institutions to achieve this objective.<sup>19</sup>

On 24 June 2019, the European Commission published the first annual report<sup>20</sup> on the application of the new Code of Conduct<sup>21</sup> for its Members for the year 2018, as per its commitment under Article 13(4) of the Code. The Report summarises, *inter alia*, the main changes introduced by the new code which contribute to achieving the highest ethical standards and transparency that are expected of Members of the European Commission.<sup>22</sup>

Moreover, in February 2019, the European Commission issued detailed and practical guidance on ethical standards for Members of the Commission who campaigned for the European Parliament elections in May<sup>23</sup>. The European Commission, supported by the European Parliament decided indeed to allow its Members to actively participate in the political campaign without having to temporarily withdraw from the institution for the whole period, if they abide by specific ethical practices<sup>24</sup>.

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<sup>17</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0788&from=EN>.

<sup>18</sup> The European Commission reviews periodically how the European Citizens' Initiative is working. It sets out its findings in reports to the European Parliament and the Council. The European Commission already issued two reports in 2015 and 2018 respectively. The next report is due by 1 January 2024.

<sup>19</sup> *Op. cit.* p.21.

<sup>20</sup> Available at: [https://ec.europa.eu/info/sites/info/files/se-2019-266\\_final\\_en.pdf](https://ec.europa.eu/info/sites/info/files/se-2019-266_final_en.pdf).

<sup>21</sup> 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'. This new Code came into force on 1 February 2018 and replaced the previous Code of Conduct for Commissioners of 20 April 2011.

<sup>22</sup> Namely: (1) the extension of the mandatory notification for post-term office activities of former Members of the College; (2) the possibility for the Members of the Commission to stand as candidates in the elections to the European Parliament without having to take an unpaid electoral leave from the Commission; (3) the definition of 'conflict of interest'; (4) a far-reaching declaration of interests; (5) the bi-monthly publication of information about each Commissioner's travel expenses; and (6) The integration into the Code of the rule that both Members of the College and the members of their Cabinets shall only meet those interest representatives that are registered on the Transparency Register and shall publish information on their meetings, etc.

<sup>23</sup> Available at: [https://ec.europa.eu/info/sites/info/files/guidelines\\_election\\_campaign\\_en.pdf](https://ec.europa.eu/info/sites/info/files/guidelines_election_campaign_en.pdf)

<sup>24</sup> Such as (i) informing the President that they intend to participate in the European Parliament election campaign and of the role they expect to play in the campaign; (ii) ensuring institutional continuity and arrange for the continued performance of their duties; (iii) refraining from using the Commission's human or material resources for activities linked to the campaign; (iv) distinguishing between statements made in their institutional capacity and statements made in their role of campaign participants during public speaking events; etc.

Furthermore, during the year 2019, the European Commission updated on a regular basis the Europa Webpage dedicated to the ethics of Commissioners and former Commissioners<sup>25</sup>, by regularly uploading decisions of the European Commission and meeting minutes about authorised occupations of former European Commissioners.

### ***The Transparency Register***

Transparency of interest representation is crucial in order to allow citizens to follow the activities and potential impact of those seeking to influence the EU law-making process. The Transparency Register established since 2011<sup>26</sup>, sheds light on the various interests pursued, including by whom and with what level of resources. The Register thus allows for increased public scrutiny, giving citizens, the media and stakeholders the possibility to track the activities and potential influence of interest representatives.

Against this background, the European Commission submitted a proposal in 2016 to make the current Transparency Register mandatory<sup>27</sup>. The proposal involves the signature of a new Interinstitutional Agreement covering the European Parliament, the Commission and, for the first time, the Council of the EU. Interinstitutional negotiations on this proposal are still ongoing.

In 2019, the negotiators of the three institutions held rounds of talks on the proposal for a mandatory Transparency Register. The purpose of these talks was to explore ways in which to render interactions with interest representatives conditional upon their prior registration in the Transparency Register, in order to make registration *de facto* mandatory for lobbyists. Although the approaches still differ from one institution to the other, the three institutions took stock of the developments regarding the future establishment of a joint Register.

In this context, the European Commission has continued to urge the European Parliament and the Council to explore options enabling them to apply the rule ‘no registration, no meeting.’ The three institutions reiterated their common ambition to reach a meaningful improvement on the status quo and agreed to continue discussions.

In the meantime, the Transparency Register has continued to grow steadily, and on 31 December 2019 contained no less than 11,899 entries, including 1,592 new registrations<sup>28</sup>.

The updated privacy statements concerning registrants, meetings with interest representatives and the handling of alerts and complaints were published on the Transparency Register website.<sup>29</sup>

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<sup>25</sup> [https://ec.europa.eu/info/about-european-commission/service-standards-and-principles/codes-conduct/ethics-and-integrity-eu-commissioners\\_en](https://ec.europa.eu/info/about-european-commission/service-standards-and-principles/codes-conduct/ethics-and-integrity-eu-commissioners_en)

<sup>26</sup> Agreement between the European Parliament and the European Commission on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, Official Journal L 191, 22 July 2011, p. 29–38, replaced by the currently in force Agreement between the European Parliament and the European Commission on the transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, Official Journal L 277, 19 September 2014, p. 11–24.

<sup>27</sup> <http://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-627-EN-F1-1.PDF>

<sup>28</sup> See the 2019 Annual Report on the operations of the Transparency Register, forthcoming.

<sup>29</sup> They are available at: <http://ec.europa.eu/transparencyregister/public>.

Against this background, in 2019, the Transparency Register operated by the European Parliament and the European Commission has remained a leading model to follow for public administrations across Europe.

### ***EU Brexit transparency***

In 2019, 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. The institution systematically published all draft negotiation positions, EU position papers, slides, agendas for the negotiation rounds and the draft as well as the final Withdrawal Agreement.

Overall, from 2017 to 2019, the European Commission proactively published on its website more than 120 documents in relation to Brexit. In addition, the institution's services responded to 10,937 citizens' letters and handled around a hundred access to documents requests. The majority of these requests resulted in positive replies disclosing documents such as the full list of meetings with stakeholders and their minutes.

The European Commission remains fully committed to maintaining this very high level of transparency in respect of the implementation of the Withdrawal Agreement and throughout the upcoming negotiations on the future EU-UK relationship.

### ***Trade policy***

Trade policy affects EU citizens. Therefore, the European Commission listens to all input so that EU policy accurately reflects society's values and interests as a whole. Accordingly, this policy is built with EU citizens' input, which is made before, during and after the negotiation process.

In 2019, transparency and engagement with the public remained essential features within the trade policy in order to ensure democracy, public trust and accountability.

The European Commission continued to systematically publish information at all stages of trade negotiations. The Commission thus shares publicly proposals to the Council for draft negotiating directives of preferential trade agreements<sup>30</sup>, reports of negotiation rounds<sup>31</sup>, EU initial negotiating proposals, Sustainability Impact Assessments and the negotiated text, as soon as it exists in an agreed consolidated version<sup>32</sup>. Moreover, the European Commission

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<sup>30</sup> For instance, on 18 January 2019, the European Commission published, as part of its commitment to transparency, its draft negotiating directives for its trade talks with the United States at the same time as submitting them to the EU Member States.

See [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_502](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_502).

<sup>31</sup> An interim progress report was published on 30 January 2019, providing a detailed overview on the state of play of the talks with the United States so far. It reported on the work of the Executive Working Group and listed a number of concrete actions where regulatory cooperation could facilitate transatlantic trade - such as pharmaceuticals, medical devices and cybersecurity - by lowering regulatory barriers.s.

<sup>32</sup> In July 2019, the European Commission thus published the texts of the EU-Mercosur Trade Agreement following the agreement, announced on 28 June 2019, notwithstanding the fact that the texts might undergo further modifications, including as a result of the process of legal revision. See <http://trade.ec.europa.eu/doclib/press/index.cfm?id=2048>.

actively reached out to stakeholders to receive concrete substantive input to achieve an evidence-based EU trade policy at all stages. In 2019, the Commission held three major public consultations in relation to trade<sup>33</sup>.

The above-mentioned measures build on the pro-active transparent approach to trade policy already pursued by the European Commission.

### ***Europe for Citizens' programme***

The so-called 'Europe for Citizens' programme' set for the period 2014-2020<sup>34</sup> 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. In 2019, the European Commission continued to organise multiple initiatives and actions in its framework<sup>35</sup>.

### ***Conclusion***

In 2019, the European Commission continued to publish a wide range of information and documents proactively and in a 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.

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<sup>33</sup> For more information on those three consultations, see [https://trade.ec.europa.eu/consultations/#\\_tab\\_2019](https://trade.ec.europa.eu/consultations/#_tab_2019).

<sup>34</sup> Council Regulation (EU) No 390/2014 of 14 April 2014 establishing the 'Europe for Citizens' programme for the period 2014-2020, Official Journal L 115, 17 April 2014, p.3.

<sup>35</sup> For more information, see [https://ec.europa.eu/info/departments/justice-and-consumers/justice-and-consumers-funding-tenders/funding-programmes/europe-citizens-efc-0\\_en#documents](https://ec.europa.eu/info/departments/justice-and-consumers/justice-and-consumers-funding-tenders/funding-programmes/europe-citizens-efc-0_en#documents).

## 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 implemented under Regulation (EC) No 1049/2001 continued to be one of the cornerstones of the European Commission's transparency agenda in 2019.

The right of public access to documents of the institutions is related to the democratic nature of the institutions<sup>36</sup>. 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'<sup>37</sup>. This goal is reiterated in Article 10 of the EU Treaty. Moreover, Article 298 of the Treaty on the Functioning of the European Union provides that '[i]n carrying out their missions, the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration'.

Within this framework, in 2019, 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 2019. It is based on statistical data, which are summarised in Annex<sup>38</sup>.

The statistics reflect the number of applications received and replies provided in 2019. They further provide more accurate data as regards the statistics retrieved for the previous years, following subsequent regular encoding corrections<sup>39</sup>.

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 almost 78 % of the 7,445 cases at the initial stage, and wider or even full access was granted in 53.4 % of the 296 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.

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<sup>36</sup> See Second recital in the preamble to Regulation (EC) No 1049/2001.

<sup>37</sup> See First recital in the preamble to Regulation (EC) No 1049/2001.

<sup>38</sup> Unless otherwise indicated, the statistics presented in this Report are based on figures extracted from the European Commission IT applications on 31 December 2019, as updated following subsequent encoding corrections. Percentages in the narrative part of the Report are rounded to the closest decimal.

<sup>39</sup> For this reason, the figures provided in this report and the previous ones may slightly differ.

## *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’.

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 the application of Regulation (EC) No 1049/2001. The team 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, in close cooperation with the Legal Service. The Unit also manages the European Commission-wide IT system for handling initial and confirmatory requests for access to documents: GestDem, and is developing in collaboration with the Secretariat-General’s Unit for *Digital Solutions and Process Efficiency* a new system, namely EASE (‘Electronic AccesS to European Commission Documents’).

The aim of the EASE project is to design and develop a one-stop-shop, electronic and fully integrated IT solution for submitting and handling applications for access to Commission documents. It is being explored with the ultimate goal in mind of bringing the EU decision-making process closer to its citizens, and making it more cost-effective than the current system ‘GestDem’.

During the first half of 2019, the project team continued to collect and define the business needs for the new system, which included organising the workshops with the access-to-document staff from the Directorates-General. In addition, the Business Case and Project Charter, two key project management documents explaining the objectives, business needs and features of the future system as well as the timeline and deliverables were drafted and approved.

The second half of 2019 was reserved for the business analysis of the case management system (completed in the beginning of 2020) including interviews with users from various Commission services.

In addition, in cooperation with the Directorate-General for Informatics, the project team started working on the Artificial Intelligence Study whose aim is to identify ‘use cases’ where artificial intelligence techniques could simplify the handling of applications for access to

documents. The project, scheduled to go into production by early 2021, consists of two parts, namely:

- (1). A new online portal allowing the citizens to (i) submit and have an overview of their applications for access to Commission documents, (ii) communicate with the Commission as well as (iii) search for previously disclosed documents; and
- (2). A new case-management system allowing the Commission staff to register, attribute and handle the applications for access to documents. It will replace GestDem, the current IT system used for this purpose.

In conclusion, the new EASE project should provide increased transparency and bring citizens closer to the EU decision-making process.

Notwithstanding these expected significant IT progresses, the steadily rising number of new applications for access to documents and the increased demand for transparency highlight the need to allocate sufficient human resources to the European Commission. This warrants the proper handling of access to documents requests within the regulatory time limits and achievement of the best outcomes for citizens.

## **1. REGISTERS AND INTERNET SITES**

In 2019, 18337 new documents were added to the register of Commission documents (see Annex – Table 1), falling within the C, COM, JOIN, OJ, PV, SEC or SWD categories<sup>40</sup>.

In 2019, the ‘Access to Documents’ website on *Europa*<sup>41</sup> recorded 6,642 visitors and 10112 pages viewed (see Annex – Table 2)<sup>42</sup>.

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.

## **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 2019, the European Parliament, the Council of the European Union and the European Commission continued to hold regular

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<sup>40</sup> 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.

<sup>41</sup> Access to documents: [http://ec.europa.eu/transparency/access\\_documents/index\\_en.htm](http://ec.europa.eu/transparency/access_documents/index_en.htm).

<sup>42</sup> Those data result from the use since 2018 of a new algorithm, which provides more accurate statistics. Therefore, they are not comparable to the ones retrieved for the years prior to 2018.

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.

Moreover, on 24 September 2019, the European Commission participated in the expert seminar held by Finland's Presidency of the Council of the European Union on 'The Future of EU Transparency'. This seminar provided a platform for inclusive discussions on the future of transparency with not only experts from EU institutions and agencies, but also civil societies and academia.

In the framework of this joint discussion of concrete measures to increase transparency during the coming legislature, the European Commission took stock of the case law on access to documents and explored how Regulation (EC) No 1049/2001 stood the test of the time<sup>43</sup>. The seminar concluded with the acknowledgment of the significant progress in EU openness and the further work that remains ahead<sup>44</sup>.

### **3. ANALYSIS OF THE APPLICATIONS FOR ACCESS**

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

##### *▪ Initial applications*

As illustrated by the graph below, in 2019, the number of initial applications reached 7,445. This figure reflects a striking increase of almost 7.7% in comparison with 2018 and 11% in comparison with 2014<sup>45</sup>. The European Commission issued 8,449 initial replies in comparison with 7,257 in 2018, showing a rise of almost 16.4%.

Amongst those initial replies, 7,612 were issued on the basis of Regulation (EC) No 1049/2001 (compared to 6,117 in 2018)<sup>46</sup>. This number illustrates an increase of around 24.4% 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

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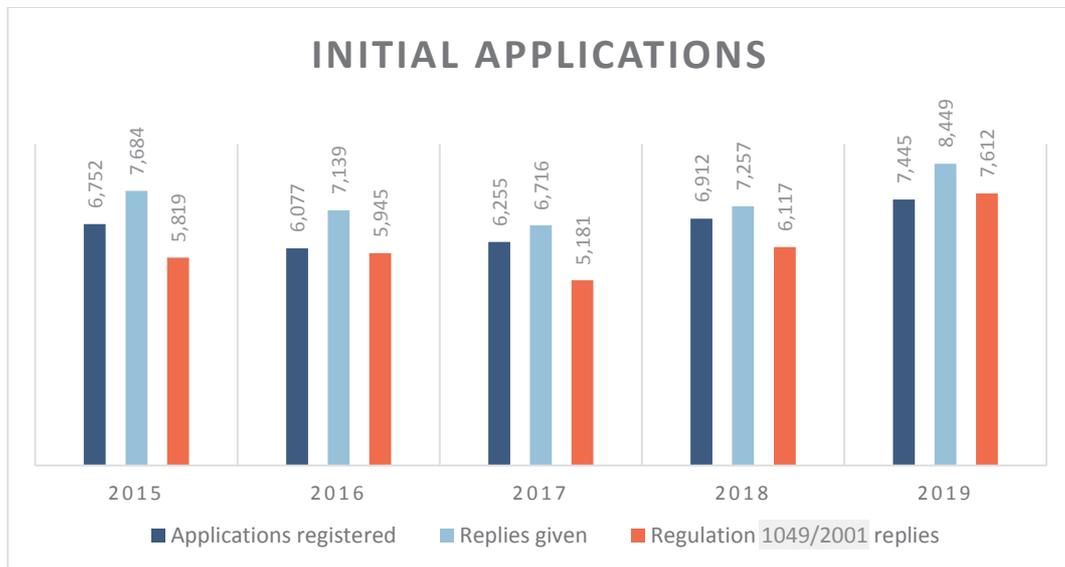
<sup>43</sup> See the Note the Presidency to the Delegations of 9 October 2019, 'Presidency Report on the seminar on the future of EU transparency - 24 September 2019', 12876/19, available at: <https://data.consilium.europa.eu/doc/document/ST-12876-2019-INIT/en/pdf>.

<sup>44</sup> *Ibid.*, p.3.

<sup>45</sup> In 2018 the number of initial applications amounted to 6,912, whereas in 2014, they amounted to 6,227 (Data extracted from the previous annual reports).

<sup>46</sup> Depending on the contents of the requests or the status of the applicants, the remaining replies resulted in responses handled in accordance with other legal frameworks (such as the Code of Good Administrative Behaviour or the principle of sincere cooperation, etc.).

- Responses provided under different legal frameworks (due to the contents of the application or status of the applicant<sup>47</sup>, etc.); or even
- Closures following the applicants' failure to provide requested clarifications or to fulfil procedural requirements.



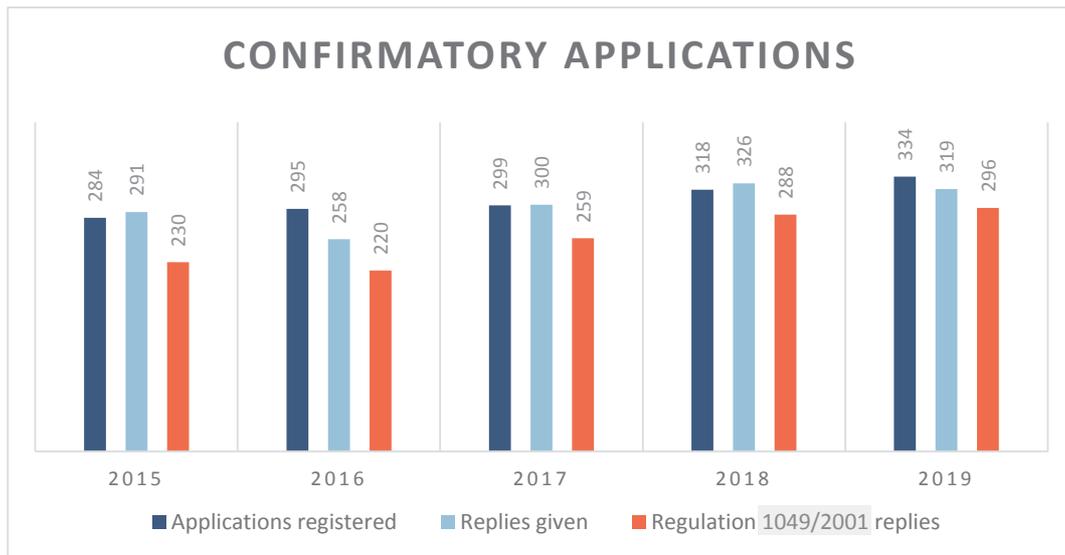
- *Confirmatory applications*

As regards confirmatory applications requesting a review by the European Commission of initial replies fully or partially refusing access, their number amounted to 334 in 2019, reflecting an increase of 5% in comparison with 2018. The data confirm the steadily upward trend observed since 2016.

The European Commission issued 319 replies, amongst which 296 were based on Regulation (EC) No 1049/2001. Whereas this number reflects only a slight increase by around 2.8% from 288<sup>48</sup>, it reveals a sharper increase of approximately 8.8% since 2014, as illustrated by the graph below.

<sup>47</sup> 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.

<sup>48</sup> *Ibid.*



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

- *Initial applications*

In 2019, the *Secretariat-General*<sup>49</sup> received the highest proportion of initial applications (8.6%).

It was closely followed by the *Directorate-General for Health and Food Safety*<sup>50</sup>, which accounted for 8.4% of the initial applications. Notwithstanding a slight decrease compared to the previous year (where this Directorate-General received the highest proportion of initial applications, namely 11%), this figure illustrates the steady great interest of the applicants in health related matters.

It was followed by the *Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs*<sup>51</sup> (6.9%), the *Directorate-General for Trade* (6%), the *Directorate-General for Competition*<sup>52</sup> (5.7%), the *Directorate-General for Mobility and Transport*<sup>53</sup> (4.7%), the *Directorate-General for Migration and Home Affairs*<sup>54</sup> (4.3%), the *Legal Service*<sup>55</sup> (4.1%) and the *Directorate-General for Taxation and Customs Union* (4%).

The remaining European Commission departments each accounted for less than 4% of all initial applications.

<sup>49</sup> Referred to as ‘SG’ in the graphs below.

<sup>50</sup> Referred to as ‘SANTÉ’ in the graphs below.

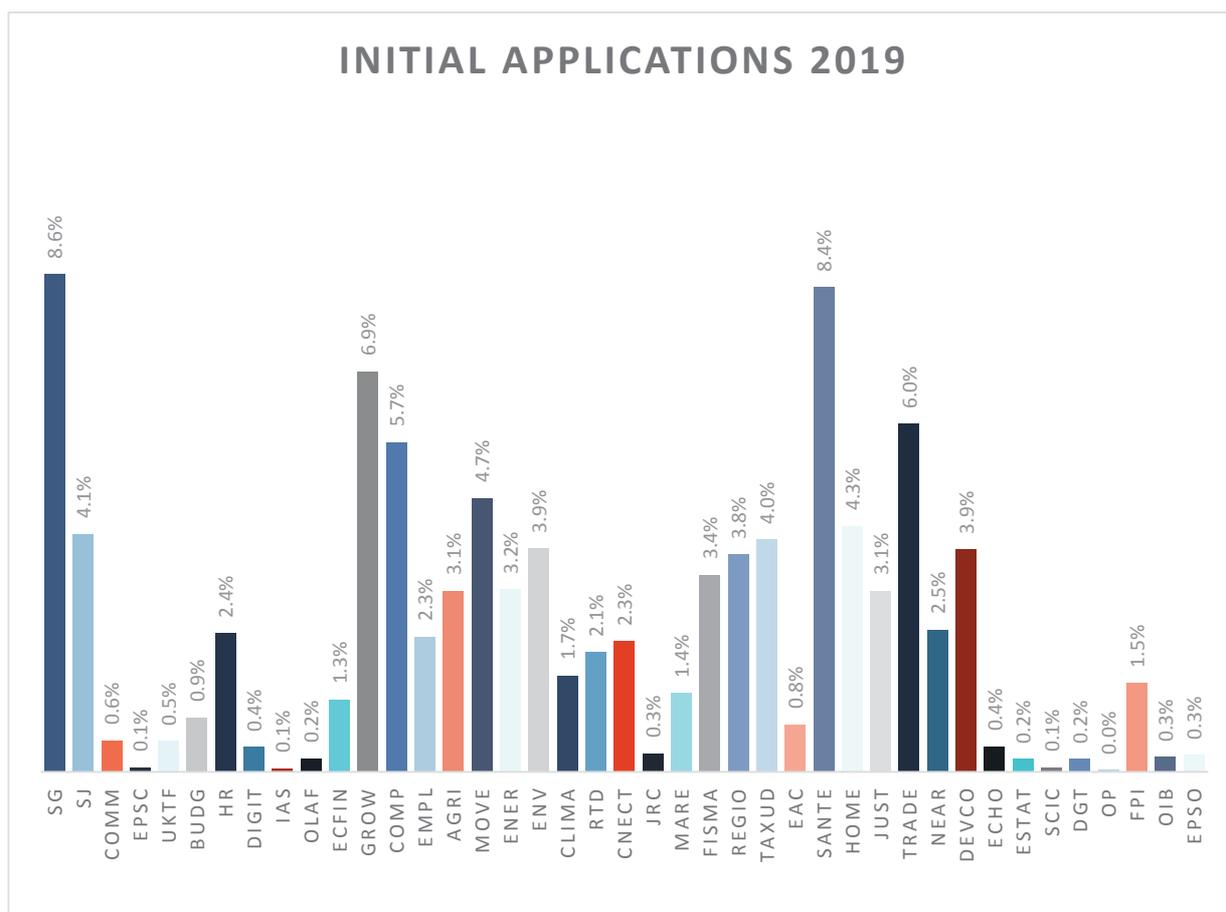
<sup>51</sup> Referred to as ‘GROW’ in the graphs below.

<sup>52</sup> Referred to as ‘COMP’ in the graphs below.

<sup>53</sup> Referred to as ‘MOVE’ in the graphs below.

<sup>54</sup> Referred to as ‘HOME’ in the graphs below.

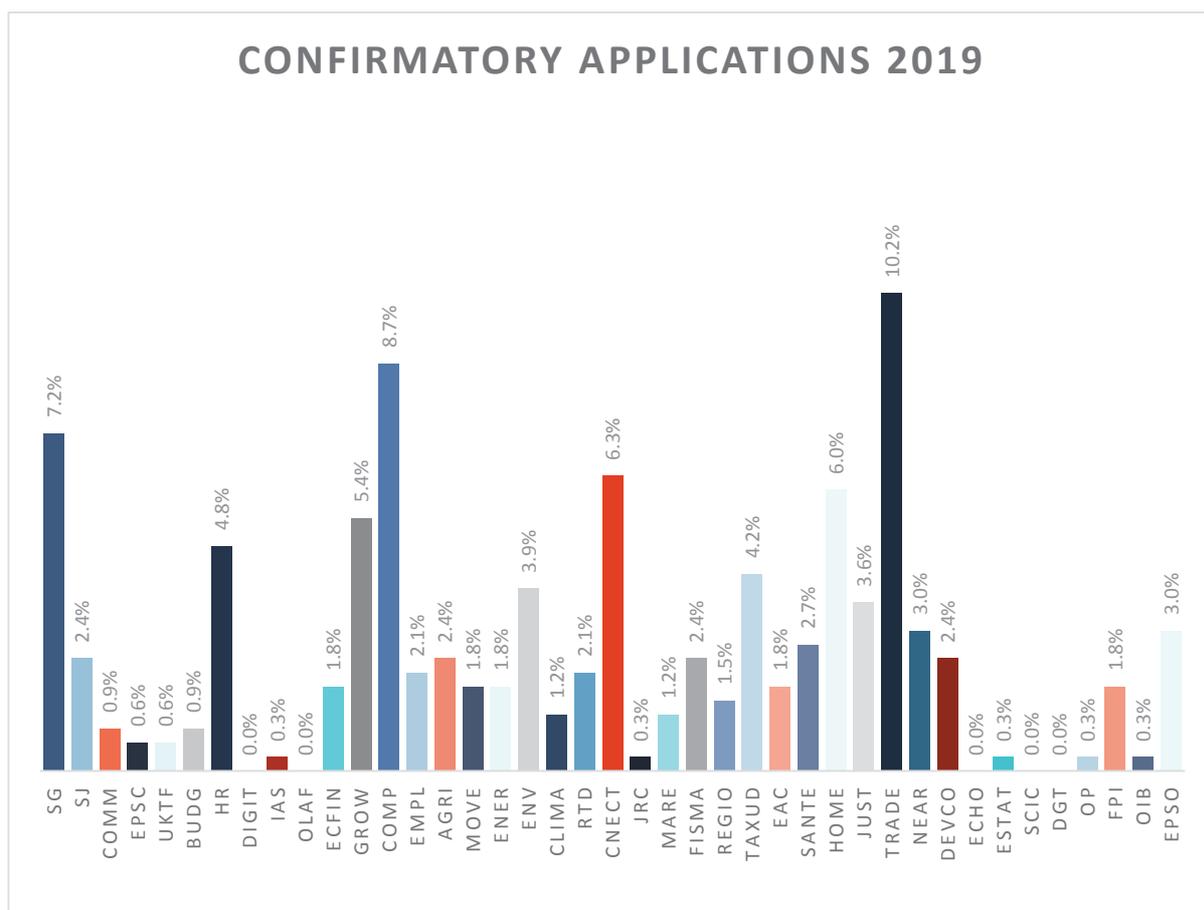
<sup>55</sup> Referred to as ‘SJ’ in the graphs below.



- *Confirmatory applications*

The highest proportion of confirmatory applications received in 2019 by the Secretariat-General originated from initial replies provided by the *Directorate-General for Trade* (10.2%). The latter was followed by the *Directorate-General for Competition*, which nonetheless observed a net decrease of the confirmatory applications submitted in relation to its initial replies over the last three years (8.7% in 2019 compared to 13.8% in 2018 and 19.7% in 2017). This Directorate-General was followed by the *Secretariat-General* (7.2%), and the *Directorate-General for Communications Networks, Content and Technology* (6.3%). It is noteworthy that the *Directorate-General for Health and Food Safety*, which accounted for 7.9% of the confirmatory applications in 2018, saw its share fall to 2.7%.

The initial replies of the *Directorate-General for Migration and Home Affairs* and the *Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs*, formed the subject of respectively 6% and 5.4% of all confirmatory applications. The initial replies provided by the *remaining European Commission departments* accounted for less than 5% of requests for a confirmatory review each.



### 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<sup>56</sup>.

For statistical purposes, the profile of ‘citizens’ covers the applicants who indicated their profile as such, and constitutes the default option covering those who did not select any social/occupational category.

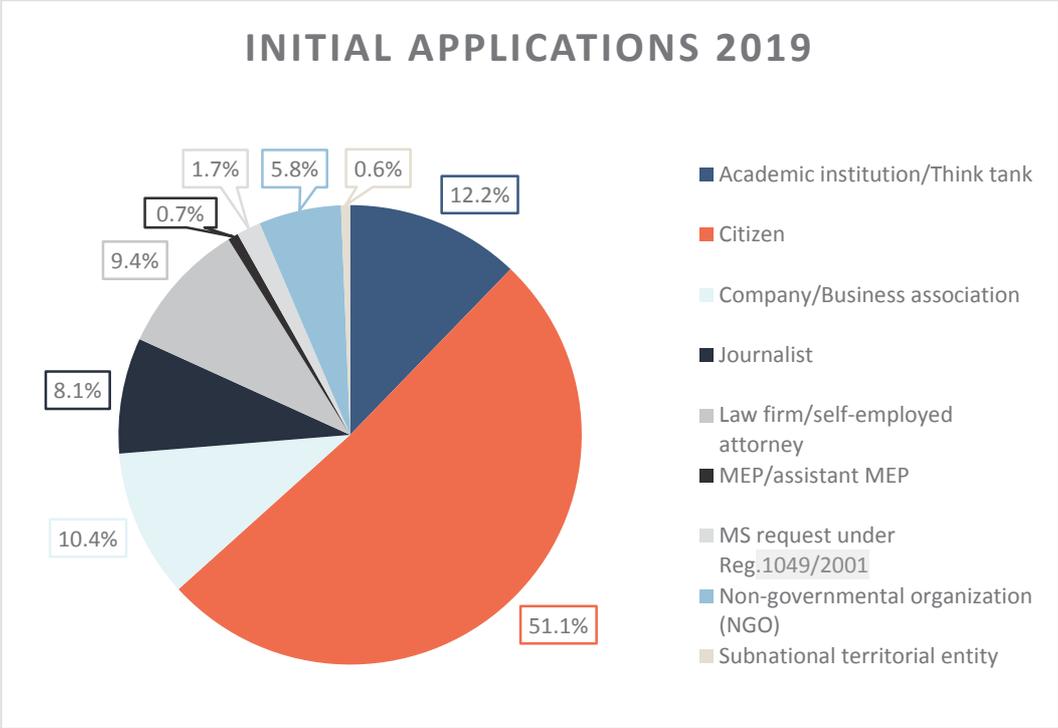
- *Initial applications*

In 2019, most initial applications originated, as in the previous years from *citizens*. This category of applicant submitted indeed approximately 51.1% of the requests.

The second place amongst the most prolific applicants, which was occupied by *companies* in 2018, was in 2019 regained by *academic institutions and think tanks* (as in 2017) who accounted for 12.2% of the initial applications. Nevertheless, *companies* closely followed with approximately 10.4% of the initial applications. *Legal professionals* and *journalists*

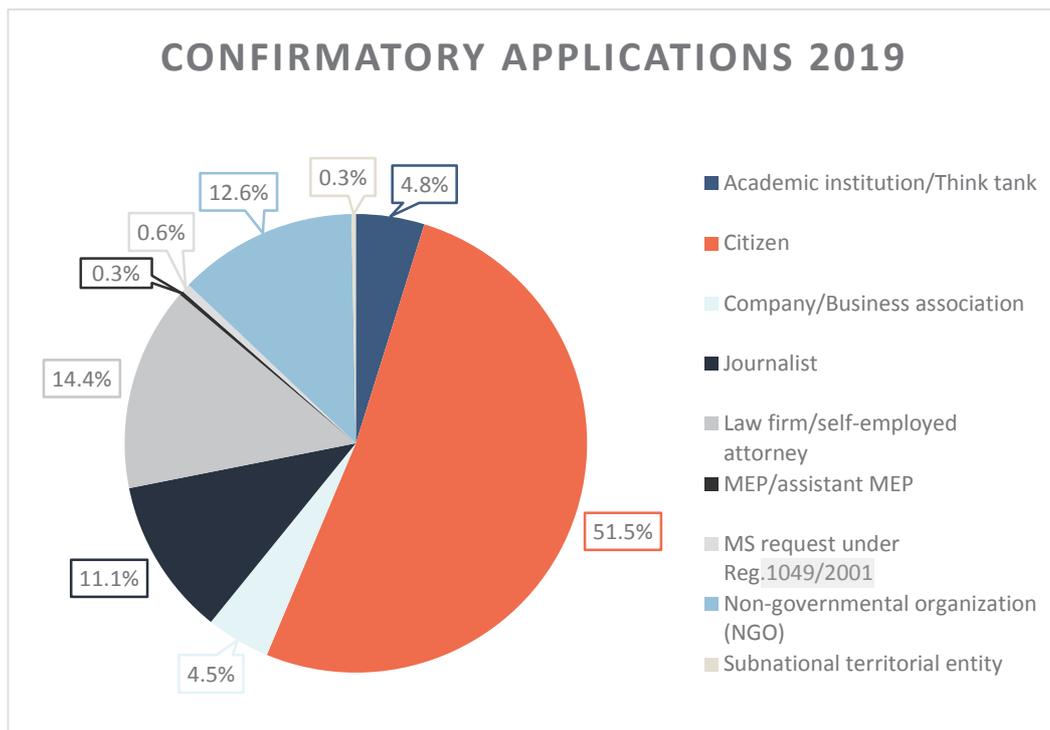
<sup>56</sup> The latter is a new category introduced in 2018, in order to reflect the fact that national authorities of Member States are entitled to submit applications for access to documents in the framework of Regulation (EC) No 1049/2001.

(with respectively 9.4% and 8.1%) continue to remain major applicants, as in the previous years. *Non-governmental organisations* represents the only remaining category of applicants accounting for more than 5% of the initial applications. They were remotely followed by the remaining categories, accounting each for less than 2% of the initial applications.



- *Confirmatory applications*

Most confirmatory applications in 2019 originated from *citizens*, who accounted for 51.5% of such applications (compared to 36.2% in 2018 and 24.7% in 2017). *Legal professionals* reached the second position, by submitting a large number of confirmatory applications, accounting for no less than 14.4%. The third position is occupied by *non-governmental organisations* who submitted 12.6% of the confirmatory applications, closely followed by *journalists*, accounting for approximately 11.1% of the confirmatory applications. They were remotely followed by *academic institutions and think tanks* (4.8%) and *companies* (4.5%), and the remaining categories accounted each for less than 1% of the initial applications.



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

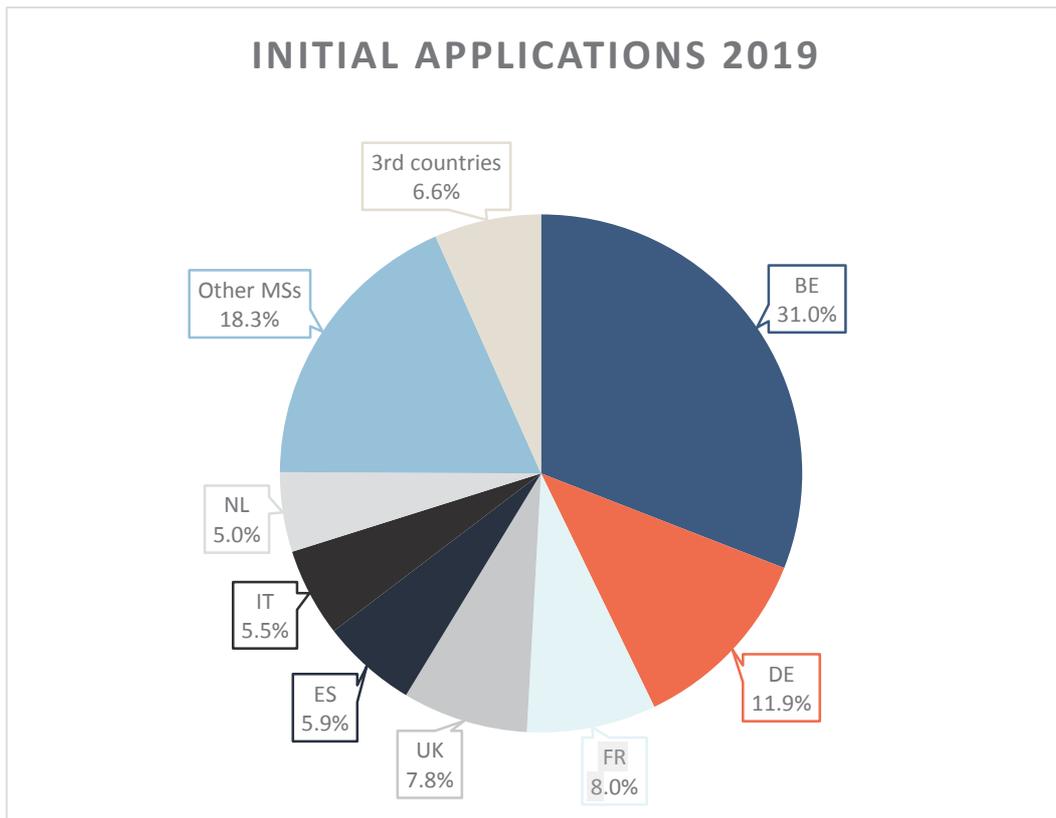
- *Initial applications*

Regarding the geographical breakdown of initial applications in 2019, it appears that those that originated from Belgium (31%), Germany (11.9%) and France (8%) account together for over half of total number of applications received by the Commission.

Whereas Belgium and Germany have historically been two of the main countries from which most of the initial applications for access to documents originate, one former very active applicant, namely the United Kingdom, ranked fourth, continuing thereby to mark the significant steady decrease observed in the number of its initial applications since 2017. Indeed, in 2019 only 7.8% of the initial applications originated from the United Kingdom, compared to 9.2% in 2018 and 15.2% in 2017.

Fifth came Spain with 5.9% of the initial applications, closely followed by Italy (5.5%) and the Netherlands (5%). 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 confirmed the slight but steady increase observed in the previous years, accounting for approximately 6.6% in 2019, compared to 5.3% in 2018 and almost 5% in 2017.

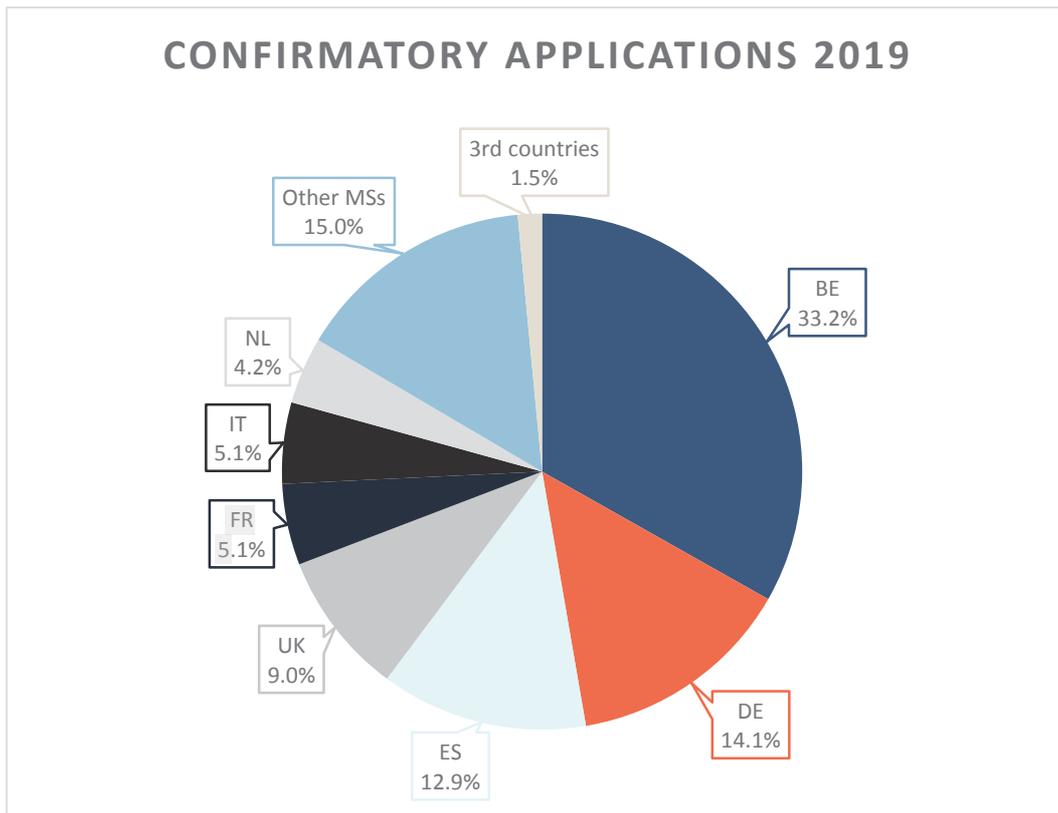


- *Confirmatory applications*

Regarding the geographical breakdown of confirmatory applications, the largest proportion by far originated, as in the previous years, from applicants within Belgium (in spite of a net decrease with 33.2% of such applications, compared to 45.9% in 2018), followed by Germany (14.1%), Spain (12.9%) and the United Kingdom (9%).

France and Italy (with each 5.1%), together with the Netherlands (4.2%) were the only other Member States from where more than 4% of applications originated. Applications originating from the remaining 21 Member States accounted for 3%, or less, each.

Finally, the number of confirmatory applications from applicants residing or having their registered office in third countries confirmed the slight decrease observed since the last two years, accounting for almost 1.5% of all applications (compared to 2.2% in 2018 and 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)

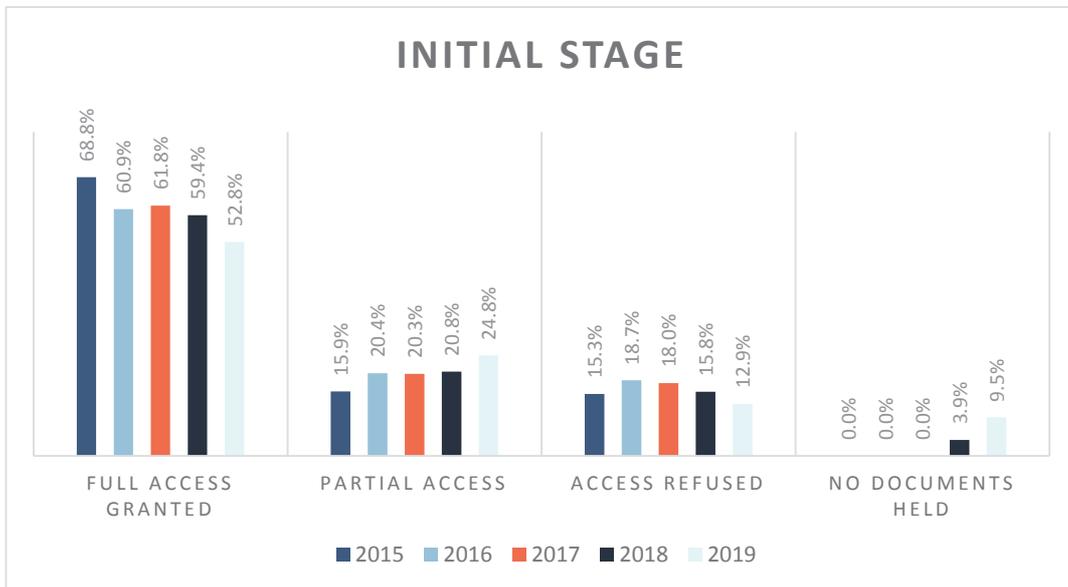
- *Initial stage*

In 2019, full or partial access to documents was granted in more than 77.6% of cases at the initial stage (showing thereby a slight decrease since 2018, where it reached 80.2%).

The percentage of fully positive replies slightly diminished from 59.4% in 2018 to 52.8% in 2019. Nevertheless, the percentage of partially positive replies continued to confirm the slight but steady upward trend observed since 2017 (from 20.3% in 2017, to 20.8% in 2018 and 24.8% in 2019).

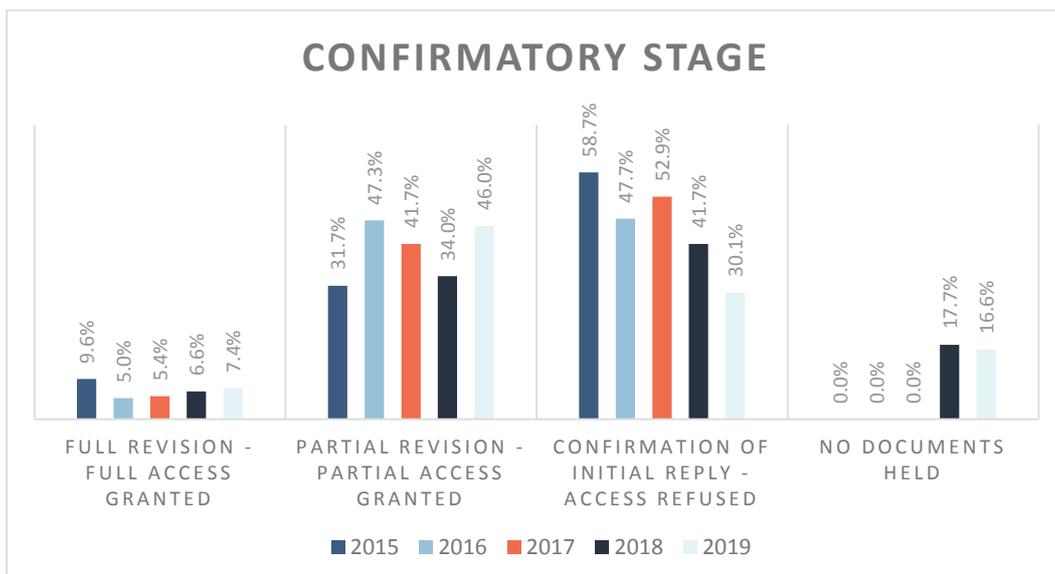
In parallel, the slight and steady decrease in the percentage of fully rejected access, observed since 2016, continued, accounting for only 12.9% of the total initial applications (against 15.8% in 2018 and 18% and 19%, in 2017 and 2016 respectively).

Moreover, 2019 reflected a sharp increase in the number of cases in which the documents requested either did not exist or were not held by the institution (9.5% of the initial applications, compared to 3.9% in 2018).



- *Confirmatory stage*

In 2019, 30.1% of the initial replies challenged by confirmatory applications were fully confirmed at the confirmatory stage (compared to 41.7% in 2018 and 52.9% in 2017). A percentage of 53.4% were fully or partially reversed (against 40.6% in 2018).



## 4.2. Invoked exceptions to the right of access<sup>57</sup> (Annex – Table 10)

### 4.2.1. Initial stage

In 2019, the protection of *privacy and the integrity of the individual*<sup>58</sup> continued to be the most frequent exception relied upon by the European Commission for (fully or partially) refusing access at the initial stage. It was invoked in no less than 41.1% of the refusals, compared to 34.5% in 2018 and 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.

The second most invoked exception concerns the protection of *commercial interests*<sup>59</sup>. This exception was relied upon in more than 15% of the (partial or full) refusals<sup>60</sup>.

The third place amongst the most relied upon exceptions no longer consisted in the exception aimed at protection of the *ongoing decision-making process*, but in the exception related to the protection of the *purpose of inspections, investigations and audits*<sup>61</sup>, which accounted for 13.4% of the refusals<sup>62</sup>.

The exception aimed at protecting the *ongoing decision-making process*<sup>63</sup>, followed, with a percentage of use of 10.2%<sup>64</sup>.

The relative use of the exception protecting *public security*<sup>65</sup> maintained its slight but steady increase (from 5.4% in 2017 to almost 8.8% in 2018 and 9.2% in 2019).

Apart from the exception providing for the protection of *international relations*<sup>66</sup> which accounted for 5.3% of the cases<sup>67</sup>, the remaining exceptions provided by Regulation (EC) No 1049/2001, were invoked by the institution in less than 4% each, in refusing partial or full access to the requested documents at the initial stage.

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<sup>57</sup> On the basis of Article 4 of Regulation (EC) No 1049/2001.

<sup>58</sup> This exception is provided under Article 4(1)(b) of Regulation (EC) No 1049/2001.

<sup>59</sup> This exception is provided under the first indent of Article 4(2) of Regulation (EC) No 1049/2001.

<sup>60</sup> Compared to 15.4% in 2018 and 16.8% in 2017.

<sup>61</sup> This exception is provided under the third indent of Article 4(2) of Regulation (EC) No 1049/2001.

<sup>62</sup> Compared to 12.7% in 2018 and 17.7% in 2017.

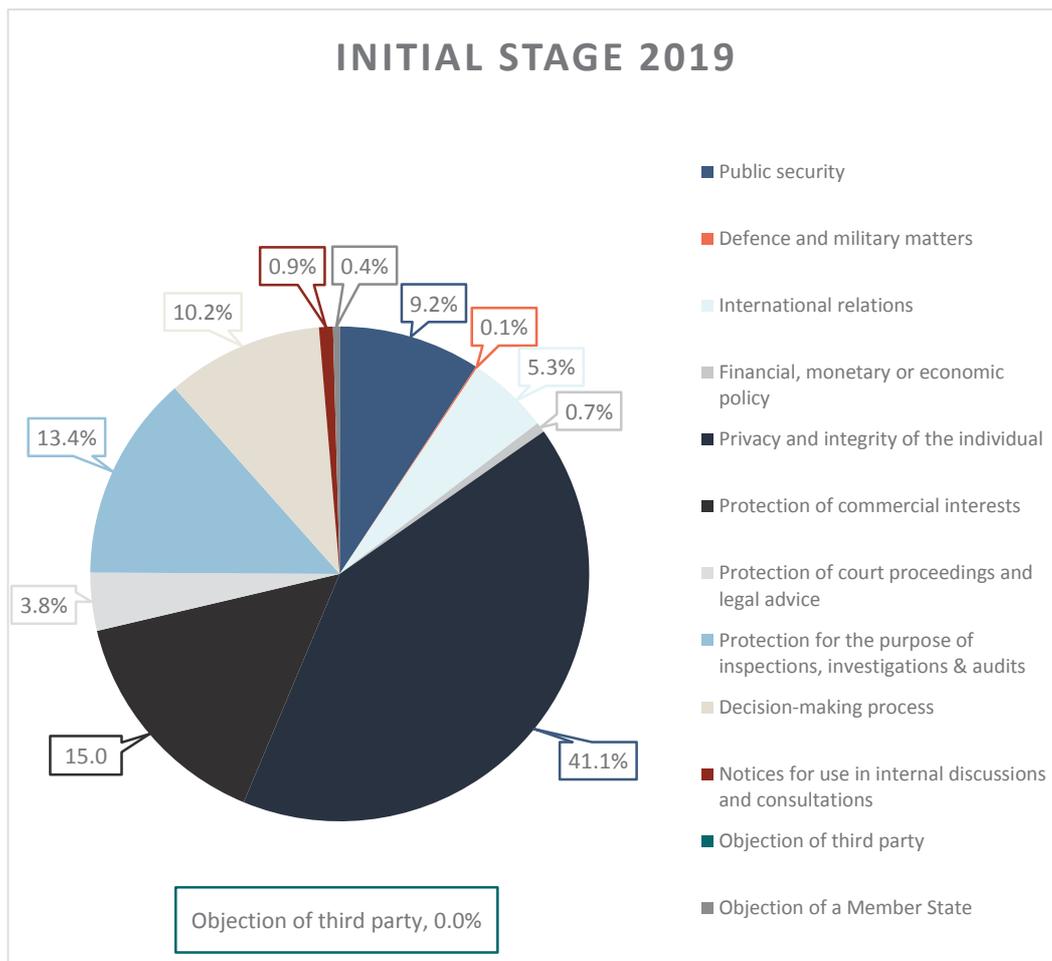
<sup>63</sup> This exception is provided under the first subparagraph of Article 4(3) of Regulation (EC) No 1049/2001.

<sup>64</sup> Compared to 15.1% in 2018 and 16.3% in 2017.

<sup>65</sup> This exception is provided under the first indent of Article 4(1) of Regulation (EC) No 1049/2001.

<sup>66</sup> This exception is provided under the third indent of Article 4(1) of Regulation (EC) No 1049/2001.

<sup>67</sup> Compared to 5.8% in 2018, 4% in 2017 and 3.4% in 2016, showing thereby a slight but steady increase in its use by the European Commission.



#### 4.2.2. Confirmatory stage

Notwithstanding a certain decrease in its use, the protection of the *purpose of inspections, investigations and audits* continued to be in 2019, like in the previous years, the most frequently invoked, main ground for confirming a (full or partial) refusal of access, accounting for 24.3% of the cases (compared to 30.6% in 2018 and almost 35% in 2017).

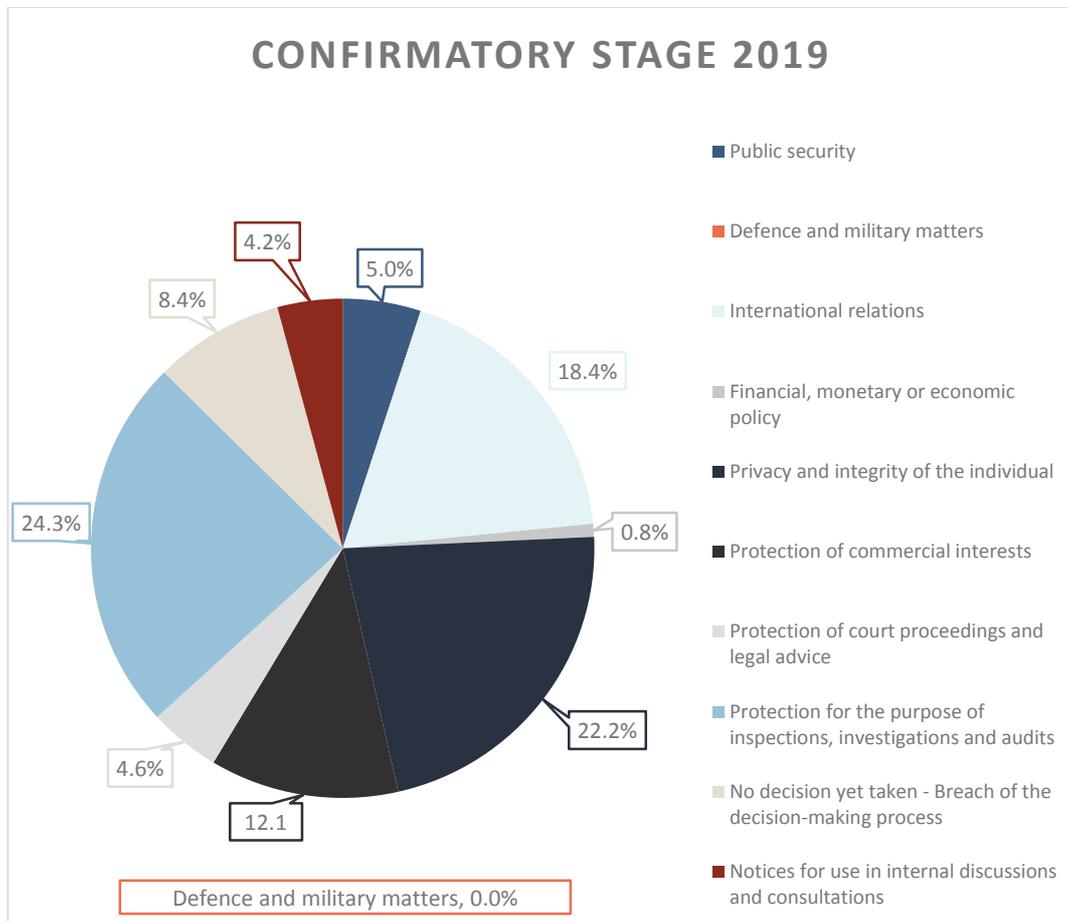
The exception protecting *privacy and the integrity of the individual* came second (22.2% compared to 25% in 2018 and almost 26.1% in 2017).

The exception protecting the public interest as regards *international relations* took the third place in 2019 with 18.4% (compared to 5.6% in 2018 and almost 4% in 2017).

The exception protecting *commercial interests* continued to be invoked less frequently (12.1% in 2019, compared to 12.5% in 2018, and 13.2% in 2017), relegating it in the fourth 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 *ongoing decision-making process* of the institution came in fifth position with a percentage of reliance of 8.4%. This figure confirms the trend observed in the previous report, pursuant to which the exception seems to be invoked less steadily (with its use having already decreased from 10.8% in 2018, around 12.2% in 2017 and 20.2% in 2016).

The exceptions protecting the public interest as regards *public security* and *legal advice and court proceedings* followed as the most relied upon by the institution (with 5% and 4.6% respectively).



## 5. COMPLAINTS TO THE EUROPEAN OMBUDSMAN

In 2019, the European Ombudsman closed 42 complaints concerning the European Commission's handling of requests for access to documents<sup>68</sup>. In comparison, in the last three years, the European Ombudsman had closed a lower number of complaints (namely 29 in 2018, 25 in 2017 and 21 in 2016).

In only six of the cases, the European Ombudsman found instances of maladministration<sup>69</sup>.

In 2019, the European Ombudsman opened 32 new enquiries where access to documents was either the main or a subsidiary part of the complaint, compared to 29 in 2018, 25 in 2017 and 12 in 2016.

These statistics confirm the significant increase observed since 2017 regarding the number of new enquiries<sup>70</sup>, and reflect the accrued importance given by the European Ombudsman to this specific area of activity<sup>71</sup>.

<sup>68</sup> The statistics concern the European Ombudsman cases for all European Commission departments except the European Anti-Fraud Office.

<sup>69</sup> Namely cases 1302/2017, 1632/2018, 1227/2017, 2134/2018, 195/2017 and 1708/2015

This importance is further illustrated by the so-called ‘fast-track procedure’ for access to documents complaints launched by the European Ombudsman in 2018. Pursuant to this procedure, the latter committed to deciding on the opening of an inquiry within five working days, and to adopting decisions on ‘access to documents’ inquiries within 40 working days upon receipt of the complaints<sup>72</sup>.

If the European Ombudsman finds the European Commission was wrong to have refused access to the requested document(s), she may recommend that it grant either full or partial access to the documents in question.

These recommendations are not legally binding for the institution. Nevertheless, if the latter fails to comply with her recommendations, the European Ombudsman can refer the issue to the European Parliament with a Special Report.

Finally, the slight increase in the number of complaints and enquiries accounts for only a very small proportion of the total number of requests for access to documents handled by the European Commission.

## **6. JUDICIAL REVIEW**

In 2019, the EU Courts further developed, in the framework of various judicial proceedings, the already considerable body of case-law concerning access to documents of the EU institutions. This newly generated case-law confirmed to a large extent the European Commission's practice under Regulation (EC) No 1049/2001 and will continue to guide it further.

### **6.1. The Court of Justice**

The Court of Justice handed down in 2019 no less than five judgments 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 one in 2018<sup>73</sup>.

In the framework of these five judgments, the Court of Justice clarified issues extending from procedural aspects to more substantive points arising from the implementation of Regulation (EC) No 1049/2001.

#### *6.1.1. Clarifications of some substantive rules*

Amongst the five judgments handed down by the Court of Justice in 2019 in relation to the implementation of Regulation (EC) No 1049/2001, two of them concerned the application of

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<sup>70</sup> See the 2017 Annual Report on access to documents, *op.cit.* p11.

<sup>71</sup> See also the 2018 Annual Report on access to documents, *op.cit.*

<sup>72</sup> <https://www.ombudsman.europa.eu/en/letter/en/89730>.

<sup>73</sup> Namely: order of 30 January 2019, *Verein Deutsche Sprache eV v European Commission*, C-440/18P, EU:C:2019:77; judgment of 13 March 2019, *AlzChem AG v European Commission*, C-666/17P, EU:C:2019:196; order of 21 May 2019, *P Anikó Pint v European Commission*, C-770/18, EU:C:2019:436; order of 6 November 2019, *Hércules Club de Fútbol, SAD v European Commission*, C-332/19 P, EU:C:2019:948; and order of 17 December 2019, *Rogesa Roheisengesellschaft Saar mbH v European Commission*, C-568/18P, EU:C:2019:1092;

the *general presumption of confidentiality* in relation to documents forming part of *State aid files*<sup>74</sup>.

The Court of Justice confirmed that the disclosure of documents in the Commission's administrative file in a State aid review procedure, in principle, undermines the protection of the purpose of an investigation, audit or inspection within the meaning of the third indent of Article 4(2) of Regulation (EC) No 1049/2001.

The institution may apply a general presumption of confidentiality on the mere ground that the requested document(s) form(s) part of an administrative State aid file<sup>75</sup>. The documents thus protected 'do not fall within an obligation of disclosure, in full or in part, of their content'<sup>76</sup>.

This general presumption is also applicable irrespective of (i) the number of documents requested, (ii) whether or not the applicant specifically identified the document or documents concerned<sup>77</sup>, or (iii) whether the latter are of 'pre-existing nature' to the formal opening of the State aid investigation in question<sup>78</sup>.

However, the said general presumption is rebuttable and does not exclude the possibility that some of the specific documents contained in the Commission's State aid file may be disclosed<sup>79</sup>. The burden of proof is on the applicant, regardless of whether it is difficult to adduce the evidence necessary to rebut it<sup>80</sup>. In that respect, it is noteworthy that the fact that the documents requested concern the applicant directly and specifically is not sufficient to rebut the general presumption in question<sup>81</sup>.

The Court of Justice further confirmed that documents relating to *EU Pilot procedures* are also covered by a general presumption of non-disclosure, due to their links with infringement procedures, which they precede, prepare or avoid<sup>82</sup>.

The abovementioned general presumptions acknowledged by the Court of Justice, do not exclude the right for the interested party to demonstrate the existence of *an overriding public interest* justifying the disclosure of the document(s) sought.

In this respect, the Court of Justice clarified that such an interest cannot be established on the grounds that the documents would enable the applicant to submit more convincing arguments in its action for annulment,<sup>83</sup> to prepare a legal action or to produce evidence in proceedings before the national courts<sup>84</sup>, or to allow the applicant to exercise its right of defence in the

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<sup>74</sup> Namely, the judgments of 13 March 2019, *AlzChem AG v European Commission* and of 6 November 2019, *Hércules Club de Fútbol, SAD v European Commission*, *op.cit.*

<sup>75</sup> See judgment of 13 March 2019, *AlzChem AG v European Commission*, *op.cit.* paragraph 32.

<sup>76</sup> *Ibid.* paragraph 70.

<sup>77</sup> *Ibid.* paragraph 31.

<sup>78</sup> *Ibid.* paragraph 34.

<sup>79</sup> *Ibid.* paragraph 38.

<sup>80</sup> *Ibid.* paragraph 39.

<sup>81</sup> Order of 6 November 2019, *Hércules Club de Fútbol, SAD v European Commission*, *op.cit.* paragraph 7.

<sup>82</sup> Order of 21 May 2019, *P Anikó Pint v European Commission*, *op.cit.* paragraph 12.

<sup>83</sup> Judgment of 13 March 2019, *AlzChem AG v European Commission*, *op.cit.* paragraph 56.

<sup>84</sup> Order of 21 May 2019, *P Anikó Pint v European Commission*, *op.cit.* paragraph 24.

framework of the infringement procedure pertaining to a State aid<sup>85</sup>. Each of these grounds thus qualify as private interests.

Finally, the Court of Justice reiterated its settled case law pursuant to which the administrative activity of the Commission does not require such extensive access to documents as that required by its legislative activity<sup>86</sup>.

### 6.1.2. Clarifications of some procedural rules

First, the Court of Justice acknowledged the presumption of lawfulness attached to the declaration by the institution that the requested documents do not exist<sup>87</sup>. The Court of Justice held that such a presumption (i) applies even to a declaration of a general nature (not concerning specific and identified documents)<sup>88</sup> and (ii) cannot be rebutted by a mere assertion that the alleged lack of existing documents would be manifestly contrary to a proper administrative practice<sup>89</sup>.

Secondly, the Court of Justice reiterated that an applicant does not retain, in principle, an interest in seeking annulment of the contested and not-formally-withdrawn decision, following the disclosure of the requested documents, albeit after introduction of judicial proceedings<sup>90</sup>. The continuation of that interest presupposes that that unlawfulness is liable to recur in the future, irrespective of the particular circumstances of the case in question, and must be assessed *in concreto*<sup>91</sup>.

## 6.2. The General Court

In 2019, the General Court handed down nine judgments involving the European Commission in relation to the right of access to documents under Regulation (EC) No 1049/2001<sup>92</sup>. The European Commission was a party in all of them.

Amongst these nine judgments, four of them rejected the actions of annulment against the Commission's decisions. More specifically, in two of those judgments, the General Court confirmed the decision of the European Commission and dismissed the actions in their

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<sup>85</sup> Order of 6 November 2019, *Hércules Club de Fútbol, SAD v European Commission*, *op.cit.* paragraph 16.

<sup>86</sup> Judgment of 13 March 2019, *AlzChem AG v European Commission*, *op.cit.* paragraph 65.

<sup>87</sup> Order of 30 January 2019, *Verein Deutsche Sprache eV v European Commission*, *op.cit.* , paragraph 14.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.* paragraph 23.

<sup>90</sup> Order of 17 December 2019, *Rogesa Roheisengesellschaft Saar mbH v European Commission*, *op.cit.* paragraphs 25 and 26. (In this instance, it was after introduction of the appeal.)

<sup>91</sup> *Ibid.* paragraphs 27 to 29.

<sup>92</sup> Orders of 12 November 2019, *Patrick Breyer v European Commission*, T 158/19, EU:T:2019:791, of 17 December 2019, *Uniunea Națională a Transportatorilor Rutieri din România (UNTRR) v European Commission*, T-560/19, EU:T:2019:905; of 11 April 2019, *Damien Bruel v European Commission*, T-202/18, EU:T:2019:253; of 30 April 2019, *Marco Bronckers v European Commission*, T-746/18, EU:T:2019:280 ; of 14 May 2019, *Régie autonome des transports parisiens (RATP) v European Commission*, T-422/18, EU:T:2019:339 ; of 12 September 2019, *Régie autonome des transports parisiens (RATP) v European Commission*, T-250/18, EU:T:2019:615 ; of 27 February 2019, *Pesticide Action Network Europe (PAN Europe) v European Commission*, T-25/18, EU:T:2019:129 ; and judgments of 14 May 2019, *Commune de Fessenheim and Others v European Commission*, T-751/17, EU:T:2019:330 ; of 12 February 2019, *Hércules Club de Fútbol, SAD v European Commission*, T-134/17, EU:T:2019:80 .

entirety<sup>93</sup>, whereas in the two other judgments, the actions were held as manifestly inadmissible<sup>94</sup>.

In the framework of the remaining five judgments, the General Court ordered the removal from the register of three actions against the European Commission following the applicants' decisions to discontinue the proceedings<sup>95</sup>. Moreover, in one case, the General Court granted the rectification of the action introduced wrongly against the European Commission instead of the Research Executive Agency<sup>96</sup>, and in another case, it held that there was no need to adjudicate<sup>97</sup>.

In the framework of this body of case law developed in 2019, the General Court had the opportunity to clarify issues extending from procedural aspects to more substantive points arising from the implementation of Regulation (EC) 1049/2001.

#### 6.2.1. Clarifications of some substantive rules

In 2019, the substantive clarifications issued by the General Court essentially revolved around the application of the exception pertaining to the *protection of the purpose of investigations* which is provided for in the third indent of Article 4(2) of Regulation (EC) No 1049/2001.

- *Pre-notification stage of State aids protected under a general presumption*

First, the General Court acknowledged the 'extension' of the application of a general presumption of confidentiality to the documents exchanged during the *pre-notification stage* of a State aid procedure<sup>98</sup>, on the ground that it ensures the good cooperation of Member States in an atmosphere of mutual trust and therefore the proper functioning of the possible subsequent preliminary investigation or even the formal investigation procedure<sup>99</sup>.

The General Court stressed in that respect that pre-notification exchanges take place at the initiative of the Member States, which depends, in essence, on the relationship of trust established by the institution with them<sup>100</sup>. Moreover, pre-notification does not give rise to a decision as such, but rather to a non-binding assessment, merely expressing the view of the Commission, which is subject to change on the basis of information that might be provided to the institution subsequently<sup>101</sup>.

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<sup>93</sup> Namely the judgments of 14 May 2019, *Commune de Fessenheim and Others v European Commission*, T-751/17, *op.cit.* and of 12 February 2019, *Hércules Club de Fútbol, SAD v European Commission*, T-134/17, *op.cit.*

<sup>94</sup> Namely the orders of 17 December 2019, *Uniunea Națională a Transportatorilor Rutieri din România (UNTRR) v European Commission*, T-560/19, *op. cit.*; and of 14 May 2019, *Régie autonome des transports parisiens (RATP) v European Commission*, T-422/18, *op. cit.*

<sup>95</sup> Namely the orders of 11 April 2019, *Damien Bruel v European Commission*, T-202/18, *op.cit.*, of 30 April 2019, *Marco Bronckers v European Commission*, T-746/18, *op.cit.*; and of 12 September 2019, *Régie autonome des transports parisiens (RATP) v European Commission*, T-250/18, *op.cit.*

<sup>96</sup> Order of 12 November 2019, *Patrick Breyer v European Commission*, T 158/19, EU:T:2019:79.

<sup>97</sup> Order of 27 February 2019, *Pesticide Action Network Europe (PAN Europe) v European Commission*, T-25/18, EU:T:2019:129.

<sup>98</sup> Judgment of 14 May 2019, *Commune de Fessenheim and Others v European Commission*, T-751/17, *op.cit.* paragraph 71.

<sup>99</sup> *Ibid.* paragraph 50.

<sup>100</sup> *Ibid.* paragraph 54.

<sup>101</sup> *Ibid.* paragraph 33.

According to settled case law, where an institution bases its decision on an exception to the right of access laid down in Article 4(2) of Regulation (EC) No 1049/2001, it must in principle, provide explanations as to how access to that document could specifically and actually undermine the interest protected by that exception.

The General Court reiterated nevertheless that where the institution is entitled to rely on a general presumption of confidentiality, it is not necessary for its reasoning to go into all the various relevant facts and points of law. It is indeed sufficient for the statement of reasons to disclose in a clear and unequivocal fashion the reasoning followed by the institution, in such a way as to enable, first, the persons concerned to ascertain the reasons for the measure adopted and to defend their rights and, second, to enable the Court to exercise its power of review<sup>102</sup>.

The General Court further stressed that the application by the institution of a general presumption of confidentiality in order to refuse access to the documents exchanged during the pre-notification stage of a State aid procedure does not infringe neither Article 42, nor Article 47 of the Charter of Fundamental Rights<sup>103</sup>.

As regards this last provision, it is noteworthy that the General Court followed the European Commission, by noting that ‘the purpose of Regulation No 1049/2001 is to settle questions relating to public access to documents held by the EU institutions, not those relating to the evidence to be produced by the parties in judicial proceedings, whether it be a dispute before the EU judicature or before the national courts’<sup>104</sup>.

- *Protection of closed State aid files under a general presumption of confidentiality*

Moreover, the General Court confirmed the applicability of the presumption of confidentiality to *State aid files, even closed ones*, when a legal action brought against the decision on the substance is pending<sup>105</sup>. The General Court thereby abided by settled case law, which takes into account the fact that it is open to the European Commission, depending on the outcome of the legal proceedings, to resume its investigations with a view to possibly adopt of a further decision<sup>106</sup>.

- *Concept of overriding public interest*

The General Court also had the opportunity to clarify the limits of the concept of ‘overriding public interest’ within the meaning of Article 4 of Regulation (EC) No 1049/2001. The latter plays a crucial role in the framework of the Regulation, insofar as it is susceptible of prevailing over some of the exceptions justifying the refusal to grant access to requested documents. The General Court reiterated in this respect, that the *right of defence* of the

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<sup>102</sup> *Ibid.* paragraph 72.

<sup>103</sup> *Ibid.* see paragraphs 112 and 125 respectively.

<sup>104</sup> *Ibid.* paragraph 123.

<sup>105</sup> Judgment of 12 February 2019, *Hércules Club de Fútbol, SAD v European Commission*, T-134/17, *op.cit.* see *inter alia*, paragraphs 44 to 47, 54 and 55.

<sup>106</sup> *Ibid.*

applicant cannot qualify as ‘an overriding public interest’ within the meaning of Article 4 of Regulation (EC) No 1049/2001<sup>107</sup>.

Similarly, the particular interest that may be claimed by a person requesting access to a/some *document(s) concerning him personally* cannot be taken into account as an overriding public interest within the meaning of Article 4(2) of Regulation (EC) No 1049/2001, as the purpose of this regulation is to give the general public a right of access to documents of the institutions, and not to lay down rules designed to protect the particular interest which a specific individual may have in gaining access to one/some of them<sup>108</sup>.

#### 6.2.2. Clarifications of some procedural rules

In 2019, the General Court also addressed several procedural issues pertaining to actions of annulment against the European Commission’s decisions adopted within the framework of Regulation (EC) No 1049/2001.

- *The mandatory nature of the time limit under Article 263 TFEU*

As regards procedural rules, the General Court first emphasised the imperative character of the two-month time limit provided for in Article 263 of the Treaty on the Functioning of the European Union for bringing an annulment action against decisions of the institution.

The two-month time limit is thus a matter of public policy and is not subject to the discretion of the parties or the Court<sup>109</sup>.

The time limit provided for in Article 263 of the Treaty on the Functioning of the European Union was established in order to ensure legal clarity and certainty, and to avoid any discrimination or arbitrary treatment in the administration of justice<sup>110</sup>.

It is only subject to derogations in case of the existence of unforeseeable circumstances or of force majeure within the meaning of Article 45 the Statute of the European Court of Justice<sup>111</sup>.

Accordingly, an annulment action against a confirmatory decision of the European Commission which is introduced outside the two-month limit laid down in Article 263 of the Treaty on the Functioning of the European Union, without being subject to any of the above-mentioned derogations, must be rejected as manifestly inadmissible<sup>112</sup>.

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<sup>107</sup> *Ibid.* paragraphs 46-47 and 54.

<sup>108</sup> *Ibid.* paragraph 44.

<sup>109</sup> Order of 17 December 2019, *Uniunea Națională a Transportatorilor Rutieri din România (UNTRR) v European Commission*, T-560/19, EU:T:2019:905, paragraph 7.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.* paragraph 9.

<sup>112</sup> *Ibid.* paragraph 10.

- *Legal effects of the confirmatory decision*

Secondly, the General Court recalled that, in principle, only the decision adopted by the Secretary-General on behalf of the European Commission is actionable under Article 263 the Treaty on the Functioning of the European Union. This position is consistent with settled case-law, pursuant to which 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<sup>113</sup>.

Indeed, the decision issued at confirmatory stage pursuant to Article 8(1) of Regulation (EC) No 1049/2001, constitutes a legal decision, which entirely replaces *ex tunc* the previous statement of position contained in the initial reply of the institution<sup>114</sup>. Consequently, sole this decision is capable of producing legal effects such as to affect the interests of the applicant and, therefore, of being the subject of an action for annulment under Article 263 the Treaty on the Functioning of the European Union<sup>115</sup>.

- *Consequences of the de facto withdrawal of the contested decision*

Thirdly, the General Court confirmed that an action for annulment of a Commission decision becomes devoid of purpose and no longer requires adjudication, where the applicant obtained the requested information by a subsequent decision of the institution, which *de facto* withdrew the contested one<sup>116</sup>.

- *Rectification of errors of forms in the annulment action*

Finally, the General Court granted the correction requested by an applicant who had mistakenly introduced an action against the European Commission instead of the Research Executive Agency<sup>117</sup>.

The General Court noted in that respect that pursuant to settled case law, errors in form concerning the designation of the defending party can be corrected after the introduction of the action where its identity can be inferred without any ambiguity<sup>118</sup>.

Consequently, the General Court accepted to consider that the Research Executive Agency would be considered as the party against whom the annulment action was brought<sup>119</sup>. In this instance, the heading of the contested decision which indicated, in capital letters, as expeditor 'European Commission Research Executive Agency' was deemed by the General Court as

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<sup>113</sup> See *inter alia*, judgment of 11 December 2018, *Arca Capital Bohemia a.s. v European Commission*, T-441/17, EU:T:2018:899, paragraphs 18-20.

<sup>114</sup> Order of 14 May 2019, *Régie autonome des transports parisiens (RATP) v European Commission*, T-422/18, EU:T:2019:339, paragraph 35.

<sup>115</sup> *Ibid.* paragraph 37.

<sup>116</sup> Order of 27 February 2019, *Pesticide Action Network Europe (PAN Europe) v European Commission*, T-25/18, *op.cit.* paragraphs 18 to 20.

<sup>117</sup> Order of 12 November 2019, *Patrick Breyer v European Commission*, T 158/19, *op.cit.*

<sup>118</sup> *Ibid.* paragraph 24.

<sup>119</sup> *Ibid.* paragraph 31.

possibly misleading as to the distinct legal personality of the Research Executive Agency<sup>120</sup>. Accordingly, the action for annulment was corrected and held admissible against the Research Executive Agency.

### 6.3. Court cases introduced against the European Commission in 2019<sup>121</sup>

In 2019, 12 new cases involving the European Commission were brought before the General Court under Regulation (EC) No 1049/2001<sup>122</sup>. Amongst those cases, three of them were, already during the course of 2019, either rejected, withdrawn, or continued against another party<sup>123</sup>.

In parallel, two 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<sup>124</sup>. Both appeals were rejected as manifestly unfounded, by two orders handed down in 2019.

The European Commission followed attentively the developments of the case law of the European Courts in 2019. The institution particularly welcomed the confirmation by the European Courts in all the above-mentioned adjudicated cases in 2019 of the compliance of its administrative practice with Regulation (EC) No 1049/2001. Indeed, all eight cases adjudicated by both the Court of Justice and the General Court in 2019<sup>125</sup> resulted in full dismissals of the annulment actions against the European Commission's decisions, and the position of the institution therefore prevailed.

The European Commission also took good note of all above-mentioned substantive and procedural clarifications provided by the European Courts in 2019 in relation to Regulation (EC) No 1049/2001. As in the previous years, the Secretariat-General, jointly with the Legal Service, regularly organised, seminars to update the staff of the European Commission on the recent case law developments.

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<sup>120</sup> *Ibid.* paragraph 26.

<sup>121</sup> As of 31 December 2019.

<sup>122</sup> Namely, cases: *PL v European Commission*, T-728/19; *Basaglia v European Commission*, T-727/19; *AlzChem Group v European Commission*, T-569/19; *Uniunea Națională a Transportatorilor Rutieri din România (UNTRR) v European Commission*, *op.cit.*, T-560/19; *Homoki v European Commission*, T-517/19; *Public Resource Org and Right to Know v European Commission*, T-185/19; *Bronckers v European Commission*, T-166/19; *Breyer v Research Executive Agency*, T-158/19, *op.cit.*; *Activos e Inversiones Monterroso v CRU*, T-16/19; *Marco Bronckers v European Commission*, T-746/18, *op.cit.*; *Umweltinstitut München v European Commission*, T-712/18; and *Campbell v European Commission*, T-701/18.

<sup>123</sup> Namely, cases *Uniunea Națională a Transportatorilor Rutieri din România (UNTRR) v European Commission*, *op.cit.*, T-560/19; *Breyer v Research Executive Agency*, T-158/19, *op.cit.*; and *Marco Bronckers v European Commission*, T-746/18, *op.cit.*

<sup>124</sup> Namely, cases *Anikó Pint v European Commission*, C-770/18 P, *op.cit.*; and *Hércules Club de Fútbol, SAD v European Commission*, C-332/19 P, *op.cit.*

<sup>125</sup> Other than those which were removed from the Register or did not require any adjudication.

## CONCLUSIONS

The year 2019 marked the transition from the ‘Juncker Commission’ to the ‘von der Leyen Commission’.

Against this political background, transparency, integrity and accountability which are the pillars of democracy, remained in 2019 top priorities of the European Commission.

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

In 2019, this was illustrated, *inter alia*, by the adoption by the two co-legislators of the Commission’s proposal for Regulation of the European Parliament and of the Council on the European Citizens’ initiative, designed to facilitate increased participation of European citizens in the democratic process of the institutions; but also by the publication of detailed and practical guidance on ethical standards for Members of the Commission who campaigned for the European Parliament Elections in May; the continued proactive publication of Brexit documents and the institution’s commitment to maintaining this unprecedented level of transparency in respect of the implementation of the Withdrawal Agreement and throughout the upcoming negotiations on the future EU-UK relationship.

These measures build on multiple well-established tools and initiatives which already contribute to the European Commission’s upholding of the principle of transparency, such as the Transparency Portal; the systematic publication of Commissioners’ meetings; the submission of their Declarations of interests; the Register of Commission Documents and other registers<sup>126</sup>; EurLex<sup>127</sup>; online resources providing information on EU funding opportunities<sup>128</sup> and funding recipients<sup>129</sup>; the portal on public consultations and the EU Open Data Portal; etc.

Against this background, in 2019, 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 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 2019, it reached its highest number of requests ever since the entry into force of the Regulation in 2001, having received no less than 7,445 initial applications.

Most of these applications pertained each to a range of documents, if not entire files and gave rise to several different replies. The institution responded by no less than 8,449 initial replies.

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<sup>126</sup> Such as the Register of Commission Expert groups and other similar entities; the Comitology Register, etc.

<sup>127</sup> The database which offers access to EU law, case-law by the Court of Justice of the European Union and other public EU documents.

<sup>128</sup> In respect to grants and tenders.

<sup>129</sup> Via the Financial Transparency System.

On one hand, the constant high rise in the number of applications observed since 2016, and their complexity has increasingly confronted the institution with the difficult challenge of reconciling the principle of transparency with the principle of efficiency and good administration.

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

On 24 September 2019, the European Commission participated in the expert seminar held by Finland's Presidency of the Council of the European Union on 'The Future of EU Transparency', aimed at providing further impetus to an open, efficient and independent administration in the era of digitalisation. In the framework of this joint discussion of concrete measures to increase transparency during the coming legislature, the European Commission took stock of the case-law on access to documents and explored how Regulation (EC) No 1049/2001 stood the test of the time.

The clarifications provided by the Court of Justice contributed significantly to improve the Commission's implementation of the existing rules.

The low rates of actions and judgments in annulment of the institution's decisions in that area illustrates that the 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 slight increase in the number of appeals submitted to the Court of Justice and complaints to the European Ombudsman should not conceal that they account for only a very small proportion of the total number of requests handled by the European Commission, which is also constantly rising.

In conclusion, in 2019 the European Commission delivered on its pledge for an open European administration, as provided for under the EU Treaties and the Charter of Fundamental Rights, and as crystallised by Regulation (EC) No 1049/2001.

Ultimately, the European Commission remained more than ever determined to fight the new threats for democracy stemming from the lack of transparency in the digital era or disinformation, the antithesis of transparency.