

**6203/02**

**LIMITE**

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**API 38**

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**NOTE**

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from : General Secretariat of the Council  
to : Coreper (Part II)

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Subject : Public access to documents  
- Issues of principle

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During the meeting of Coreper (Part II) on 27 February 2002, the Presidency agreed, following a request from one delegation, to discuss certain issues of principle that arise from the application 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<sup>1</sup> and Council Decision 2001/840/EC of 20 November 2001 amending the Council's Rules of Procedure<sup>2</sup>, both of which became applicable on 3 December 2001.

There are two issues of principle on which an orientation debate is requested as the line which the Council will take in these issues will set a precedent for its future practice:

- definition and treatment of documents originating from Member States, and
- treatment of documents relating to legislative acts on which discussions are still ongoing and which contain delegations' positions.

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<sup>1</sup> OJ L 145, 31.5.2001, p. 43.

<sup>2</sup> OJ L 313, 30.11.2001.

## **1. Definition and treatment of documents originating from Member States**

In document 5108/02 the Council Legal Service has submitted its comments on the interpretation of the provisions of Regulation No 1049/2001 on documents originating from Member States, in particular Articles 3(b), 4(4) and 4(5) thereof. The Legal Service comes to the following conclusions:

When participating in the work of the Council and its committees and bodies, members of the Council or their delegates, although representatives of the Governments of the Member States, are not persons or entities outside the institution, but part of it. Consequently, parts of documents summarising oral statements by members of the Council or their delegates within the Council or one of its preparatory bodies and the written positions of a delegation submitted in the context of the institution's discussions even in a separate document are not third-party documents but Council documents. When the Council receives a request for access to one of those documents, it is therefore incumbent upon it to take a decision on that application on the basis of the exceptions laid down in Article 4(1), (2) and (3) of Regulation No 1049/2001, without being legally compelled to consult the delegation concerned on each (passage in a) document stating its position. This is confirmed by Article 207(3) TEC.

On the other hand, as regards documents originating from a Member State as such, the absence of prior agreement on the part of the Member State concerned is sufficient grounds pursuant to Article 4(5) of Regulation No 1049/2001 to justify the refusal to grant access to such a document by the institution which has it in its possession, and that institution is obliged to refuse access to it on those grounds.

## **2. Treatment of documents relating to legislative acts on which discussions are still ongoing and which contain delegations' positions**

As regards access to a document relating to legislative acts on which discussions are still ongoing and which contain delegations' positions, the Council is confronted with three options on how to reply to requests for access to such documents:

### Option 1

Release of the entire document.

Option 2

Release of the contents of the document but refusal of all delegations' positions "en bloc".

Option 3

Release of the contents of the document including the text of the footnotes and other references to delegations' positions whilst suppressing the name of the respective delegation but excluding parts covered by the exceptions in Article 4 of Regulation (EC) 1049/2001.

Option 1 would be legally defensible but such a principle, followed in a systematic manner, would undermine the institution's decision-making process.

Option 2 presents the problem of refusal "en bloc" of parts of documents. This practice has already been condemned by the Court of Justice.

Option 3 appears to be the only legally defensible option. This option guarantees a right balance between transparency and the protection of the Council's deliberations.