



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 30.1.2004
COM(2004) 45 final

REPORT FROM THE COMMISSION

**on the implementation of the principles in EC Regulation No 1049/2001 regarding public
access to European Parliament, Council and Commission documents**

FOREWORD

The European Parliament, the Council and the Commission have, since 3 December 2001, been applying Regulation No 1049/2001 regarding public access to the documents they hold¹. Pursuant to the provisions in the Regulation (Article 17(1)), each one of the three institutions has published a first annual report concerning the implementation of the Regulation:

- Note by the Secretary-General of the European Parliament to the Bureau, dated 23 January 2003, ref. PE 324.892/BUR
- Report from the Council, dated 31 March 2003, ref. 7957/03
- Report from the Commission, dated 29 April 2003, ref. COM(2003) 216 final.

The Regulation also states that the Commission shall, by 31 January 2004 at the latest, publish a report on the implementation of the principles of the Regulation and shall make recommendations in this respect (Article 17(2)). This report has been produced to comply with this provision in the Regulation.

The purpose of this report is to attempt to produce an initial qualitative evaluation of the application of Regulation 1049/2001 in the light of the principles of the transparency policy pursued by the Community institutions.

It emerges from the above-mentioned annual reports that the number of applications doubled in 2002 compared with the previous year, during which the institutions applied the old system of access to their documents. The provisional figures for 2003 indicate another considerable increase in demand. Despite this growing number of documents requested, the rate of positive responses remains stable. In addition, the number of documents made directly accessible is constantly growing. There is thus a substantial increase in the number of documents made available to the general public. Can we thus deduce from this increase that Regulation 1049/2001 has helped achieve the objective of granting the general public as much access as possible to the documents held by the Community institutions?

This report intends to answer this question using a detailed analysis of the way in which the three institutions concerned applied each of the provisions in Regulation 1049/2001. The analysis is essentially based on the practical experience of the relevant departments within the three bodies. It is still too early to assess the Regulation in the light of case law and the decisions of the European Ombudsman. Two years after the implementation of the Regulation, only one ruling had been issued by the Court of First Instance² and eleven complaints had been resolved by the Ombudsman³.

¹ OJ L 145, 31.5.2001, p. 43.

² Ruling of 17.9.2003 in the case T-76/02 *Messina v. Commission*, not yet published.

³ Six complaints against the Council: 917/2000/GG, 1542/2000/PB, 573/2001/IJH, 648/2002/IJH, 1015/2002/PB and 1795/2002/IJH.
Five complaints against the Commission: 1128/2001/IJH, 1184/2002/PB, 1437/2002/IJH, 1753/2002/GG and 412/2003/GG.

TABLE OF CONTENTS

1.	The Community system of access to documents: legal framework and characteristics.....	6
1.1.	The legal framework	6
1.2.	General principles	6
1.3.	Innovations introduced by Regulation 1049/2001	7
2.	Scope of the Right of Access	8
2.1.	Institutions covered	8
2.1.1.	Provisions in the Treaty and in the Regulation	8
2.1.2.	Joint declaration by the three institutions.....	8
2.1.3.	The de facto situation	9
2.2.	Beneficiaries.....	10
2.2.1.	Provisions in the Treaty and in the Regulation	10
2.2.2.	Extension of the right of access	10
2.2.3.	Categories of persons who have availed of their right of access	10
2.3.	Material scope	11
2.3.1.	Definition of “document”	11
2.3.2.	Areas of activity covered by the right of access	12
2.3.3.	Concept of “document held by an institution”	13
2.3.4.	Documents in the form of sound or audiovisual recordings	14
2.3.5.	Documents and systems in electronic format.....	14
2.4.	Scope in terms of time.....	14
2.5.	Conclusions	14
3.	Limits to the right of access	16
3.1.	General overview of the application of exceptions in 2002.....	16
3.2.	Absolute exceptions	17
3.2.1.	Protection of public security	17
3.2.2.	Protection of defence and military matters	17
3.2.3.	Protection of international relations	18
3.2.4.	Protection of financial, monetary and economic policy.....	18
3.2.5.	Protection of privacy and the integrity of the individual	18

3.3.	Special treatment of sensitive documents	19
3.4.	Exceptions subjected to a public interest test.....	20
3.4.1.	Protection of commercial interests.....	21
3.4.2.	Protection of court proceedings and of legal advice	21
3.4.3.	Protection of investigations.....	22
3.4.4.	Protection of the decision-making process	23
3.4.5.	Balancing the public interest in disclosure of a document.....	24
3.5.	Access to third-party documents.....	25
3.5.1.	General system.....	25
3.5.2.	Documents originating from Member States	25
3.5.3.	Sensitive documents.....	26
3.6.	Partial disclosure of documents	26
3.7.	Accessibility of documents over thirty years old.....	27
3.8.	Access to Community documents on the basis of a national law	27
3.9.	Cases not covered by the Regulation	28
3.10.	Compatibility of specific rules of access with the general system in the Regulation	29
3.11.	Conclusions	29
4.	Practical application of the right of access.....	30
4.1.	Admissibility of applications	30
4.2.	Time-limits for reply	30
4.3.	Complex, very long or unfair applications – proportionality.....	31
4.4.	Methods of access – invoicing	32
4.5.	Consultation of third parties.....	32
4.6.	Internal administrative remedy	33
4.7.	External remedies.....	34
4.8.	Administrative burden for the institutions concerned.....	34
4.9.	Interinstitutional cooperation	35
4.10.	Conclusions	35
5.	Publicity and active information	37
5.1.	Registers.....	37
5.1.1.	Nature of registers	37

5.1.2.	Contents	37
5.1.3.	Documentary field.....	38
5.1.4.	Use of registers.....	38
5.2.	Direct access to documents and dissemination of information.....	39
5.3.	Assistance to applicants	40
5.4.	Conclusions.....	40
6.	Review and outlook	41
6.1.	General right of access.....	41
6.2.	Clarification of material scope.....	41
6.3.	Application of the system of exceptions	41
6.4.	Workload generated by the practical implementation of the Regulation.....	42
6.5.	Place of the Regulation in public information policy	43
6.6.	Recourse to the Regulation with a view to exercising specific rights of access.....	43
6.7.	Suitability of Regulation 1049/2001	44
7.	Proposed actions	45
7.1.	Short-term actions	45
7.1.1.	Recommendation to adapt rules of access to those of Regulation 1049/2001	45
7.1.2.	Recommendation to extend the right of access to all natural and legal persons, irrespective of nationality or residence	45
7.1.3.	Development of the registers and of direct access to documents.....	45
7.1.4.	Development of other information tools	46
7.1.5.	Strengthening interinstitutional cooperation.....	46
7.1.6.	Appropriate training for officials responsible for access to the documents of the agencies and other institutions	46
7.2.	Longer-term actions	46
7.2.1.	List of areas lacking specific rules of access	46
7.2.2.	Examination of the need or advisability of amending Regulation 1049/2001.....	46

1. THE COMMUNITY SYSTEM OF ACCESS TO DOCUMENTS: LEGAL FRAMEWORK AND CHARACTERISTICS

To assess the implementation of the principles of transparency, it is worthwhile recalling the legal framework of the Community system of access to documents and the underlying principles. The first system of access to documents was established jointly by the Council and Commission in 1993-1994. The principles forming the basis of the system are still valid today, despite the substantial modification of the legal framework in 2001. However, the new Regulation 1049/2001 introduced major innovations which have extended the right of access and led to a significant increase in demand.

1.1. The legal framework

Since 1 May 1999, the date on which the Treaty of Amsterdam came into force, the Treaty establishing the European Community has contained a new Article 255 which enshrines the principle of public access to European Parliament, Council and Commission documents.

The scope, limits and arrangements for exercising this right of access were laid down in Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, which came into force on 3 December 2001. The Regulation establishes a common legal framework for access to the documents of the three institutions concerned.

To apply these common rules, each one of the three institutions adopted implementing rules forming part of their rules of procedure⁴. These rules cover the practical arrangements in each institution, in accordance with the principles and limits laid down by the Regulation.

This set of texts replaces the decisions which the three institutions had adopted concerning public access to their own documents.

1.2. General principles

The Community system of access to documents is similar to systems of access to documents or information in force in most countries that have legislation in this field⁵. It is also very close to the recommendation by the Council of Europe⁶ and the Convention of Århus⁷. This system is characterised by its broad scope and limited number of exceptions to the right of access, formulated in a rather general way. It is

⁴ Decision of 28.11.2001 of the European Parliament Bureau, OJ C 374, 29.12.2001, p. 1. Council Decision of 29.11.2001, OJ L 313, 30.11.2001, p. 40.

Commission Decision of 5.12.2001, OJ L 345, 29.12.2001, p. 94.

⁵ See the comparative analysis available on the “document access” site: http://europa.eu.int/comm/secretariat_general/sgc/acc_doc/index_fr.htm.

⁶ Recommendation (2002) 2 of the Committee of Ministers of the Member States on access to public documents, adopted on 21 February 2002.

⁷ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in Århus, Denmark, on 25 June 1998.

based on the principle that all documents are accessible except when disclosure would infringe a specific public or private interest.

The fundamental principles of the Community system of access to documents are as follows:

- **General, unconditional right of access:** Right of access is granted to all natural and legal persons. They do not have to justify their applications.
- **Broad definition of the concept of document:** The definition of “document” covers all information kept in any form whatsoever: paper, electronic medium or sound, visual or audiovisual recording. However, the documents must refer to areas within the competence of the institution concerned.
- **Principle of harm:** No category of document is excluded from the right of access, not even classified documents. Refusal to disclose a document must be based on an analysis of the harm that would be caused by disclosure to one of the public or private interests expressly mentioned in the Regulation.
- **Administrative appeal:** All decisions refusing even partial access to a document may be the subject of an administrative appeal to the institution concerned. Following a *confirmatory application*, the institution is required to re-examine the application for access. Reasons must be given for a confirmation of the refusal, and the applicant is then entitled to institute court proceedings or to make a complaint to the European Ombudsman.

1.3. Innovations introduced by Regulation 1049/2001

The fundamental principles mentioned above were already present in the Code of Conduct adopted jointly by the Council and Commission in 1993, and implemented by Council Decision 93/731 and Commission Decision 94/90, and by European Parliament Decision 97/632. However, Regulation 1049/2001 has introduced a number of innovations which have considerably broadened the right of access:

- **Abolition of the originator rule:** the right of access has been extended to all documents held by the institutions concerned, including documents from third parties.
- **Adaptation of the system of exceptions:** A specific exception has been added to cover defence and military matters, with these documents being henceforth included within the scope of the Regulation⁸. Another specific exception concerns legal opinions: it is not a question of extending the system of exceptions, but of incorporating case law in this area⁹.
- **Balancing interests:** the Regulation states that the protection of certain interests must be balanced with the public interest in disclosure. If there is an overriding

⁸ They had been excluded from the scope of the Council access system by Decision 2000/527 amending Decision 93/731.

⁹ Case T-610/97 R, *Carlsen and others v. Council*, [1998] ECR II-485.
Case T-44/97, *Ghignone and others v. Council*, Reports. – public service 2000, p. IA-223 ; II-1023.

public interest in disclosure, the document will be made accessible even if an exception is applicable to the right of access.

- **Registers and direct access to documents:** Each institution must establish a public register of documents that can be consulted on the Internet. In addition, the Regulation lays down the objective that the documents should, where possible, be made directly accessible in electronic form.
- **Partial access:** This principle laid down in case law¹⁰ now forms part of the Regulation (Article 4(6)). All parts of a document not covered by an exception must be disclosed, unless the selection of passages to be disclosed represents a disproportionate administrative burden compared with the value of the information contained in these passages.
- **Shorter time-limits for replies:** The one-month time-limit for reply has been cut to 15 working days, with the possibility of an extension of 15 working days in duly justified cases.

2. SCOPE OF THE RIGHT OF ACCESS

The scope of the Regulation is very broad: it covers all the documents held by the European Parliament, the Council and the Commission. However, there are some shortcomings, which will be looked at below.

2.1. Institutions covered

2.1.1. Provisions in the Treaty and in the Regulation

The Regulation covers only the three institutions mentioned in Article 255 of the EC Treaty – the European Parliament, the Council and the Commission. There is no legal basis at the moment that allows the right of access to be extended to the documents held by the other European Union institutions and bodies.

2.1.2. Joint declaration by the three institutions

Aware of this shortcoming, the three institutions concerned adopted a joint declaration¹¹ in which:

- (1) they undertake to make the Regulation applicable to agencies and similar bodies set up by the Community legislator;
- (2) they appeal to the other institutions and bodies to adopt similar rules voluntarily.

¹⁰ Ruling of the Court of First Instance in case T-14/98 *Hautala v. Council*, [1999] ECR II-2489; Court Ruling in case C-353/99 *Council v. Hautala*, [2001] ECR I-9565; Ruling of Court of First Instance in case T-204/99, *Mattila v. Council and Commission*, [2001] ECR II-2265.

¹¹ OJ L 173, 27.6.2001, p. 5.

2.1.3. *The de facto situation*

Following the survey conducted by the European Ombudsman in 1996¹², most Community institutions and bodies had already adopted rules relating to access to their documents before the adoption of Regulation 1049/2001. These voluntary arrangements often fall short of the rules in the new Regulation, however.

As a result of their joint declaration (see previous paragraph), the institutions extended the application of Regulation 1049/2001 to the Agencies. During a review of all the regulations establishing the Agencies, a provision was included in the founding instruments making Regulation 1049/2001 applicable to the agencies and stating that the latter should adopt implementing rules. These modifications were adopted on 18 June 2003 (instruments adopted by means of the consultation procedure with the EP) and on 22 July 2003 (instruments adopted by co-decision). They came into force on 1 October 2003¹³. The Agencies must adopt arrangements to apply the Regulation by 1 April 2004.¹⁴

The Committee of the Regions and the Economic and Social Committee responded to the call by the three institutions. The Committee of the Regions adopted a system of access to its documents on 11 February 2003 which is quite in line with the provisions in Regulation 1049/2001¹⁵. The Economic and Social Committee adopted a similar system on 1 July 2003¹⁶.

The Court of Auditors, the European Investment Bank and the European Central Bank apply rules on access to their documents that are more restrictive than Regulation 1049/2001. As judicial bodies, the Court of Justice and the Court of First Instance have not adopted rules on access to their documents.

The draft Regulation on application to the EC institutions and bodies of the Convention of Århus¹⁷ provides for the extension of the access system established by Regulation 1049/2001 to the other institutions and bodies as regards access to environmental information. However, these provisions will not apply to the Court of Justice and to the Court of First Instance except in cases where they are not acting as judicial bodies. The Court of Justice and the Court of First Instance are therefore concerned only to a limited extent by the right of access to documents less than thirty years old. Following the expiry of this period, Regulation No 354/83 concerning the opening to the public of historical archives will be applied. This covers all Community institutions and bodies (see point 3.7).

¹² See the special report by the Ombudsman to Parliament dated 15.12.1997, OJ C 44 10.2.1998, p. 10.

¹³ Regulations 1641/2003 to 1655/2003, OJ L 245, 29.9.2003.

¹⁴ The Office for Harmonization in the Internal Market has already adopted implementing arrangements. Decisions are being prepared in the other agencies.

¹⁵ Decision No 64/2003, OJ L 160, 28.6.2003, p. 96.

¹⁶ Decision No 603/2003, OJ L 205, 14.8.2003, p.19.

¹⁷ COM(2003) 622 final of 24 October 2003.

2.2. Beneficiaries

2.2.1. Provisions in the Treaty and in the Regulation

In accordance with Article 255 of the EC Treaty, the Regulation guarantees free access to citizens and residents of the European Union and to all legal persons whose registered offices are located in a Member State. However, it leaves it to the institutions to extend the right of access to other categories of persons.

2.2.2. Extension of the right of access

The Council and the Commission have extended right of access to all natural persons and legal persons in their implementing rules¹⁸. The European Parliament has provided for a similar extension of access in its rules of procedure “where possible”¹⁹. While this wording gives Parliament discretionary powers, it has in practice responded to applications from citizens from non-EU countries who are not resident in the EU. The three institutions thus apply the regulation in a non-discriminatory way to citizens of non-EU countries who are not resident in a Member State of the Union and to legal persons which are not established on the territory of the Union.

Most of the Agencies have not yet adopted their implementing rules. The Economic and Social Committee and the Committee of the Regions, which voluntarily apply the principles in Regulation 1049/2001, have not provided for the extension of the right of access to citizens of third countries and to people who are not resident in the EU.

It is worthwhile noting that, since more and more applications are being lodged by e-mail, it is not always possible to check whether applicants are citizens of the Union or whether they are resident or have their registered offices on Community territory.

Moreover, the Convention of Århus does not allow the right of access to be limited to citizens and residents of the European Union. Since the adoption of the Regulation on the application of the Convention of Århus set down in paragraph 2.1.3, Community institutions, bodies and agencies should grant right of access to all natural and legal persons, at least when the application concerns environmental information.

2.2.3. Categories of persons who have availed of their right of access

The annual reports of Parliament, the Council and the Commission contain statistics relating to the professional profiles of the persons who availed of the right of access to documents in 2002.

It emerges from the statistics on those who benefited from the right of access to the documents of the institutions that citizens exercising this right mainly belong to very specific groups. Applications for access to the institutions’ documents generally

¹⁸ Council Decision of 29.11.2001 (2001/840) amending the rules of procedure; Annex III of the rules of procedure, Article 1; Commission Decision of 5.12.2001 (2001/937); Annex II of the rules of procedure, Article 1.2.

¹⁹ EP Rules of Procedure, Rule 172.1.2.

come from the academic world (for research purposes) or professional sectors (such as lobbies trying to influence decision-making or lawyers wanting to find information to defend the interests of their clients).

Since applicants are not required to justify their applications and since only copying and postal charges can be invoiced to them, the Regulation paves the way for commercial applications. Thus the Commission has had to process applications for access to documents that could have a commercial value (lists of addresses or of contact points) or documents that normally have to be paid for, but of which the Commission holds copies.

It also emerges that a large number of applications for access (especially to Commission documents) come from persons with a specific interest in obtaining certain documents. The applications are lodged pursuant to Regulation 1049/2001, but concern documents that can only be communicated to the persons concerned and cannot be placed in the public domain. Such applications concern, for instance, recruitment procedures, invitations to tender and audits (see also point 3.10).

It is interesting to note that although they act as vectors of information for the public, very few journalists avail of the right to access conferred on them by the Regulation. This seems to be because journalists are mainly interested in immediate news. They need to obtain information on the spot and cannot wait for fifteen working days to receive a reply. Applications for access from journalists concern sound recordings of European Parliament meetings, documents concerning negotiations at the Council, in particular in relation to the common foreign and security policy, the common foreign and defence policy and justice and home affairs, as well as investigations into specific issues such as the Commission's real estate policy or the practice of granting leave on personal grounds to officials. This last type of application clearly falls within the domain of investigative journalism. The vast majority of applications come from a very small number of journalists.

2.3. Material scope

2.3.1. Definition of “document”

The Regulation provides a very broad definition of the concept of “document” under Article 3(a). Hence all sets of information preserved in any form whatsoever constitute a document within the meaning of the Regulation.

Bearing in mind the principle of partial access, as it was first defined in judicial decisions and then incorporated into Regulation 1049/2001, the right conferred by this Regulation is in fact a right of access to the content of any existing document. The Court of First Instance and the Court of Justice²⁰ lay down the principle of access to the elements of information they contain. If some of these elements are not covered by an exception to the right of access, they can be disclosed.

The wording used in Article 2(3), document *drawn up* by an institution, could imply a certain degree of formalisation of the document. However, the Regulation does not contain any criterion or any other indication relating to the official nature of a

²⁰

Rulings in cases T-14/98 *Hautala/Council* and C-353/99 *Council/Hautala*, mentioned above.

document. Nevertheless, it is true that the value of the information contained in a document and the harm caused by its disclosure may vary in line with elements such as the degree of completion of the document, the rather ephemeral nature of its content or the presence of a signature and the administrative level of issue.

Moreover, the Regulation does not at all oblige the institutions to create documents to respond to an application. When the information requested is not available in one or more existing documents, but involves research in different sources and the drafting of specific documents and/or collation of data, the application clearly goes beyond the scope of the Regulation. It may be handled as a request for information in line with the administrative rules of the institution concerned. Parliament, the Council and the Commission have adopted codes of good administrative conduct comprising rules relating to the handling of requests for information²¹. In practice, however, it is not always easy to distinguish a request for information from an application for access to documents (particularly in the case of data bases - see point 2.3.5).

2.3.2. *Areas of activity covered by the right of access*

Article 3(a) of the Regulation limits the definition of “document” to matters relating to the policies, activities and decisions falling within the institution’s sphere of responsibility. Moreover, Article 2(3) states that the Regulation applies to all areas of activity of the European Union.

In accordance with Articles 28 and 41 of the Treaty on European Union, the right of access specified under Article 255 of the EC Treaty also covers documents falling under Titles V and VI of the Treaty on European Union, in other words the common foreign and security policy and cooperation in the area of justice and home affairs.

The Euratom Treaty does not contain any provisions that are similar to Article 255. In accordance with Declaration No 41 annexed to the Final Act of the Treaty of Amsterdam, the institutions must use Regulation 1049/2001 as a basis for access to documents relating to matters in the Euratom Treaty. However, Article 305(2) of the EC Treaty specifies that the provisions in the EC Treaty shall not derogate from the Euratom Treaty. It follows that Article 255 of the EC Treaty and Regulation 1049/2001 apply if there are no provisions to the contrary in the Euratom Treaty or in secondary legislation deriving from it²². On this basis, only documents classified by virtue of secrecy systems laid down in Regulation (EAEC) No 3 of 1958, applying Article 24 of the Euratom Treaty, are outside the scope of Regulation 1049/2001.

²¹ EP: OJ C 97, 5.4.2000
Council: OJ C 189, 5.7.2001
Commission : OJ L 267, 20.10.2000.

²² In a preliminary ruling, case 328/85 *Deutsche Babcock v. Hauptzollamt Lübeck-Ost*, [1987] ECR 5119, the Court interpreted the first paragraph of Article 232 EC (which became Art. 305 EC) to mean that the EC Treaty and the provisions applied by it should apply to matters falling within the scope of the ECSC Treaty unless there were specific provisions in this Treaty or in the Regulations adopted on the basis of it. This reasoning applies by analogy to the second paragraph of Article 305.

2.3.3. Concept of “document held by an institution”

According to Article 2(3) of the Regulation, the latter “shall apply to all documents held by an institution, that is to say documents drawn up or received by it and in its possession”. “Institution” should be understood as the European Parliament, the Council or the Commission (Article 1 of the Regulation). However, the Regulation does not specify under what conditions a document is “held” by the institution or what exactly should be understood by an “institution”.

This question differs depending on the institution:

- The **European Parliament** comprises on the one hand the members, some of whom have a mandate (the President, the Vice-Presidents and the Quaestors), the organs (the Bureau, the Conferences of Group Presidents, Committee Chairs and Presidents of Delegations), the Political Groups, the Committees and the Delegations, and on the other hand the Secretariat.
- The **Council** consists of Member State representations at ministerial level. Its work is prepared by the Permanent Representatives Committee and by committees and working groups. It is assisted by a General Secretariat.
- The **Commission** consists of Members and of a number of administrative departments.

Parliament has specified in its Rules of Procedure what must be understood by a “Parliament document”²³. This concept covers the documents drafted or received by the members holding a mandate, by the bodies, committees and delegations, and by the Secretariat. The documents drafted by other members or by political groups are Parliament documents when they have been lodged in accordance with the Rules of Procedure. Parliament therefore considers that the documents drafted by members or by political groups that have not yet been lodged, and the documents by third parties held by members do not come within the scope of the Regulation.

The **Council** has not defined in its Rules of Procedure what should be understood by “Council document”. However, it has clarified the distinction between Council documents proper and Member State documents (see point 3.5.2).

The **Commission** has not given any definition of “Commission document” in its implementing rules. Any document held by the President, by a Vice-President or by a Member of the Commission, or by a member of a cabinet, is regarded as a Commission document in the same way as documents held by one of its departments. Moreover, in accordance with case law²⁴, the documents drafted by the committees which assist the Commission in the performance of its duties are regarded as Commission documents²⁵.

²³ EP rules of procedure, Rule 172(2), 1st and 2nd indents.

²⁴ Ruling by the Court of First Instance in case T-188/97, *Rothmans v. Commission*, [1999] ECR II-2463 (paragraph 62).

²⁵ See Article 7.2 of the Decision of 28.6.1999, OJ L 184, 17.7.1999, p. 25.

2.3.4. *Documents in the form of sound or audiovisual recordings*

This type of application mainly concerns Parliament. All of its meetings are recorded and the recordings are placed in the archives, initially by the department concerned and afterwards in Parliament's central archives.

Handling of applications for access to sound recordings raises special problems. First the content of the recording must be analysed to determine whether it can be disclosed pursuant to Regulation 1049/2001. Next, copies must be made without damaging the content of the recording. The problems are accentuated when partial access must be granted.

Applications for access to audiovisual recordings of plenary sessions lead to a disproportionate work load for Parliament departments, given the volume of the recordings. Parliament therefore considers that citizens should justify such applications, especially in the case of repetitive applications.

The **Commission** has received only a few applications for access to recordings. The department concerned followed them up by asking the applicant to listen to them in its offices.

2.3.5. *Documents and systems in electronic format*

The definition given by the Regulation also covers documents kept exclusively in electronic form (Word, PDF and HTML, for instance). The question is, however, whether to apply this definition to data bases. They are not in fact collections of documents, but constantly-changing sets of data. The financial and accounts management systems are examples of data bases that do not correspond to the traditional definition of "document".

Normal practice at the **Commission** is to regard as a document any report extracted from such systems which corresponds to normal use of them.

2.4. **Scope in terms of time**

The Regulation, which came into force on 3 December 2001, guarantees the right of access to all documents in the possession of the institutions. The extension of the right of access to documents from third parties also applies to documents received by the institutions before 3 December 2001. Thus there is a retroactive effect with regard to third-party documents. This is partly offset by consultation of the third-party originator (see point 3.5).

2.5. **Conclusions**

- **While the system of access does not yet cover all Community institutions and bodies, it has been extended beyond Parliament, the Council and the Commission.**
- **The three institutions grant access rights to citizens from non-EU countries and to legal persons that are not resident or do not have their registered offices in the EU, but this practice is not followed by the other institutions, bodies and agencies.**

- **A more precise definition of the concept of “document” should be given, based on practical experience.**
- **The Regulation has mainly benefited specialists; therefore awareness-raising efforts must be undertaken with respect to the general public.**

3. LIMITS TO THE RIGHT OF ACCESS

This chapter contains an analysis of the application, by each one of the three institutions, of exceptions to the right of access arising from the provisions in Articles 4 and 9 of the Regulation.

3.1. General overview of the application of exceptions in 2002

Annual reports indicate for 2002 the following rates of positive response, following processing of confirmatory applications:

	Full Access	Partial Access
<i>Council</i>	76.4 %	12.2 %
<i>Commission</i>	62.4 %	8.3 %
Parliament refused access to 9 out of 528 admissible applications, hence a rate of positive response of 98.3 %. One refusal led to a confirmatory application, following which partial access was granted.		

The breakdown of refusals of initial applications according to the main reason for the exception is as follows:

Exception	EP	Council	Comm.
Public security		22.9 %	
International relations		24.5 %	1.8 %
Protection of personal data	22.2 %	0.2%	5.2 %
Court proceedings and legal advice	55.6 %	11.4 %	3.7 %
Inspections, investigations, audits			35.9 %
Protection of the decision-making process	11.1 %	28.0 %	8.6 %
Combination of several exceptions		10.5 %	38.0 %

These figures are for information only: they are not comparable or exhaustive. The Council and Commission figures concern only applications for access to documents which are not yet in the public domain and which must, consequently, be the subject of a harm test, whereas Parliament's Registry records all applications for access that are officially sent to it. Because of the nature of Parliament's work, most of its official documents can be communicated to the public, even when they have not yet been made accessible. The applications sent to the Council and Commission, however, frequently concern documents which, if disclosed, would harm interests protected by the provisions in the Regulation. Lastly, the figures given above are not exhaustive since applications are sometimes processed through other channels, such as public information services.

The frequency of refusals based on each exception indicates the relative importance of the exception compared with all the negative decisions by the institution in question. The discrepancy in applying exceptions reflects the differences between the missions and activities of the institutions, not a different interpretation of the provisions in the Regulation:

- The reason for over half of **Parliament's** negative decisions is the need to protect legal opinions.
- The restrictions applied by the **Council** mainly concern the protection of its activities in the areas of intergovernmental cooperation (external and security policy, defence and cooperation on justice and home affairs) as well as its deliberation process. In relation to the latter, however, considerable partial access has frequently been granted.
- By far the most significant reason for refusing access invoked by the **Commission** concerns the protection of its work of inspection, investigation and auditing. Given the large number of refusals based on several exceptions, including the protection of investigations, this reason for an exception is used to justify, at least partly, about two-thirds of the negative decisions.

3.2. Absolute exceptions

The exceptions set down in Article 4(1) of the Regulation are compulsory and absolute. Should disclosure of a document cause harm to one of the interests mentioned, access to this document must be refused. The institution does not have discretionary powers and the harm must not be balanced against another interest.

3.2.1. *Protection of public security*

This reason for an exception, which is found in the laws of every country, appears to be less significant in terms of current Community powers. All the same, it is applied in relation to the foreign and security policy and cooperation on justice and home affairs. As these policies are essentially implemented by the **Council**, the latter may invoke this exception to a significant extent.

3.2.2. *Protection of defence and military matters*

This exception was not provided for in the joint Code of Conduct of the Council and Commission as the Community had no power at the time in the field of defence. Integration into the European Union of the Western European Union has led to a European security and defence policy.

Classified documents relating to this policy were initially excluded from the right of access by a Council decision²⁶. Since the entry into force of the Regulation, the right of access extends explicitly to this category of documents. However, given the need to protect this particularly sensitive area of activity, this new exception was introduced by the Regulation, as well as specific provisions relating to “sensitive” documents (see point 3.2). This exception has been used only in very rare cases: the **Council** and the **Commission** made marginal use of it in 2002 in initial applications (less than 1% of cases) and have not used it in confirmatory applications.

²⁶

Decision of 14 August 2000 (2000/527) amending Decision 93/731.

3.2.3. *Protection of international relations*

“International relations” is understood as meaning the relations between the Community institutions and third countries or international organisations. This exception covers quite a broad spectrum: bilateral and multilateral relations, and political, commercial and development aid relations. In 2002, it was mainly invoked by the **Council**.

In the case of the **Council**, the refusals generally concerned documents exchanged with third countries or international organisations in the domain of external and security policy or in cooperation on justice and home affairs.

The **Commission** invoked this exception in order to protect negotiations with third countries, whether bilateral or multilateral, in the context of the World Trade Organisation. These decisions led to three complaints being made to the Ombudsman, all lodged by NGOs. One of the complaints has been resolved – it concerned a refusal to disclose internal Commission documents produced in preparation for trans-Atlantic conferences. The Ombudsman accepted the Commission’s arguments whereby disclosure of these documents would undermine trade relations with the United States²⁷.

Parliament refused to disclose the sound recording of a non-public meeting with members of parliament from a third country in order not to undermine relations with that country.

3.2.4. *Protection of financial, monetary and economic policy*

This exception aims to protect the essential interests of the Community and Member States and is related more to specific Community powers than the first two. Despite this, it has been used only marginally (less than 1% of refusals in 2002) by the **Council** and the **Commission**.

3.2.5. *Protection of privacy and the integrity of the individual*

In the exercise of the right of access to documents, account must be taken of the right to protection of personal data. This is stated in Article 4(1)(b), which contains an explicit reference to Community legislation on the protection of personal data. This matter is governed by Regulation 45/2001²⁸. Where an application for access concerns personal data, the exception in Regulation 1049/2001 and the reference to Regulation 45/2001 are applicable. The documents concerned, or at least the parts of these documents containing personal data, can only be communicated if the conditions laid down in Regulation 45/2001 are met.

In practice, however, the interlinking of the two Regulations is fairly subtle. According to the definition in Regulation 45/2001, all information concerning a natural person who is identified or identifiable is personal data²⁹. The question that

²⁷ Complaint 1128/2001/IJH

²⁸ Regulation No 45/2001 of 18.12.2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8 12.1.2001, p. 1.

²⁹ Article 2(a) of Regulation 45/2001.

arises then is to what extent the disclosure of the names of people, which constitutes handling of personal data, can be carried out in accordance with the rules on the protection of personal data³⁰. In this respect, one might include, in addition to officials and staff members acting in the context of their work for the institutions, people mentioned in a document, those featured on a list of participants at a meeting, those taking part in Community programmes or those who have sent correspondence to the institutions.

Only a small number of applications concern personal data. In one case, the question of the application of Regulation 45/2001 in the context of an application for access to lists of participants of meetings of a committee consisting of experts from Member States led to a judicial appeal³¹.

The question of disclosing the identity of people had already arisen before the entry into force of Regulations 1049/2001 and 45/2001 in the case of an application concerning the disclosure of names of people who had taken part in a meeting organised by the Commission³². At the time, the Commission had applied the principles contained in Directive 95/46/EC³³ in order to solve the question by balancing the interests at stake in each case. With the entry into force of Regulations 1049/2001 and 45/2001, the same approach can be maintained. The decision on whether to grant access to documents containing personal data must be based on the balancing of the interests at stake, on the one hand the need to inform the public and, on the other, the protection of the persons concerned. This balancing exercise must be carried out in each case, with due regards to all the circumstances involved.

It must be noted that the two Regulations have different scopes. Regulation 45/2001 covers only matters that come under Community law either fully or partly, under this Treaty and hence not the common foreign and security policy or justice and home affairs, whereas these two areas are covered by Regulation 1049/2001. Moreover, contrary to the latter, Regulation 45/2001 applies to all the Community institutions and bodies.

3.3. Special treatment of sensitive documents

Article 9 of Regulation 1049/2001 establishes special treatment for “sensitive” documents³⁴:

- applications for access to these documents can only be handled by those persons who have the right to acquaint themselves with the documents;
- the documents shall be recorded in the register or released only with the consent of the originator³⁵.

³⁰ The first two rulings concerning the interpretation of data protection were issued in 2003, see C-465/00 ruling of 20/05/2003, *Österreichischer Rundfunk i.a. (“Rechnungshof” ruling)*, [2003] ECR I-4989; C-101/01, ruling of 06/11/2003, *Lindqvist*, not yet published.

³¹ Case pending T-170/03, *British American Tobacco (Investments) Ltd v. Commission*.

³² Complaint 713/98/IJH, special report by the Ombudsman and Parliament Resolution A5-423/2001.

³³ Directive 95/46/EC of 24.10.1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31.

³⁴ Under Article 9 of Regulation 1049/2001, a document is sensitive when it is classified at least “EU CONFIDENTIAL” in order to protect the public interest as defined in Article 4 (1) (a) of the same Regulation. Only documents issued by the institutions, agencies, Member States, third countries and international organisations can be classified as “sensitive”.

The concept of a “sensitive” document coincides only partly with the classification system envisaged for documents under the Council and Commission’s security rules³⁶. The classified documents regarded as “sensitive” are only those which:

- have been classified at least “EU CONFIDENTIAL”
- in order to protect a public interest (public security, defence, international relations or financial, monetary or economic policy)
- and which originate from a Community institution or agency, a third country or an international organisation.

This definition consequently excludes documents classified “EU RESTRICTED” as well as those classified “EU CONFIDENTIAL”, “EU SECRET” or “EU TOP SECRET”, but which do not concern areas of public interest (for instance documents relating to investigations by OLAF or containing information concerning private life) or which are not issued by a public authority (for instance documents provided by an undertaking on a confidential basis).

While the security rules in force at the Commission and Council were adopted without prejudice to instruments implementing the right of access to documents, this divergence between “sensitive” documents and “classified” documents is a potential source of incoherence. Logic dictates that all classified documents should be submitted to the same rules.

The security rules of the institutions do not contain additional exceptions, but they do define the treatment of classified documents. When a classified document is the subject of an application for access, the harm caused by disclosure is examined as it is for all documents. If it emerges that none of the exceptions apply at the time of examination, the document should then be de-classified and disclosed. Thus there is no risk of documents being unavailable because of unfair classification.

In practice, however, this divergence has not yet generated any specific problems. The number of classified documents held by the Council and the Commission is small, and applications for access to such documents are rare. Parliament does not hold sensitive documents and has not yet adopted any security rules of its own. However, Parliament and the Council concluded an interinstitutional agreement on 20 November 2002 concerning access by Parliament to sensitive Council documents and information in the field of the security and defence policy. Parliament adopted a decision on 23 October 2003 concerning the implementation of this agreement³⁷.

3.4. Exceptions subjected to a public interest test

The exceptions given in Article 4(2) and Article 4(3) of the Regulation are also compulsory, but they must be balanced against interest of the public in becoming acquainted with the content of the documents concerned. When this interest is overriding, the documents shall be disclosed despite the applicability of an exception.

³⁵ See points 3.4.3. and 5.2.

³⁶ Council Decision 2001/264, OJ L 101, 11.4.2001, p. 1.

Commission Decision 2001/844, OJ L 317, 3.12.2001, p. 1.

³⁷ The agreement and the implementing decision are to be found in Annex VII of Parliament’s Rules of Procedure.

3.4.1. *Protection of commercial interests*

This exception protects commercial secrets and the intellectual property of a natural or legal person, as well as its commercial interests in a wider sense, including aspects relating to commercial reputation. It is invoked almost exclusively by the **Commission**.

In most cases, the reason for a refusal arose from the need to protect the data communicated by undertakings in the context of investigations relating to observance of the rules of competition and with a view to obtaining works or supplies contracts following an invitation to tender launched by the Commission. Applications for access generally came from rival undertakings.

In a number of cases, refusals concerned not so much the information communicated by the undertaking, but data which, if disclosed, would have undermined its reputation, which could have resulted in loss of market share. In this case, the aim was to protect the undertaking's commercial interests.

Refusal to disclose documents to protect commercial interests led to several appeals before the Court of First Instance. In each case, however, the protection of commercial interests was invoked in combination with other reasons for refusal³⁸.

3.4.2. *Protection of court proceedings and of legal advice*

This reason for refusal, invoked by the three institutions, covers two examples: protection of the conduct of proceedings pending before a court and protection of the independence of legal opinions.

The scope of the concept of “protection of court proceedings” is limited: it covers only documents drafted for the sole purpose of specific judicial proceedings (pleadings or documents lodged, internal documents concerning the investigation of a case in progress, communications with the institution's legal service or with a law firm). This reason for an exception does not permit refusal of access to administrative documents linked to the subject of the proceedings³⁹.

Protection of “legal advice” was not expressly included in the rules on access to documents prior to Regulation 1049/2001. However, judgments had already recognised on several occasions the need to give such documents special protection, considering that the possibility of the Community institutions seeking independent legal opinions should be preserved^{40 41 42}. Inclusion of a specific exception in the Regulation simply confirms these judgments.

³⁸ Cases T-68/02 and T-159/02, *Masdar (UK) Ltd v. Commission*, T-237/02, *Technische Glaswerke Ilmenau GmbH v. Commission* and T-2/03, *Verein für Konsumenteninformation v. Commission*, all pending.

³⁹ Ruling of Court of First Instance in case T-92/98, *Interporc Im-und Export GmbH v. Commission*, *Comp.* [1999] ECR II-3521.

⁴⁰ Order by the President of the Court of First Instance of 3 March 1998 in case T-610/97R, *Carlsen i.a. v. Council*, mentioned above (see in particular paragraph 46).

⁴¹ Ruling of the Court of First Instance of 8 November 2000 in case T-44/97, *Ghignone i.a. v. Council*, mentioned above.

⁴² Order of the Court of 23 October 2002, case C-445/00, *Austria v. Council*, not yet published.

The interpretation and scope of this exception aimed at protecting legal opinions have, however, led to differences of views, particularly between the institutions and the European Ombudsman. The latter considers that it would be advisable to distinguish between opinions issued in the context of legislative activity, which should be made public once the decision-making process is complete, and opinions referring to judicial proceedings. The exception under Article 4(2) of the Regulation would apply only to the second category⁴³.

Several Members of the European Parliament agree with the Ombudsman and consider that Parliament's practice is itself too restrictive. One Member has referred this matter to the Court of First Instance⁴⁴.

In a specific case, the Ombudsman considered that it was reasonable to refuse access to a legal opinion that does not form part of the legislative process or of judicial proceedings, if there is no higher public interest to justify disclosure⁴⁵.

3.4.3. *Protection of investigations*

This is the reason most often invoked by the **Commission** (35.9% of refusals in 2002). The importance of this reason can be explained by the growing number of applications for access to documents relating to infringement procedures and to files concerning competition policy. In addition, there is the interest aroused by the investigations of the European Anti-Fraud Office (OLAF), and the audits concerning projects and programmes financed by Community funds.

Only the accessibility of documents relating to ***infringement proceedings*** led to Court rulings issued on the basis of Decision 94/90 (the Code of Conduct). The Commission's practice is in line with these rulings, which are still quite pertinent given the system introduced by Regulation 1049/2001. The Court of First Instance has, on several occasions, considered that the objective of reaching an amicable settlement between the Commission and the Member State concerned before a Court ruling was issued justified refusal of access to documents relating to infringement proceedings, the aim being to protect the investigation⁴⁶. In a complaint against the refusal to disclose exchanges of correspondence with a Member State in infringement proceedings that were not finished, the Ombudsman also considered that the refusal was justified on the basis of the exception in Article 4(2), 3rd indent, of the Regulation⁴⁷.

Anxious to strike a fair balance between the need to protect investigations relating to alleged infringements and the public interest in having greater transparency in this domain, the Commission has laid down specific guidelines for handling applications for access to documents relating to infringement proceedings⁴⁸.

⁴³ See the special report by the Ombudsman to the European Parliament following complaint 1542/2000 (PB)SM dated 12 December 2002 and the draft recommendation of 27 March 2003 concerning complaint 1015/2002/(PB)IJH.

⁴⁴ Case pending T-84/03, *Turco v. Council*.

⁴⁵ Complaint 412/2003/GG.

⁴⁶ For instance the rulings in cases T-105/95, *WWF UK v. Commission*, [1997] ECR II-313 (paragraphs 62 *et seq.*) and T-191/99, *Petrie v. Commission*, [2001] ECR II-3677 (paragraphs 67 *et seq.*).

⁴⁷ Complaint 1437/2002/IJH.

⁴⁸ Commission Working Paper of 28 February 2003, reference SEC(2003) 260/3.

The Court's reasoning in the above-mentioned cases applies *mutatis mutandis* to proceedings similar to infringement proceedings such as the examination of state aids and the notification of technical rules and standards⁴⁹.

A refusal to disclose audit reports in order to protect an investigation concerning possible irregularities has led to an appeal before the Court of First Instance⁵⁰, as well as to several complaints to the Ombudsman.

3.4.4. *Protection of the decision-making process*

The exception under Article 4(3) of Regulation 1049/2001 enables the institutions, under certain conditions, to protect internal deliberations held prior to decision-making. This exception, the objective of which is to ensure that decisions taken are shielded from undue external pressure, is relevant for the three institutions.

The conditions for applying this exception are very strict, however. Unlike the other exceptions that apply if the disclosure of a document should undermine the protected interest, in this case disclosure must “seriously undermine” the decision-making procedure. The distinction between the concept of “undermining” and “seriously undermining” is very theoretical and difficult to determine in practice. What will determine whether or not to disclose a particular document will be the balancing of this with the public interest rather than an examination of the seriousness of the harm caused.

The existence of serious harm is particularly difficult to demonstrate when, pursuant to the second paragraph of Article 4(3), refusal concerns a decision that has already been taken. The decision-making process of the institution relating to this particular issue has been completed, and the disclosure of a preparatory document drawn up for internal deliberations concerning this matter should seriously undermine the institution's capacity to take future decisions. Analysing the harm could thus become much too abstract an exercise.

Moreover, the Regulation concerns only the internal decision-making process of each institution and ignores the interinstitutional nature of decision-making at Community level. Once the Commission has forwarded its proposal to Parliament and the Council, its own decision-making process is complete. However, this constitutes just one stage in the Community decision-making process. The disclosure of Commission documents relating to a matter on which the final decision has not yet been taken could undermine the decision-making process of the other institutions, for instance the process of conciliation.

In practice, the protection of the decision-making process concerns almost exclusively the Council and the Commission. The debates at Parliament in committees and in the plenary session are public and the documents drafted by political groups that are not lodged are outside the scope of the Regulation.

⁴⁹ In case T-237/02, *Technische Glaswerke Ilmenau GmbH v. Commission*, the plaintiff disputes the admissibility of these judgments as far as State aid is concerned.

⁵⁰ Cases pending T-68/02 and T-159/02, *Masdar (UK) Ltd v. Commission*.

3.4.5. *Balancing the public interest in disclosure of a document*

Balancing the public interest and the interest to be protected in the case of disclosure of a document is one of the most difficult exercises in the processing of applications for access to documents.

This “exception to the exceptions” applies when two conditions are met:

- there is a **public** interest in disclosing the information contained in the document
- this interest must be **overriding** compared with the interest to be protected.

The public interest is a quite vague legal concept. It is difficult to lay down criteria to identify the existence of a public or general interest to disclose information. It is clear, however, that the interest of applicants, insofar as the latter have justified their applications at their own initiative, is not in itself a public interest. On the other hand, it is possible to maintain that there is always a public interest in disclosing information held by the authorities.

The question of whether or not a public interest in disclosing a specific document exists is, therefore, quite academic. However, the real problem is to determine whether the interest in disclosure is such that it justifies disregarding the harm that would thus be caused to interests protected by the Regulation, such as the commercial interests of an undertaking.

There are no rules for determining *a priori* that the public interest in the disclosure of a document overrides the harm that disclosure would cause to one of the public or private interests protected by the Regulation. When it comes to balancing interests at a specific time, such rules cannot be laid down. The harm must be assessed in each specific case, and it must be decided whether the interest in making public the information it contains takes precedence over this. Decisions taken in specific cases could, however, be used as a precedent and thus permit the development of an administrative practice.

In every application examined to date, the institutions concluded that the public interest of disclosing the documents requested was not overriding and did not therefore justify going beyond the exception.

In most cases in which the applicant himself invokes the greater public interest of disclosure, which is frequent in confirmatory applications, the arguments put forward indicate a personal interest by the applicant. The interest of a private individual can never justify disregarding an exception, as any document made accessible following an application enters, as a result of this, into the public domain and becomes accessible to all.

Several applicants considered, notably on the basis of Article 1 of the Treaty on European Union, that the general principle of transparency was in itself a greater public interest justifying the disclosure of a document. Lastly, researchers have sometimes based their arguments on the scientific nature of their application in order to prove the existence of a greater public interest in disclosing the desired documents. These arguments cannot be accepted as they would render the exceptions in the Regulation devoid of all substance. The public interest in disclosure is in fact an “exception to an exception” which must be applied restrictively. In one particular

case, the Ombudsman considered that the fact that a document was requested for scientific reasons did indeed constitute a public interest for disclosure, but that the interest was not overriding⁵¹.

Even when the applicant does not refer to a greater public interest, the institution examines the case as a matter of course to see whether there is such an interest to justify disclosure. This balancing can only be conducted on the basis of the elements available to the institution. Any argument put forward by the applicant helps to refine the balancing act. Thus even if the burden of proof is not for the applicant alone, it is clear that in practice he/she must provide evidence to establish the existence of a greater public interest in disclosing a document despite the applicability of an exception. The Ombudsman has taken this line⁵².

3.5. Access to third-party documents

3.5.1. *General system*

Article 4(4) of Regulation 1049/2001 states that in the case of an application concerning documents originating from third parties, the institution shall consult the third-party originator to determine whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed. In the event that a third party opposes the disclosure of the document, and if the institution considers that no exception is applicable, the Council and the Commission state in their implementing rules that the third party must be informed of the intention to make the document accessible, and that he/she has ten working days to oppose this. In any case, the decision is made by the institution. In practice, reasons are generally given for refusals, and account is taken of the third party's opposition. It is very rare that the institutions would notify an originator of their intention to divulge a document against his/her will, and even in the cases that have arisen, disclosure did not give rise to litigation.

3.5.2. *Documents originating from Member States*

A special system is provided under Article 4(5) for applications concerning documents originating from a Member State. Pursuant to this provision, which incorporates Declaration No 35 annexed to the Final Act of the Treaty of Amsterdam, a Member State may ask an institution not to disclose a document originating from that Member State without prior agreement.

Applications for access to documents originating from Member States mainly concern the **Commission**. The **Council** has restrictively interpreted the concept of "documents originating from a Member State" to take account of the fact that Member State representatives take part in its work. According to this interpretation, representatives of Member States' governments or their delegates are not, in the context of their involvement in the work of the Council and of its committees and groups, persons or entities outside the institution; rather, they form part of it. However, documents drawn up by a Member State expressing that Member State's

⁵¹ Complaint 412/2003/GG, quoted above.

⁵² *ibid*

positions as such and not as a member of the Council in the course of its work are regarded as documents originating from a third party.

The wording of Article 4(5) does not make it clear to what extent the institutions are required to respect the negative opinion of a Member State as regards the disclosure of one of its documents. However, the absence of any obligation would deprive this measure of any useful effect since in this case, the Member States' position would not be different from that of other third parties. The Member States are in a privileged position compared with other third parties because the Regulation does not affect national laws on access to documents. It is not for the institutions, in fact, to take a decision contrary to a decision adopted by a Member State pursuant to its own national laws.

This interpretation was confirmed by the Court of First Instance in a ruling issued on 17 September 2003. The Court in fact rejected the appeal, considering that the Commission had rightly refused to grant access to documents originating from the Italian authorities, which had opposed the disclosure of these documents⁵³. This matter is also the subject of five other appeals and of a complaint to the Ombudsman, which has been completed⁵⁴.

Only in a small number of cases was access refused following opposition by the Member State from which the document originated: this clause was applied only by the Commission, and it was responsible for only 2.1% of the negative decisions in 2002. Generally speaking, the national authorities opposed the disclosure of documents to which they had already refused access on the basis of their own laws or which they would not have disclosed if the application had been referred to them.

Despite the low number of refusals of access at the request of a Member State, the latter resulted in a relatively large number of appeals. Of the eleven appeals lodged before the Court of First Instance against negative decisions by the Commission, six concerned the application of this exception (see above).

3.5.3. *Sensitive documents*

By virtue of the special treatment accorded by Article 9 of the Regulation to "sensitive" documents (see point 3.3), the originating authority of such a document may oppose disclosure and entry on the register (Art. 9(3)). The institutions are required to respect the opposition of a third-party originator. This is, therefore, another exception to the general arrangement, under which the institutions have the last say. Applications for access to sensitive documents originating from third parties are very rare.

3.6. **Partial disclosure of documents**

The institutions are increasingly granting partial access to their documents (12.16% for the **Council**, 8.3% for the **Commission** and two cases for Parliament in 2002). In the applications handled by Parliament and in most of the cases handled by the

⁵³ Ruling of Court of First Instance in case T-76/02 *Messina v. Commission*, mentioned above.

⁵⁴ Cases T-168/02, *Internationaler Tierschutz-Fonds (IFAW) GmbH v. Commission*, T-139/03 and T-151/03, *Nuova Agricast srl v Commission* and T-287/03 *S.I.M.S.A. srl v Commission*; T-187/03, *Scippacercola v. Commission*; complaint to the Ombudsman 1753/2002/GG.

Commission, information was concealed in order to protect the integrity of an individual or commercial interests. In the case of the **Council**, the aim was in general to conceal information that would permit identification of delegations which had expressed an opinion during the examination of legislative proposals while the discussions on the matter were still in progress⁵⁵.

The practice of partial access ensures greater transparency for the public while protecting the interests that would be harmed by full disclosure. However it can lead to a considerable burden of work. The courts have thus acknowledged that, in order to uphold the interest of good administration, the institutions can apply the principle of proportionality in specific cases in which the volume of the document or of the passages to be censored would result in an inappropriate administrative burden, and balance the interest of access by the public to these fragmented parts against the resulting workload⁵⁶.

3.7. Accessibility of documents over thirty years old

Pursuant to Regulation No 354/83 of 1 February 1983⁵⁷, as amended by Regulation No 1700/2003 of 22 September 2003⁵⁸, concerning the opening to the public of the EEC and EAEC historical archives, all the documents of the Community institutions become accessible to the public after a period of thirty years. This rule has a limited number of exceptions: only documents containing either personal data or information that could undermine commercial interests, as well as sensitive documents which are still classified after thirty years, are not automatically made public.

The Regulation concerning the opening to the public of historical archives is echoed in Article 4(7) of Regulation 1049/2001, which states that the exceptions may apply for a period of thirty years. After this period, only the exceptions relating to privacy and commercial interests and the special arrangements for sensitive documents can still be applied if necessary. The text of Regulation 354/83 has been brought into line with the provisions in Regulation 1049/2001 as provided for in Article 18 of the latter.

The only difference between the system of access to documents less than thirty years old and the system of access to the historical archives concerns the institutions covered: the Regulation on “historical archives” applies to all the institutions and bodies of the European Union and to the Community agencies.

3.8. Access to Community documents on the basis of a national law

Regulation 1049/2001 does not have the purpose or effect of amending national laws on access to documents. However, to ensure some coherence in the handling of applications for access to Community documents by the national authorities, Article

⁵⁵ The names of delegations were not concealed, however, in the case of reservations pending parliamentary or linguistic review.

⁵⁶ Ruling by the Court of First Instance in case T-14/98 *Hautala v. Council*, mentioned above (paragraph 86), confirmed by the ruling of the Court in case C-353/99 P *Conseil v. Hautala*, mentioned above (paragraph 30); ruling of the Court of First Instance in case T-204/99 *Mattila v. Council and Commission*, mentioned above (paragraphs 68 and 69) and case T-211/00 *Kuijer v. Council*, [2002] ECR II-485 (paragraph 57).

⁵⁷ OJ L 43, 15.2.1983, p. 1.

⁵⁸ OJ L 243, 27.9.2003, p. 1.

5 of the Regulation recommends that the Member State which receives an application for access to a document originating from an institution should consult the originating institution, unless it is clear that the document must or must not be disclosed. The response by the Member State to the application for access should not jeopardise the attainment of the objectives of Regulation 1049/2001.

This provision is a corollary to Article 4(5) of the Regulation which allows a Member State to oppose the disclosure of its documents by the institutions. Since the Regulation does not affect national laws, the parallelism is not total, however. An institution to which an application for access to a document originating from a Member State has been referred is required not to disclose the document if the national authorities from which it originates oppose this. A Member State to which an application for access to a document originating from an institution has been referred applies its own legislation. Article 5 of the Regulation simply enshrines the principle of loyalty laid down in Article 10 of the EC Treaty. It follows that the Member State is required to consult the originating institution in case of doubt and to take a decision which does not compromise the achievement of the objectives of the Regulation. In practice, the Member State will endeavour to reconcile the provisions in the Regulation with its own legislation.

Since the entry into force of Regulation 1049/2001, relatively few consultations have been started by Member States. Some Member States have a greater tendency to consult the institutions, for instance when the application concerns an infringement procedure. Others forwarded letters of formal notice and reasoned opinions without any prior consultation of the Commission. Information relating to Member States' practices in this domain is very fragmented, however. It is not therefore possible to assess the extent of the disclosure by national authorities on the basis of their laws of documents originating from the Community institutions.

3.9. Cases not covered by the Regulation

The exceptions provided for in Article 4 of Regulation 1049/2001 have, to date, sufficiently justified refusal of access in the case of documents which, if disclosed, would be harmful. Unlike certain national laws, the Regulation does not contain a detailed and precise list of the exceptions, but does indicate the public and private interests to be protected. The departments entrusted with the application of the Regulation must therefore ensure that the disclosure of a document does not harm one of these interests. They have not had to deal with a case in which disclosure would harm an interest other than those mentioned under Article 4 of the Regulation.

The very restrictive nature of Article 4(3) must be underlined, however. The wording does not protect certain preparatory documents relating to a decision already adopted by an institution and containing information, the disclosure of which would be contrary to the interests of that institution. Moreover, this Article only protects the decision-making process within the institution itself and not the interinstitutional process resulting in the final adoption of a decision.

Furthermore, it would perhaps be judicious, in the interests of clarity, and in order to protect certain well-defined interests, to provide specific exceptions covering these cases rather than to invoke a general exception based on a broad interpretation.

Lastly, the Convention of Århus contains a special exception for which there is no equivalent in the Regulation. By virtue of this exception, an application for access to environmental information may be refused if disclosure of it would harm the environmental site to which the information refers. The text quotes the example of places of reproduction of rare species⁵⁹.

3.10. Compatibility of specific rules of access with the general system in the Regulation

Regulation 1049/2001 establishes a general system of access by the public to Commission documents. The legislator has endeavoured to prevent the application of specific rules governing access to documents, information or files under special procedures from resulting in restrictions to access that are contrary to the Regulation. To this end the Regulation states that the Commission shall examine the conformity of these specific rules with the general system of access (Article 18(2)).

An analysis of these clauses conducted by the Commission shows that they can be divided into two categories:

- (1) certain rules should be regarded as special cases of application of one of the general exceptions laid down in Article 4 of the Regulation;
- (2) other clauses grant one party involved or with an interest in a specific procedure a right of access to documents which, if disclosed to the public, would harm one of the interests protected by the Regulation.

In both instances, the Commission has not identified any case in which there is incompatibility with the provisions in the Regulation. Practice to date has confirmed this conclusion. The list of clauses analysed by the Commission was communicated to Parliament and the Council at the meeting of the Interinstitutional Committee held in Strasbourg on 23 September 2003.

The question arises, however, concerning extending or codifying rules granting special access that goes beyond the public right of access. It has been noted, in fact, that the Regulation has sometimes been invoked to exercise a special right of access in the absence of any specific provisions.

3.11. Conclusions

The following conclusions can be drawn in the light of the experience acquired to date:

- **More than two out of every three applications receive a positive response.**
- **Only some of the exceptions in the Regulation were invoked frequently. The disparity in the statistical data reflects the differences between the missions and roles of the three institutions.**
- **The exceptions generally provide adequate protection of interests.**
- **While the exception concerning the protection of the decision-making**

⁵⁹ Article 4(4)(h) of the Convention.

process protects the internal decision-making process of each institution, it does not take account of the interinstitutional nature of decision-making.

- **The application of the Regulation concerning the protection of personal data has proven delicate because of interlinking problems between Regulation 1049/2001 and Regulation 45/2001.**
- **The concept of “sensitive document” in Regulation 1049/2001 does not coincide with the classification system laid down in the security rules.**
- **The concept of a greater public interest in disclosure cannot be defined a priori but must be the subject of evaluation in each case.**
- **While refusals because of the opposition of the originating Member State are few, it has become clear, in the Commission’s experience, that this exception is very much disputed.**
- **Member States do not systematically consult the institutions.**

4. PRACTICAL APPLICATION OF THE RIGHT OF ACCESS

This chapter examines the procedural aspects of the application of the Regulation, the work load it generates, possibilities of appeal and cooperation between the three institutions concerned.

4.1. Admissibility of applications

The only condition laid down in the Regulation regarding admissibility of an application is that it should be made in writing in one of the official languages of the Community. The three institutions have spelled out the application procedures in their implementing measures. Applications may be sent by post, by fax or by e-mail. The three institutions have posted an e-mail address on the Internet to which all applications may be sent. Applicants who so wish may use the electronic form available on the Parliament and Commission web sites. Acknowledgement of receipt is sent to the applicant, except where the reply can be sent by return mail.

More and more applications are being sent by e-mail. In a number of cases, the applicant cannot be identified from the electronic address. The Regulation states that applicants need not justify their applications. However, there is nothing to prevent the institutions from requiring a minimum of useful information to process the application, such as the name and address for sending out paper documents and, where appropriate, for invoicing, as well as the professional profile of the applicant for statistical purposes in order to assess the practical effects of the Regulation. General use of an electronic form, such as the one used by Parliament’s Registry, should allow minimum information to be obtained from applications submitted by e-mail.

4.2. Time-limits for reply

In some cases, the institutions have had to extend the 15-working days time-limit for reply because the application could not be processed within that time. This applied in particular to the Commission, which receives a number of large and complex applications. Given the obligation to examine each application individually, the time-

limit of 15 working days is generally insufficient to process the applications. When the time-limit is extended, it is generally for one of the following reasons:

- need to look for and locate documents (especially in the case of old documents);
- identification of documents requested when the applications are long and rather vague;
- limited availability of people with the necessary expertise to determine the damage that would be caused by disclosing the documents requested;
- need to consult third-party originators;
- translation of the applications and of the replies.

4.3. Complex, very long or unfair applications – proportionality

Some applications for access sent to the *Commission* and *Parliament* are vague, for instance when they concern “any document relating” to an area of activity or a specific subject. A large number of applications (mainly sent to the Commission) are also very long, for instance those concerning entire files (relating to State aids or competition, for example). It is difficult to process such applications since the Regulation provides only for the possibility of extending the deadline for reply, asking the applicant to make a more precise request if the application is too vague and does not permit the identification of the documents concerned, or reaching a fair solution when the application concerns a very long document or a large number of documents (see Article 6(2) and 6(3) of the Regulation). A fair solution may involve limiting the application in time, for instance. It is also possible to ask the applicant to come and consult the documents on the spot. However, these solutions are not always sufficient. In the case of disproportionate applications, the Commission has already invoked the principle of proportionality by replying to the applicant that processing of the application would involve an administrative burden that would undermine the principle of good administrative practices (by analogy with partial access – see point 3.6). Two refusals by the Commission based on the principle of proportionality were referred to the Court of First Instance. These cases are still pending⁶⁰.

Parliament is the only institution that systematically keeps sound and audiovisual recordings. They mainly concern meetings of its committees and plenary sessions. It is receiving a growing number of applications for access to these recordings, which are often very long. In the cases in which the recordings can only be made partly accessible, erasing the parts covered by an exception to the right of access generates a very significant workload.

Contrary to some national laws, the Regulation does not contain any clauses on unfair, repetitive or clearly unreasonable applications. Such applications result in disproportionate work to the detriment of applications from citizens genuinely looking for information. The only defence the institutions have is to invoke the principle of proportionality (see above) or to consult with the applicant in order to reach a fair solution, as provided for in Article 6(3) of the Regulation.

⁶⁰ Cases T-2/03 *Verein für Konsumenteninformation v. Commission* and T-170/03, *British American Tobacco (Investments) Ltd v. Commission*, mentioned above.

Some systematic and repetitive applications can constitute unfair use of the Regulation. For instance applications that are obviously being used on a regular basis to fuel campaigns that are systematically hostile to Community policies. These professional applicants, who also make use of the remedies available to them, are putting the institutions on the defensive by confronting them with demands which the latter cannot satisfy and which are obviously contrary to the spirit of the Regulation.

4.4. Methods of access – invoicing

The Regulation states that applicants shall have access to documents either by consulting them on the spot or by receiving a copy (paper or electronic copy).

The vast majority of documents are sent in electronic format, with paper copies of the older documents generally being sent by post. In some cases where the documents are very long, the applicant is asked to come and consult them on the spot.

In their arrangements for applying the Regulation, the institutions have provided for a system of optional invoicing for the supply of documents of over 20 pages. However, it appears that the option of invoicing is rarely used because of the cumbersome procedures and the fact that the cost of invoicing and collection of the sums would be higher than the amounts collected. In the case of very long applications, the fact of informing applicants that the supply of the documents would be invoiced to them can have a dissuasive effect. However, this effect is limited since the highest cost factor – searching for and collating the documents – cannot be invoiced.

The invoicing option should be retained, particularly in cases of really long applications, but the invoicing and collection procedure could probably be simplified.

4.5. Consultation of third parties

The three institutions laid down a procedure of consultation of third parties in their rules of procedure. Consultation must be in writing (usually by e-mail). *Parliament* lays down a compulsory time-limit for reply of five working days. The *Council* provides for a “reasonable time-limit”, and the *Commission* has a time-limit of at least five working days. In both cases, however, the consultation must enable the institutions to comply with the time-limits for reply laid down in Articles 7 and 8 of the Regulation.

In the case of documents originating in Member States, it has been agreed that the members of the Council’s Information Group should act as contacts. Thus requests for consultation must be sent to them.

Generally speaking, third parties comply with reasonable time-limits for reply.

Consultation of third-party originators nevertheless gives rise to a considerable administrative burden, especially in the case of very long applications concerning a complete file containing a number of documents originating from different authors. Consultation of third parties should be explicitly laid down as a reason for extending the time-limit for reply.

The institutions have also undertaken to consult each other systematically in the event of an application for access to a document originating in one of the other institutions⁶¹. They concluded a “*Memorandum of understanding*” signed on 9 July 2002 by the representatives of the three Secretaries-General. So far, this *Memorandum* has worked very well in practice, and replies to consultations are usually very swift.

4.6. Internal administrative remedy

The Regulation explicitly provides for an internal administrative remedy against any decision refusing access to a document (recital 13 and Articles 7 and 8). This remedy, known as a *confirmatory application*, takes the form of the renewal of the original application to obtain a revision of the institution’s position. In the case of a (partial) refusal, the applicant is informed of the possibility of making a confirmatory application within fifteen working days of receiving the institution’s reply.

Confirmatory applications are examined by a body independent of the one which took the initial decision.

In *Parliament*, initial decisions are taken by the Secretary-General or by an official authorised to do so, except in the case of a sensitive document. In this case, and for confirmatory applications, the decision is taken by the Bureau.

In the *Council*, initial decisions are also taken by the Secretary-General. Decisions regarding confirmatory applications are taken by the Council. Normally, decisions are adopted on a simple majority at the proposal of the Information Group and Coreper.

The *Commission* works in a decentralised way because of the size of its departments and the responsibilities specific to each Directorate-General. Initial decisions are taken by the Director-General concerned or by an official authorised to do so. The Secretary-General is delegated the power by the College to decide on confirmatory applications. To guarantee the independence of OLAF as regards investigations, decision-making powers are delegated to the Director-General of this Office when the documents requested relate to its investigations⁶². Initial applications concerning the Secretariat-General and OLAF documents are processed by Directors to retain the possibility of an independent review of applications by the Secretary-General or Director-General of OLAF.

This two-tier system of decision-making (initial and confirmatory applications) has worked well. It provides applicants with a simple, formality-free means of redress and a guarantee that applications will be reviewed by a different body from the one which refused the initial application. This is clear from the number of initial decisions modified at the stage of the confirmatory application (33.1% at the Commission). However, given the length of the decision-making process concerning confirmatory applications, the 15-day time-limit for reply is generally insufficient.

⁶¹ See Article 15(2) of Regulation 1049/2001.

⁶² Activities mentioned under Article 2(1) and (2) of Decision 1999/352.

4.7. External remedies

In the event of the confirmation of the refusal, applicants are informed of the remedies at their disposal to appeal the decision: they can initiate proceedings before the Court of First Instance or lodge a complaint with the European Ombudsman.

In 2002, the number of appeals and complaints compared with the number of applications was as follows:

	EP	Council	Comm.
Number of initial applications	637	2394	991
Number of confirmatory applications	1	43	96
Number of complaints to the Ombudsman	-	3	4
Number of cases brought before the Court	-	1	6

Of the seven complaints lodged with the Ombudsman:

- five were closed with the conclusion that there was no maladministration⁶³
- one resulted in a critical remark⁶⁴
- one led to a draft recommendation, but the case was closed since a similar issue is pending before the Court of First Instance⁶⁵.

The Court has ruled in only one case, rejecting the applicant's appeal⁶⁶.

In some cases of applications sent to the **Commission**, applicants attempted to obtain documents to which access had been denied them by a national court. A national court may in fact require that the Commission communicate documents to it⁶⁷. The documents communicated in the context of this application are exclusively destined for the court concerned, however, and cannot be disclosed.

4.8. Administrative burden for the institutions concerned

The processing by the institutions of applications for access to documents has given rise to a quite considerable work load since the entry into force of the Regulation, because of the significant increase in the number of applications and because of their growing complexity. Issues that have been widely covered in the media often lead to a number of applications. The processing of applications often means an extra burden for staff who are already very busy. Lastly, very long and complex applications require the mobilisation of administrative resources in the departments concerned, which is often perceived as excessive, depending on the nature and volume of the documents requested.

⁶³ Complaints 736/2002/GG, 1184/2002/PB, 1437/2002/IJH, 1753/2002/GG and 1795/2002/IJH.

⁶⁴ Complaint 648/2002/IJH.

⁶⁵ Complaint 1015/2002/(PB)IJH.

⁶⁶ Case T-76/02, *Messina v. Commission*, mentioned above.

⁶⁷ Court Orders of 13.7.1990 and of 6.12.1990 in case C-2/88 Imm. *Criminal proceedings versus Zwartveld and others*, [1990] ECR I-3365 and I-4405.

Processing of applications often involves considerable identification work and searching for the documents concerned, in particular at the **Commission**. When an application concerns a complete file, the concept of “file” as perceived by the applicant does not necessarily correspond to the logic applied by the departments when organising their files.

All three institutions have embarked on ambitious projects to introduce electronic management and archiving of documents. In future, systematic registration of documents in internal electronic registers will facilitate the identification of and search for documents, thus reducing the work load generated by the search for documents.

To guarantee the best possible application of the Regulation, the institutions have organised major awareness-raising, information and training actions for their staff (for instance, the publication of internal guides and the organisation of training schemes). These actions must be pursued and stepped up to improve the familiarity of officials with the rules on access to documents.

4.9. Interinstitutional cooperation

The Regulation applies to three institutions whose roles and methods of operation are quite different. To guarantee the coherent application of the rules governing access to the documents, the Regulation has therefore provided, under Article 15(2), for the establishment of an interinstitutional committee “*to examine best practice, address possible conflicts and discuss future developments on public access to documents*”.

The Committee consists of political representatives of the three institutions. Its preparatory work is carried out by the Secretaries-General or their representatives. Because of this high-level membership, of both the Committee itself and the preparatory group, regular meetings are not possible.

Moreover, the objective of the Interinstitutional Committee is to discuss political questions raised by the application of the Regulation. However, it has emerged that the implementation of the Regulation has raised a number of technical and legal questions that cannot be submitted to the political representatives without having first been thoroughly examined by the departments responsible for implementing the Regulation. These departments have thus far been coordinated on an ad hoc basis.

4.10. Conclusions

- **The institutions, particularly the Commission, regularly receive very long or vague applications for access.**
- **The Regulation does not contain any clauses concerning unfair, repetitive or clearly unreasonable applications. The institutions are sometimes obliged to apply the principle of proportionality.**
- **Compliance with time-limits is sometimes difficult because of the complexity of applications and the need to consult third-party originators.**
- **The number of court proceedings and complaints is low compared with the volume of applications.**
- **The application of the Regulation is resulting in a considerable burden of**

work for the institutions. However, modernisation of document management will eventually alleviate the burden.

- **Some systematic and repetitive applications obviously constitute misuse of the Regulation.**

5. PUBLICITY AND ACTIVE INFORMATION

The purpose of Regulation 1049/2001 is to establish, pursuant to Article 255(2) of the EC Treaty, the conditions under which citizens may obtain, on request, access to documents of Parliament, the Council and the Commission. Although it therefore concerns “passive” information, the Regulation contains a few provisions on “active” information, for instance the establishment of public registers and direct access to documents by electronic means. Moreover, the Regulation is a fundamental part of a more global public information policy.

5.1. Registers

Article 11 of the Regulation states that the institutions shall provide access to a register of documents in electronic form to enable citizens to avail of their access rights. Only the **Council** already had a public register on the Internet before the entry into force of Regulation 1049/2001. Pursuant to the latter, **Parliament** and the **Commission** launched their registers on 3 June 2002⁶⁸.

5.1.1. *Nature of registers*

These registers must allow citizens to identify documents likely to be of interest to them. They are tools for helping with the search, but they must not in any way influence the right of access to documents. Moreover, the fact that documents are mentioned in the register does not make them automatically accessible to the public, while other documents not mentioned in the register may be the subject of applications in the same way as those shown in the register.

5.1.2. *Contents*

The Regulation does not define the categories of documents that must feature in the register. It does not oblige the institutions to hold a register covering all the documents they receive or produce. This would be impossible given the very broad definition of the concept of document in Article 3(a) of the Regulation.

The registers must be exhaustive in terms of their documentary scope, however. Once the families of documents forming part of the register have been determined, all the documents belonging to these families must be mentioned there.

The register must contain one or more reference numbers for each document listed there, as well as the subject, title or brief description of the contents and the dates of receipt or of drafting and registration. Hyperlinks must be provided to allow access to the full text of documents that are directly accessible (see point 5.2).

The data shown in the register are devised in such a way as not to undermine the protection of the interests covered by the exceptions in Article 4 of the Regulation. To this end, an abbreviated title may replace a full title that would reveal information which would be harmful if disclosed.

⁶⁸

The Council Register has been accessible since 1 January 1999.

A single exception is provided for, however, when a document should be recorded in the register: “sensitive” documents within the meaning of Article 9 of the Regulation, which must be entered on a register only with the agreement of the originator. The annual report to be presented by each institution must mention the number of sensitive documents not entered in the register. In 2002, the European Parliament did not produce or receive any sensitive documents. There are no “sensitive” documents in the documentary field of the Commission’s register, either. For the Council, it is stated that out of 250 documents classified at least “EU CONFIDENTIAL”, less than one third were not mentioned on the register.

5.1.3. *Documentary field*

Parliament has defined wide coverage of its register, covering not only all documents relating to parliamentary work, but also the mail sent to the institution and to its President. The register initially contained references to the most recent documents and a process of clearing the backlog is now in progress. Parliament also intends to broaden the register to include administrative documents.

The **Council’s** register covers all “standard” documents, in other words documents relating to the Council’s work that have been submitted to one of its bodies (Working Groups, Coreper and Council configurations).

Given the huge amount of documents and its decentralised organisation, the **Commission** opted initially for a register of documents registered and disseminated by the Secretariat-General’s Registry and relating to the institution’s legislative and regulatory activities. This covers agendas and minutes of Commission meetings as well as COM, C and SEC series documents. The register exists in addition to the register of the President’s mail and other sources of information. A recent addition was a public register of documents relating to the committees which assist the Commission in the exercise of enforcement powers (“comitology”), submitted to Parliament in the context of its legislative responsibility⁶⁹. To facilitate matters for users, all of these documents are accessible via the same portal. Greater integration of registers and other information tools is planned for the future.

The documents covered by these registers, in particular that of the Commission, are to be gradually extended. Initially, the Commission focused on the registration of legislative documents which are also the documents for which direct access is a priority under Article 12(2) of the Regulation.

5.1.4. *Use of registers*

The establishment of the registers has led to an increase in the number of applications for access, mainly at **Parliament** and the **Council**. In the latter case there was a 70% increase in 1999, the year in which the register was made available. Parliament observed a spectacular increase in demand after 3 June 2002: 117 applications between January and May 2002, and 520 between June and December 2002. At the Commission, demand increased more gradually throughout 2002.

⁶⁹ Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184, 17.7.1999, p. 23.

At **Parliament** and the **Council**, the vast majority of applications for access arise from the consultation of the registers. Almost all the applications sent to Parliament are submitted using the electronic form associated with the register. At the **Commission**, only a small number of applications concern documents identified in the two registers, that of the COM, C and SEC documents and that of the President's mail. Most of the applications concern files (infringements, state aid, mergers) and not specific documents. Moreover, the applications sent to the Commission do not usually concern legislative activities, but rather the monitoring of the application of Community law.

It is clear from the Parliament's and Council's experience that the registers enable people to make more precise applications and hence they contribute to reducing the administrative burden linked to the identification of and search for documents.

5.2. Direct access to documents and dissemination of information

The Regulation does not lay down criteria governing the direct accessibility of documents, but states in Article 12 that documents must "*as far as possible*" be made directly accessible to the public in electronic form or through a register. The objective of direct accessibility concerns legislative documents in particular.

All three institutions have defined in their rules of procedure the categories of documents which are, as far as possible, made directly accessible in electronic form (for instance by creating links between the references in the register and the full texts) or by providing them automatically on request⁷⁰.

The full text of a substantial part of the documents shown in the registers of the three institutions is now accessible. As the registers are extended to cover more documents, the number of documents directly accessible should increase significantly. At the moment, over half of the documents in the Parliament and the Council registers are directly accessible. The Commission's register contains links with the final versions of COM documents on the EurLex site of the Office for Publications. Work is in progress to associate the register with a catalogue of documents not published by the Office for Publications but which must be made directly accessible, such as the initial versions of COM documents after the adoption of the final version.

In addition to the documents made accessible via the registers, the three institutions have in recent years considerably developed the information disseminated to the general public through their Internet sites. The latter contain a lot of factual information aimed at generally informing the public. The EUROPA server gives guided access to these different sites via a single portal. Moreover, the sites of each institution have links to the registers of the others. There are also services providing replies to requests by the public for information (EuropeDirect and electronic mailboxes).

⁷⁰

Annex XV to Parliament's rules of procedure.

Article 11 of Council Decision 2001/840.

Article 9 of the Annex to Commission Decision 2001/937.

5.3. Assistance to applicants

To facilitate exercise by citizens of their right of access, the three institutions have published a joint brochure providing the public with general information on their documents and how to access them. The brochure is available on paper and in electronic form on the institutions' joint portal on the EUROPA server. Citizens can gain access via this portal to the specific sites of the three institutions which contain more detailed information on their work and on access to their documents and to the registers.

With this information, it is easier to make more precise, targeted applications. However, when an institution receives an application that is not specific enough, it asks the applicant to identify more clearly the subject of the search and assists with this, for instance by explaining how to use the register. This assistance very often involves an exchange of e-mails. If necessary, telephone contact with the applicant helps clarify the application. In some cases, the institution draws up a list of documents likely to be of interest, to enable the applicant to determine what exactly is required. In other cases, applicants are informed of sites on the Internet where they can find some information that will enable them to clarify their applications.

It sometimes happens that applicants do not want to obtain precise documents, but are looking for more general information. In this case, the applications are handled by information services such as Parliament's "Correspondence with the Citizen" service, the Council's "Information to the public" unit and the Commission's EuropeDirect service.

5.4. Conclusions

- **The establishment of public registers by the three institutions makes it easier for citizens to search for documents that may be of interest to them.**
- **More thorough integration of the Commission's registers and other information tools is desirable.**
- **The full text of a substantial proportion of the documents mentioned in the registers is directly accessible.**
- **Each institution has set up information services for the public which deal with requests for general information.**
- **A considerable amount of information is disseminated by means of the specific Internet sites of the three institutions. If necessary, more personal assistance is provided to citizens when exercising their right of access to documents.**

6. REVIEW AND OUTLOOK

The analysis in Chapters 2 to 5 highlighted the strong and weak points of the Regulation itself and the way in which it has been applied. Now we will evaluate to what extent the Regulation has permitted the achievement of the objective of granting the widest possible access to the documents of the Community institutions and of thus ensuring better information and increased participation of citizens in the decision-making process.

6.1. General right of access

While the right of access does not extend to the documents of all the Community bodies, it does cover a growing number of institutions and bodies. Regulation 1049/2001 now applies to the agencies, while institutions and bodies not covered by Article 255 of the Treaty, with the exception of the Court of Justice, have all adopted rules on access on a voluntary basis.

The Regulation on the application to the EC institutions and bodies of the provisions in the Convention of Århus will extend the right of access to the environmental information held by all the Community institutions and bodies. Lastly, the draft Constitutional Treaty drawn up by the Convention provides for a right of access “to documents of the Union institutions, bodies and agencies”. Thus there is a real prospect that the right of access to documents will apply generally in all Union organisations.

However, this development will not put an end to the distinction between Union citizens and residents on the one hand, and, on the other, citizens of third countries not residing in a Member State or legal persons not established on Community territory. The Convention of Århus does not make this distinction, but the draft Constitution does. In a bid to ensure both equity and clarity, it would be desirable to abolish this difference of treatment on a voluntary basis.

6.2. Clarification of material scope

The Regulation provides a very broad definition of the concept of “document” but does not specify the contours. It does not contain any criteria relating to the degree of officialisation of documents, with informal messages thus having the same status as official records. Moreover, the Regulation does not state either what the concept of institution covers. Parliament clarified the concept of “Parliament document” in its rules of procedures, thus delimiting the scope of the Regulation as regards documents from political groups and individual members not holding a mandate from the institution.

6.3. Application of the system of exceptions

The exceptions laid down under Article 4 of the Regulation correspond to the usual limits on the right of access as featured in most national laws, as well as in Recommendation (2002) 2 of the Council of Europe and in the Convention of Århus. Community legislation on access to documents is not any more or less restrictive than that in force in most countries.

In practice, it turns out that only a few exceptions were invoked regularly. They concerned protection of:

- public security and international relations, invoked by the Council in the context of activities under the second and third pillars;
- court proceedings and legal advice;
- the internal decision-making process;
- inspections, investigations and audits, invoked only by the Commission.

The global rate of positive replies for 2002 ranged from 70% to 98%. The rates of positive replies vary from one institution to another, but the figures are not easy to compare. Since the percentages of positive replies for the Council and Commission concern only documents that were not yet accessible, this means that a considerable number of additional documents have been placed in the public domain because of the Regulation.

The application of the exception relating to the protection of “personal data” is a delicate matter because of the interlinking of Regulation 1049/2001 and the Regulation on the protection of personal data (45/2001).

The decision-making process is not protected in the same way as the other interests covered by Article 4 of the Regulation. The requirement of “seriously undermining” the process appears to be excessive and demonstration of this leads to very theoretical arguments. Moreover, this exception should protect not only the decision-making process of the institution which is the subject of the application for access, but also that of other institutions involved in the decision-making in that particular case.

The institutions did not have to deal with cases in which they had to communicate documents in the absence of an exception based on the Regulation even though disclosure was harmful. However, problematic cases could arise. For instance, environmental protection is not a reason for refusing access under Regulation 1049/2001. Given the forthcoming application of the Convention of Århus to the Community institutions, a specific exception should be made, such as the one in the Convention.

More generally, in the light of experience and in a bid to ensure clarity, it would be a good thing to provide for specific exceptions covering certain well-defined cases.

6.4. Workload generated by the practical implementation of the Regulation

This matter comprises two aspects.

First, it is important that the institutions allocate the resources needed to ensure the proper implementation of the Regulation on access to documents. The very principles of access to documents and of transparency will be undermined if the appropriate resources are not made available. It is not simply a question of allocating the necessary human and material resources, but also of ensuring the training and information of the persons concerned. Access to documents is a horizontal activity which involves a large number of people working at the institutions.

Second, the Regulation does not explicitly address the problem of very long, repetitive, unfair or unreasonable applications. While it might be rather dangerous to define this type of application, it would be advisable to prevent the disproportionate burden generated by certain applications from penalising citizens submitting applications in good faith for access to documents because of a genuine need for information. Since the possibility of invoicing copying and postal charges is only a limited disincentive, the concept of proportionality, already enshrined in case law, should be refined when it comes to granting partial access by removing parts of documents to which the exceptions do not apply.

In two cases of particularly long applications, the Commission applied the principle of proportionality by analogy with the situation of partial access. Both decisions were appealed before the Court of First Instance. We must therefore wait for the ruling of the Court before further exploring this solution.

6.5. Place of the Regulation in public information policy

The objective of Regulation 1049/2001 is to make the work of the institutions more transparent and hence to bring them closer to the public. Transparency is not an aim in itself, but permits increased participation by the public in the decision-making process, thus strengthening the democratic nature of the institutions and the confidence of citizens in the European administration.

Implementation of the Regulation has marked an important stage in the development of a transparency policy at European Union level. More than two thirds of the applications for access made to the three institutions resulted in the disclosure of documents not yet published, while a growing number of documents is being made directly accessible.

Experience tends to confirm, however, that specialists in European affairs were the main people to benefit, and that it cannot therefore be regarded as a special instrument of information for the public. Looking for a Community institution's unpublished documents implies, in fact, that the applicant is familiar with the Union's powers and activities.

Consequently, there is still a lot of work to be done as regards informing the general public, in two ways: people must be kept more abreast of the Union's activities by means of an active information policy, and they must be aware of their right to obtain access to the documents of the institutions.

6.6. Recourse to the Regulation with a view to exercising specific rights of access

The objective of Regulation 1049/2001 is to make documents accessible to the public, disclosure of which will not harm the public interest or specific private interests. It is not intended to determine the conditions under which certain people can obtain special access to documents that cannot be disclosed to the general public.

However, experience has shown, particularly at the Commission, that the Regulation has sometimes been invoked to obtain such special access. Two cases of inappropriate recourse to the Regulation can be pinpointed:

- Some people attempted to obtain, pursuant to the Regulation, the communication of documents to which access had been refused them in the context of a specific

procedure involving the invoking of the general right to transparency. For instance, law firms trying to obtain, under Regulation 1049/2001, documents to which they did not have access under the right of access to the file granted to the parties concerned, either because the documents requested were not even accessible to the parties, or because they were acting on behalf of a third party. Such applications can undermine the functioning of the services responsible for managing the files in question, which generally concern investigations by the Commission.

- In other cases, people with a special interest in a file concerning them invoked the Regulation because of the absence of specific rules in this area. This occurred in the case of the recruitment of officials or other staff, invitations to tender and audits. There is a lack of rules in a number of areas relating to the right of access to the file for the parties concerned, going beyond the right of public access.

6.7. Suitability of Regulation 1049/2001

Regulation 1049/2001 has been applied for two years and no problems have arisen during implementation that would justify amending legislation for the time being. However, further experience is needed and significant case law must be developed before considering any amendment of texts regulating public access to documents. However, it would be advisable to consider ways of protecting institutions better against obviously unfair applications.

The new treaty that will emerge from the Intergovernmental Conference is likely to extend the right of access to documents and to strengthen the dialogue between the institutions and civil society. The Regulation should be thoroughly revised in this respect. It should, at the very least, be adapted in order to be applicable to all the Union's institutions, bodies and agencies, given their very different roles. The Regulation would thus become a framework law, the implementing arrangements for which would have to be laid down in the rules of procedure of the organisations concerned. Moreover, the right of access should be situated more precisely in the context of public participation in the democratic life of the Union.

The Regulation could be revised in tandem with the process of ratification of the new treaty, based on more experience and new case law. A public debate on transparency in the European institutions should be launched to steer this process. Specific proposals based on the outcome of this broad consultation could then be formulated with a view to amending Regulation 1049/2001.

7. PROPOSED ACTIONS

Given the analysis of the application of the Regulation and the conclusions which it is possible to draw at this juncture, an initial series of actions could be carried out in the short term to consolidate the public access right and to incorporate it further into a public information policy. In the longer term, an examination should be conducted to see to what extent the legislative provisions themselves need to be revised.

7.1. Short-term actions

7.1.1. Recommendation to adapt rules of access to those of Regulation 1049/2001

The three institutions could reiterate their call to the other Community institutions and bodies, asking them to adopt rules of access to their documents that are similar or equivalent to those of Regulation 1049/2001.

It would be very appropriate if revision of the rules were to coincide with the entry into force of the Regulation on the application in EC institutions and bodies of the provisions in the Convention of Århus. The institutions and bodies would quite likely be anticipating a probable amendment of the Treaty with this voluntary introduction of a general right of access.

7.1.2. Recommendation to extend the right of access to all natural and legal persons, irrespective of nationality or residence

In the same spirit, the three institutions could adopt a recommendation with respect to the other institutions, bodies and agencies, asking them to extend, in their implementing rules, the benefit of the right of access to all natural and legal persons, irrespective of nationality or residence.

7.1.3. Development of the registers and of direct access to documents

The Commission could embark on the work required to integrate its public document registers further.

A study could be launched to look into the feasibility of extending coverage of the Commission registers to other categories of documents. This would largely depend on the progress made in modernising document management.

The number of documents for which the text is directly accessible via the Internet could be increased considerably, for instance the categories mentioned under Articles 9 (2) and 9 (3) of the Commission's implementing rules.

Pursuant to a decision by the Interinstitutional Committee at its meeting on 23.9.2003, the three institutions should highlight the relations between the documents in their registers using a system of hyperlinks that allow users to navigate through a given subject or specific procedure using the information tools of the three institutions.

7.1.4. Development of other information tools

The dissemination of information on the EUROPA server could be better coordinated by the three institutions.

General public information tools such as EuropeDirect could be promoted more actively.

Ways of streamlining the various networks of information points should be examined, and they should be coordinated better, both within the Commission and between the institutions.

7.1.5. Strengthening interinstitutional cooperation

Cooperation between the three institutions is now consolidated, both in political terms and in terms of operational services. Mechanisms for the exchange of experiences should be put in place in conjunction with the other institutions and bodies applying similar rules, and with the agencies.

The Interinstitutional Committee should regularly review the administrative practices of the three institutions in the light of Court judgments and decisions by the Ombudsman.

A joint methodology should be established for the registration and recording of applications for access to allow the three institutions to draw up annual reports based on a uniform model.

7.1.6. Appropriate training for officials responsible for access to the documents of the agencies and other institutions

In support of the recommendations set out under points 7.1.1 and 7.1.2, information and training sessions should be organised for officials and staff members who will be responsible for applying rules of access in the other institutions, bodies and agencies. Training material should also be made available to them.

7.2. Longer-term actions

7.2.1. List of areas lacking specific rules of access

First of all, there is a need to take stock of all the sectors in which specific rules on access to files for persons with special interests are lacking or insufficient. The shortcomings in these measures would subsequently have to be remedied.

7.2.2. Examination of the need or advisability of amending Regulation 1049/2001

This examination will become useful as soon as a significant body of case law has been developed and experience has been acquired by the Community institutions and bodies in applying the Convention of Århus, and when the process of ratification of the Constitution is in progress. If, following this examination, revision of the Regulation should prove indispensable, a broad public debate should be held before submitting a proposal for amendment.