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REPORT FROM THE COMMISSION

on the application in 2010 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents

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FOREWORD

This report, drawn up pursuant to Article 17(1) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents[1], covers the year 2010 and is based on statistical data which are summarised in the annex.

These statistics reflect the number of applications and not of requested documents. In practice, applications may cover a single document or entire files concerning a specific procedure. Applications for access to documents which were publicly accessible at the time of the request, are not included.

1. REVISION OF REGULATION (EC) NO 1049/2001

1.1. The proposal for a recast of the Regulation, submitted by the Commission on 30 April 2008, is still at first reading. The Parliament voted a report with amendments on 11 March 2009 but postponed the vote on the legislative resolution. After the June 2009 elections, the new Parliament has resumed work on the Commission proposal. The committees for Constitutional Affairs (AFCO) and for Petitions (PETI) adopted their opinions on 30 November 2010 and 1 December 2010 respectively. The Civil Liberties committee (LIBE) has not yet voted on a new draft report. In the Council, the proposal has been examined at the working group level.

1.2. Following the entry into force of the Treaty of Lisbon on 1 December 2009, the Commission has submitted on 21 March 2011 a new proposal with a view to adapting Regulation 1049/2001 to the requirements of the Treaty of Lisbon. This proposal aims at extending the institutional scope of the Regulation to all the European Union institutions, bodies, offices and agencies, with some restrictions as regards the European Court of Justice, the European Central Bank and the European Investment Bank, in accordance with Article 15(3) of the consolidated version of the Treaty on the functioning of the European Union.

2. REGISTERS AND INTERNET SITES

2.1. In 2010, 18661 new documents were added to the register of Commission documents (see table in annex).

2.2. According to Article 17 (1) of Regulation 1049/2001 the Commission has to provide in its annual reports the number of documents in its possession which are “sensitive”

[1] OJ L 145, 31.5.2001, p. 43

in the meaning of Article 9(1) of the Regulation[2] and have therefore not been recorded in the register. The Commission's public register covers documents of the COM, C, OJ, PV and SEC series. In 2010 no sensitive documents were created or received by the Commission, that would fall within one of these categories of documents.

2.3. The table below shows the statistics for 2010 on consultation of the Openness and Access to Documents website on EUROPA.

	Number of visitors	Number of sessions	Pages viewed
Total	48.557	61.308	452.695
Monthly average	4046	5109	37725

3. COOPERATION WITH THE OTHER INSTITUTIONS SUBJECT TO THE REGULATION

The inter-institutional committee set up pursuant to Art. 15(2) of the Regulation was not convened during 2010. The three institutions (European Parliament, Council and Commission) maintained regular contacts at the administrative level with a view to ensure a consistent application of the Regulation.

4. ANALYSIS OF ACCESS APPLICATIONS

4.1. 2010 has seen a significant increase of the number of **initial applications** made under Regulation 1049/2001 (6127 applications compared with 5055 in 2009, i.e 21% more).

4.2. The number of substantive decisions on **confirmatory applications** issued during 2010 remained stable: 122 decisions of substance in 2010 against 120 in 2009. The total number of responses to confirmatory applications was 152. The additional 30 cases have been closed without a formal decision under Regulation 1049/2001. They concern either applications which were devoid of purpose, or requests which were handled under another, more appropriate legal basis, e.g. under Regulation 45/2001 on personal data protection as regards requests for access to the applicant's own personal data. The number of confirmatory applications received increased from 140 in 2009 to 181 in 2010. The difference between the number of confirmatory applications received and the number of decisions issued is reflected in the number of cases pending at the end of the year (68).

4.3. Competition policy comes first on the list of domains of interest with 9.07% of initial applications, followed closely by other major EU policy areas, such as home and

[2] "Documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as "TRÈS 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 or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters" (Article 9(1)).

justice affairs, transport and energy, the internal market, taxation and customs union, health and consumer protection, environment and enterprise policy.

4.4. The main categories of applicants remain the academic world, accounting for 23.24% of initial applications, law firms with 10.69 % and civil society (NGO's, interest groups) with 8.18% of the total number of applications. For 32.68 % of the applications, the socio-professional profile is undefined.

4.5. The geographical breakdown of initial applications also remained very similar to previous years. However, whereas for obvious reasons the largest proportion of applications, namely 17.95%, came from persons or bodies established in Belgium, an almost equal proportion of applications (16.62%) originated from Germany. None of the other Member States, exceeded 10% of applications, the largest numbers coming from the highly-populated Member States, i.e. France, Italy, Spain, the United Kingdom and the Netherlands, which together accounted for 36.45% of the applications. The share of applications from the new Member States slightly increased with 4.23% of applications originating from the Czech Republic and 2.76% from Poland.

5. APPLICATION OF EXCEPTIONS TO THE RIGHT OF ACCESS

5.1. The percentage of initial applications which were fully granted remained in 2010 above 80% (82,16%), while partial access was granted in 5,37% of initial applications. In 82.16% of cases (compared with 84.23% in 2009) the documents were disclosed in full, while in 5.37% of cases (compared with 4.11% in 2009) partial access was granted. This means that as in 2009, the percentage of applications that were refused in the first instance in full (for various reasons) stabilised around 12%.

5.2. After a decrease in 2009, the percentage of decisions confirming the initial position show a return to a level comparable to the one of 2008 (50% in 2010, against 48.08% in 2008 and only 22.50% in 2009).

Also the percentage of cases in which access was granted in full after an initial refusal returned to a level similar to 2008 (15.57% in 2010 against 50% in 2009 and 18.59% in 2008). On the other hand, the percentage of cases in which partial access was granted after an initial refusal, increased noticeably (34.43% in 2010, as against 27.50% in 2009).

5.3. The two main reasons for refusing an initial application continued to be:

– the protection of the purpose of inspections, investigations and audits (third indent of Article 4(2)), with a slight decrease compared to 2009 (26.63% of refusals instead of 27.61% in 2009);

– the protection of the Commission's decision-making process (Article 4(3)), with a percentage of 16.80% for cases where the decision had still to be taken and 9.66 % for those concerning opinions for internal use, totalling 26.42% of refusals (compared with a total of 25.61% in 2009).

The percentage of refusals based on the protection of commercial interests slightly decreased in comparison with the previous year amounting to 11.84% (instead of 13.99% in 2009).

5.4. The main grounds for confirming a refusal of access were:

– the protection of the purpose of investigations (32% compared with 25.91% in 2009);

– the protection of commercial interests (16.67% compared with 17.52% in 2009);

– the protection of the Commission's decision-making process, with a percentage of 11.33% for cases where the decision had still to be taken and 8% for those concerning opinions for internal use, totalling 19.33% of refusals (compared with a total of 26.64% in 2009).

6. COMPLAINTS TO THE EUROPEAN OMBUDSMAN

6.1. In 2010 the Ombudsman closed the following 23 complaints against the Commission's handling of requests for access to documents:

1 case closed without finding any form of maladministration			
2953/2008/FOR			
13 cases closed with a critical and/or a further remark			
3699/2006/ELB	355/2007/TN(FOR)	671/2007/PB	2502/2007/RT
3163/2007/BEH	676/2008/RT[3]	1039/2008/FOR	1438/2008/DK
1202/2009/GG	1207/2009/GG	1302/2009/TS	100/2010/GG
465/2010/FOR			
9 cases closed without further action			
301/2008/IP	2219/2008/(JMA)MHZ	2643/2008(TN)RT	3052/2008(BB)FOR
966/2009/JMA	2647/2009/IP	172/2010/ANA	1195/2010/OV
1357/2010/MHZ			

6.2. In the course of the year the Ombudsman opened 22 new inquiries where access to documents was either the main or a subsidiary part of the complaint.

7. JUDICIAL REVIEW

[3] This case has been also subject to a special report from the European Ombudsman.

2010 was a very intensive year as regards new case law[4].

7.1. The Court of Justice delivered four judgments on appeals in 2010:

C-362/08 P *Internationaler Hilfsfonds v Commission*, judgment of 26/1/2010	C-139/07 P Commission v *Technische Glaswerke Ilmenau*, judgment of 29/6/2010 *(TGI)*
C-28/08 P *Commission v Bavarian Lager*, judgment of 29/6/2010	Joined cases C-514/07P, C-528/07 P, C- 532/07 P, *API, Sweden and Commission*, judgment of 21/9/2010

These four judgments provided important clarifications in relation to the interpretation of both substantive and procedural aspects of Regulation 1049/2001.

Concerning the substantive aspects, in the two judgments handed down on 29 June 2010 (*Bavarian Lager* and *TGI*), the Court of Justice clarified the interpretation of the exceptions provided for under Article 4(1)(b) and under Article 4(2) 3rd indent of Regulation 1049/2001. In *API* judgment the Court of Justice interpreted the exception of Article 4(2) 2nd indent.

In *Bavarian Lager*, the Court of Justice ruled that, where a public access request is made to documents containing personal data, the provisions of the Data Protection Regulation become applicable in their entirety, including the provision requiring the recipient of personal data to establish the need for their disclosure and the provision which confers on the data subject the right to object at any time, on compelling legitimate grounds relating to his or her particular situation, to the processing of data relating to him or her.

In the *TGI* judgment the Court of Justice held that documents pertaining to the Commission's administrative files relating to State aid investigations are covered by a general presumption that their disclosure would in principle undermine the protection of the purpose of investigations. The State aid Regulation does not lay down any right of access to the file for interested parties. If they were able to obtain access, on the basis of Regulation 1049/2001, the system for State aid review would be called into question. The Court further ruled that this presumption can be rebutted if the applicant demonstrates that a requested document is not "covered by that presumption" or that there is an overriding public interest in disclosure.

In *API*, the Court of Justice formulated a presumption of inaccessibility of pleadings submitted by an institution to the EU courts before the closure of the judicial proceedings. Similarly to the logic used in *TGI* decision, this interpretation of the exception relating to court proceedings was deduced from the legal framework governing court proceedings and from the absence of access rights for the public as regards judicial activities.

Finally, as concerns *Internationaler Hilfsfonds*, the Court clarified that a new application for access to a document which was previously refused can be introduced

[4] For details of each case referred to below, see http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en

at any time and that the institution concerned is obliged in such case to analyse whether the refusal remains justified in the light of a change of legal or factual circumstances which could have occurred in the meantime.

7.2. As for the General Court, it has handed down five judgments concerning Commission's decisions:

Joined cases T-355/04 et T-446/04, *Co-Frutta Soc.coop. v Commission*, judgment of 19.1.2010	T-237/05, *Editions Odile Jacob SAS v Commission*, judgment of 9.6.2010	T-111/07, *Agrofert v Commission*, judgment of 7.7.2010
T-474/08, *D. Umbach v Commission*, judgment of 21.10.2010	Joined cases T-494/08 to T-500/08 and T-509/08, *Ryanair v Commission*, judgment of 10.12.2010	

In two cases concerning access to the Commission's investigation files in the field of merger control, *Editions Odile Jacob* and *Agrofert*, the Commission's decisions under Regulation 1049/2001 have been annulled by the General Court essentially on grounds of lack of individual and concrete examination of the documents[5].

In the *Ryanair* cases, the General Court followed the judgment of the Court of Justice in *TGI* and dismissed the applications.

In the remaining two cases the Commission's decisions under Regulation 1049/2001 have been upheld by the General Court.

Likewise, in the judgment of 21.10.2010, the application was dismissed in case T-439/08, *Agapiou Joséphidès v Commission and EACEA*, where the Commission was one of the defending parties, although the author of the challenged decision was EACEA.

Finally, three further cases have to be mentioned which have been removed from the register following the withdrawal by the applicant:

T-245/09, *Shell Hellas v Commission*, order of 5.1.2010	T-251/09, *Soc. des Pétroles Shell v Comission*, order of 5.1.2010	T-170/03, *BAT v Commission*, order of 6.9.2010

7.3. 14 new cases were brought in 2010 against Commission decisions under Regulation (EC) No 1049/2001.

T-17/10, *Gerald Steinberg v Commission*	T-36/10, *Internationaler Hilfsfonds e.V. v Commission*	T-120/10, *ClientEarth and Others v Commission*

[5] See also Section 7.4 of the present Report

T-167/10, *Evropaïki Dynamiki v Commission*	T-180/10, *Nickel Institute v Commission*	T-181/10, *Reagens SpA v Commission*
T-267/10, *Land Wien v Commission*	T-291/10, *Anne Martin v Commission*	T-300/10, *International Hilfsfonds e.V. v Commission*
T-301/10, *Sophie in 't Veld v Commission*	T-359/10, *Ecologistas en Acción-CODA v Commission*	T-395/10, *Stichting Corporate Europe Observatory v Commission*
T-449/10, *ClientEarth and Others v Commission*	T-511/10, *Evropaïki Dynamiki v Commission*	

7.4. Also, three new appeals have been brought to the Court of Justice against judgments of the General Court.

Appeals lodged by the Commission (see section 7.2. above):

C-404/10P, *Commission v Editions Odile Jacob SAS, Lagardère SCA*	C-477/10P, *Commission v Agrofert Holding a.s., other parties Sweden, Finland, Denmark, Polski Koncern Naftowy Orlen SA*

Appeal lodged by the applicant at first instance:

C-609/10P, *Dieter C. Umbach v Commission*

8. CONCLUSIONS

8.1. In 2010, there was again a significant increase in the volume of access requests. While in 2009 the number remained at the same level as in the previous year, at around 5,000, more than 6,000 requests were made in 2010. Despite this 20% increase, the ratio of disclosure remains high: four out of five requests receive a positive reply. It is noteworthy that, in ten years time, the number of access requests has risen from 500 to 6,000 per year. Given the overall volume of requests, the number of confirmatory applications, complaints to the Ombudsman and applications to the Court remains very modest.

Even if the share of citizens has increased, most applications for access are still made by the academic sector, by NGO's, interest groups and law firms. Many of these requests cover infringement proceedings, antritrust, merger, State aid or antidumping cases. As in the previous years, requests for access concern mainly the Commission's role in enforcing EU law, where transparency must be balanced against other legitimate interests, in accordance with the applicable rules. As regards Commission initiatives for new legislation, there is already a high degree of transparency, as many documents are made public pro-actively.

8.2. Ten years after the Regulation was adopted, its implementation has led to a consolidated administrative practice with regard to the citizen's right of access to Commission documents. Through the case law, the Court of Justice and the General Court have significantly contributed to this consolidation. Therefore, the Commission remains convinced that the revision of the Regulation should build on what has been achieved in the past ten years.

ANNEX

Statistics relating to the application of Regulation (EC) No 1049/2001

1. NUMBER OF DOCUMENTS ENTERED IN THE REGISTER

	COM	C	OJ	PV	SEC	Total
2010	2088	12630	127	92	3724	**18661**

INITIAL REQUESTS

2. APPLICATIONS RECEIVED AND HANDLED

	2008[6]	2009	2010
Applications received	-	5401	6361
Replies given[7] [8]	-	6636	7148
Replies given based on Regulation 1049/2001	5197	5055	6127

3. RESULT

	2008		2009		2010	
	No	%	No	%	No	%
Access granted	4314	82.68	4258	84.23	5034	82.16
Access refused	703	13.99	589	11.65	764	12.47
Partial access	180	3.33	208	4.11	329	5.37
total	5197	100	5055	100	6127	100

6 Please note, that for 2008 the Commission cannot provide the comparable statistical data corresponding to the categories of "Applications received" and "Replies given" for either initial nor confirmatory requests;

7 Please note that a single request can concern several documents and can consequently give rise to several different replies;

8 Please note that the category "Replies given" includes the replies given outside the scope of Regulation 1049/2001, for example replies given under Regulation 45/2001;

CONFIRMATORY REQUESTS

4. APPLICATIONS RECEIVED AND HANDLED

	2008	2009	2010
Applications received	-	140	181
Replies to applications	-	134	152
Decisions on confirmatory applications based on Regulation 1049/2001	156	120	122

5. RESULT

	2008		2009		2010	
	No	**%**	**No**	**%**	**No**	**%**
Confirmation	75	48.08	27	22.50	61	50
Partial revision	52	33.33	33	27.50	42	34.43
Full revision	29	18.59	60	50	19	15.57
total	**156**	100	**120**	100	**122**	100

(1) BREAKDOWN OF REFUSALS BY EXCEPTION APPLIED (%)

6. INITIAL REQUESTS

	2008	2009	2010
4.1.a. 1st indent – Protection of public security	0.18	1.36	1.94
4.1.a. 2nd indent Protection of defence and military matters	0.82	0.54	0.14
4.1.a. 3rd indent - Protection of international relations	10.24	8.17	9.83
4.1.a. 4th indent – Protection of the financial, monetary or economic policy	2.9	2.09	2.15
4.1.b. Protection of privacy and the integrity of the individual	5.98	6.99	9.76
4.2.1st indent - Protection of commercial interests	14.4	13.99	11.84
4.2 2nd indent - Protection of court proceedings and legal advice	6.52	9.81	7.32
4.2 3rd indent - Protection of the purpose of inspections, investigations and audits	26.63	27.61	26.63
4.3 subparagraph 1– Decision-making process, no decision yet taken	13.5	17.80	16.80
4.3. subparagraph 2- Decision making process, decision already taken: opinions for internal use as part of deliberations and preliminary consultations	15.22	7.81	9.62
4.5. Refusal by Member State/third author	3.62	3.81	3.94
total	100	100	100

7. CONFIRMATORY REQUESTS

	2008	2009	2010
4.1.a. 1st indent – Protection of public security	0.42	2.55	2,67
4.1.a. 2nd indent - Protection of defence and military matters	0.42	0	0
4.1.a. 3rd indent - Protection of international relations	5.91	4.38	6,67
4.1.a. 4th indent – Protection of the financial, monetary or economic policy	0.84	3.28	3,33
4.1.b. - Protection of privacy and the integrity of the individual	5.06	14.23	9,33
4.2. 1st indent - Protection of commercial interests	24.89	17.52	16.67
4.2. 2nd indent - Protection of court proceedings and legal advice	3.8	5.47	10
4.2. 3rd indent - Protection of the purpose of inspections, investigations and audits	27.85	25.91	32
4.3 subparagraph 1 – Decision-making process, no decision yet taken	17.3	12.77	11,33
4.3. subparagraph 2 - Decision making process, decision already taken: opinions for internal use as part of deliberations and preliminary consultations	12.24	13.87	8
4.5. Refusal by Member State	1.27	-	-
total	100	100	100

BREAKDOWN OF REQUESTS

8. ACCORDING TO SOCIAL AND OCCUPATIONAL PROFILE OF APPLICANTS (%)

	2008	2009	2010
Academics	31.03	21.29	23.24
Public authorities (other than the EU institutions)	14.19	7.33	13.56
Lawyers	11.01	10.24	10.69
Other EU institutions	6.3	3.77	8.32
Civil society (interest groups, industry, NGOs. etc.)	18.26	9.85	8.18
Journalists	2.46	2.02	3.35
Not specified	16.75	45.5	32.68
total	100	100	100

9. ACCORDING TO GEOGRAPHICAL ORIGIN (%)

	2008	2009	2010
Belgium	18.93	18.26	17.95
Germany	16.89	16.61	16.62
France	8	8.01	9.05
Italy	8.54	7.18	8.85
United Kingdom	6.34	6.23	7.24
Spain	5.29	6.27	6.86
Netherlands	4.83	5.45	4.43
Czech Republic	1.26	1.11	4.23
Poland	2.57	2.86	2.76
Sweden	1.44	2.13	2.18
Austria	2.11	1.98	2.08
Luxembourg	2.61	1.71	1.99
Denmark	2.45	1.63	2.02
Ireland	1.28	0.72	1.49
Greece	1.93	1.06	1.22
Portugal	1.5	1.61	1.16
Romania	0.58	0.93	1.11
Finland	1.08	0.78	0.81
Hungary	0.86	0.70	0.89
Bulgaria	0.36	0.56	0.69
Slovakia	0.24	0.50	0.56
Slovenia	0.32	0.39	0.52
Lithuania	0.62	0.35	0.31
Malta	0.2	0.30	0.22
Cyprus	0.22	0.20	0.20
Latvia	0.28	0.06	0.13
Estonia	0.1	0.17	0.09
Non-EU European countries	2.12	0.83	0.50
North America	1.16	0.37	0.11
Australia and New Zealand	0.14	0.07	0.09
Africa	0.04	0.20	0.05
South America	0.06	0.09	0.05
Asia	0.46	0.19	0.04
Not specified	5.24	10.57	3.49
total	100	100	100

10. ACCORDING TO AREA OF INTEREST (%)

Directorate-General / Service	2008	2009	2010
SG – Secretariat General	9.38	10.10	11.64
COMP – Competition	7.18	7.03	9.07
JUST - Justice + HOME - Home Affairs (former JLS)	6.69	7.74	8.38
MOVE – Mobility and Transport + ENER – Energy (former TREN)	8.18	8.02	7.14
MARKT – Internal market	7.28	7.27	6.14
ENV – Environment + CLIMA – Climate Action	6.07	8.37	6.07
SANCO – Health and Consumer Protection	5.74	4.69	5.44
TAXUD – Taxation and Customs Union	5.17	6.20	5.30
ENTR – Enterprise	5.91	4.55	4.48
RELEX – External Relations	2.39	2.25	3.29
AGRI – Agriculture	3.6	4.07	3.15
REGIO – Regional Policy	3.42	3.67	3.06
TRADE – Trade	2.72	2.08	3.06
DEVCO – Development and Cooperation-EuropeAid (former DEV + AIDCO)	3.22	2.75	2.77
EMPL – Employment and Social Affairs	3.72	3.28	2.74
SJ – Legal Service	1.75	1.80	2.68
ECFIN – Economic and Financial Affairs	1.23	1.87	2.32
HR - Human Resources and Security (former ADMIN) + OIB + OIL - Offices for Infrastructure and Logistics in Brussels and Luxembourg + PMO – Office for Administration and Payment of Individual Entitlements	4.54	3.15	2.29
RTD – Research, JRC – Joint Research Centre	1.36	1.74	1.82
INFSO – Information Society	2.3	2.29	1.79
ELARG – Enlargement	1.5	1.74	1.47
BUDG – Budget	1.07	1.07	1.24
EAC – Education and Culture	1.4	1.44	1.13
COMM – Communication	0.85	0.41	0.74
MARE - Maritime Affairs and Fisheries	1.13	0.79	0.66
DGT – Translation	0.32	0.13	0.36
ESTAT – Eurostat	0.22	0.11	0.31
CAB – Commissioners' Cabinets	0.43	0.30	0.28
ECHO – Humanitarian Office	0.15	0.24	0.28
OLAF – European Anti-Fraud Office	0.62	0.24	0.27
OPOCE – Publications Office	0.05	0.19	0.19
EPSO – Recruitment Office	0.23	0.26	0.14
IAS – Internal Audit Service	0.07	0.02	0.09
DIGIT – Informatics	0	0.07	0.09
SCIC – Interpretation	0.02	0.02	0.08
BEPA – Bureau of European Policy Advisers	0.07	0.06	0.03
total	100	100	100