

*José Manuel Barroso*  
*President of the European Commission*

Brussels, 30 SEP. 2009  
PRES(2009) D/ 1849

**Subject: complaint by STATEWATCH**  
**ref. 3208/2006/GG**

*Dear Mr Diamandouros,*

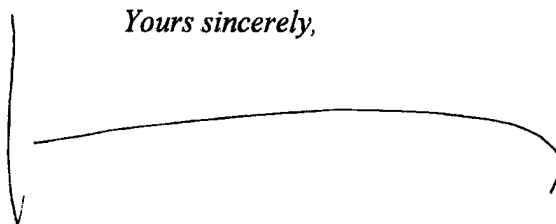
*Thank you for your letter of 18 December 2008 regarding the above case.*

*I am pleased to transmit to you the enclosed comments of the Commission on the above-mentioned complaint.*

*I regret that a certain delay has occurred in transmitting this reply.*

*Naturally, the Commission remains at your disposal for any further information you may require.*

*Yours sincerely,*

A handwritten signature in black ink, consisting of a vertical line on the left and a long, sweeping horizontal line that curves upwards at the end.

*José Manuel BARROSO*

*Enclosures*

*Mr Nikiforos DIAMANDOUROS*  
*European Ombudsman*  
*1, avenue du Président Robert Schuman*  
*B.P. 403*  
*F-67001 STRASBOURG Cedex*

**Comments of the Commission on a critical remark from the European Ombudsman in his closing decision**

**- Complaint by STATEWATCH, ref. 3208/2006/GG**

---

**1. CONCLUSION OF THE OMBUDSMAN**

In his closing decision, the Ombudsman arrived at the conclusion that the Commission has failed to comply with Article 11 of Regulation 1049/2001 by omitting to include all relevant documents in its register of documents. According to the Ombudsman, this constitutes an instance of maladministration.

The Ombudsman asks the Commission to report on what steps, if any, it has taken to avoid similar maladministration in the future.

**2. POSITION OF THE COMMISSION**

The Commission considers that when assessing obligations incumbent upon it under Article 11 of Regulation 1049/2001 it is important to take into account not only the provisions of this Article, but also the objectives pursued by this Regulation.

The Commission would like to reiterate that it cannot be inferred from the wording of Article 11 that there is an obligation to enter into a public register all documents falling under the definition of Article 3 (a) of the Regulation. The Commission believes that the Ombudsman has not given sufficient consideration to the argument that comprehensive registers must, by their nature, be accompanied by a clear and precise definition of what constitutes a document. Comprehensive registers exist under national legislations exactly having a narrow definition of what is a 'document', which is much more precise than the definition of Article 3 (a). The Commission agrees that the more documents are referenced to in public registers, the more effective citizens' rights under Regulation 1049/2001.

In this respect, the Commission considers transparency in the legislative process as a priority. As the Court of Justice stated in its judgment in the *Turco* case, "openness achieved through the public access to documents is of particular relevance where [the institutions] are acting in their legislative capacity, as is apparent from recital 6 of the preamble to Regulation No 1049/2001, according to which wider access must be granted to documents in precisely such cases. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights"<sup>1</sup>. The use of the term 'wider' can only mean that the legislator sought a degree of differentiation with the highest level of transparency and access to be granted to documents relating to the legislative process compared to other documents.

---

<sup>1</sup> Judgement of 1 July 2008 of the European Court of Justice, Joined Cases C-39/05 P and C-52/05 P, para.46-48 (not yet reported)

The Commission therefore feels vindicated in its position that Regulation 1049/2001 has a particular focus on legislative activities, including as regards the priority of the coverage of its registers.

Other institutions have also demonstrated similar views. Indeed, the European Parliament's Rules of Procedure (Rule 104(3)) provide for direct access to legislative documents, while at the same time "[r]eferences for other Parliament documents shall *as far as possible* be included in the register."

Consequently, the Commission considers that, as regards its role in the legislative process involving the other institutions, it has generally achieved the same level of transparency and a similar coverage of its register as the two other institutions directly involved in the process. Furthermore, in the context of the reform of the Comitology Decision (1999/468/EC) in 2006, the Commission developed a new and much improved comitology register in order to enhance transparency and give the European Parliament and the general public access to documents of the comitology committees and to other relevant information. This enables the public to follow the various stages of the development of draft implementing measures. The new register was put into operation on 1 April 2008. However, as mentioned in earlier replies, the Commission is continuously looking for ways to improve the coverage of its registers.

The Commission is, therefore, convinced that it has achieved a very high level of transparency in the legislative field, including the exercise of delegated powers as well as the adoption of implementing measures which are *stricto sensu* not part of the legislative process.

In his conclusion, the Ombudsman states that the Commission did not dispute the complainant's claim that only "a fraction" of its documents is listed in its registers. While such a statement might be technically correct, it must be borne in mind that these "non-listed" documents pertain generally to very voluminous files with regard to the administrative functions of the Commission, in areas such as trade defence investigations, enforcement of competition rules, etc. In this respect it is important for the Commission to make clear that, given the nature of the activities and the sensitivity of the information, it would be very difficult to set up a public register and, at the same time, not undermine the protection of the interests foreseen in Article 4 as required by Article 11(2) of the Regulation. Indeed, in many of these activities the Commission must ensure a very high level of confidentiality, in line with its duties under Article 287 of the Treaty. Furthermore, as recognised by the Court of First Instance<sup>2</sup>, the public interest in access to these documents does not carry the same weight as in relation to documents concerning legislative activities. Therefore, the risk of harm resulting from undue disclosure of protected information<sup>3</sup> together with the lower level of public interest in having these very numerous documents listed in publicly accessible registers would hardly justify the efforts in setting up such very wide registers. It is also worth noting that, as regards

---

<sup>2</sup> T-403/05, not yet reported, at para 49.

<sup>3</sup> It must be observed that in certain cases even the existence of information must be protected as recognised by the Court of First Instance in its judgement of 6 July 2006, Case T-50/00, ECR 2006, p. II-2023, at para. 121-122.

activities in the competition field, in the Member States, these functions are usually carried out by specialised competition authorities, whose documents are, typically, excluded from the general transparency rules.

Finally, the Commission also plays a central role in ensuring that EU law is correctly transposed and applied in all 27 Member States. This is a vast responsibility and a very significant number of files contain many documents. The key objective for the EU is that a solution is found as quickly as possible to any problem identified in this field. The case-law recognises that in this area the Commission has a duty of confidentiality towards the Member States. The Regulation itself also recognises the special nature of documents held by the Commission originating from the Member States. Already today the Commission is systematically informing the public from the stage of the Reasoned Opinion that such a file has been opened. As announced in its Communication "A Europe of Results"<sup>4</sup> this will shortly be extended to cover all the investigations already from the Letter of Formal Notice. The register will also include some basic information about the issues at stake.

Similarly, in areas under their responsibility all of the Commission's Directorates-General have set up specific websites on the Europa server providing information on their policies and activities as well as access to key documents. For example, Directorate-General Competition has developed specific, easily accessible web pages focusing on different fields of their activities<sup>5</sup>. Such websites are designed to provide information, guidance and access to documents on Community policies in a user-friendly way and, clearly, are much more useful for citizens than a mere reference in the register. The Commission's efforts for greater transparency are further reinforced by the recently launched Register of interest representatives, aimed at providing information about the interest representatives (lobbyists) who engage with European institutions with a view to influencing policy shaping and the decision-making process. The Commission continues to work together with the European Parliament with the view to establishing a common register.

The Commission's commitment towards increased access to the decision-making process is thus confirmed and goes together with the gradual development of its registers and their respective contents. Citizens can access directly many documents through a variety of information supports and benefit from numerous reference sources for those documents that are not directly accessible.

---

<sup>4</sup> Communication COM(2007) 502 Final, A Europe of Results – Applying Community Law

<sup>5</sup> E.g. web page focusing on cartel investigations at <http://ec.europa.eu/competition/cartels/cases/cases.html>