

The European Ombudsman Draft recommendation

Draft recommendation to the European Commission in complaint 3208/06/GG

(Made in accordance with Article 3(6) of the Statute of the European Ombudsman)
[1]

THE COMPLAINT

Article 11 ("Registers") of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2] ("Regulation 1049/2001") provides as follows:

"1. To make citizens' rights under this Regulation effective, each institution shall provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without delay.

2. For each document the register shall contain a reference number (including, where applicable, the interinstitutional reference), the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. References shall be made in a manner which does not undermine protection of the interests in Article 4.

3. The institutions shall immediately take the measures necessary to establish a register which shall be operational by 3 June 2002."

The complainant, a British non-governmental organization, pointed out that Article 11 obliged each of the three main EU institutions to set up a public register of documents. According to the complainant, the Council of the European Union and the European Parliament had set up such registers. Although there was room for improvement in the scope of these registers, the complainant considered that they could broadly be said to meet the requirements of Regulation 1049/2001.

The complainant alleged, however, that the Commission's register of documents did not comply with the requirements of Regulation 1049/2001. This register only contained legislative texts and adopted Commission reports (including SEC documents). It clearly did not include the vast majority of the documents produced and received by the Commission.

The complainant pointed out that, in its annual reports on the implementation of Regulation 1049/2001, the Commission had simply spoken of gradually "improving" its register.

The complainant noted that recital 10 and Article 2(3) of Regulation 1049/2001 provided that the latter does not only cover documents drawn up by the institutions but also documents received by them.

According to the complainant, the obligation set out in Article 11 had to be seen in the context of Article 3(a) of Regulation 1049/2001 which defined "document" as "any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility".

In the complainant's view, the obligations set out in Article 11 had to be seen in the overall context of Article 1 which obliged the institutions "to ensure the widest possible access to documents".

The complainant took the view that the Commission's register did not fulfil these requirements because it contained only a fraction of the documents produced and received by the Commission in the course of its activities. It added that since four years had now passed from the deadline date set down in Article 11(3) of Regulation 1049/2001, the Commission's approach constituted maladministration.

In the complainant's view, this failure was compounded by the fact that the Commission had internal databases (e.g., 'Adonis') which could provide the basis for a proper public register of documents.

THE INQUIRY

The Commission's opinion

In its opinion, the Commission made the following comments:

General comments

Article 11 did not stipulate that the register should include references to all documents. On the other hand, Article 3(a) gave a very wide definition of the term "document". A fully comprehensive register required a precise definition of what is a "document" that has to be included in the register. This was the case in Sweden, Finland and Denmark, countries with a register-based system for public access to their documents, where a clear difference was made between "documents" in general and "official documents", the latter being the only documents to which rights of access apply. Under Regulation 1049/2001, the registers were intended to assist applicants in identifying relevant documents; they were search tools and did not in any way limit the scope of the right of access.

Public registers in the field of Community legislation

Regulation 1049/2001 governed access to any type of document held by Parliament, the Council and the Commission. However, as recitals 1, 2 and 6 and Articles 12 and 13 showed, it had a particular focus on the legislative activity of these institutions. The legislative activity of the Commission was well covered by public registers.

The public register of documents opened by the Commission on 3 June 2002 had the following contents:

- references to all draft proposals, reports and communications (COM documents) before their adoption;
- the full text of all adopted proposals, reports and communications (COM final documents); references of working papers and key administrative documents (SEC documents);
- references of legal acts adopted by the Commission (C documents);
- the full text of agendas and minutes of the meetings of the Commission.

In addition, a specific register on documents regarding the Commission's decision-making process under delegated powers (the so-called 'comitology' procedures) had been opened in December 2003. This public register on comitology had the following contents:

- agendas of committee meetings;
- draft implementing measures;
- summary records of committee meetings;
- voting results as regards opinions delivered by a committee.

In a further effort to increase the transparency of the preparatory work, the Commission had opened a specific register on expert groups.

Moreover, the Pre-Lex system (<http://ec.europa.eu/prelex>) provided extensive information on the different stages in the decision-making process between the institutions, as well as links to the sites containing the documents themselves. It complemented the above-mentioned registers and the registers of the European Parliament and of the Council, providing the public with a comprehensive view of legislation in progress.

Other information tools available to the public

This particular focus on legislation did not mean that the other activities of the Commission were left in the dark. All Directorates-General of the Commission

had set up specific websites providing information on their policies and activities, as well as access to key documents.

Further developments

The Commission would gradually extend the scope of its public registers and other information tools available to the public. The internal databases, to which the complainant had referred, would provide the basis for new or expanded public registers. As regards 'Adonis', it should be clarified that there was no single internal database on Commission documents. Adonis was the common software used by the Commission services for the internal registration and follow-up of mail and documents. Each Directorate-General or administrative unit had its own internal register of documents. In the near future, a new centralised document management system should replace the Adonis software. In the context of its development, a module for the export of document references from this system to a public register was foreseen.

Conclusion

The complainant had based its complaint on one Commission register only and had not taken into account the other information tools, which were available to the public. Moreover, the allegation that the register only contained legislative texts and adopted Commission reports was not correct, since references of documents were entered before their adoption.

The complainant's observations

In its observations, the complainant made the following comments:

Regulation 1049/2001 did not refer to "registers" in the plural, that is, that the documents could be listed in a series of "registers".

Article 11 was unambiguous in its reference to "a" register of documents.

Article 11 was unambiguous and clearly referred to all documents. Since Regulation 1049/2001 contained a number of express exceptions to its rules, it followed that if the drafters had wanted Article 11 to apply to some documents only, they would have specified this expressly.

Quite extraordinarily, the Commission sought to question the definition of "document". However, Article 3(a) of Regulation 1049/2001 set out the definition of the term "document". Article 11 combined with Article 3(a) was perfectly clear: the register had to contain a reference to all documents as defined in Article 3(a).

References to national law were irrelevant, since Regulation 1049/2001 was not dependant on national law for its interpretation or implementation. If anything, the fact that national law distinguished between documents in

general and documents on a register proved a contrario that the EU legislator did not intend to make such a distinction.

These issues raised a fundamental point. The Commission could not blatantly ignore what was set out in Regulation 1049/2001. Its response was even more worrying as the Commission had an obligation, as guardian of the Treaty, to ensure the proper implementation of regulations.

Regulation 1049/2001 did not have a "particular focus" on legislative activities. The references to legislative activities in Articles 12 and 13 were clearly complementary to the provisions of Article 11 in that they referred not to a register but rather to direct access to the content of references listed.

The Commission had stated that its legislative activity was well covered by public registers. However, the terms used by the Commission in describing these registers were revealing, as they indicated that only final adopted COM documents and agendas/minutes were available in a full-text version. The other categories were references only and not available in a full-text version.

Article 12 of Regulation 1049/2001 concerned "direct access" to the full text of documents. According to Article 12(2), this concerned "[i]n particular" legislative documents, "that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States". Article 12(3) stated that, where possible, other documents, notably those relating to the development or strategy, should also be directly accessible. However, in April 2007 the complainant had carried out a survey as regards three Directorates-General of the Commission. It emerged from this survey that, to take an example, as far as Directorate-General Justice and Home Affairs was concerned, the full text of only 43% of COM documents, 21% of SEC documents and 0.5% of the Commission's (599) decisions was directly accessible.

The complainant therefore submitted a further complaint that the Commission was failing to abide by the terms of Article 12 of Regulation 1049/2001.

As regards the comitology register, the Commission had stated that all documents were available in full text. However, this was not the case. For instance, a number of committees did not publish agendas and only about two-thirds of agendas were listed.

As regards other sources of information, these were by no means comprehensive and could not be said to meet the standards set out in Regulation 1049/2001. Moreover, the provision of 'information' should not be confused with access to documents under Regulation 1049/2001.

The Commission had stated that it would gradually extend the scope of its public registers. However, it was not for the Commission to take its time when it was obliged to provide a proper public register as from mid-2002. Moreover, in light of the position taken by the Commission in its opinion, there was no guarantee whatsoever that the new centralised document management

system to which the Commission had referred would lead to a proper public register of documents.

As regards Adonis, if each Directorate-General had its own internal register of documents, it was to be asked why these registers could not, as an intermediate step, be made publicly available.

Further inquiries

After careful consideration of the Commission's opinion and the complainant's observations, it appeared that further inquiries were necessary.

On 5 July 2007, the Ombudsman therefore asked the Commission to reply to the following questions:

1. In its report of 30 January 2004 on the application of Regulation 1049/2001 (COM(2004) 45 final), the Commission noted the following with regard to its register and the registers of Parliament and of the Council: "The documents covered by these registers, in particular that of the Commission, are to be gradually extended. Initially, the Commission focused on the registration of legislative documents which are also the documents for which direct access is a priority under Article 12(2) of the Regulation." This statement would appear to suggest that the extensions of the scope of the register that are envisaged here concern documents other than those relating to the legislative activity of the Commission. However, the extensions carried out until now would essentially appear to be limited to the Commission's activity concerning legislation. Could the Commission therefore please specify if it considers that its register(s) only need to list documents concerning its involvement in the legislative process of the Communities and, if so, what the reasons for this belief are?

(2). In its above-mentioned report of 30 January 2004, the Commission noted that whereas the "vast majority" of applications for access at Parliament and at the Council arise from the consultation of the registers, at the Commission "only a small number of applications concern documents identified in the two registers, that of the COM, C and SEC documents and that of the President's mail. (...) Moreover, the applications sent to the Commission do not usually concern legislative activities, but rather the monitoring of the application of Community law." In its Green Paper of 18 April 2007 on "Public Access to documents held by institutions of the European Community. A review" (COM(2007) 185 final), the Commission itself acknowledged that "[t]here is room for improvement as regards the scope of the registers, in particular those of the Commission". Could the Commission please explain why it nevertheless considers that its present approach to Article 11 of Regulation 1049/2001 is in conformity with the letter and the spirit of that Regulation?

(3). In its reply to the Ombudsman's request for information in case 2350/2005/GG [3], the Commission submitted that, given the very wide definition of the term "document" in Regulation 1049/2001, it would be "impossible" to operate a comprehensive register. However, in its opinion in

the present case the Commission stated that each of its Directorates-General or administrative units had its own internal register of documents. Could the Commission please explain why these internal registers cannot be used to extend the scope of the register(s) set up under Article 11 of Regulation 1049/2001?

(4).In its observations, the complainant appears to allege that the Commission has also failed to comply with Article 11 of Regulation 1049/2001 by offering several registers rather than a single one. Could the Commission please provide a supplementary opinion on this new allegation?

The Commission's reply

In its reply, the Commission made the following comments:

(1) The Commission did not consider that its public registers should only cover documents relating to its legislative activities. However, it took the view that the traceability of legislative documents was a priority.

(2) Article 11 did not oblige the institutions to list all their documents. Furthermore, it was impossible to set up a fully comprehensive register, given the wide definition of the term "document" in Article 3(a) of Regulation 1049/2001. However, the Commission intended gradually to extend the scope of its public registers, as it had already done with the register on comitology and the register on expert groups.

(3).The Commission had no single electronic database for the registration of its documents yet. There were common rules for the registration of documents and all administrative units used common software. However, these registers did not have a uniform data format. Furthermore, they had been set up for internal administrative purposes and their content could not simply be transferred to a public register. The data contained in the internal registers would have to be screened, selected and reformatted through interfaces before they could be fed into a public register. This would require important investments, which would be useless since the current system will be replaced with a single registration system.

(4) .It could not be concluded from Article 11 of Regulation 1049/2001 that the institutions should set up a single public register. The purpose of this provision was to enable members of the public to identify documents held by the institutions that might be of interest to them. Regulation 1049/2001 did not prescribe how this was to be achieved. Considering the number and diversity of documents held by the Commission, it was questionable whether a huge single register would offer the best service to the public. The public registers of the Commission were complementary and their scope was well-defined. The Commission was not aware that users had experienced difficulties in searching the registers, on account of the fact that there was no single Commission register.

The complainant's observations

In its observations, the complainant maintained its complaint and expressed its disappointment at the fact that the Commission had simply reiterated its position. It added that it was extraordinary that the Commission, which was a custodian of EU law, should think that it could simply ignore or re-interpret the obligations placed upon it under Regulation 1049/2001.

THE DECISION

1 The scope of the Ombudsman's inquiry

1.1 The present complaint was submitted to the Ombudsman by a British non-governmental organization. In its complaint, the complainant alleged that the European Commission failed to comply with its obligations under Article 11 ("Registers") of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [4] ("Regulation 1049/2001"). The complainant argued that this register should include all the documents within the meaning of Article 3(a) of Regulation 1049/2001 that were in the Commission's possession but that the Commission's register did not include the vast majority of the documents produced and received by that Institution.

1.2 In its observations on the Commission's opinion, the complainant further alleged that, by offering several registers rather than a single one, the Commission had also failed to comply with Article 11 of Regulation 1049/2001. Given that this allegation was closely related to the subject-matter of the original complaint, the Ombudsman decided to include it in the present inquiry.

1.3 In its observations on the Commission's opinion, the complainant alleged that the Commission has also failed to comply with Article 12 of Regulation 1049/2001. Given that the complainant did not yet appear to have made the appropriate prior approaches to the Commission concerning this issue, the Ombudsman decided that this new allegation should not be taken up for inquiry in the present case.

2 The Commission's alleged failure to comply with its obligations under Article 11 of Regulation 1049/2001

2.1 The complainant alleged that the Commission had failed to comply with its obligations under Article 11 Regulation of 1049/2001 (1) since its register of documents only contained a fraction of the documents produced and received by the Commission in the course of its activities and (2) because it offered several registers rather than a single one.

2.2 In its opinion and in its reply to a request for further information, the Commission provided the following comments:

- Article 11 did not oblige the institutions to list all their documents.
- Regulation 1049/2001 governed access to any type of document held by Parliament, the Council and the Commission. However, it had a particular focus on the legislative activity of these institutions, as recitals 1, 2 and 6 and Articles 12 and 13 showed. The legislative activity of the Commission was well covered by the public register of documents opened by the Commission on 3 June 2002, by an additional register on documents regarding the Commission's decision-making process under delegated powers (the so-called 'comitology' procedures) that had been opened in December 2003 and by a specific register on expert groups. Moreover, the Pre-Lex system (<http://ec.europa.eu/prelex>) provided extensive information on the different stages in the decision-making process between the institutions, as well as links to the sites containing the documents themselves.
- The Commission did not consider that its public registers should only cover documents relating to its legislative activities. The particular focus on legislation did not mean that the other activities of the Commission were left in the dark. All Directorates-General of the Commission had set up specific websites providing information on their policies and activities, as well as access to key documents.
- It was impossible to set up a fully comprehensive register, given the wide definition of the term "document" in Article 3(a) of Regulation 1049/2001. However, the Commission intended gradually to extend the scope of its public registers, as it had already done with the register on comitology and the register on expert groups.
- The Commission had no single electronic data base for the registration of its documents yet. Each Directorate-General or administrative unit had its own internal register of documents. However, these registers did not have a uniform data format. Furthermore, they had been set up for internal administrative purposes and their content could not simply be transferred to a public register. The data contained in the internal registers would have to be screened, selected and reformatted through interfaces before they could be fed into a public register. This would require important investments, which would be useless since the current system will be replaced with a single registration system. In the near future, a new centralised document management system should replace the software currently used. In the context of its development, a module for the export of document references from this system to a public register was foreseen.
- Under Regulation 1049/2001, the registers were intended to assist applicants in identifying relevant documents; they were search tools and did not in any way limit the scope of the right of access.
- It could not be concluded from Article 11 of Regulation 1049/2001 that the institutions should set up a single public register. The purpose of this provision

was to enable members of the public to identify documents held by the institutions that might be of interest to them. Regulation 1049/2001 did not prescribe how this was to be achieved. Considering the number and diversity of documents held by the Commission, it was questionable whether a huge single register would offer the best service to the public. The public registers of the Commission were complementary and their scope was well-defined.

2.3 In its observations, the complainant submitted that Article 11 of Regulation 1049/2001 was unambiguous and clearly referred to all documents within the meaning of Article 3(a). Furthermore, Article 11 did not refer to "registers", but to "a" register of documents. The complainant argued that the Commission could not blatantly ignore what was set out in Regulation 1049/2001. The complainant added that the Commission's response was even more worrying as the Commission had an obligation, as guardian of the Treaty, to ensure the proper implementation of regulations.

The complainant submitted that Regulation 1049/2001 did not have a "particular focus" on legislative activities. In its view, the references to legislative activities in Articles 12 and 13 were clearly complementary to the provisions of Article 11 in that they referred not to a register but rather to direct access to the content of references listed. The complainant also expressed doubts as regards the Commission's statement that its legislative activity was well covered by public registers. As regards other sources of information, the complainant argued that these were by no means comprehensive and could not be said to meet the standards set out in Regulation 1049/2001. Moreover, the provision of information should not be confused with access to documents under Regulation 1049/2001.

As regards the Commission's statement that it would gradually extend the scope of its public registers, the complainant took the view that it was not for the Commission to take its time when it was obliged to provide a proper public register as from mid-2002. Moreover, in light of the position taken by the Commission in its opinion there was no guarantee that the new centralised document management system to which the Commission had referred would lead to a proper public register of documents.

2.3 Article 11 of Regulation 1049/2001 provides as follows:

"1. To make citizens' rights under this Regulation effective, each institution shall provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without delay.

2. For each document the register shall contain a reference number (including, where applicable, the interinstitutional reference), the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. References

shall be made in a manner which does not undermine protection of the interests in Article 4.

3. The institutions shall immediately take the measures necessary to establish a register which shall be operational by 3 June 2002."

2.4 It should be recalled that the Ombudsman has already had occasion to consider this provision in the draft recommendation and the subsequent special report that he submitted in case 917/2000/GG, which concerned the Council of the European Union [5]. In that case, the Ombudsman arrived at the conclusion that the register maintained by the Council should comprise all the documents put before the Council. Given that the complainant in that case was only concerned about this type of document, the Ombudsman did not have to examine whether other documents, such as correspondence with other institutions or third parties, should also be included in the register. However, the Ombudsman noted that the relevant register was intended, as Article 11 of Regulation 1049/2001 underlines, "[t]o make citizens' rights under this Regulation effective". Article 2(3) provides that the Regulation shall apply to "all" documents held by an institution, "that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union". Recital 4 indicates that the purpose of Regulation 1049/2001 is to give "the fullest possible effect to the right of public access". In light of these provisions, the Ombudsman took the view that the register referred to in Article 11 could only achieve its aim "[t]o make citizens' rights under this Regulation effective" if it were as comprehensive as possible.

2.5 The Ombudsman notes that the Commission has put forward a number of arguments to support its view that Article 11 does not oblige it to include all the documents that are in its possession and that concern its activities in its register(s) of documents.

2.6 As regards the Commission's argument that appears to be based on the wording of Article 11, it is true that this provision does not explicitly state that all the above-mentioned documents need to be listed in the Commission's register of documents. However, Article 11(1) provides that "references to documents shall be recorded in the register without delay". Given that the term "document" is defined in Article 3(a) of Regulation 1049/2001 as "any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility", it is logical to assume that all these documents need to be included in the register. If the legislator had intended the term "document" to have a different, more limited meaning in Article 11 of Regulation 1049/2001, he could have been expected to include a provision to that effect. It should be noted in this context that Article 9 concerns the handling of "sensitive" documents and that Article 12(2) refers to "legislative" documents. This confirms that the legislator distinguished between certain categories of documents in cases where he considered this to be appropriate. The absence of any such distinction in Article 11 can hardly be interpreted otherwise than

as meaning that all documents within the meaning of Article 3(a) are meant to be covered by this provision.

2.7 In any event, the interpretation adopted by the Ombudsman in case 917/2000/GG would appear to be the only one that does justice to the *effet utile* of Article 11. As Article 11(1) expressly confirms, the aim pursued by this provision is "[t]o make citizens' rights under this Regulation effective". However, in order to be able to exercise their right of access to documents under Regulation 1049/2001, citizens must have sufficient information as to what documents are in the hands of the institutions. It is indeed difficult to see how a citizen could make proper use of his/her right of access if s/he does not even know which documents are held by an institution. This is moreover confirmed by the Commission itself. In its report of 30 January 2004 on the application of Regulation 1049/2001 (COM(2004) 45 final, p. 39), the Commission noted that whereas the "vast majority" of applications for access at Parliament and at the Council arise from the consultation of the registers, at the Commission "only a small number of applications concern documents identified in the two registers, that of the COM, C and SEC documents and that of the President's mail [6]. (...) Moreover, the applications sent to the Commission do not usually concern legislative activities, but rather the monitoring of the application of Community law." The Ombudsman considers that this statement clearly confirms that the scope of the register(s) maintained by the Commission is insufficient [7].

2.8 As regards the Commission's argument that Regulation 1049/2001 particularly focuses on the legislative activity of the EU institutions, the Ombudsman considers that this argument is unconvincing. It should be noted that, among the recitals or provisions invoked by the Commission in this context, only Article 12 refers to registers. In addition to that, these recitals and provisions are concerned not with the issue of access to documents, in general, but with the question of how such access is to be given. Article 12(2) provides that "legislative documents" should, to the extent possible, be made "directly" accessible. Since Article 12(1) stipulates that the institutions shall as far as possible "make documents directly available to the public in electronic form or through a register", this means that legislative documents should preferably not be made accessible by being listed in a register but "directly...in electronic form". The importance thus assigned to the possibility of direct access to legislative documents clearly does not mean that the Commission should be entitled to refrain from listing other documents on its register.

2.9 The Ombudsman notes that the registers of documents maintained by the Commission at present only appear to concern the legislative activity of the EU institutions and certain documents adopted by the Commission. As mentioned above, the complainant expressed doubts as regards the Commission's statement that its legislative activity was well covered by public registers. The Ombudsman considers, however, that the present case does not make it necessary for him to carry out further inquiries concerning this issue. In reply to a question put to it to that effect, the Commission has confirmed that it did not consider that its public register(s) should only cover documents relating to its legislative activities. However, it is abundantly clear

that the registers currently maintained by the Commission do not provide reference to many documents that concern the Commission's activities and are in the Commission's possession. It should be noted in this context that the Commission has not disputed the complainant's statement that only a "fraction" of the Commission's documents is listed on its registers. The fact that certain 'key' documents may be available on specific websites maintained by individual services of the Commission or that these websites provide additional information does not affect this conclusion.

2.10 The Ombudsman notes that the Commission also argued that it was impossible to set up a fully comprehensive register, given the wide definition of the term "document" in Article 3(a) of Regulation 1049/2001. The Ombudsman is not convinced that it would be impossible to set up a fully comprehensive register of the documents drawn up or received by the Commission. As the Commission has acknowledged, each of its Directorates-General or administrative units has its own internal register of documents. The Ombudsman therefore finds it difficult to see why it should be impossible for the Commission to draw up a comprehensive register of documents on the basis of the existing internal registers.

2.11 In its reply to the Ombudsman's request for further information, the Commission stressed that the existing internal registers had been set up for internal administrative purposes and that their content could not simply be transferred to a public register. According to the Commission, the data contained in the internal registers would have to be screened, selected and reformatted through interfaces before they could be fed into a public register. The Commission added that this would require important investments, which would be useless since the current system will be replaced with a single registration system. The Ombudsman is not convinced by these arguments. As the complainant correctly observes, Article 11(3) of Regulation 1049/2001 provides that the public register of documents had to be operational by 3 June 2002. Given that the regulation was adopted on 30 May 2001, the Commission would appear to have had enough time to adopt the arrangements necessary to making its register function properly. If the format or content of the data that were needed for this register differed between its Directorates-General or other units, it is difficult to see why the Commission did not take rapid action in order to adopt the measures necessary to harmonise these systems. This failure is all the more difficult to understand since the Commission was able, even before the entry into force of Regulation 1049/2001, to establish a register of the correspondence addressed to its then President as well as of the replies to this correspondence. According to information published by the Commission, on 31 December 2002, this register contained references to 34 383 documents [8].

2.12 The Ombudsman notes that the Commission has pointed out that its current system of registering documents will be replaced with a single registration system. However, and as the complainant has pointed out, there is no clear guarantee that the new system will lead to a proper public register of documents. The Commission has indicated that, in the context of the development of the new system, a module for the export of document

references from this system to a public register was foreseen. However, the Commission has failed to provide any indications or commitments as to the extent to which this possibility will be used. The Ombudsman notes in particular that the Commission has not provided any precise information as to whether it would extend the scope of the present register(s) once the new document registration system has been put in place. Besides, the Commission has not provided any specific information on when exactly this new system is expected to become operational.

2.13 Furthermore, and in the absence of any further information on this issue by the Commission, it cannot be excluded that the new system for the registration of documents will only be applied to documents newly drawn up or received by the Commission. In that case, the introduction of this system would not provide any progress as regards those documents that have been drawn up or received by the Commission before that date and have not yet been included in the register.

2.14 As regards the Commission's statement that it intended gradually to extend the scope of its public registers, the Ombudsman considers that this intention is certainly laudable. However, the Commission has not indicated any precise date by which its register(s) should finally be in conformity with Article 11 of Regulation 1049/2001. In any event, regard needs to be had to the fact that nearly six years have passed since the Commission's register was meant to have become operational by virtue of Article 11(3) of Regulation 1049/2001.

2.15 In view of the above, the Ombudsman arrives at the conclusion that the Commission has indeed failed to comply with Article 11 of Regulation by omitting to include all relevant documents in its register of documents. A draft recommendation will therefore be made.

2.16 As regards the question whether the Commission also erred by maintaining several registers rather than a single one, the Ombudsman considers that the wording of Article 11 of Regulation 1049/2001 ("a register of documents") indeed suggests that the legislator envisaged one single register per institution. However, the Ombudsman notes that the Commission has stressed that the purpose of this provision was to enable members of the public to identify documents held by the institutions that might be of interest to them. The Commission has queried whether, considering the number and diversity of the documents held by it, a huge single register would really offer the best service to the public. The Commission also submitted that its public registers were complementary and their scope was well-defined. The Ombudsman considers that these arguments are not without merit. In the Ombudsman's view, it cannot be excluded that the aim pursued by Article 11 of Regulation 1049/2001 can also be attained if the institution concerned maintains several registers rather than a single one, provided that the scope of these registers is clearly defined, that there are no overlaps and that the number and scope of these registers is not such as to create confusion and thus make it difficult for the citizen to find the information s/he is looking for. Upon a preliminary examination of the registers currently maintained by the

Commission, the Ombudsman considers that these conditions appear to be fulfilled at present. However, given that the draft recommendation set out below is meant to encourage the Commission quite considerably to increase the scope of its register(s), the Ombudsman considers that there are no grounds for further inquiries into the issue of how many registers could and should be maintained at the present stage.

3 Conclusion

In view of the above, the Ombudsman makes the following draft recommendation to the Commission, in accordance with Article 3(6) of the Statute of the Ombudsman:

The draft recommendation

The Commission should, as soon as possible, include references to all the documents within the meaning of Article 3(a) that are in its possession in the register foreseen by Article 11 of this regulation, to the extent that this has not yet been done.

The Commission and the complainant will be informed of this draft recommendation. In accordance with Article 3(6) of the Statute of the Ombudsman, the Commission shall send a detailed opinion by 15 July 2008. The detailed opinion could consist of the acceptance of the Ombudsman's decision and a description of the measures taken to implement the draft recommendation.

Strasbourg, 7 April 2008

P. Nikiforos DIAMANDOUROS

(1) Decision 94/262 of 9 March 1994 of the European Parliament on the Regulations and General Conditions Governing the Performance of the Ombudsman's Duties, OJ 1994 L 113, p. 15.

(2) OJ 2001 L 145, p. 43.

(3) This inquiry concerned a complaint against the European Anti-Fraud Office. The Ombudsman's decision is available on his website (<http://www.ombudsman.europa.eu>).

(4) OJ 2001 L 145, p. 43.

(5) Both documents are available on the Ombudsman's website (<http://www.ombudsman.europa.eu>).

(6) As regards this register, see point 2.11 below.

(7) It appears useful in this context to quote from point 2.1 (which concerns the issue of registers) of the Commission's report (Commission staff working document) of 16 January 2008 on the outcome of the public consultation on the review of Regulation 1049/2001 (SEC/2008/29/2): "In all four categories of correspondents, a large majority considers that information is difficult to find on the registers and websites. For half of these respondents, the scope of these registers and websites is also insufficient."

(8) See point 1.3 of the Commission's report of 29 April 2003 on the application in 2002 of Regulation 1049/2001 (COM(2003) 216 final). For comparison, in its report of 24 September 2007 on the application in 2005 (the most recent year for which statistics appear to be available) of Regulation 1049/2001 (COM(2007)548 final), the Commission's registers comprised 61085 references at the end of 2005.