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REPORT FROM THE COMMISSION

on the application in 2009 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents

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FOREWORD

This report, which covers 2009, was drawn up pursuant to Article 17(1) of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents[1].

The annex to this report contains statistics on the processing of access applications. The statistics refer only to access applications to unpublished documents and do not cover orders for published documents or requests for information.

1. Revision of Regulation (EC) No 1049/2001

   The Commission proposal, presented on 30 April 2008, was examined by the Council Information Group.

   On 11 March 2009, the European Parliament voted on the report by its LIBE Committee (Committee on Civil Liberties, Justice and Home Affairs), presented by Mr Cashman, which contained a large number of amendments to the Commission proposal. However, Parliament postponed the vote on the legislative resolution. The proposal is therefore still at the first reading stage. The new Parliament which emerged from the June 2009 elections continued the parliamentary work on the proposal.

2. Registers and internet sites

2.1. In 2009, 18 063 new documents were added to the register of Commission documents (see table in annex).

2.2. Article 9(3) of the Regulation states that documents defined as "sensitive"[2] may be recorded in the register only with the consent of the originator. In 2009 no sensitive document within the meaning of this provision was included in the register.

2.3. The table below shows the statistics for 2009 on consultation of the Openness and Access to Documents website on EUROPA.

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1 OJ L 145, 31.5.2001, p. 43.

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)).

	Number of visitors	Number of sessions	Pages viewed
Total	44.538	61.823	84.094
Monthly average	3.712	5.152	7.008

3. Cooperation with the other institutions and the Member States

The **Interinstitutional Committee**, provided for in Article 15(2) of the Regulation, met at political level on 15 December 2009 at the instigation of the Swedish Presidency of the Council with a view to looking in particular at ways of further facilitating access by citizens to the documents held by the EU institutions.

The following suggestions were made at this meeting:

(1) the Committee should meet at least once a year at political level, and the results of its discussions should be made public;

(2) the Committee's work should be based on preparatory work carried out by the competent departments of the various institutions;

(3) the Committee should discuss the possibility of:

- combining on a single web page all links to websites relating to access to the documents of the three institutions;

- ensuring that the public registers of the institutions complement each other, thereby improving user-friendliness and the accessibility of documents;

- gradually aligning the search engines of the institutions (in this respect, the advisability and feasibility of a common indexing method for documents might be examined in order to create a common search function);

- broadening the *PreLex*[3] database to cover all the documents produced by the institutions involved in the legislative process, while taking account of the possibility of supplementing *PreLex* with *Œil*[4];

- improving the accessibility of all the documents connected with a particular legislative dossier by grouping them all together;

- in relation to the above point, carrying out a preliminary study in 2010 of the legislative dossiers identified as priorities in terms of EU communication efforts;

(4) when an institution intends to set up a new electronic storage system or considerably change its existing system, it should take account of the impact on access rights, and its approach should promote the objective of transparency.

3 Database of the Publications Office of the European Union.

4 Database of the European Parliament.

In addition, the departments of the three institutions responsible for implementing the Regulation continued their forum for discussing legal issues concerning application of the Regulation in 2009.

4. Analysis of access applications

4.1. The number of **initial applications** remained stable in 2009 (5 055 applications compared with 5 197 in 2008).

4.2. The number of **confirmatory applications** fell slightly: 134 in 2009 as against 156 in 2008.
A large number of applications concerned entire files relating to various administrative procedures.

4.3. With regard to the **breakdown of applications by area of interest**, the environment, transport and energy, cooperation in judicial matters, the internal market and competition accounted for nearly 40% of applications.

4.4. The breakdown **of applications by socioprofessional profile** confirmed the significance of applications from the academic world, which remained the largest single category, albeit smaller than in 2008 (21.29% of applications compared with 31.03% in 2008).

4.5. Lastly, the **geographical breakdown of applications** remained constant. Almost 20% of applications came from persons or bodies established in Belgium because of the number of enterprises, law firms, associations and NGOs operating at European level. Apart from that, the bulk of the applications came from the most highly-populated Member States, i.e. Germany, France, Italy, Spain, the United Kingdom and the Netherlands, which together accounted for almost half the applications (49.75%). The share of applications from the new Member States remained modest.

5. Application of exceptions to the right of access

5.1. The percentage of initial applications receiving positive responses was higher than in 2008.

In 84.23% of cases (compared with 82.68% in 2008) the documents were disclosed in full, while in 4.11% of cases (compared with 3.33% in 2008) partial access was granted.

5.2. The percentage of decisions confirming the initial position – which had already fallen considerably in 2008 – again fell significantly in 2009 (by over 25%, from 48.08% of the total in 2008 to 22.50% in 2009).

The percentage of cases in which applications were granted in full after an initial refusal virtually tripled (50% as against just 18.59% in 2008). The percentage of cases in which partial access was granted after an initial refusal fell slightly (27.50%, as against 33.33% in 2008).

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

– protecting the purpose of inspections, investigations and audits (third indent of Article 4(2)), with a slight increase on 2008 (27.61% of refusals compared with 26.63% in 2008);

– protecting the Commission's decision-making process (Article 4(3)), with a percentage of 17.80% for cases where the decision had still to be taken and 7.81% for those concerning opinions for internal use, totalling 25.61% of refusals (compared with a total of 28.72% in 2008).

The percentage of refusals based on the protection of commercial interests remained significant: 13.99% of refusals (14.4% in 2008).

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

– protection of the purpose of investigations (25.91% compared with 27.85% in 2008);

– protection of commercial interests (17.52% compared with 24.89% in 2008);

– protecting the Commission's decision-making process, with a percentage of 12.77% for cases where the decision had still to be taken and 13.87% for those concerning opinions for internal use, totalling 26.64% of refusals (compared with a total of 29.54% in 2008).

– Refusal based on the outright opposition of the Member State is no longer used since the Court[5] ruled that Article 4(5) of the Regulation does not confer on the Member State a general and unconditional right of veto so that it could in a discretionary manner oppose the disclosure of documents originating from it. The Member State is required to state the reasons for its objection with reference to the exceptions provided for in the Regulation; only these exceptions can constitute grounds for refusal.

6. Complaints to the European Ombudsman

6.1. In 2009 the Ombudsman closed the following 16 complaints against the Commission for refusing to disclose documents[6]:

2 cases closed without a finding of maladministration			
1906/2007/VIK		97/2008/BEH	
11 cases closed with a critical remark and/or other remark			
429/2007/PB	488/2007/PB	672/2007/WP	819/2007/PB
70/2008/TS	443/2008/JMA	1010/2008/AL	1059/2008/WP
1190/2008/DK	3085/2008/GG	2/2009/MHZ	

[5] Cf. judgment of the Court of 18 December 2007 in Case C-64/05P *Sweden* v *Commission.*

[6] For detailed information on these cases, see http://www.ombudsman.europa.eu/cases/home.faces

3 cases closed without further action		
3824/2006/GG	1452/2007/PB	2420/2007/BEH

6.2. In the course of the year the Ombudsman dealt with 12 complaints concerning refusal to disclose documents.

7. Court action

7.1. The Court of First Instance handed down two judgments on cases relating to Commission decisions partially refusing access to documents under Regulation (EC) No 1049/2001. These were the judgments of 11 March 2009 in Cases T-121/05 and T-166/05, *Borax Europe Ltd* v *Commission.*

In these judgments, the Court set aside the Commission decisions refusing access to various documents relating to a meeting of a group of scientific experts specialised in the toxic effects of chemicals on human reproduction. The experts were appointed by Member States but took part in the meetings in their capacity as experts and not as Member States' representatives.

With regard to the Commission's argument that revealing the identity of the experts, and the opinions they had expressed at the meeting, would considerably undermine their integrity by exposing them to unjustified external pressure, the Court found that the contested decisions contained only general grounds and that the Commission had not provided relevant evidence which could demonstrate the existence of this risk.

In relation to the "decision-making process" exception also invoked by the Commission, the Court stated that scientific opinions collated by an institution in order to produce a "legislative" text should in principle be divulged even if they were likely to cause controversy or dissuade the persons who had expressed them from contributing to the decision-making process of that institution. The risk, invoked by the Commission, that a public debate arising from the divulging of their opinions would dissuade experts from taking part in its decision-making process was inherent in the rule recognising the principle of access to documents containing opinions designed for internal use in the context of preliminary consultations and discussions, which obviously included consultations involving experts.

The Court therefore set aside the contested decisions on the grounds that the reasons for refusal were too general.

7.2. Six new appeals were brought in 2009 against Commission decisions under Regulation (EC) No 1049/2001[7].

Case T-59/09, *Germany* v *Commission*	Affaire T-245/09, *Shell Hellas Oil and Chemical SA (Shell*	Case T-251/09, *Société des Pétroles Shell SAS* v *Commission*[9]

[7] For details, see http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en.

	Hellas AE) c/ Commission[8]	
Case T-337/09, *Colegio Oficial de Farmacéuticos de Valencia* v *Commission*	Case T-411/09, *Ioannis Terezakis* v *Commission*	Case T-467/09, *Dierk Stelzer* v *Commission*

8. Conclusions

8.1. Characteristics of requests and reasons for refusals

As in past years, the overall picture that emerges from analysis of access applications is that a large proportion of them relate to Commission monitoring of the application of Community law. In a very large number of cases, access was requested in order to obtain documents likely to support the applicant's position in a complaint concerning, for example, an alleged infringement of Community law, or in an administrative or judicial action concerning, for example, a Commission decision on competition policy. These applications generally relate to large volumes of documents, analysis of which gives rise to a substantial administrative burden.

It should also be noted that the exception relating to protection of the Commission's decision-making process is cited mainly to protect decision-making on individual issues. In the legislative field, more and more documents are made available to the public directly, without waiting for access applications. The Commission's Directorates-General have developed their websites on specific policies and have used them to make a large number of documents publicly available.

The exception concerning the protection of commercial interests is mainly cited in connection with requests for access to competition policy documents and tender procedures.

8.2. Developments in case-law

The Court of First Instance has confirmed its case-law on the following points:

– an excessively general reason for refusal leading to the exclusion of a whole category of documents is, in itself, insufficient to justify the application of an exception;

– the institution must prove that there is a risk of an adverse effect in the case in question, and this risk must be reasonably foreseeable and not simply hypothetical;

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8 Removed from the register, order of 5.1.2010.

9 Removed from the register, order of 5.1.2010.

– with respect to "legislative" activities, the case-law of the Court of First Instance is consistent with the judgment of the Court of Justice in the *Turco*[10] case.

[10] Judgment of the Court of Justice of 1 July 2008, joined cases C-39/05 P and C-52/05 [2008] ECR I-4723.

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
2009	1970	11940	131	92	3931	**18063**

INITIAL REQUESTS

2. NUMBER OF APPLICATIONS

2007	2008	2009
4196	5197	5055

3. REPLIES

	2007		2008		2009	
	No	%	No	%	No	%
Positive	3051	72.71	4314	82.68	4258	84.23
Refusal	982	23.40	703	13.99	589	11.65
Partial access	163	3.88	180	3.33	208	4.11
Total	4196	100.00	5197	100.00	5055	100.00

CONFIRMATORY REQUESTS

4. NUMBER OF APPLICATIONS

2007	2008	2009
273	156	134

5. REPLIES

	2007		2008		2009	
	No	%	No	%	No	%
Confirmation	181	66.30	75	48.08	27	22.50
Partial revision	50	18.32	52	33.33	33	27.50
Full revision	42	15.38	29	18.59	60	50
Total	273	100.00	156	100.00	120 (1)	100.00

(1) This figure includes 14 applications which were still being processed at 30 April 2010, mainly because of the volume of documents involved.

BREAKDOWN OF REFUSALS BY EXCEPTION APPLIED (%)

6. INITIAL REQUESTS

	2007	2008	2009
4.1.a Protection of the public interest – 1st indent – public security	1.19	0.18	1.36
4.1.a Protection of the public interest – 2nd indent - defence and military matters	2.23	0.82	0.54
4.1.a Protection of the public interest – 3rd indent - international relations	10.98	10.24	8.17
4.1.a Protection of the public interest – 4th indent - financial, monetary or economic policy	1.26	2.9	2.09
4.1.b. Protection of privacy and the integrity of the individual	5.04	5.98	6.99
4.2. 1st indent - Protection of commercial interests	10.79	14.4	13.99
4.2. 2nd indent - Protection of court proceedings and legal advice	6.08	6.52	9.81
4.2. 3rd indent - Protection of inspections, investigations and audits	23.48	26.63	27.61

4.3 1st indent – Decision-making process, no decision yet taken	12.02	13.5	17.80
4.3. 2nd indent - Decision making process, decision already taken: opinions for internal use as part of deliberations and preliminary consultations	19.29	15.22	7.81
4.5. Refusal by Member State/author	7.64	3.62	3.81
Total	100.00	100.00	100.00

7. CONFIRMATORY REQUESTS

	2007	**2008**	**2009**
4.1.a Protection of the public interest – 1st indent – public security	0.9	0.42	2.55
4.1.a Protection of the public interest – 2nd indent - defence and military matters	0.4	0.42	0
4.1.a Protection of the public interest – 3rd indent - international relations	2.2	5.91	4.38
4.1.a Protection of the public interest – 4th indent - financial, monetary or economic policy	0.4	0.84	3.28
4.1.b. Protection of privacy and the integrity of the individual	4.8	5.06	14.23
4.2.1st indent - Protection of commercial interests	25.25	24.89	17.52
4.2 2nd indent - Protection of court proceedings and legal advice	4.8	3.8	5.47
4.2 3rd indent - Protection of inspections, investigations and audits	24.75	27.85	25.91
4.3 1st indent – Decision-making process, no decision yet taken	5.7	17.3	12.77
4.3. 2nd indent - Decision making process, decision already taken: opinions for internal use as part of deliberations and preliminary consultations	11.7	12.24	13.87
4.5. Refusal by Member State	19.1	1.27	0
Total	100.00	100.00	100.00

BREAKDOWN OF REQUESTS

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

	2007	2008	2009
Academics	31.85	31.03	21.29
Civil society (interest groups, industry, NGOs. etc.)	17.77	18.26	9.85
Members of the public whose socioprofessional profile was not indicated	15.33	16.75	45.5
Public authorities (other than the EU institutions)	15.69	14.19	7.33
Lawyers	9.69	11.01	10.24
Other EU institutions	6.75	6.3	3.77
Journalists	2.90	2.46	2.02

9. ACCORDING TO GEOGRAPHICAL ORIGIN (%)

	2007	2008	2009
Belgium	19.86	18.93	18.26
Germany	15.58	16.89	16.61
Italy	8.18	8.54	7.18
France	9.32	8	8.01
United Kingdom	5.76	6.34	6.23
Spain	5.92	5.29	6.27
Netherlands	4.42	4.83	5.45
Other	1.76	2.63	-
Luxembourg	2.8	2.61	1.71
Not specified	1.16	2.61	10.57
Poland	2.41	2.57	2.86

Denmark	1.23	2.45	1.63
Austria	2.71	2.11	1.98
Greece	1.5	1.93	1.06
Portugal	1.18	1.5	1.61
Sweden	1.46	1.44	2.13
Ireland	0.82	1.28	0.72
Czech Republic	0.89	1.26	1.11
Switzerland	0.82	1.18	-
Finland	1.43	1.08	0.78
United States	0.61	1.02	0.09
Hungary	0.86	0.86	0.70
Lithuania	0.55	0.62	0.35
Romania	0.96	0.58	0.93
Norway	0.32	0.36	0.07
Bulgaria	0.94	0.36	0.56
Slovenia	1.8	0.32	0.39
Latvia	0.14	0.28	0.06
Liechtenstein	0.45	0.28	-
Slovakia	0.59	0.24	0.50
Japan	0.2	0.24	-
Cyprus	0.25	0.22	0.20
Malta	0.45	0.2	0.30
China (incl. Hong Kong)	1.01	0.14	-
Estonia	0.29	0.1	0.17
Russia	0.05	0.1	-
Mexico	0.05	0.1	-
Croatia	0.43	0.08	-

Ukraine	0.04	0.08	-
New Zealand		0.08	-
Australia	0.07	0.06	0.07
Brazil	0.04	0.06	-
Turkey	0.12	0.04	-
Canada	0.25	0.04	-
Israel	0.12	0.04	-
South Africa		0.04	-
FYROM	0.04	0.02	--
Albania	0.02	0.02	-
Iceland	0.02	0	-
Egypt	0.14	0	-
Non-EU European countries	-	-	0.76
Asia	-	-	0.19
South America	-	-	0.09
North America	-	-	0.28
Africa	-	-	0.20

	2007	**2008**	**2009**
EU countries	92,28	99,46	87,79
Candidate countries	0,12	0	0
Other	4,55	0	1,63
Not specified	3,05	0,54	10,57

10. ACCORDING TO AREA OF INTEREST (%)

Directorate-General / Service	**2007**	**2008**	**2009**
SG – Secretariat General	10.19	9.38	10.10

TREN – Energy and Transport	7.54	8.18	8.02
MARKT – Internal market	6.46	7.28	7.27
COMP – Competition	7.32	7.18	7.03
JLS – Justice, Freedom and Security	8.45	6.69	7.74
ENV – Environment	6.11	6.07	8.37
ENTR – Enterprise	5.48	5.91	4.55
SANCO – Health and Consumer Protection	4.27	5.74	4.69
TAXUD – Taxation and Customs Union	4.82	5.17	6.20
ADMIN - Personnel and Administration + OIB, Office for Infrastructure and Logistics - Brussels, + OIL, Office for Infrastructure and Logistics – Luxembourg	2.34 +0.22	4.08 +0.28	3.15
EMPL – Employment and Social Affairs	3.1	3.72	3.28
AGRI – Agriculture	4.11	3.6	4.07
REGIO – Regional Policy	3.69	3.42	3.67
TRADE – Trade	2.48	2.72	2.08
RELEX – External Relations	4.09	2.39	2.25
INFSO – Information Society	2.21	2.3	2.29
SJ – Legal Service	1.34	1.75	1.80
DEV – Development	2.12	1.67	1.33
AIDCO – EuropeAid Cooperation Office	1.27	1.55	1.42
ELARG – Enlargement	3.18	1.5	1.74
EAC – Education and Culture	1.58	1.4	1.44
RTD – Research	1.64	1.23	1.52
ECFIN – Economic and Financial Affairs	1.07	1.23	1.87
MARE - Maritime Affairs and Fisheries	0.95	1.13	0.79
BUDG – Budget	1.31	1.07	1.07
COMM – Communication	0.73	0.85	0.41
OLAF – European Anti-Fraud Office	0.45	0.62	0.24
CAB – Commissioners' Cabinets	0.16	0.43	0.30
DGT – Directorate-General for Translation	0.4	0.32	0.13
EPSO – Recruitment Office	0.08	0.23	0.26
ESTAT – Eurostat	0.24	0.22	0.11
PMO – Office for Administration and Payment of Individual Entitlements	0.13	0.18	-
ECHO – Humanitarian Office	0.21	0.15	0.24
JRC – Joint Research Centre	0.02	0.13	0.22
IAS – Internal Audit Service	0.1	0.07	0.02
BEPA – Bureau of European Policy Advisers	0.06	0.07	0.06
OPOCE – Publications Office	0.03	0.05	0.19

SCIC – Joint Interpreting and Conference Service	0.02	0.02	0.02
DIGIT	0.03	0	0.07
FC – Financial Control	0.02	-	-
Total:	**100**	**100**	**100**