



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 29.4.2003  
COM(2003) 216 final

**REPORT FROM THE COMMISSION**

**on the application in 2002 of Regulation (EC) No 1049/2001 of the European Parliament  
and of the Council regarding public access to European Parliament, Council and  
Commission documents**

## FOREWORD

On 30 May 2001, the European Parliament and the Council adopted Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents<sup>1</sup>. This Regulation, which implements the new Article 255 of the Treaty establishing the European Community, is in line with the more general policy of transparency and information, of which it forms an intrinsic part.

The policy of transparency, in turn, represents one of the pivotal features of European governance<sup>2</sup>, particularly as regards the principles of openness, participation and responsibility. Other action has been taken with regard to transparency, information and relations with European citizens. The Commission has, for example, adopted minimum standards for the consultation of civil society organisations<sup>3</sup>. It has continued to work towards simplifying and improving the regulatory environment<sup>4</sup> and has proposed a new information and communication strategy to the Council<sup>5</sup>.

Regulation 1049/2002 became applicable on 3 December 2001, thereby replacing the rules on access previously introduced by the three institutions<sup>6</sup>. Article 17(1) stipulates that "*each institution shall publish annually a report for the preceding year including the number of cases in which the institution refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register*".

The present document is the first annual report of this kind drawn up by the Commission. It is of a factual nature and takes stock of how the Regulation has been implemented during its first year in force by all Commission services, including OLAF.

On the basis of the information contained in this report and in the similar reports produced by the European Parliament and the Council, the European Commission will publish a report on the implementation of the principles of the Regulation by January 2004, in accordance with Article 17(2) of the Regulation.

The report is divided into three parts:

- A an overview of the action taken to implement the Regulation;
- B an analysis of the practical application of the Regulation;
- C figures on the application of the Regulation.

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<sup>1</sup> OJ L 145 of 31.5.2001.

<sup>2</sup> White Paper on European Governance, COM(2001) 428 final; Report from the Commission on European Governance, COM(2002) 705 final.

<sup>3</sup> Communication from the Commission - Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission - COM(2002)704 final; Communication from the Commission on the collection and use of expertise by the Commission: principles and guidelines - "Improving the knowledge base for better policies", COM(2002) 713 final

<sup>4</sup> European Governance: Better lawmaking, COM(2002) 275 final; Action plan: "Simplifying and improving the regulatory environment", COM(2002) 278 final; Communication from the Commission on impact assessment, COM(2002) 276 final.

<sup>5</sup> An information and communication strategy for the European Union, COM(2002) 350 final.

<sup>6</sup> Decision 93/731 of the Council, Decision 94/90 of the Commission, Decision 97/632 of the European Parliament.

To illustrate the trends in requests for access to Commission documents, the report also presents the data on the last three years of implementation of the Code of Conduct introduced pursuant to Decision 94/90. The data can thus be used to compare four years during which a policy of transparency towards the public has been in force.

Finally, it should be pointed out that requests for information and for published documents — of which there are a great many — are not recorded as requests for access to documents pursuant to Regulation 1049/2001, with the result that they are not included in the figures shown in part C of the present report.

## **A. Implementation of the Regulation**

The Regulation makes provision for a number of specific measures to ensure that members of the public can fully exercise the right of access guaranteed in Article 255 of the Treaty. The Commission has also introduced a number of initiatives to put into practice the principles laid down in the Regulation. They largely consist of support measures to improve the provision of information to the public and to promote good administrative practice.

### **1. MEASURES LAID DOWN IN THE REGULATION AND THE JOINT DECLARATION<sup>7</sup>**

#### **1.1. Adaptation of the rules of procedure**

Article 255 of the EC Treaty makes provision for the right of access to be implemented at two levels:

- a legal framework establishing, for the three institutions, the general principles and limitations governing this right of access;
- specific provisions to be incorporated into the rules of procedure of each institution.

Regulation 1049/2001 lays down the general legal framework.

It further stipulates, in Article 18(1), that each institution should adapt its rules of procedure to the provisions contained in the Regulation. On 5 December 2001, the Commission adopted a Decision to incorporate provisions concerning the implementation of the Regulation as an annex to its rules of procedure<sup>8</sup>.

Decision 2001/937 extends the right of access to Commission documents to all natural or legal persons, irrespective of nationality, place of residence or location of registered office. It also lays down the practical arrangements for implementing the Regulation, particularly in the following areas:

- (1) processing of applications at two levels in order to guarantee the applicant internal administrative means of appeal: i.e. the initial requests are processed by the Directorates-General which authored or hold the documents and confirmatory requests are processed by the Secretary-General acting on behalf of the College of Commissioners; where a confirmatory request concerns a document which relates to investigations carried out by OLAF, the Director-General of OLAF takes a decision on behalf of the Commission;
- (2) consultation of third-party authors: they are consulted as soon as the Commission plans to disclose a document from a third party which has not yet been made public legitimately, unless its disclosure would clearly undermine one of the interests protected by the Regulation;

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<sup>7</sup> Joint Declaration relating to Regulation (EC) No 1049/2001, OJ L 173 of 27.6.2001.

<sup>8</sup> Commission Decision of 5 December 2001 (2001/937/EC, ECSC, Euratom) amending its rules of procedure, OJ L 345 of 29/12/2001, pp. 94-98.

- (3) categories of documents which can be accessed directly: these consist largely of agendas and ordinary minutes of Commission meetings and documents adopted by the Commission which are intended for publication; moreover, preparatory versions of documents adopted by the Commission are automatically made public as long as it is clear that none of the exceptions provided for in the Regulation applies to them.

## 1.2. Establishment of an interinstitutional committee

As the three institutions use the same system for accessing their documents, the Regulation stipulates, in Article 15(2), that "*the institutions shall establish an interinstitutional committee to examine best practice, address possible conflicts and discuss future developments on public access to documents*".

At a tripartite meeting held on 28 November 2001, the three Presidents agreed to set up the interinstitutional *committee* at political level and entrusted the three Secretaries-General with the task of preparing the groundwork for this process and monitoring its operation.

The interinstitutional *committee* held its inaugural meeting in Strasbourg on 13 March 2002 in the presence of Patrick Cox, President of the European Parliament, Josep Piqué, Acting President of the Council, and Loyola de Palacio, Vice-President of the Commission. During the meeting, it was agreed that each President would appoint a representative from his/her institution to sit on the *committee* and that the meetings of the *committee* would be organised and chaired by each institution in turn in the order of precedence set out in the Treaty. The *committee* also decided that its meetings would be prepared by the Secretaries-General, who would draw up the agendas, and that the institution organising the meeting would take the minutes.

At its second meeting, in Strasbourg on 10 April 2002, the interinstitutional *committee* discussed the following points in particular:

- (1) information for the public: the *committee* decided to publish a joint information brochure for the public (see point 2.2 below);
- (2) direct access to legislative documents (see point 2.3);
- (3) extension of the scope of the Regulation to the agencies (see point 1.6).

A third meeting was held in Brussels on 9 July 2002, at which the *committee*:

- (1) welcomed the opening, on 3 June 2002, of the public registers of the Parliament and the Commission (see point 1.3)<sup>9</sup>;
- (2) reported on the progress of work on the joint information brochure;
- (3) approved the signing of a memorandum on mutual consultation by the institutions;
- (4) had an exchange of views on how to deal with extensive or abusive requests.

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<sup>9</sup> The Council has maintained a public document register since 1.1.1999.

These meetings were preceded by preparatory meetings held by the senior officials responsible for this area from the three institutions<sup>10</sup>. Furthermore, on the technical and administrative front, the officials responsible for implementing the Regulation in the three institutions keep in touch regularly in order to ensure that the Regulation is applied consistently, to share their experience and to identify best practice.

### 1.3. Document register

To make citizens' rights under the Regulation effective, Article 11 of the Regulation stipulates that each institution should take the necessary action to provide public access to an electronic register of documents.

Before the Regulation was adopted, the Commission provided public access via the Internet to a register containing references to correspondence addressed to the President of the European Commission<sup>11</sup> as well as replies to this correspondence and letters sent by the President on his own initiative. On 31 December 2002, the register contained references to 34 383 documents.

In order to improve public access to information on legislation in preparation, the Commission also set up a database of documents which form part of the decision-making process between the Commission and the other institutions. The database provides information on the progress of the procedure and gives direct access to electronic versions of the preparatory acts which are available<sup>12</sup>.

The Commission also installed a new register of internal and preparatory documents, which was made available to the public on 3 June 2002. Given that the Regulation gives priority to legislative documents, as set out in Article 12(2), the Commission decided that the register should initially list documents with the codes "COM", "C" and "SEC", as of 1 January 2001.

The "COM" series of documents covers all the proposals and communications which the Commission addresses to the Council and the European Parliament. The "C" series brings together the legal instruments adopted by the Commission by virtue of its own powers or delegated powers. Both series thus cover the legislative functions of the Commission. Finally, the "SEC" series covers internal documents concerning the decision-making process and the general operation of the Commission's departments.

The register can be accessed on the Internet<sup>13</sup>. To make it easier to search for documents, the register appears on the same website as the other electronic information sources. A help page provides information on how to use the site. Published documents are made directly accessible by means of an electronic link to the full text in the Eur-Lex system<sup>14</sup>. On 31 December 2002, the register contained references to 24 942 documents.

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<sup>10</sup> The Commission is represented by Moavero Milanesi, deputy Secretary-General.

<sup>11</sup> This register was set up on the personal initiative of the President in order to improve transparency in accordance with the undertaking he gave to the European Parliament on 14 September 1999, which was published in OJ C 91 of 30 March 2000.

<sup>12</sup> PreLex database.

<sup>13</sup> [http://europa.eu.int/comm/secretariat\\_general/sgc/acc\\_doc/index\\_en.htm](http://europa.eu.int/comm/secretariat_general/sgc/acc_doc/index_en.htm)

<sup>14</sup> <http://europa.eu.int/eur-lex>

The Commission intends to gradually increase the scope of the register. To that end, several changes are planned for 2003, in conjunction with the work to modernise the management and electronic archiving of documents.

The register is designed to be a support tool for document searches. The accessibility of a document does not depend on the fact that its references are contained in the register.

Article 9 of the Regulation foresees a specific treatment for “sensitive documents”<sup>15</sup>. These documents are a particular category of “classified documents”. Pursuant to the new security rules, which apply as from 1 December 2001<sup>16</sup>, internal registers of classified documents are gradually being set up. Once they become fully operational, it will be possible to identify each document being classified as “confidential” or higher. In reality, the Commission produces and receives a limited number of such documents, only a part of which can be described as "sensitive documents". Among the three categories of documents presently covered by the register (the COM, C and SEC series of 2001 and 2002) there are no sensitive documents within the meaning of Article 9(1) of the Regulation.

#### **1.4. Adaptation of the rules on public access to historical archives**

In adopting Regulation 1049/2000, the Community legislator wanted to ensure that the pre-existing rules on access to Commission documents were in keeping with the principles of the new Regulation. Hence, Article 18(2) stipulates that "*the Commission shall examine the conformity of Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community(6) with this Regulation in order to ensure the preservation and archiving of documents to the fullest extent possible*".

The provisions of Article 3(1)(b), (1)(c) and (2) of Regulation 354/83 exclude certain categories of documents from public access. However, in accordance with Regulation 1049/2001, these documents are covered by the public's right of access and their disclosure can be refused only on the basis of the exceptions set out in Article 4 and the provisions relating to sensitive documents in Article 9. Moreover, Article 4(7) stipulates that only three exceptions to the right of access may, if necessary, apply for more than 30 years: these relate to the protection of privacy, the protection of commercial interests and specific provisions on sensitive documents.

On 19 August 2002, the Commission adopted a proposal for a Regulation amending Regulation 354/83<sup>17</sup> in order to bring it into line with Regulation 1049/2001. The Parliament delivered its opinion at the plenary part-session in March 2003<sup>18</sup>.

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<sup>15</sup> *documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as “TRES SECRET/TOP SECRET”, “SECRET” or “CONFIDENTIEL” in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters*

<sup>16</sup> Commission Decision of 29 November 2001 (2001/844) amending the Rules of Procedure, OJ L 317, 3.12.2001, p. 1

<sup>17</sup> COM(2002) 462 final.

<sup>18</sup> PE 319.253

## **1.5. Analysis of the specific rules on confidentiality in Community legislation**

The desire to bring existing legislation into line with the principles of Regulation 1049/2001 is reflected in more general terms in Article 18(3) of the Regulation, which stipulates that the Commission should examine whether the existing rules on access to documents conform with the Regulation. The aim is to ensure that the specific rules in question do not make provision for exceptions in addition to those set out in the Regulation.

As part of this exercise, the Commission examined more than 120 specific provisions contained in current Community legislation concerning the conditions under which certain documents or pieces of information can be transmitted. It should be noted that these provisions do not relate solely to access to documents, but often relate to access to information.

An analysis of these provisions shows that they can be grouped into two categories.

A number of specific rules on access to documents or, as appropriate, to information should be considered to be special cases to which one of the general exceptions set out in Article 4 of Regulation 1049/2001 applies. In most cases, access to such documents is refused in order to protect commercial interests, personal data or investigations.

None of these rules appear to be incompatible with the principles set out in Regulation 1049/2001. It should be stressed that all requests for access are treated on the basis of Regulation 1049/2001 and that all decisions concerning the disclosure of a document are taken in accordance with Article 4 of the Regulation.

Other clauses grant the parties to specific proceedings the right of access to confidential information or documents whose disclosure to the public would undermine one of the interests protected under Article 4 of Regulation 1049/2001. In such cases, certain people are granted specific rights which go beyond the right of public access. Such clauses exist, in particular, in the field of competition law.

## **1.6. Extension of the applicability of the Regulation to the agencies**

In accordance with the wording of Article 255 of the EC Treaty, the Regulation applies only to the European Parliament, the Council and the Commission. The Community agencies and the other similar bodies created by the Community legislator have legal personality and therefore cannot be given the same status as one of the institutions covered by the Regulation. This is why, in adopting the Regulation, the three institutions stated that the similar agencies and bodies created by the legislator should have rules on access to their documents which conform to those of the Regulation<sup>19</sup>. To this end, it fell to the Commission to propose the necessary amendments to the acts establishing the agencies.

As soon as Regulation 1049/2001 was adopted, the attention of the agencies was drawn to the fact that, in future, the Regulation would apply to them, which meant that, where appropriate, they would have to adapt the rules of voluntary access which they currently apply.

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<sup>19</sup> Joint Declaration relating to Regulation 1049/2001, OJ L 173 of 27.6.2001.

With a view to achieving "better lawmaking", the amendments concerning the applicability of Regulation 1049/2001 were included in a "package" of amendments to the acts establishing the agencies as a result of the new financial regulation. The Commission adopted its proposal for an amendment of the Community bodies on 17 July 2002<sup>20</sup>. The proposal is currently being examined by the European Parliament and the Council.

The amendment involves incorporating a clause in each of the basic regulations stating that Regulation 1049/2001 applies to documents held by the agency and making its administrative board or board of management responsible for laying down the detailed rules for the application of the Regulation.

Furthermore, a clause relating to the channels of appeal — the Ombudsman and the Court of Justice — will be added for the agencies whose founding act does not contain a general clause on jurisdiction.

## **2. SUPPORT MEASURES CONCERNING INFORMATION AND GOOD ADMINISTRATIVE PRACTICE**

In addition to the specific measures concerning the implementation of the Regulation set out in the previous chapter, Regulation 1049/2001 makes a number of recommendations concerning information and good administrative practice. The Commission has taken a number of steps to put these recommendations into practice.

### **2.1. The website "Openness and access to documents"**

The Regulation stipulates that the institutions should inform the public about their right of access (Article 14(1)) and facilitate the exercise of this right (Article 15(1)).

To this end, the Commission has developed and modernised the website "Openness and access to documents" on the EUROPA server, which it created to inform the public about the Code of Conduct on accessing its documents. This site<sup>21</sup> provides a range of useful information enabling members of the public to become more familiar with their rights and make use of them.

A key element of the site is the guide for citizens on access to European Commission documents. The guide, which is available in all the Community languages, explains in detail how to request access to Commission documents. It shows how to obtain documents which have been published or made accessible to the public, particularly via websites, and also mentions specific contact points to which general requests for information may be addressed.

In order to make it easier to search for documents, the site provides access to the register of internal and preparatory documents mentioned above (point 1.3), to the register of the President's correspondence, and to various other sources of information on the Commission's activities. These include:

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<sup>20</sup> COM(2002) 406 final.

<sup>21</sup> [http://europa.eu.int/comm/secretariat\\_general/sgc/acc\\_doc/index\\_en.htm](http://europa.eu.int/comm/secretariat_general/sgc/acc_doc/index_en.htm)

- the databases relating to the interinstitutional legislative process and current Community legislation;
- statistical data on the application of Community law;
- the database of historical archives.

From the same screen, the user can access certain categories of documents directly:

- agendas and ordinary minutes of Commission meetings;
- press releases;
- documents published in the Official Journal;
- the Bulletin of the European Union and the General Report.

Another screen enables the user to view the organisational charts of the Directorates-General and departments of the Commission. Finally, the site provides links to the corresponding sites of the other institutions and contains information on legislation in the Member States concerning access to documents.

The "access to documents" site has been so successful that it is being consulted more than 30 000 times a month.

## **2.2. The interinstitutional brochure**

In order to provide the public with general information on how to access documents produced by the European Parliament, the Council and the Commission, the three institutions have published a joint brochure in all the Community languages<sup>22</sup>.

The brochure has been published in response to a decision of the interinstitutional *committee* mentioned in point 1.2. It can be obtained from the representations, delegations, relays and networks.

## **2.3. Direct access to documents**

Article 12 of the Regulation sets out recommendations on making documents directly accessible to the public, particularly documents connected with the Community legislative process. Article 13, which relates to documents to be published in the Official Journal, confirms an existing practice.

The categories of documents which are made directly accessible to the public are detailed in Article 9 of the implementing rules<sup>23</sup>.

By virtue of these provisions, the agendas and ordinary minutes of Commission meetings can be accessed directly from the aforementioned "access to documents" site<sup>24</sup>. Documents adopted by the Commission which are intended for publication in

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<sup>22</sup> Catalogue number: KA-41-01-187-EN-C - ISBN 92-894-1904-0.

<sup>23</sup> OJ L 345 of 29/12/2001, p. 94-98.

<sup>24</sup> [http://europa.eu.int/comm/secretariat\\_general/sgc/acc\\_doc/index\\_en.htm](http://europa.eu.int/comm/secretariat_general/sgc/acc_doc/index_en.htm)

the Official Journal can be accessed via the Eur-Lex system<sup>25</sup> in the days following their adoption.

Documents which have already been disclosed in response to a prior request or documents produced by third parties which have already been disclosed by the author or with his consent are made available on request.

In addition to the documents which are made directly accessible in accordance with the arrangements for implementing the Regulation, the Directorates-General and other Commission departments disseminate a large quantity of documents via the EUROPA server and provide access to around 50 databases. This server represents an excellent way of accessing information on the activities of the European Commission. In 2002, some 500 million documents were consulted or downloaded on the EUROPA site.

#### **2.4. Raising staff awareness and providing information and training for staff**

It was not possible to implement the new system for allowing public access to documents without providing training for the staff concerned. It was particularly important to make staff aware of the obligations arising from Article 15(1) of the Regulation, which stipulates that the institutions should develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by the Regulation.

The new Regulation continues to make provision for the decentralised processing of requests for access to documents. Initial training has been provided for members of the network of officials responsible for the system within the various Directorates-General. This network, which was created with a view to implementing the Code of Conduct, serves as a forum for the exchange of information, experience and good practice. The members of the network also pass on information to their Directorates-General and departments. They have thus ensured that their colleagues have received appropriate training and have made staff in their Directorates-General aware of the implications of the new Regulation.

A practical guide has been made available to officials in order to help them process requests for access to documents. This guide, which can be found on the Commission's internal website, can also be consulted by the staff of the other Community institutions.

Finally, a module focussing on the public's right of access to documents has been incorporated into the training course for new Commission officials.

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<sup>25</sup> <http://europa.eu.int/eur-lex/>

## **B. Practical application of the Regulation in 2002<sup>26</sup>**

### **1. GENERAL RISE IN THE NUMBER OF REQUESTS FOR ACCESS**

The year 2002 was marked by a major change in the policy of allowing access to Commission documents. The number of initial requests, which had remained relatively constant during the last three years of implementing the Code of Conduct, more than doubled during the first year of implementing Regulation 1049/2001 (the number rose from 450 requests in 2001 to 991 in 2002). The number of confirmatory requests also almost doubled.

Although there are no objective factors which explain the reasons for this spectacular increase in the number of requests, it can no doubt be attributed largely to the adoption of the Regulation and the publicity surrounding it and to the opening of the public register.

The type of requests and their origin have also changed during the past year. Some trends are worth mentioning:

- An increase in requests has been particularly noticeable in the fields of competition and of customs and taxation; the percentage of requests in these areas has doubled, which means a fourfold increase in absolute figures. However, the percentage of requests concerning the internal market has remained constant (which still means that the actual number of requests has doubled), while the percentage of requests relating to environmental policy has fallen to less than a half (the number of requests remains more or less the same in absolute figures). It is noteworthy that almost 40 % of the total number of requests falls within the remit of 4 Directorates-General, whereas the Secretariat-General deals with 15 % of the total number of requests received by the Commission.
- The proportion of requests from members of the public or people who do not say that they are acting on behalf of any particular organisation has risen sharply from an average of 10% to over 30%. This is explained in part by the high number of requests submitted by e-mail, where only the requester's name is shown.
- The interest shown by law firms in accessing documents has continued and remains steady at around 22-23%. Although, in percentage terms, the interest shown by law firms has remained stable, the numbers of requests from this sector has actually doubled.
- In relative terms, requests from the academic sector have fallen sharply from 22% to 12%, which nevertheless corresponds to a slight increase in absolute figures.

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Only requests for access to documents which have not been published or which are not in the public domain are considered to be requests for access in accordance with Regulation 1049/2001.

- Many requests for access submitted to the Commission are very extensive and vague. For example, a large number of requests relate to accessing all documents on a particular subject. Requests of this kind can cover hundreds of documents. They tend to be submitted by researchers, students and law firms.

## **2. INITIAL REQUESTS**

The number of requests has more than doubled — rising from 450 in 2001 to 991 in 2002. The number of identifiable documents taken into consideration for all requests has increased almost fourfold.

The proportion of negative replies to initial applications has gradually increased over the past four years. It stood at approximately 20% in 1999, 25% in 2000, 30% in 2001 and 33% in 2002.

Various factors explain the relative increase in the number of refusals:

- (1) The increasing number of requests concerning infringement proceedings and cases relating to competition policy. It should be noted that in over a third of cases where access to a document is refused (35.9%), the decision to refuse disclosure is motivated by the desire to protect the purposes of inspections, investigations and audits. In most cases the requests were made by law firms. The legal appeals clearly confirm this trend (see para 4.1).
- (2) The extension of the rules to include documents from third parties.
- (3) The marked increase in the number of Commission documents which have been published or are directly accessible, particularly via the EUROPA website, as requests increasingly relate to non-communicable documents.

## **3. CONFIRMATORY REQUESTS**

The number of confirmatory requests has increased in proportion to the number of initial requests, going from 52 in 2001 to 96 in 2002. The percentage of confirmatory requests compared to the number of requests which are refused at the initial stage of the process has remained relatively constant and stands at around a third. Although the increase is slight, the number of initial requests which are refused has therefore not resulted in an increase in the number of confirmatory requests.

It is notable that the number of decisions confirming an initial refusal has remained at the same level as in 2001, i.e. around a third of cases as against approximately three quarters of cases in 1999 and 2000. In almost 10% of cases, the Secretary-General granted partial access to the documents to which access was initially refused. This percentage reflects the increased transparency which has resulted from this new provision in the Regulation. Finally, in almost one in four cases, the re-examination of the request for access results in a decision to grant access.

By far the most common reason for refusing a request is the protection of the purposes of inspections, investigations and audits, which applies to almost 30% of confirmed decisions to refuse a request. It should be noted that in almost half of

cases in which a confirmatory request is refused, the decision to refuse the request is based on several exceptions to the right of access.

On completion of the procedure for processing requests, approximately 70% of all requests are granted.

## 4. APPEALS

### 4.1 Legal appeals

The only case which gave rise to a judgment of the Court of First Instance during the reference period is the *British American Tobacco (Investments) Ltd v Commission* case (T-311/00, ECR 2002 p. II-2781). In this judgment, which is not based on Regulation 1049/2001 but on Decision 94/90, the Court confirms that there is a right of access to existing documents only.

Actions have been brought before the Court of First Instance of the EU for the annulment of five decisions to refuse access, which were taken in 2002 on the basis of Regulation 1049/2001. All these cases are pending.

- *Case T-76/02 Messina v Commission*<sup>27</sup>

The appellant has contested the implicit refusal to grant her access to an exchange of correspondence between the Commission and the authorities of a Member State concerning a notified state aid scheme about which the Commission had decided not to raise objections.

Access to the documents concerned was initially refused on the basis of the exception provided for in Article 4(2), third indent, of the Regulation (protection of the purpose of the investigation). On being consulted when the confirmatory request was examined, the national authorities said that they were opposed to the disclosure of the documents which they had sent the Commission in connection with the provision of aid. However, as the consultation process did not allow a reply to be provided within the time-limit set by the Regulation, the appellant brought an action for annulment of the implicit refusal of her request.

- *Cases T-68/02 and T-159/02 Masdar (UK) v Commission*<sup>28</sup>

These appeals concern the refusal to disclose audit reports in order to protect an investigation (Article 4(2), third indent) and, to a lesser extent, the commercial interests of the company which underwent the audit (Article 4(2), second indent).

- *Case T-168/02 Internationaler Tierschutz-Fonds (IFAW) GmbH c/Commission*<sup>29</sup>

The dispute concerns the refusal, in accordance with Article 4(5) of the Regulation, to provide access to documents originating from a Member State which did not want them to be disclosed. The appellant has contested the Commission's interpretation of

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<sup>27</sup> OJ C 109 of 04/05/2002 p.68

<sup>28</sup> OJ C 131 of 01.06.2002 and OJ C 202 of 24.08.2002 p.29

<sup>29</sup> OJ C 202 of 24.08.2002 p.30

this provision and takes the view that a Member State's opposition to the disclosure of a document does not constitute sufficient justification for refusing access to it.

- *Case T-237/02 Technische Glaswerke Ilmenau GmbH c/Commission*<sup>30</sup>

This appeal concerns the application of the exceptions relating to the protection of investigations in the context of an aid scheme (Article 4(2), third indent) and the protection of commercial interests (same article, first indent). The appellant feels that the Commission has applied these exceptions across the board without clearly illustrating the harm which would be caused by disclosing the documents requested. She has also contested the application of case law concerning infringement proceedings to cases concerning state aid.

- *Case T-2/03 Verein für Konsumenteninformation (VKI) c/Commission*<sup>31</sup>

This appeal, which was brought on 7.1.2003, concerns a Commission decision of 18.12.2002 to refuse access to the file relating to a cartel case. The refusal is based on the exception concerning "investigations" (Article 4(2), third indent) as well as on the need to protect the commercial interests of the companies concerned, the legal procedure under way and the integrity of the individuals cited in the case file. Basing its decision on the principle of proportionality, which has been recognised by the Court of Justice and by the Court of First Instance in several rulings, the Commission feels that a disproportionate administrative burden would be caused by examining each individual document in order to find those parts which could be disclosed.

## 4.2 Complaints submitted to the European Ombudsman

Only complaints dealing principally with a request for access to documents are considered in the present report.

- *Complaint 1128/2001/IJH by Mr Hoedeman (on behalf of the Corporate Europe Observatory) of 21.7.2001 (case closed)*

The complaint concerns the refusal to grant access to briefing notes drawn up for the Member of the Commission and the Director-General in connection with meetings of the organisation "Transatlantic Business Dialogue". It should be noted that all the documents requested are available on the Internet or have been disclosed.

The request was processed under the terms of the Code of Conduct. The Ombudsman asked the Commission to review its decision in the light of the Regulation, which had since come into force. The Commission confirmed its refusal on the basis of two exceptions: the protection of the Commission's negotiating position (and thus of the decision-making process — Article 4(3), first indent) and the protection of international relations (Article 4(1)(a)).

The Ombudsman initially took the view that the Commission had failed to take sufficient account of the fact that it would be in the public interest to disclose the documents requested. In a draft recommendation, he asked the Commission to disclose the documents unless there were serious reasons for refusing access to them.

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<sup>30</sup> OJ C 233 of 28.09.2002 p.35

<sup>31</sup> OJ C 55 of 08.03.2003 p.37

The Commission provided more detailed arguments, which were accepted by the Ombudsman. The file was closed on 9.12.2002.

- Complaint 1184/2002/PB by Mr Jens-Peter Bonde MEP of 29.5.2002 (case closed)

This file comprises a number of very extensive requests which, to some extent, go beyond the scope of the Regulation, as some of the documents requested do not exist. The Commission reacted as follows to these requests:

- the full list of all the committees and working parties with the names of their members: the complainant received the list of committees and working parties; a list of members is not available, as participation in meetings varies depending on the subject under discussion;
- the full list of people who received reimbursement of travelling and subsistence expenses: no such list exists;
- the list of all the documents to which access could be refused, even in part: such a list does not exist and would be impossible to compile;
- all the opinions of the Legal Service concerning the Community *acquis*: this request is too extensive; in view of the protection granted to opinions of the Legal Service (Article 4(2), second indent), the possibility of disclosing them must be examined on a case-by-case basis for specific documents;
- screening reports concerning Malta: these documents do not come from the Commission; the Member States have to be consulted.

The Commission sent its comments to the Ombudsman on 1.8.2002. The Ombudsman closed the case on 11.3.2003, concluding there had been no maladministration on part of the Commission.

- Complaint 1437/2002/IJH of 31.7.2002

The complainant is one of the private investors in the Lloyd's insurance market (Lloyd's "names") who suffered financial ruin as a result of the losses sustained by Lloyd's in the USA following extensive compensation payouts to victims of asbestos. He filed a complaint against the UK authorities for failure to apply the "non-life insurance" Directive (73/239/EEC).

The complainant asked for a copy of the letter of formal notice. The refusal by the Internal Market DG to grant his request was confirmed by the Secretary-General. The Commission sent its comments to the Ombudsman on 24.10.2003. The case is still pending.

- Complaint 1753/2002/GG of 7.10.2002

The complainant contests the refusal to grant him access to documents originating from a Member State. On being consulted by the Commission, the national authorities were opposed to the disclosure of the documents. By virtue of Article 4(5) of the Regulation, the Taxation and Customs Union DG refused to make its

documents available. This decision was subsequently confirmed by the Secretary-General.

The complainant contests in particular the fact that the Commission consulted the national authorities. He feels that, under the implementing rules which apply to the Regulation, the Commission should have granted him access to the documents concerned without consulting the national authorities.

The Commission sent its comments to the Ombudsman on 9.1.2003. The case is still pending.

## C. Figures concerning the application of the Regulation

Reminder: these statistics relate only to requests for documents which have not been published. They do not include the numerous general information queries and the growing number of requests for copies of published documents, which have been dealt with by Commission services.

### 1. INITIAL REQUESTS

<b>Number of initial requests</b>			
<b>1999</b>	<b>2000</b>	<b>2001</b>	<b>2002</b>
408	481	450	991

<b>Number of identifiable documents taken into consideration</b>			
<b>1999</b>	<b>2000</b>	<b>2001</b>	<b>2002</b>
587	505	589	2150

<b>Proportion of positive/negative replies (%)</b>			
<b>1999</b>	<b>2000</b>	<b>2001</b>	<b>2002</b>
81 / 19	76.6 / 23.4	70.3 / 29.7	66.5 / 33.5

<b>Number of requests for which partial access was granted</b>			
<b>1999</b>	<b>2000</b>	<b>2001</b>	<b>2002</b>
Data not available			44

<b>Cases in which access was refused — breakdown according to the exception invoked (%)</b>	<b>1999</b>	<b>2000</b>	<b>2001</b>	<b>2002</b>
Protection of the public interest (public security)	50.6	58.8	65.3	-
Protection of the public interest (defence and military matters)				0.46
Protection of the public interest (international relations)				1.8
Protection of the public interest (financial, economic or monetary policy)				0.46
Protection of court proceedings and legal advice				3.7
Protection of the purposes of inspections, investigations and audits				35.9
Protection of commercial interests, including intellectual property	2.6	4.1	2.6	3.7
Protection of privacy and the integrity of the individual (protection of personal data)	-	2.1	1.7	5.2
Protection of the decision-making process	13.0	9.3	8.7	8.6
Confidentiality requested by a Member State	6.5	5.1	2.6	2.1
Various exceptions or unspecified exception	27,3	19.6	19.1	38.0

## 2. CONFIRMATORY REQUESTS

Number of confirmatory requests			
1999	2000	2001	2002
33	46	52	96

Breakdown of decisions on confirmatory requests (%)	1999	2000	2001	2002
Confirmation of refusal	73.1	73	65.3	66.9
Partial access	-	-	-	9.2
Complete reversal	26.9	27	34.7	23.9

Cases in which refusal of access was confirmed — breakdown according to the exception invoked (%)	2002
Protection of the public interest (public security)	-
Protection of the public interest (defence and military matters)	-
Protection of the public interest (international relations)	7.2
Protection of the public interest (financial, economic or monetary policy)	-
Protection of court proceedings and legal advice	4.4
Protection of the purposes of inspections, investigations and audits	29.4
Protection of commercial interests, including intellectual property	3.3
Protection of privacy and the integrity of the individual (protection of personal data)	0.6
Protection of the decision-making process	1.6
Confidentiality requested by a Member State	4.4
Various exceptions	48.9

### 3. STATISTICS RELATING TO ALL REQUESTS

<b>Proportion of positive replies with respect to the procedure as a whole (%)</b>			
<b>1999</b>	<b>2000</b>	<b>2001</b>	<b>2002</b>
82.8	80.7	74.7	70.7*

\* including 8.3 % of cases in which partial access was granted

#### **Breakdown of requests**

<b>According to the professional profile of the requesters (%)</b>	<b>1999</b>	<b>2000</b>	<b>2001</b>	<b>2002</b>
Members of the public or unspecified	10.5	10.5	12.6	31.8
Lawyers	18.4	21.6	23.5	22.4
Civil society (industrial sectors, lobby groups, NGOs, etc.)	26.0	25.4	23.2	17.8
Academic sector	26.2	20.4	22.0	12.3
Public authorities	13.4	13.2	12.0	8.6
Journalists	2.5	5.7	2.6	3.8
MEPs	2.7	3.2	4.1	3.1

<b>According to geographic origin (%)</b>	<b>1999</b>	<b>2000</b>	<b>2001</b>	<b>2002</b>
Belgium	27.5	28.5	23.6	23.0
Denmark	1.2	2.8	2.7	1.6
Germany	10.0	9.3	12.7	10.9
Greece	1.0	0.4	0.2	1.2
Spain	7.1	4.2	7.1	5.4
France	10.5	6.6	7.3	10.3
Ireland	1.0	2.3	3.8	2.0
Italy	7.6	12.1	7.3	9.6
Luxembourg	1.7	0.2	0.7	0.4
Netherlands	9.0	11.0	8.2	6.4
Austria	1.7	1.1	0.9	2.1
Portugal	0.7	0.6	0.4	1.2
Finland	0.2	1.1	1.6	0.5
Sweden	2.0	1.5	1.1	1.3
UK	15.0	13.4	15.8	8.8
European countries outside the Community	1.7	2.8	1.8	1.7
Countries outside Europe	2.0	1.3	3.3	1.3
Other	0.0	0.8	1.5	12.2

<b>According to subject area (%)</b>	<b>2000</b>	<b>2001</b>	<b>2002</b>
Agriculture	2.2	2.9	4.8
Anti-Fraud Office	2.2	1.2	2.4
Budget	1.6	3.7	2.3
Competition	4.3	5.2	12.7
Development	2.4	2.4	0.8
Economic and Financial Affairs	1.4	1.4	1.1
Education and Culture	2.0	1.7	0.5
Employment and Social Affairs	4.5	3.5	3.2
Energy and Transport	4.0	2.3	2.9
Enlargement	1.4	1.2	1.0
Enterprise	4.1	5.0	3.9
Environment	14.6	16.3	6.2
External Relations	2.8	3.7	2.1
Financial Control	0.2	0.6	0.4
Fisheries	2.2	1.0	0.6
Health and Consumer Protection	3.0	2.7	4.4
Humanitarian Aid	0.6	0.4	0.1
Information Society	0.6	0.6	0.7
Inspectorate-General	0.0	0.4	0.2
Internal Market	5.7	11.4	10.3
Joint Interpreting and Conference Service	0.0	0.0	0.4
Justice and Home Affairs	6.3	5.8	2.2
Legal Service	1.8	2.9	3.0
Personnel and Administration	1.8	1.9	3.2
Press	0.2	0.8	0.8
Regional Policy	2.6	1.7	0.8
Research (Joint Research Centre)	0.4	0.2	0.3
Research and Technological Development	0.6	0.6	0.7
Secretariat-General	15.8	12.1	15.9
Statistical Office	0.0	0.4	0.1
Taxation and Customs Union	9.7	5.0	10.6
Trade	1.0	0.8	1.1
Translation Service	0.0	0.2	0.4