



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 26 November 2008**

**16338/08**

---

**Interinstitutional file:  
2008/0090 (COD)**

---

**LIMITE**

**INF 251  
API 87  
JUR 531  
CODEC 1658**

**NOTE**

---

From : General Secretariat  
To : Working Party on Information  
Subject : Proposal for a Regulation of the European Parliament and of the Council  
regarding public access to European Parliament, Council and Commission  
documents

---

Delegations will find at Annex the following documents which were circulated at the meeting of the Working Party on 25 November 2008:

- proposal by Austria, Greece and Italy for amendment to Article 2(5) and Article 5(2) and insertion of new recital (8)A;
- proposal by Austria for a new Article 4(1)(f);
- proposal by UK for amendment to Article 4(5);
- proposal by Germany for a new Article 4(2)(d).

Proposal by Austria, Greece, Italy

## I. Amending Regulation 1049/2001

### 1. Amendment to Article 2(5) of Regulation and new recital (8)A:

New recital 8A:

It is appropriate to preserve the confidentiality of legal advice provided internally to an institution.

New Article 2(5):

This Regulation shall not apply to →internal legal advice given to an institution by its own legal service and to← documents submitted to Courts ~~by parties other than the institutions.~~

Rationale of the amendment: to protect both the Governmental interests and the functioning of the legislative procedure; to put on equal footing all the parties that have submitted documents to Courts

Proposal by Greece and Italy

### 2. Amendment to Article 5 (2), last sentence

“The institution holding the document shall disclose it unless the Member State →, within the time limit provided for in Article 7,← gives reasons for withholding it, based on the exceptions referred to in Article 4 or on specific provisions in its own legislation preventing disclosure of the document concerned. ~~The institution shall appreciate the adequacy of reasons given by the Member States insofar as they are based on exceptions laid down in this regulation~~”.

Rationale of the amendment: MS should have a reasonable and certain time-limit to reply; enhance the position of the MS. If the party asking access is not satisfied, the same party may apply for a judicial remedy. We see no reason why the reasons stated by a MS should be appreciated by an institution.

Proposal by Austria

## II. Amending Regulation 1049/2001

### **Amendment to Article 4 of Regulation:**

New Article 4 (1) (f)

#### **Exceptions**

1. The institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards:

.....

→ (f) legal advice and court, arbitration and dispute settlement proceedings including the pre-litigation stages of infringement procedures; ←

#### **Rationale of the amendment:**

1. Protection of the above mentioned proceedings is of public interest and outweighs the public interest in disclosure.
2. The exceptions of Article 4 (1) (f) also include documents produced during preliminary proceedings

As a result Article 4 (2) (c) would be deleted.

New Article 4(5)

Personal data shall be disclosed in accordance with the conditions regarding lawful processing of such data laid down in EC legislation on the protection of individuals with regard to the processing of personal data.

**Proposal for a new Article 4 para. 2 lit. d'**

The subsequent new Article 4 para. 2 lit. d' should be inserted into the Regulation:

*Article 4***Exceptions**

(...)

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

↓ 1049/2001 (adapted)

(a) commercial interests of a natural or legal person; ~~including intellectual property;~~

(b) intellectual property rights;

↓ 1049/2001 (adapted)

⇒ new

(c)  legal advice and  court proceedings ⇒ , arbitration and dispute settlement proceedings ⇐ ~~and ;~~

(d) the purpose of inspections, investigations and audits;

↓ new

(d') ~~infringement proceedings, including the preparatory stages thereof.~~<sup>1</sup>

↓ new

(e) the objectivity and impartiality of selection procedures.

↓ 1049/2001 (adapted)

⇒ new

~~unless there is an overriding public interest in disclosure.~~

<sup>1</sup> DE: „den Ablauf der Vertragsverletzungsverfahren, einschließlich der vorbereitenden Arbeiten“;  
FR: « le déroulement des procédures d'infraction, y compris les étapes préparatoires ».

## Explanatory Statement

In infringement proceedings, Member States and Commission cooperate with a view to reach a solution that ensures full adherence to Community law. If documents originating from infringement proceedings were openly accessible this would entail a danger of impeding the faithful cooperation between COM and MS. These proceedings are characterised by a spirit of loyal cooperation and the aim of both sides, to reach results, which are in compliance with Community law. In order not to impede this exchange between MS and Commission, Germany is suggesting an explicit reference to documents from infringement proceedings for the sake of legal clarity.

In 2000 the Commission had initially proposed an exception for access to documents originating from infringement proceedings. This clause was, however, deleted by Parliament in the course of the legislative process. The main criticism against this proposal was its wide phrasing at the time. The provision foresaw that the institutions shall refuse access to documents where disclosure could significantly undermine the protection of the “*public interest* and in particular“ *inter alia* infringement proceedings, including the preparatory stages thereof.

Germany now proposes an amendment that takes up in substance the wording proposed by the Commission in 2000, but avoids an extensive scope and wording („in particular“). We would therefore reach the same legal clarity for these proceedings as for legal proceedings.

Even though the exceptions in regulation 1049/2001 should be read to encompass infringement proceedings – at least implicitly (“international relations”, Art. 4 para. 1; “investigations”, Art. 4 para. 2; *cf.* European Court of First Instance, Judgment *Petrie, Primhak, Verzoni et al.. v Commission*, Case T-191/99, para. 68-69) – the addition of an explicit reference would add to legal certainty.