



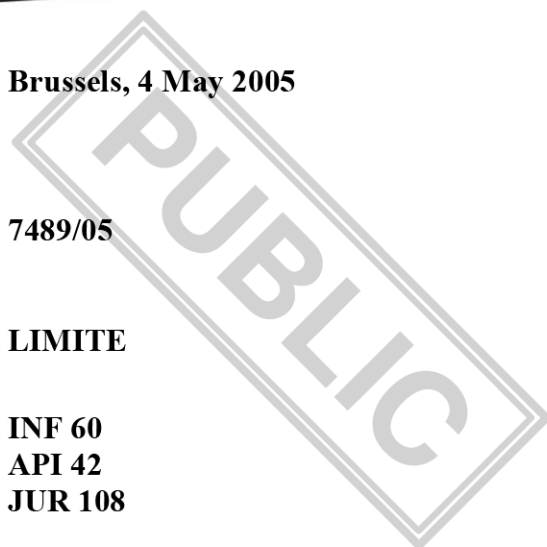
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In accordance with Article 17(1) of Regulation No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, each institution publishes an annual report on the implementation of that Regulation.

The General Secretariat herewith submits to delegations a draft annual report for 2004 (see Annex).

After it has been examined by the Working Party on Information, the draft report will be submitted to Coreper for adoption by the Council.

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**DRAFT**

**THIRD ANNUAL REPORT OF THE COUNCIL ON THE IMPLEMENTATION  
OF REGULATION 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**

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## INTRODUCTION

Article 17(1) of Regulation 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 provides that "*Each institution shall publish annually a report for the preceding year including the number of cases in which the institution refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register*"<sup>1</sup>.

This report covers the Council's implementation of Regulation No 1049/2001 in 2004.

As in the earlier annual reports<sup>2</sup>, Part I of this report sets out the regulatory, administrative and practical adaptations made by the Council in 2004 in order to ensure compliance with the provisions of Regulation No 1049/2001. Part II analyses the figures for applications for access during the reference period. Part III relates more specifically to the Council's application of exceptions to the right of access under Article 4 of Regulation No 1049/2001. Part IV lists the key events of the third year of implementation of the Regulation, and Part V deals with complaints made to the European Ombudsman and with legal actions. A final section, Part VI, presents the report's conclusions.

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<sup>1</sup> See earlier reports by the Council (7957/03 and 8036/04) and the Commission (COM (2003) 216 final and COM (2004) 347 final). For the European Parliament's reports, see the Notes from the Secretary-General of the European Parliament to the Bureau dated 23 January 2003 (PE 324.992/BUR) and 19 February 2004 (PE 338.930/BUR/NT). Moreover, in accordance with Article 17(2) of Regulation No 1049/2001, the Commission published a report on the implementation of the principles of the Regulation on 30 January 2004 (COM (2004) 45 final).

<sup>2</sup> See 7957/03 and 8036/04.

## I. REGULATORY, ADMINISTRATIVE AND PRACTICAL ADAPTATIONS

Among the measures taken by the Council in order to ensure compliance with the provisions of Regulation No 1049/2001 in this third complete year after its entry into force, the following should be instanced in particular:

- the implementation of a number of technical adjustments designed to ensure that documents to which the Council grants partial access are directly available through its public register of documents;
- the organisation of training sessions for the staff of the General Secretariat of the Council.

Also noteworthy in this connection is the political agreement reached in the Environment Council of 20 December 2004 on the proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies<sup>3</sup>.

### 1. *Public register of Council documents*

Under Article 11 of Regulation No 1049/2001, the Community institutions are required to make a document register available in electronic form. The Regulation also stipulates that such registers, allowing citizens to identify the documents of potential interest to them, should be operational by 3 June 2002 at the latest. The Council fulfilled this requirement well before Regulation No 1049/2001 entered into force with the setting up, on 1 January 1999, of a public internet register (<http://register.consilium.eu.int>).

The register contains references to the Council documents entered in it via an automatic archiving system. Accordingly, all non-sensitive documents submitted to the Council or to one of its preparatory bodies which are to serve as a basis for deliberations, could influence the decision-making process or reflect the progress made on a given subject are automatically listed in the register. In the case of sensitive documents<sup>4</sup>, the author specifies the references which may be permitted to appear in the register<sup>5</sup>.

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<sup>3</sup> The latest text of the draft common position is set out in document 6273/05.

<sup>4</sup> For the purposes of Regulation (EC) No 1049/2001, "sensitive documents" means documents classified as "CONFIDENTIEL", "SECRET" or "TRÈS SECRET/TOP SECRET". On this subject, see Article 9(1) of that Regulation.

<sup>5</sup> See Article 9(2) and Article 11(2) of Regulation No 1049/2001.

The register allows access to the full text of a large number of documents which, pursuant to Article 11 of Annex II to the Council Rules of Procedure, must be made directly available to the public as soon as they have been circulated<sup>6</sup>. These are documents in the following categories:

- provisional agendas for Council meetings and for its preparatory bodies (with the exception of certain bodies dealing with military and security questions);
- documents originating from a third party which have been made public by the author or with his agreement;
- in the legislative field, "I/A" and "A" item notes submitted to Coreper and/or the Council, as well as draft legislative acts, draft common positions and joint texts approved by the Conciliation Committee to which they refer;
- any other text adopted by the Council which is intended for publication in the Official Journal;
- documents regarding a legislative act after a common position has been adopted, a joint text has been approved by the Conciliation Committee or a legislative act has been finally adopted;
- documents which have been made available in full to a member of the public who made an application.

As at 21 February 2005, the register listed 583 713 documents (all languages taken together), of which 359 633 (61,6% of those registered) were public documents, i.e. either available in downloadable format (354 054 documents in PDF or HTML format) or on request (5 579 documents in other formats). This represented an increase of nearly 25% on the number of documents appearing in the register in 2003 (467 532 in 2003 against 583 713 at the beginning of 2005) and an increase of nearly 42% in the number directly accessible via the register (249 935 in 2003 against 354 054 at the beginning of 2005).

Moreover, in February 2005 the register contained 6 465 documents bearing the code "P/A" (i.e. partially accessible), including 685 which were accessible on-line (in PDF format). "P/A" documents registered before 1 February 2004 (since when all new documents classified as partially accessible have been directly available to the public via the register) are not usually downloadable but may be made available on request.

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<sup>6</sup> In 2004, 68 996 documents were made available to the public via the register as soon as they had been circulated.

In 2004, 295 002 different users logged on to Council's public document register (as against 181 317 in 2003), representing a 62,7% increase in the number of users in one year. The total number of visits increased by 19,2% (919 584 en 2004 against 768 725 in 2003), representing more than 2 500 visits per day. Consultations (in terms of number of screens viewed) totalled 5 677 302.

226 (original language) sensitive documents were produced in the period concerned, 12 classified as "SECRET UE" and 214 as "CONFIDENTIEL UE". Of these, one "SECRET UE" document and 75 "CONFIDENTIEL UE" documents are mentioned in the register, in accordance with Article 9(2) and Article 11(2) of Regulation No 1049/2001.

## *2. Practical adaptations*

Under Regulation (EC) No 1049/2001, all applications for access to documents held by the Council concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility must be given consideration, including applications relating to classified documents.

A specific consultation procedure has been put in place to facilitate the processing of applications relating to classified documents, which require thorough investigation by the relevant departments of the General Secretariat of the Council. This procedure enables the officials concerned to conduct the (often very complex) examination of classified dossiers in close co-operation with the authors, and to notify their conclusions to the applicant under the conditions and within the time-limits laid down by Regulation No 1049/2001.

It should be noted in this connection that the time-limit for replying is 15 working days, with a possible extension of a further 15 working days in duly justified cases, e.g. where the application concerns a very large number of documents.

In 2004 the average time for processing initial applications was 9 working days. The Council Secretariat extended the time-limit in 8,7% of initial applications but it is forced to use this option more frequently for confirmatory applications, which have to be examined by the Working Party on Information before being submitted to Coreper and the Council for adoption, each of these steps requiring some time.

As provided for in Article 4(6) of Regulation No 1049/2001, the Council routinely considers disclosing parts of requested documents. This makes for greater openness, particularly in the legislative field.



Where a document is still subject to discussions within the Council or its preparatory bodies, and this document reflects the positions of delegations, the situation may arise that full release of the document can interfere with the proper conduct of the negotiations. In such cases, the Council applies, as a general rule, Article 4(3) of the Regulation by granting access to the content of the preparatory documents while these are still being discussed, removing only the references to names of delegations. Interested parties can thus follow the progress of discussions without the institution's decision-making process being undermined. This practice does not, however, prejudice the possible application of other exceptions provided for in Article 4 of the Regulation.

Until the end of 2003, documents to which the Council had granted partial access were not directly accessible via the public register of Council documents. However, persons wishing to consult partially accessible documents, which bear the code "P/A" in the register, could always submit an application for access to the "Transparency – Access to documents" unit of the General Secretariat of the Council, which would then send them the documents in question.

Following a series of technical adaptations made in February 2004, the public is now able to consult on-line all new documents partly released by the Council. The number of applications for access received by the General Secretariat of the Council in 2004 consequently decreased with 23,6% compared with the previous year (670 applications less), while the number of documents examined further to an application for access increased slightly (by about 2%).

Meanwhile, the total number of "P/A" documents appearing on the register remained quite steady (at around 5 000). This is due to the fact that many "P/A" documents relate to legislative proposals and are released in full once the relevant negotiations have been completed.

### *3. Proposal for a Regulation on access to information in environmental matters*

On 20 December 2004 the Council reached political agreement on the proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies <sup>7</sup>.

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<sup>7</sup> COM (2003) 622 final, adopted by the Commission on 24 September 2003.

The UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Århus Convention) was adopted and signed by the European Community and its Member States in 1998. The Community legislation required to implement it in the Member States has been adopted in the meantime. It consists in Directive 2003/4/EC on public access to environmental information <sup>8</sup> and Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment <sup>9</sup>.

However, in order for the Community to be able to ratify the Convention, the Regulation on the application of the provisions of the Århus Convention to the Community institutions still needs to be adopted<sup>10</sup>.

The Regulation will extend the right of access to environmental information held by all Community institutions and bodies, not just by those specified in Article 255 of the EC Treaty and Regulation (EC) No 1049/2001. The future Regulation will not however apply to the Court of Justice when acting in its judicial capacity.

Under Article 3 of the future Regulation any physical persons, without discrimination as to citizenship, nationality or domicile, and any legal person, without discrimination as to where it has its registered seat or an effective centre of its activities, will be entitled to access to environmental information.

The future Regulation lays down that the exceptions under Article 4(1), (2) and (3) of Regulation (EC) No 1049/2001 will also apply *mutatis mutandis* to applications for access to environmental information held by the institutions.

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<sup>8</sup> Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41, 14.2.2003.

<sup>9</sup> Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156, 25.6.2003, p. 17.

<sup>10</sup> This series of additional instruments (dubbed "Århus package") was proposed by the Commission in September 2003 and comprises the proposal for a Regulation (COM (2003) 622 final), the proposal for a Directive on access to justice in environmental matters (COM (2003) 624 final) and the proposal for a Council Decision on the conclusion, on behalf of the European Community, of the Århus Convention (COM (2003) 625 final).

In addition to the exceptions under Article 4 of Regulation (EC) No 1049/2001, the Community institutions and bodies may refuse access to environmental information where disclosure of the information would adversely affect the protection of the environment to which the information relates, such as the breeding sites of rare species.

Lastly, the future Regulation's provisions on the collection and dissemination of environmental information go further than those earlier laid down in Articles 12 and 13 of Regulation (EC) No 1049/2001. The following will be automatically made available to the public:

- texts of international treaties, conventions or agreements, Community legislation on the environment or relating to it, and of policies, plans and programmes relating to the environment;
- progress reports on the implementation of those instruments;
- reports on the state of the environment which the Commission is required to publish and disseminate at regular intervals not exceeding 4 years;
- data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment;
- authorisations with a significant impact on the environment, and environmental impact studies and risk assessments concerning environmental elements.

In appropriate cases, Community institutions and bodies may satisfy their obligations regarding the collection and dissemination of environmental information by creating links to Internet sites where the information can be found.

#### *4. In-house instructions, training sessions, staff*

In January 2004, the Transparency – Access to Council Documents Unit produced an updated version of the *Transparency Guide*, a handbook for delegates and Council Secretariat staff, a key section of which deals with public access to documents and the case-law applicable to the area. The Transparency Guide sets out the principles and instruments that apply as regards transparency and access to documents and provides practical information on the procedures for implementing those instruments.

In addition, the Council Secretariat regularly runs training sessions for Council staff responsible for document production in order to familiarise them with the procedures and practice to be followed as regards public access to documents.

Until November 2004, the "Transparency, access to documents and information to the public" Unit of the General Secretariat of the Council (DG F) had a staff of 14, allocated as follows:

|                            |                          |
|----------------------------|--------------------------|
| Access to documents:       | 2 A* 2 B*, 4 C* and 1 D* |
| Legislative transparency:  | 1 B* and 1 C*            |
| Information to the public: | 4 C*.                    |

Since the internal reorganisation of DG F at the end of 2004 the two staff members attached to legislative transparency have been redeployed to a new department, which should eventually become the Registry of the General Secretariat of the Council.

Staff of the "Information to the public" section handle the requests for information from members of the public under the Code of good administrative behaviour for the General Secretariat of the Council <sup>11</sup>. In 2004, the section dealt with 9 227 requests for information sent by e-mail (8 529) or letter (698)<sup>12</sup>.

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<sup>11</sup> Decision of the Secretary-General of the Council/High Representative for Common Foreign and Security Policy of 25 June 2001 on a code of good administrative behaviour for the General Secretariat of the Council of the European Union and its staff in their professional relations with the public, OJ C 189, 5.7.2001, p. 1.

<sup>12</sup> In 2003, the corresponding figure was 8 896 (8 146 requests for information sent by e-mail and around 750 requests sent by letter).

## II. ANALYSIS OF APPLICATIONS FOR ACCESS

In the initial stage, applications from members of the public for access to Council documents are handled by the General Secretariat of the Council. In the event of total or partial refusal by the Council Secretariat, the applicant may make a confirmatory application asking the Council to reconsider its position. If the confirmatory application is totally or partially refused, the applicant may lodge a complaint with the European Ombudsman and/or institute proceedings before the Court of First Instance of the European Communities.

The Annex to this report provides statistics on public access to Council documents for the first two full years following entry into force of Regulation No 1049/2001.

During the reference period the Council received 2 160 requests from the public for access to a total of 12 907 documents. This represents a 23,7% drop on the previous year in the number of applications (2 160 in 2004 against 2 830 in 2003), mainly attributable to fact that it is now possible to consult all new, partially accessible documents on-line via the Council's public register (see previous chapter), and an almost 2,5 % rise in the number of documents requested (12 907 in 2004 against 12 595 in 2003).

The number of documents disclosed in full or in part (following initial or confirmatory applications) totalled 11 067 in 2004 (10 912 in 2003).

The number of documents disclosed in full in 2004 rose considerably (by more than 10%) on 2003 (a total of 9 014 in 2003 against 9 940 in 2004), whereas the number of documents partially disclosed in 2004 fell in comparison with the previous year (a total of 1 928 in 2003 against 1 127 in 2004).

As the statistics for Internet consultation of the public register of Council documents demonstrate, the internet register has become an important research tool for citizens wishing to keep close track of the activities of the European Union. This impression is borne out by the rise in the numbers of users (up 62,7%) and of visits (up 19,2% on the previous year) and the large number of "non-public" documents requested (totalling 12 907 in 2004).

Moreover, a significant number of the documents requested were released if not all in full then at least in part after examination by the relevant departments of the General Secretariat of the Council.

### **Occupations and geographical distribution of applicants**

Initial applications came mainly from students and researchers (27,6%). Lawyers (10,7%), industry and commerce and pressure groups (21,9%) were also high on the list of social and professional categories represented. Since applicants are not required to give their identity or provide reasons for their applications, which are usually sent by e-mail, the occupations of a significant proportion (17,5%) of them is unknown. Most confirmatory applications also originated from students and researchers (34,5%).

Journalists accounted for only (6,9%) of applicants at the confirmatory stage, mainly because the institutions' public document registers represent only one of several possible sources of information for journalists. Moreover, the vast majority of journalists are mainly interested in the immediate news. It is therefore not surprising that the few applications for access from journalists came in the main from the field of investigative journalism and were hence similar to applications from academics.

As regards the geographical distribution of applicants, the majority of initial applications came from Belgium (26,9%), Germany (14,2%) and the United Kingdom (8%). Applications originating from third countries (outside the EU) represented 7% of the total. Confirmatory applications came mainly from the following four countries: Belgium (48,3%), the United Kingdom (20,7%), Italy (10,4%) and the Netherlands (6,9%)<sup>13</sup>.

The relatively high number of initial and confirmatory applications originating from Belgium is explained by the fact that several multinational companies and international law firms, as well as numerous associations representing various economic and industrial sectors at European level have their headquarters in Brussels.

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<sup>13</sup> In 2003, too, most confirmatory applications came from the four countries referred to above, viz. the Netherlands (28,9%), Belgium (26,3%), the United Kingdom (18,4%) and Germany (15,8%).

## Fields covered by applications

As regards the fields covered by the applications, the interest in Justice and Home Affairs remained high (20,1%), although the figure has fallen in relation to previous years <sup>14</sup>. This was followed, in descending order, by applications for documents on external relations and CFSP (14,6%), the internal market (14,3%), the environment (6,8%) and transport (4,9%).

The interest of applicants in the internal market (14,3% of applications in 2004 as against 16,3% in 2003) and the environment (6,8% in 2004, 5,2% in 2003) remained fairly steady <sup>15</sup>, while there was a sharp rise in CFSP-related applications on the previous year (14,6% in 2004 against 9,1% in 2003).

## Number of documents examined and refusals of access

During the reference period, the General Secretariat examined 12 907 documents, 10 954 of which were made available in the initial stage (reply supplied by the General Secretariat on behalf of the Council). 35 confirmatory applications were made in respect of 197 documents, as a result of which the Council decided to release an additional 113 documents (77 in full and 36 partially).

Of the 12 907 documents requested during the reference period, access to 1 840 was refused (initial and confirmatory phases taken together), giving an access percentage of 77% (documents requested and disclosed in full) or 85,7% if documents approved for partial access are taken into account.

While the level of access to Council documents in 2004 remained steady with respect to the previous year (87,4% in 2003), these figures must be viewed in conjunction with the continuing rise in the number of documents requested (up 2,5 % on the previous year) and the increasing number of documents (68 996 in 2004 against 66 999 in 2003) made available directly via the register as soon as they have been circulated.

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<sup>14</sup> In 1999 Justice and Home Affairs accounted for 37% of applications for access, a percentage which fell to 29% in 2000, 29,5% in 2001, 24,4% in 2002 and 22% in 2003.

<sup>15</sup> However, in 2004 the percentage of internal-market related applications, which had risen steadily over the previous five years, fell for the first time since 1999.

### **III. APPLICATION OF EXCEPTIONS TO THE RIGHT OF ACCESS**

#### **Grounds for refusal**

With initial applications, the grounds for refusal most often invoked were the protection of the decision-making process, which accounted for nearly a third of refusals 33,3% , followed by the protection of the public interest as regards public security 21,1%, international relations 16,3% , defence and military matters 10,9 % and the protection of legal advice 8,8%. In 7,8% of cases several grounds for refusal were invoked: thus protection of the decision-making process was often given in conjunction with protection of the public interest as regards international relations (1,7%) or public security (1,3%).

With regard to confirmatory applications, it should be noted that protection of the public interest as regards public security was invoked as grounds for 27% of refusals in 2004, whereas these grounds had been invoked in only 4% of cases in 2003. Protection of the public interest as regards defence and military matters was invoked in 25,9% of cases in 2004 (2% in 2003), and protection of the public interest as regards international relations was invoked in 21,2% of cases in 2004 (61,6% in 2003). Protection of the decision-making process was invoked as grounds for 11,8% of refusals in 2004 (14,2% in 2003). Finally, it should be noted that in 8% of refusals protection of the decision-making process was associated with other grounds of refusal, such as protection of the public interest as regards international relations (7% of cases) or public security (2,4% of cases).

#### **Specific exception for legal advice**

The protection of court proceedings and legal advice (exception provided for in the second indent of Article 4(2) of Regulation No 1049/2001) was invoked as grounds in the initial phase in 8,8% of refusals in 2004 (10,9% in 2003) and in 4,7% of refusals at the confirmatory stage in 2004 (as against 7,1% of negative decisions in 2003).



This exception is not the Council's most frequently invoked grounds for refusal. However, although Council applies it restrictively, as it does any other exception to the right of access <sup>16</sup>, its importance for the proper functioning and effectiveness of the institution's work should nevertheless be stressed.

On the basis of case-law established over several years <sup>17</sup>, and confirmed in 2004 by the Court of First Instance in its judgment in the *Turco*-case <sup>18</sup>, the Council considers that the independent advice provided for the Council by the Legal Service allows the Council to ensure that its acts comply with Community law and to pursue the discussion on the legal aspects of a dossier. If the Council were to lose that instrument, the efficiency of its work would be compromised. This is why it is in the public interest that the Council should have access to independent legal advice.

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<sup>16</sup> The practice is as far as possible to grant partial access, in accordance with Article 4(6) of Regulation (EC) No 1049/2001, to documents containing Council Legal Service opinions and contributions by the Legal Service to the proceedings of the Council and its preparatory bodies. Thus the factual content of such documents is released to the applicants, while the confidentiality of legal opinions as such is safeguarded.

<sup>17</sup> In this connection, see the order of the Court of First Instance of 3 March 1998 in case T-610/97 R, *Carlsen and others v. Council*, ECR 1998, p. II-485, paragraphs 45 to 47, and its ruling of 8 November 2000 in case T-44/97, *Ghignone and others v. Council*, ECR 2000, p. II-1023, paragraphs 47 and 48. This case-law was cited by the Court in its order of 23 October 2002 in case C-445/00, *Austria v. Council*, paragraph 12.

<sup>18</sup> See judgment by the Court of First Instance of 23 November 2003 in Case T-84/03 *Maurizio Turco v. Council* (not yet published in the ECR), paragraphs 62 et seq.

#### IV. KEY DEVELOPMENTS

##### 1. Conference organised by the Netherlands Presidency, "Transparency in Europe II" (November 2004)

At the initiative of the Netherlands Presidency, a conference on issues relating to transparency and access to documents at European and national level, was staged in the Hague on 25 and 26 November 2004 for representatives of the 25 Member States, who were joined by representatives from the European Parliament, Council and Commission.

The conference proceedings focused inter alia on:

- the idea of transparency as a means of making European and national institutions more democratic;
- the provisions of the Treaty establishing a Constitution for Europe relating to transparency in the EU institutions' decision-making process;
- the laws and practices relating to access to documents in the new Member States;
- public access to documents versus the need to keep confidential any information which, if divulged, would undermine public security; and
- the issue of whether or not there should be an approximation of Community and national laws on access to documents <sup>19</sup>.

As its name suggests, the "Transparency in Europe II" conference was the second in a series of conferences – the first having been organised in the Netherlands in 2001 – designed to promote a regular debate on all aspects of the principle of transparency and help encourage more open decision-making at European level.

##### 2. Pilot project on transparency in the JHA field

In order to facilitate public access to documents of the institutions on a specific topic, in 2003 the European Parliament, the Council and the Commission agreed to conduct a feasibility study on a pilot project relating to *the area of freedom, security and justice*. The study was launched at the beginning of 2004 with the aim of defining a coordinated access method which should ultimately allow interested parties to consult files identifying or giving access to documents required on a given subject, irrespective of which institution holds the files. At its meeting of 17 December 2004

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<sup>19</sup> See the proceedings of the conference, published by the Ministry of the Interior and Kingdom Relations (Netherlands), entitled *Transparency in Europe II, Access to Documents in the EU and its Member States*, the Hague, 2004.

the Monitoring Group, composed of representatives from the three institutions concerned, decided to embark upon the second stage of the project to set up and finalise a search prototype in 2005.

### 3. *Interinstitutional Committee*

An Interinstitutional Committee to examine best practice, address possible conflicts and discuss future developments on public access to documents was established in 2002 under Article 15(2) of Regulation (EC) No 1049/2001, and has since met on four occasions.

The committee did not meet at political level during the reference period. However, the departments at the three institutions with responsibility for implementing Regulation (EC) No 1049/2001 met together on several occasions in 2004. The issues addressed at these interinstitutional meetings were notably the interlinking of Regulation No 1049/2001 and Regulation No 45/2001 on the protection of personal data, the future revision of Regulation No 1049/2001 in the light of the Commission's evaluation report (COM(2004) 45), the latest developments as regards the register of Comitology of the European Commission, as well as the establishing of common criteria for the statistical data to be included in the annual reports.

## V. COMPLAINTS LODGED WITH THE EUROPEAN OMBUDSMAN AND LEGAL ACTION TAKEN

### A. COMPLAINTS LODGED WITH THE EUROPEAN OMBUDSMAN

The following section of this report refers to a number of complaints lodged with the European Ombudsman in cases where Regulation No 1049/2001 was applied. Of the complaints already mentioned in the Council's annual report on 2003, we examine four cases below, on which the Ombudsman had not yet decided when the previous Council's annual report was published<sup>20</sup>. This report also examines three other cases, two of which were closed in 2004, the third having been opened in November 2004 and still in progress.

#### 1. *Complaint 1641/2003/OV of 2 September 2003*

In this case the complainant contended that the Council had not provided the full text of a document concerning an amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, and asked the Council

– to give her access to the entire content of the document

and/or

– to give her a detailed reasoning for the refusal on the basis of Article 4(3) of Regulation No 1049/2001, as regards the balance between the public interest justifying disclosure of the document concerned and the general interest of protecting the decision-making process.

In its letter of 22 December 2003 to the Ombudsman, the Council replied in substance that:

– given the delicate and contentious issues under consideration in the document concerned, disclosure of the entire document at this stage would be premature as it could deprive delegations of the necessary flexibility to alter their positions in the light of the ongoing

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<sup>20</sup> See the Council's annual report on access to documents – 2003, pp. 29 and 33-34. The Ombudsman closed the files on complaints 2189/2003/ADB, 2371/2003/GG and 1641/2003/OV on 20 October 2004, 14 December 2004 and 10 March 2005 respectively. Complaint 2395/2003/GG (still in progress) as well as complaints 375/2004/GG and 478/2004/GG (both closed in 2004) do not concern the right of access to documents in the strict sense, but rather the public nature of the Council's decision-making process in the broad sense of the term.

discussions. This would affect the progress of the negotiations and compromise overall agreement on an important legislative text;

- disclosure of the document, including the views expressed by delegations during the discussions, excluding parts which would allow delegations to be identified, was intended precisely to make as much information as possible on the progress of the negotiations available to the public while not impairing the Council's ability to reach compromises on politically sensitive issues;
- the Council generally releases as much information as possible in the context of Regulation No 1049/2001; as provided for in Article 11 of Annex II to its Rules of Procedure, the Council routinely releases most documents relating to negotiations on a specific topic once the legislative process has been completed.

Having examined the Council's reply and the complainant's comments thereon, the Ombudsman decided that the matter should be investigated further. In June 2004 he asked the Council for further information as to whether or not guidelines were in place concerning the deletion of the identities of delegations in legislative documents still under discussion and, in the same vein, whether or not delegations had a choice when it came to revealing or withholding their identity.

In reply to these questions the Council explained that the guidelines on how to deal with legislative documents still under discussion and containing delegations' positions had been drawn up by Coreper at its meeting on 6 and 8 March 2002<sup>21</sup>. In response to the second part of the Ombudsman's question, the Council stressed that documents produced for the Council's legislative activities were Council documents. Thus it was for the Council, and not for each delegation, to decide whether or not to release all or part of a document. The Council pointed out further, however, that this did not prejudice the right of individual Member States to publicise the positions taken by their representatives during Council discussions, in accordance with their national rules. Bearing the above information in mind, on 10 March 2005 the Ombudsman closed the case without finding any maladministration, concluding that the Council provided sufficiently detailed grounds for its decision to refuse access to the full document requested by the complainant.

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<sup>21</sup> As already mentioned (see Chapter I.2 above), the practice consists in releasing the requested document, including the text of the footnotes and other references to delegations' positions whilst deleting the name of the respective delegations and excluding parts covered by the exceptions in Article 4(1) and 4(2) of Regulation (EC) No 1049/2001.

2. *Complaint 2189/2003/ADB of 3 September 2003*

This complaint relates to the Council's refusal to give access to a report by the Extreme Fundamentalism and Terrorism Group, the disclosure of which could undermine the European Union's position in international negotiations on terrorism. The Council had refused access to this document by virtue of Article 4(1)(a), third indent, and Article 4(3) of Regulation (EC) No 1049/2001.

In his complaint to the Ombudsman, the complainant stated that the Council's decision breached Regulation No 1049/2001. He submitted the following arguments:

1. The report could not contain secret information, insofar as the measures to fight terrorism must be adopted by the national legislators and were, therefore, subject to public debates in the Member States.
2. The Council's argument that the recommendations contained in the report were not finalised did not justify refusal of access to the whole document. Partial access could be given, with the recommendations deleted.

In its opinion on the complaint, forwarded to the Ombudsman on 23 February 2004, the Council stated that since the document in question contained a detailed analysis and an assessment of extreme fundamentalism and terrorism throughout the world, including politically sensitive evaluations concerning a large number of foreign states, disclosure would be likely to cause complications in the European Union's relationships with those states.

The Council stated that the report contained recommendations for the reinforcement of the existing measures to prevent and/or to combat illegal and violent extremist organisations. To disclose these would, in the Council's view, provide potential perpetrators of attacks with comparative

assessments of the effectiveness of the existing structures in the Member States or third countries concerned. According to the Council, this could seriously undermine the joint efforts to find constructive solutions to the core aspects of this challenge to the international community. The Council therefore considered that the exception of Article 4(1)(a), third indent, (protection of the public interest as regards international relations) of the Regulation applied.

The Council also referred to its meeting in Thessaloniki on 19 and 20 June 2003, where the European Council had taken note of the report and indicated that it would be further discussed with a view to taking its recommendations forward. Discussions on the document in the relevant Council working parties were, at the time of the present inquiry, still at a preliminary stage. The Council considered that release of the document would limit the Member States' ability to adapt their negotiating positions and thereby seriously undermine the Council's decision-making process. The Council therefore considered that the exception of Article 4(3) of Regulation No 1049/2001 also applied.

The Council further stated that it had examined whether partial access could be granted to the document in accordance with Article 4(6) of the Regulation. In this respect, the Council noted that the analyses and recommendations in the report had to be considered as a single indivisible working paper. The Council therefore concluded that the exceptions referred to above applied to the whole document.

On 20 October 2004, the Ombudsman closed the case without finding any maladministration as regards the complainant's two allegations, concluding that the grounds referred to by the Council were valid and sufficiently specific within the framework of Regulation (EC) No 1049/2001.

### *3. Complaint 2371/2003/GG of 12 December 2003*

This complaint relates to the Council's refusal to grant access to Council document 10678/99, which contains a contribution of the Council's Legal Service to the proceedings of the Asylum Working Party with regard to the Protocol on asylum for nationals of Member States of the European Union, annexed by the Treaty of Amsterdam to the Treaty establishing the European Community. This document concerned the extent of the obligation for Member States to inform the Council in case of unilateral action by a Member State.

In his complaint to the Ombudsman, the complainant alleged that the decision of the Council was not in conformity with Regulation (EC) No 1049/2001. He submitted that, in view of its clear wording, Article 4(2), second indent of the Regulation was not applicable in the present case.

According to this provision, access to a document shall be refused "where disclosure would undermine the protection of (...) legal advice (...) unless there is an overriding public interest in disclosure". According to the complainant, the Council ought to have referred to Article 4(3) instead.

The complainant pointed out that the relevant document was already four years old, did not concern an ongoing decision-making process and that a corrigendum to the document concerned (Council document 10678/99 COR 1) was accessible. In the complainant's view, the reasoning of the Council was arbitrary and incompatible with standards imposed by the rule of law.

In its opinion on the complaint, which was forwarded to the Ombudsman on 12 February 2004, the Council took the view that opinions of its Legal Service could, if they were disclosed, be used by others to mount legal challenges to the acts of the Council. The uncertainty regarding the lawfulness of legislative acts which could follow from such disclosure would have consequences harmful to the public interest. In the Council's view, the only possible interpretation of the exception laid down in Article 4(2), second indent of Regulation No 1049/2001 was that it covered all documents or parts thereof containing legal advice, unless there was an overriding public interest. The Council submitted that the complainant's academic interest in disclosure did not constitute such an overriding public interest. It further argued that a case pending before the Court of First Instance (Case T-84/03, *Maurizio Turco v. Council*) raised the same issue of interpretation of Regulation No 1049/2001 as had been brought by the complainant.

On 14 April 2004, the Ombudsman addressed a draft recommendation to the Council, asking it to review its decision to refuse the complainant access to document 10678/99. This draft recommendation was based on the approach adopted by the Ombudsman in his special report to the European Parliament in relation to complaint 1542/2000/PB<sup>22</sup>. The Ombudsman noted that the Council had not argued that the legal opinion to which the complainant sought access had been drawn up in the context of possible future court proceedings. He also noted that the Council had not submitted any evidence to show that the relevant opinion was drawn up in the context of any legislative acts to be adopted by the Council, acting either alone or jointly.

In its detailed opinion, the Council agreed that Article 4 of Regulation No 1049/2001 had to be interpreted restrictively. The Council added, however, that this did not mean that exceptions were to be interpreted so as to empty them of all substance, as the Ombudsman's draft recommendation

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<sup>22</sup> In this connection, see the Council's annual report on access to documents – 2003, p. 32.



appeared to do. The division of legal advice into different categories that had been suggested by the Ombudsman was not supported by law, was artificial and ignored the purpose of such advice. The Council submitted that the general question as to what extent such advice fell under the scope of Article 4(2) of the Regulation also applied to the case at hand. The Ombudsman should therefore defer a decision on this matter until the Court of First Instance had ruled on the *Turco* case.

On 23 November 2004, the Court of First Instance rendered its judgment in Case T-84/03 (*Turco v. Council*). In this judgment, the Court arrived at the conclusion that the Council was entitled to refuse access to legal opinions drawn up by its Legal Service <sup>23</sup>. In the light of this judgment, the Ombudsman closed the case without finding any maladministration.

#### 4. *Complaint 2395/2003/GG, submitted to the Ombudsman in December 2003*

This complaint – together with complaints 375/2004/GG and 478/2004/GG, discussed below – does not concern the right of access to documents in the strict sense, but rather the public nature of the Council's decision-making process in the broad sense of the term.

By letter dated 18 September 2003 addressed to the Secretary-General/High Representative, the complainants had suggested that the Council's Rules of Procedure be amended, in order to ensure that sessions of the Council, when it convened in its capacity as legislator, were held in public. In their view, the citizens would indeed welcome this procedural change, since it would immediately ensure much greater transparency in the decision-making process and give a clear signal as regards the direction the Institution wanted to take in this respect.

In his reply dated 19 November 2003, the Secretary-General recalled that the provisions laid down in Article 8 of the Council's Rules of Procedure reflected the compromise reached by the Heads of State and Government at the Seville European Council meeting in the framework of a reform process which is "*a substantial change to present practices in the direction of enhancing the efficiency of the institution on the eve of an unprecedented increase in the number of Member States of the Union*".

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<sup>23</sup> See paragraphs 62 and 74 of the judgment.

In their complaint to the Ombudsman, the complainants stated that public sessions of the Council acting as legislator would in any event become practice once the new Constitution had entered into force. They maintained that the result of the Convention and the reactions to it pointed to the need to make Council sessions public in order to enhance the confidence of citizens in EU decision-making. Legally, they argued that the principle that decisions must be taken as openly as possible, which they read into Article 1(2) of the EU Treaty, was a general principle of law, which should be reflected in the Council's Rules of Procedure.

In its opinion on this complaint, the Council took the view that there was no maladministration, that the Council's existing Rules of Procedure were in conformity with the existing Treaties, that a number of arrangements had been put in place pursuant to the provisions of these Rules to ensure adequate information of the public about the Council's activities in the legislative field, and, finally, that the issue raised by the complainants extended beyond the Ombudsman's mandate.

However, considering that further inquiries into this matter were necessary, the Ombudsman addressed a letter to the Council on 25 June 2004 asking it for further information in relation to the complaint. In its reply to the Ombudsman of 27 July, in which the Council took note of the complainants' view as regards the need for amending the Council's Rules of Procedures to bring them into line with the provisions of the Constitutional Treaty, the Council also pointed out that the Treaty still had to be ratified by Member States in accordance with their democratic constitutional processes, and stated that the matter raised by the complainants clearly was a political and constitutional question rather than one of maladministration. The Council recalled that the complainants had in no way alleged that the Council misapplied the law in force.

On 9 November 2004 the Ombudsman addressed a draft recommendation to the Council to the effect that the Council should review its refusal to decide to meet publicly when acting in its legislative capacity. By letter of 17 February 2005, the Council forwarded its observations on the Ombudsman's draft recommendation, pointing out that the complaint as well as the draft recommendation did not refer to a case of maladministration, i.e. not to the Council's application of its Rules of Procedure, but to the Rules of Procedure themselves, whose adoption, as admitted by the Ombudsman in his draft recommendation, was a political matter to be decided upon by the Council itself. The Council moreover underlined, as it had done in its previous replies to the Ombudsman, that the issue raised by the complainants fell outside the Ombudsman's mandate.

As stated above, this case is still in progress.

5. *Complaints 375/2004/GG and 478/2004/GG of 5 and 14 February 2004*

These complaints concern the same issue as complaint 2395/2003/GG. By letter of 12 November 2004, the Ombudsman informed the complainants of his draft recommendation to the Council of 9 November 2004 mentioned above and closed the two cases, considering that there were no grounds to pursue his inquiries into the complaints, given that they raised the same issue as complaint 2395/2003/GG.

6. *Complaint 2366/2004/OV of 28 July 2004*

This complaint concerns alleged refused access to a document concerning the application of the principle "ne bis in idem" in competition law.

In its observations on this complaint, which were forwarded to the Ombudsman on 23 November 2004, the Council pointed out that the document, which the complainant seemed to request, did not exist and that the initial request, as initially submitted to the Council, rather appeared to be a request for legal advice on a specific point of law. In its reply to the Ombudsman, the Council therefore repeated the comments it had already made in its previous replies to the complainant, namely that the Council was under no obligation to provide the public at large with legal advice on any matter raised by it, nor was it obliged to produce documents for the purpose of public access under Regulation (EC) No 1049/2001.

This case is still pending.

B. LEGAL ACTION

*Rulings given in 2004 under the rules on access to documents*

In 2004, three cases concerning access to documents of the institutions resulted in judgments by the Community Courts, two of which concerned the Council, namely *Maurizio Turco v. Council* (T-84/03), already mentioned several times in this report, as well as *Mattila vs. Council and Commission*<sup>24</sup>. Moreover, on 26 April 2005, the Court of First Instance ruled in the joint cases T-110/03, T-150/03 and T-405/03, *José María Sison v. Council* (see below).

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<sup>24</sup> Case C-353/01 P, *Mattila vs. Council and Commission*, judgment of the Court of Justice of 22 January 2004 (not yet published). The third case is T-168/02, *IFAW vs. Commission*, Judgement of the Court of First Instance of 30 November 2004 (not yet published).

In the latter case, the Court of Justice set aside the judgment of the Court of First Instance of 12 July 2001 in Case T-204/99 *Mattila vs. Council and Commission*<sup>25</sup> as well as the decisions of the European Commission and the Council, by which the two institutions had refused to grant the applicant access to certain documents without having considered the possibility of granting partial access to the requested documents<sup>26</sup>.

Referring to the case-law established in its later judgment of 6 December 2001 in case C-353/99 P<sup>27</sup>, the Court recalled that the examination of the possibility of partial access constitutes an obligation under Community law, and that failure by an institution to comply with this obligation leads to the annulment of a decision refusing access to a document. The Court therefore considered that the Court of First Instance wrongly held that the failure of the institutions to consider the possibility of partial access in the first place should not lead to the annulment of their decisions of refusal, given that, in view of the nature of the documents at issue, they could not have granted partial access, even if they had carried out such an examination<sup>28</sup>.

Following this judgment, the Council and the Commission adopted a new decision, granting partial access to some of the requested documents. The two institutions had come to the conclusion, that, given the time elapsed, the exceptions invoked in their decisions of refusal of 5 and 14 July 1999 no longer applied to the requested documents as a whole, and that it had thus become possible to grant partial access to most of the documents concerned.

In the *Turco*-case, the applicant contested the Council's refusal to grant him access to an opinion of its Legal Service on a proposal for a Council Directive laying down minimum standards for the reception of applicants for asylum in Member States, claiming in substance that the exception in Article 4(2), second indent, relating to the protection of court proceedings and legal advice only covers legal advice drawn up in the context of legal proceedings, and would not, conversely, cover legal advice drafted in the course of the institutions' legislative activities.

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<sup>25</sup> See ECR [2001], p. II-2265.

<sup>26</sup> It should be recalled in this context, that the contested decisions were taken before the judgment of 19 July 1999 in Case T-14/98, *Hautala v. Council*, ECR [1999] II-2489, point 87, in which the Court of First Instance first found that the institutions are obliged under Community law to consider whether partial access can be granted to a document. This judgment was subsequently confirmed by the Court of Justice in its judgment of 6 December 2001, Case C-353/99 P, *Council v. Hautala*, ECR [2001] I-9565, paragraphs 25 to 31. This case law is now codified in Article 4(6) of Regulation (EC) No 1049/2001.

<sup>27</sup> *Council vs. Hautala*, ECR 2001, p. I-9565, paragraphs 21 to 31.

<sup>28</sup> *Mattila vs. Council and Commission*, paragraphs 30 - 31.

In its judgment of 23 November 2004 in this case, the Court of First Instance rejected this interpretation, taking the view that the words "legal advice" must be understood as meaning that the protection of the public interest may preclude the disclosure of the contents of documents drawn up by the Council's Legal Service in the context of court proceedings but also for any other purpose. It ruled further that the consequence of the interpretation suggested by the applicant would be that the inclusion of legal advice among the exceptions under Regulation (EC) No 1049/2001 had no practical effect<sup>29</sup>.

By its judgment of 26 April 2005 in the joint Cases T-110/03, T-150/03 and T-405/03 (*José María Sison v. Council*), in which the applicant sought the annulment of three Council decisions refusing access to documents on combating terrorism, the Court of First Instance dismissed the applications in Cases T-110/03, T-150/03 as unfounded and part of the application in Case T-405/05 as inadmissible and the remainder as unfounded.

In its judgment, the Court of First Instance rejected the action brought in case T-405/03 as inadmissible in part on the grounds that the third decision of refusal only confirmed the Council's first decision to refuse access to Council document 13 441/02, to which access had been requested by the applicant. Thus, in its third decision of refusal, the Council had stated, that there were no new documents concerning the applicant other than the document and information to which he had already been refused access by the first decision refusing access.

The Court of First Instance considered in this regard that a *presumption of legality* attaches to any statement of the institutions relating to the non-existence of documents requested. Consequently, a *presumption of veracity* also attaches to such a statement. It would be for the applicant to rebut this presumption by *relevant and consistent evidence*.

In addition, the Court of First Instance recalled that according to settled case-law, a wide discretion is conferred upon an institution when it justifies its refusal of access by reference to the protection of the *public interest in general* - i.e. in areas covered by the *mandatory exceptions* to public access to documents, provided for in Article 4(1)(a) of Regulation No 1049/2001. Against this background, the Court considered that *the particular interest* which may be asserted by a requesting party in obtaining access to a document concerning him personally *cannot be taken into account* when the

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<sup>29</sup> This judgment was subsequently appealed, and is currently the subject of cases C-39/05 P (*Kingdom of Sweden v. Council*) and C-52/05 P (*Maurizio Turco vs. Council*).

*mandatory exceptions*, provided for in Article 4 (1)(a) of the Regulation, *are applicable*<sup>30</sup>.

As regards the obligation of the institutions to state reasons for their decisions refusing access, the Court recalled the obligation of the institutions to demonstrate in each individual case, on the basis of the information at their disposal, that the documents to which access is sought do indeed fall within the exceptions listed in Regulation No 1049/2001. It added, however, that it may be impossible to give reasons justifying the need for confidentiality in respect of each individual document without disclosing the content of the document and, thereby, depriving the exception of its very purpose.

Where this is the case, the brevity of a statement of reasons is acceptable in light of the fact that mentioning additional information, in particular making reference to the content of the documents concerned, would negate the purpose of the exceptions relied on. Moreover, the fact that that statement of reasons appears formulaic does not, in itself, constitute a failure to state reasons since it does not prevent either the understanding or the ascertainment of the reasoning followed<sup>31</sup>.

#### *Pending Court cases concerning Council decisions to refuse access to documents*

Three cases in which the legality of Council decisions refusing access on the basis of Regulation No 1049/2001 is contested are currently pending before the Community Courts.

The first one concerns the Order in Case T-3/00, *Pitsiorlas v. Council and ECB*<sup>32</sup>, which was mentioned in the Council's annual report on access to documents for the year 2003<sup>33</sup>.

In January 2000, the applicant in that case brought proceedings before the Court of First Instance for annulment of the Council's decision of 30 July 1999 and the European Central Bank's decision of 8 November 1999 refusing access to a document concerning the Basle/Nyborg Agreement on the reinforcement of the European Monetary System. In February 2001, the Court of First Instance dismissed the application as inadmissible insofar as it referred to the Council decision of 30 July 1999. The applicant then brought an appeal against the Order of the Court of First Instance before the Court of Justice<sup>34</sup>.

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<sup>30</sup> See the judgment of 26 April 2005, paragraphs 46 and 52.

<sup>31</sup> *Idem*, paragraphs 60 to 63.

<sup>32</sup> *Pitsiorlas v. Council and ECB* (T-3/00), ECR 2001, p. II-717.

<sup>33</sup> See the Council's annual report, pp. 34-35.

<sup>34</sup> *Pitsiorlas v. Council and ECB* (C-193/01 P), ECR 2003, p. I-4837.

In its judgment of 15 May 2003, the Court of Justice set aside that order and referred the case back to the Court of First Instance for judgment on the substance. As a result, case T-3/00 is still pending before the Court of First Instance. Furthermore, the applicant lodged an appeal for compensation under Articles 235 and 288, second paragraph, of the EC Treaty, for damages arising out of the Council's decision of 30 July 1999 and the European Central Bank's decision of 8 November 1999 to refuse him access to documents concerning the Basle/Nyborg Agreement (Case T-337/04).

Lastly, in Case T-264/94, *WWF-EPO v. Council*, the applicant, the *World Wide Fund for Nature European Policy Programme (WWF-EPO)*, brought proceedings for annulment of the Council's decision of 30 April 2004 refusing it access to Council documents concerning the common trade policy and the proceedings of the Article 133 Committee. Moreover, WWF-EPO challenges the Council's failure to provide access to minutes of the 133 Committee (Deputies). The applicant doubts whether indeed no minutes exist and believes that the absence of such minutes renders Article 2 of Regulation No 1049/2001 devoid of any substance.

## VI. FINAL REMARKS

The Council's experience in connection with the implementation of Regulation No 1049/2001 in 2004 highlights the importance of its public register as a search tool for members of the public seeking to keep abreast of developments at Community level.

As we stated in the first part of this report, the number of users of the register increased by 62,7% during the reference period, and the number of visits rose 19,2% (919 584 visits in 2004, as against 768 725 in 2003). We should point out here that 59,4% of the Council documents produced in 2004 – i.e. 68 966 of the 116 181 documents listed in the register – were made directly accessible to the public upon circulation. Lastly, since 1 February 2004 any new document to which the Council has provided partial access may be consulted online.

It should, therefore, come as no surprise to learn that, after rising constantly between 1999, when the Council's public register was introduced, and 2003, the number of requests for access fell considerably in 2004 – by 670 over the previous year. However, despite this downward trend in the number of requests for access made to the General Secretariat of the Council in 2004, the reference period actually saw a slight increase in the number of documents consulted following such requests.

We should add here that requests for access relate almost exclusively to documents which are listed, but not directly accessible through the register. Many of the documents requested in 2004 were classified documents, the (often highly complex) examination of which involves an additional burden of work not only for the Council staff called upon to process requests on receipt, but also for the officials of the various departments producing the documents concerned, who in many cases must themselves examine the requested documents under Regulation No 1049/2001.

That said, despite the increasingly complex nature of the dossiers to be examined, the General Secretariat of the Council copes with the ensuing growing administrative burden, while meeting the time-limits laid down in Regulation (EC) No 1049/2001. By way of illustration, in 2004 processing time for initial requests was on average nine working days. In respect of confirmatory applications, which are examined by the Working Party on Information before being submitted to Coreper and the Council for adoption, the average was 24 working days in 2004, compared to 23 working days in 2003.



In this regard, the contribution made by the Working Party on Information to the processing of confirmatory applications must be noted. The Working Party met on 18 occasions in 2004. Its main tasks include the examination of documents in respect of which a confirmatory application has been made, as well as the examination and finalisation of draft replies to such applications, which in a number of cases deal with complex issues relating to public safety, defence and military affairs, or international relations.

The rate of access to Council documents in 2004 remains steady in comparison to 2003 (85,3% in 2004, as against 87,3% in 2003). Thus, the overall situation for the past year is very positive, especially in view of the fact that the number of documents released in full following requests for access rose again in 2004 over the previous year (9 337 documents, compared with 9 006 in 2003).

In conclusion, analysis of the processing of requests for access, together with public use of the register of Council documents, would seem to show that the aims set by the Treaties and by Regulation No 1049/2001 were achieved in 2004.

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**STATISTICS ON PUBLIC ACCESS TO COUNCIL DOCUMENTS**

**Situation on 03/05/2005**

**1. Number of applications pursuant to Regulation No 1049/2001**

| 2002  | 2003  | 2004  |
|-------|-------|-------|
| 2.391 | 2.830 | 2.160 |

**2. Number of documents concerned by initial applications**

| 2002  | 2003   | 2004   |
|-------|--------|--------|
| 9.349 | 12.565 | 12.907 |

**3. Documents provided by the General Secretariat of the Council at the initial stage**

| 2002                 | 2003                  | 2004                  |
|----------------------|-----------------------|-----------------------|
| 8.158 <sup>(1)</sup> | 10.912 <sup>(2)</sup> | 10.954 <sup>(3)</sup> |

**4. Number of confirmatory applications** (confirmatory applications may be made if initial application is refused)

| 2002 | 2003 | 2004 |
|------|------|------|
| 43   | 45   | 35   |

**5. Documents released by the Council following confirmatory applications**

| 2002              | 2003                  | 2004                   |
|-------------------|-----------------------|------------------------|
| 89 <sup>(4)</sup> | 64 <sup>(5) (6)</sup> | 113 <sup>(7) (8)</sup> |

**6. Rate of document released for the procedure as a whole <sup>(9)</sup>**

| 2002  |       | 2003  |       | 2004 |       |
|-------|-------|-------|-------|------|-------|
| 76,4% | 88,6% | 71,7% | 87,4% | 77%  | 85,7% |

<sup>(1)</sup> 7.089 documents released wholly, 1.069 documents released partially.

<sup>(2)</sup> 8.984 documents released wholly, 1.928 documents released partially.

<sup>(3)</sup> 9.863 documents released wholly, 1.091 documents released partially.

<sup>(4)</sup> 24 documents released wholly, 65 released partially.

<sup>(5)</sup> Based on 163 documents considered.

<sup>(6)</sup> 22 documents released wholly, 42 documents partially.

<sup>(7)</sup> Based on documents released wholly (left column) or wholly + partially (right column).

<sup>(8)</sup> 77 documents released wholly, 36 documents released partially.

<sup>(9)</sup> Based on 198 documents considered.

## 7. Professional profile of applicants

|   |                              | 2002  |       | 2003  |       | 2004  |       |
|---|------------------------------|-------|-------|-------|-------|-------|-------|
| Civil society   | Environmental Lobbies        | 26,7% |       | 21,5% |       | 1,5%  | 21,9% |
|   | Other Lobbies                |       |       |       |       | 6,4%  |       |
|   | Industrial/Commercial Sector |       |       |       |       | 12,3% |       |
|   | NGOs                         |       |       |       |       | 1,7%  |       |
| Journalists   |                              | 2%    |       | 2,1%  |       | 2,5%  |       |
| Lawyers   |                              | 11%   |       | 12,9% |       | 10,7% |       |
| Academic world  | University Research          | 23,5% | 26,1% | 24%   | 26,5% | 25,5% | 27,6% |
|   | Library                      | 2,6%  |       | 2,5%  |       | 2,1%  |       |
| Public authorities (non-EU institutions, third-country representatives, etc.) |                              | 4,9%  |       | 8,4%  |       | 7,2%  |       |
| Members of the European Parliament and their assistants                       |                              | 2,5%  |       | 2,3%  |       | 2,1%  |       |
| Others  |                              | 5,8%  |       | 9,3%  |       | 10,5% |       |
| Undeclared professional origin  |                              | 21%   |       | 17%   |       | 17,5% |       |

## 8. Geographical spread of applicants

|                 |                     | 2002  | 2003  | 2004  |
|-----------------|---------------------|-------|-------|-------|
| Belgium         |                     | 27,5% | 24,5% | 26,9% |
| Denmark         |                     | 2%    | 1,8%  | 1,7%  |
| Germany         |                     | 12,9% | 14,3% | 14,2% |
| Greece          |                     | 1,2%  | 0,9%  | 0,9%  |
| Spain           |                     | 6,4%  | 6,4%  | 4,7%  |
| France          |                     | 7,2%  | 6,1%  | 6,6%  |
| Ireland         |                     | 1,3%  | 1,1%  | 0,8%  |
| Italy           |                     | 4,6%  | 5,2%  | 6,6%  |
| Luxemburg       |                     | 0,9%  | 2%    | 0,8%  |
| Netherlands     |                     | 4,7%  | 4,9%  | 5,7%  |
| Austria         |                     | 1,9%  | 2%    | 1,7%  |
| Portugal        |                     | 1,8%  | 1,5%  | 0,5%  |
| Finland         |                     | 0,5%  | 0,8%  | 0,4%  |
| Sweden          |                     | 2%    | 1,3%  | 1,7%  |
| United Kingdom  |                     | 9,9%  | 9,5%  | 8%    |
| Cyprus          |                     | 0%    | 0,3%  | 0,3%  |
| Czech Republic  |                     | 0,1%  | 0,5%  | 0,9%  |
| Estonia         |                     | 0%    | 0,1%  | 0,1%  |
| Latvia          |                     | 0%    | 0%    | 0,1%  |
| Lithuania       |                     | 0,1%  | 0,3%  | 0,3%  |
| Hungary         |                     | 0%    | 0,8%  | 0,7%  |
| Malta           |                     | 0%    | 0,2%  | 0,3%  |
| Poland          |                     | 0,2%  | 1,5%  | 1,2%  |
| Slovakia        |                     | 0%    | 0,2%  | 0,4%  |
| Slovenia        |                     | 0%    | 0,4%  | 0,2%  |
| Third countries | Candidate countries | 0%    | 0,2%  | 0,2%  |
|                 | Others              | 6,3%  | 5,2%  | 6,8%  |
| Non specified   |                     | 8,5%  | 8%    | 7,3%  |

## 9. Sector

|  |  | 2002  | 2003  | 2004  |
|--|--|-------|-------|-------|
| Legal questions                              |  | 2%    | 1,6%  | 2,5%  |
| Agriculture, Fisheries                       |  | 4,6%  | 4,7%  | 4,6%  |
| Internal Market                              |  | 14,7% | 16,3% | 14,2% |
| External Relations – CFSP                    |  | 8,6%  | 9,1%  | 14,6% |
| Functioning of the institutions              |  | 1,6%  | 1,2%  | 1,5%  |
| Economic and Monetary Policy                 |  | 10,7% | 9,1%  | 3,3%  |
| Justice and Home Affairs                     |  | 24,4% | 22%   | 20,1% |
| Environment                                  |  | 7,9%  | 5,2%  | 6,8%  |
| Social Policy                                |  | 3,3%  | 3,5%  | 2,7%  |
| Transport                                    |  | 5,1%  | 4,4%  | 4,9%  |
| General policy questions                     |  | 1,6%  | 1,2%  | 1,7%  |
| Health and Consumer Protection               |  | 2,5%  | 4%    | 4,3%  |
| Transparency                                 |  | 0,9%  | 0,8%  | 0,9%  |
| Applications referring to more than one area | Research                                 | 0,3%  | 0,1%  | 0,3%  |
|  | Culture                                  | 0,8%  | 0,5%  | 0,2%  |
|  | Education/Jouth                          | 0,9%  | 0,8%  | 1,4%  |
|  | Industry                                 | 1,8%  | 0,5%  | 0,4%  |
|  | Regional Policy and Economical/Social    | 0,3%  | 0,1%  | 0%    |
|  | Energy                                   | 2,9%  | 2,9%  | 1,4%  |
|  | Civilian Protection                      | 0,4%  | 0%    | 0,3%  |
|  | Assistance for Development               | 0,4%  | 0,2%  | 0,3%  |
|  | Financing of the Union (Budget, Statute) | 0,9%  | 1%    | 0,3%  |
|  | Competitiveness                          | 0%    | 0,2%  | 2,2%  |
|  | Enlargement                              | 2,2%  | 2,4%  | 1,8%  |
|  | Tax Questions – Fiscalité                | 0%    | 6%    | 3,2%  |
|  | Defence and Military matters             | 0%    | 0,7%  | 2,9%  |
|  | Parliamentary Questions                  | 0%    | 1,1%  | 2,9%  |
|  | Various (more than five areas)           | 0%    | 0%    | 0,3%  |
|  |  | 12,1% | 16,9% | 17,9% |

**10. Reasons for refusal of access (replies provided by the General Secretariat of the Council at the initial stage)**

|  | 2002  | 2003  | 2004  |
|--|-------|-------|-------|
| Protection of public interest as regards public security   | 23,1% | 16%   | 21,1% |
| Protection of public interest as regards defence and military matters  | 0,1%  | 3,8%  | 10,9% |
| Protection of public interest as regards international relations   | 24,6% | 28,7% | 16,3% |
| Protection of public interest as regards the financial, monetary or economic policy of the Community or a Member State | 0,7%  | 0,7%  | 1,1%  |
| Protection of privacy and the integrity of the individual (protection of personal data)                                | 0,2%  | 0,3%  | 0,7%  |
| Protection of commercial interests of a natural or legal person, including intellectual property                       | 0%    | 0%    | 0%    |
| Protection of court proceedings and legal advice   | 11,4% | 10,9% | 8,8%  |
| Protection of the purpose of inspections, investigations and audits  | 0%    | 0%    | 0%    |
| Protection of the Institution's decision-making process  | 28,1% | 31,2% | 33,3% |
| Several reasons together   | 11,3% | 8,4%  | 7,8%  |

**11. Reasons for refusal of access (replies provided by the General Secretariat of the Council following confirmatory applications)**

|  | 2002  | 2003  | 2004  |
|--|-------|-------|-------|
| Protection of public interest as regards public security   | 5,4%  | 4%    | 27%   |
| Protection of public interest as regards defence and military matters  | 0%    | 2%    | 25,9% |
| Protection of public interest as regards international relations   | 7,3%  | 61,6% | 21,2% |
| Protection of public interest as regards the financial, monetary or economic policy of the Community or a Member State | 0%    | 7,1%  | 0%    |
| Protection of privacy and the integrity of the individual (protection of personal data)                                | 0%    | 0%    | 0%    |
| Protection of commercial interests of a natural or legal person, including intellectual property                       | 0%    | 0%    | 0%    |
| Protection of court proceedings and legal advice   | 23,6% | 7,1%  | 4,7%  |
| Protection of the purpose of inspections, investigations and audits  | 0%    | 0%    | 0%    |
| Protection of the Institution's decision-making process  | 38,2% | 14,2% | 11,8% |
| Several reasons together   | 25,5% | 4%    | 9,4%  |

**12. Average number of working days to reply to an application or to a complaint made to the European Ombudsman**

|  | 2002          | 2003           | 2004           |
|--|---------------|----------------|----------------|
| For the initial applications                       | 10 (43 appl.) | 7 (2805 appl.) | 9 (2182 appl.) |
| For the confirmatory applications <sup>(1)</sup>   | 24 (43 appl.) | 23 (45 appl.)  | 24 (35 appl.)  |
| <b>Ponderated average (initial + confirmatory)</b> | <b>10,25</b>  | <b>7,25</b>    | <b>9,24</b>    |
| Ombudsman <sup>(1)</sup>                           | 63            | 46             | 36             |

**13. Number of applications with prolonged deadline in conformity with Art. 7(3) and 8(2) of Regulation (EC) No 1049/2001**

|  | 2002   | 2003   | 2004   |
|--|--|--|--|
| Initial applications                     | 148 of 2395,<br>being 6,2% of<br>the<br>applications | 134 of 2835,<br>being 4,7% of<br>the<br>applications | 192 of 2204,<br>being 8,7% of<br>the<br>applications |
| Confirmatory applications <sup>(1)</sup> | 29 [of 43]   | 37 [of 45]   | 24 [of 35]   |

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<sup>(1)</sup> Confirmatory applications and complaints to the European Ombudsman are examined by the Council's Working Party on Information and by the Permanent Representatives Committee (Part 2). Replies to the applicants and to the European Ombudsman are adopted by the Council.