

## **Decision of the European Ombudsman closing his inquiry into complaint 3208/2006/GG against the European Commission**

Decision

**Case 3208/2006/GG - Opened on 23/10/2006 - Recommendation on 07/04/2008 -  
Decision on 18/12/2008**

Regulation 1049/2001 on public access to documents requires that the EU institutions set up public registers of the documents they produce and receive. This register had to be operational by June 2002.

In October 2006, a British NGO active in the field of citizens' rights pointed out to the Ombudsman that the Council and the European Parliament had set up registers which broadly met the requirements of the regulation, but that the Commission's register only contained legislative texts and adopted Commission reports. Since the vast majority of documents was thus not included, the complainant alleged that the Commission had failed to comply with its obligations under the regulation.

The Commission argued, amongst other things, that the regulation did not oblige the institutions to list all their documents and that it was impossible for it to set up a fully comprehensive register. It pointed out that all its departments had their own registers, which were intended for internal use and did not have a uniform data format. However, it signalled its intention gradually to extend the scope of the registers and indicated that it was working on the implementation of a new centralised system.

The Ombudsman considered that the registers have to be comprehensive in order to give citizens sufficient information as to which documents are in the hands of the institutions. He was not convinced that it was impossible for the Commission to set up such a comprehensive register and considered that it had had plenty of time to make the necessary arrangements. He deplored the Commission's failure to (i) deliver on its commitment to further develop its registers with any convincing action in that direction and (ii) provide any concrete indications as to the exact scope of the new centralised system, which seemed to be intended to be operational only in 2010.

When the Commission rejected a draft recommendation in which the Ombudsman asked it to include references to all of its documents in a register, as required by the regulation, he found that it would be justified to submit a special report to Parliament concerning this matter.



However, he noted that one of Parliament's committees had already submitted a motion to the plenary session in which Parliament was called upon to urge the Commission to follow his draft recommendation. Therefore, the Ombudsman considered that a special report was not necessary. Accordingly, he closed the case with a critical remark.

## **THE BACKGROUND TO THE COMPLAINT**

1. Article 11 ("Registers") of 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 [1] ("Regulation 1049/2001") provides as follows:

"1. To make citizens' rights under this Regulation effective, each institution shall provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without delay.

2. For each document the register shall contain a reference number (including, where applicable, the interinstitutional reference), the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. References shall be made in a manner which does not undermine protection of the interests in Article 4.

3. The institutions shall immediately take the measures necessary to establish a register which shall be operational by 3 June 2002."

2. The complainant, a British non-governmental organization, pointed out that Article 11 obliged each of the three main EU institutions to set up a public register of documents. According to the complainant, the Council of the European Union and the European Parliament had set up such registers. Although there was room for improvement in the scope of these registers, the complainant considered that they could broadly be said to meet the requirements of Regulation 1049/2001.

3. The complainant noted that the Commission's register of documents only contained legislative texts and adopted Commission reports (including SEC documents). In the complainant's view, it clearly did not include the vast majority of the documents produced and received by the Commission.

## **THE SUBJECT MATTER OF THE INQUIRY**

4. In its complaint to the Ombudsman, the complainant alleged that the European Commission failed to comply with its obligations under Article 11 of Regulation 1049/2001. The complainant argued that the Commission's register should include all the documents within the meaning of Article 3(a) of Regulation 1049/2001 that were in the Commission's possession but that the



Commission's register did not include the vast majority of the documents produced and received by that Institution.

5. In its observations on the Commission's opinion, the complainant further alleged that, by offering several registers rather than a single one, the Commission had also failed to comply with Article 11 of Regulation 1049/2001. Given that this allegation was closely related to the subject-matter of the original complaint, the Ombudsman decided to include it in the present inquiry.

6. In its observations on the Commission's opinion, the complainant alleged that the Commission has also failed to comply with Article 12 of Regulation 1049/2001. Given that the complainant did not yet appear to have made the appropriate prior approaches to the Commission concerning this issue, the Ombudsman decided that this new allegation should not be taken up for inquiry in the present case.

## **THE INQUIRY**

7. The complaint was submitted to the Ombudsman on 11 October 2006. On 23 October 2006, the Ombudsman asked the Commission for an opinion on it.

8. The Commission sent its opinion on 22 May 2007. The Ombudsman forwarded this opinion to the complainant, which sent its observations on 27 June 2007.

9. On 5 July 2007, the Ombudsman asked the Commission for further information concerning this case.

10. The Commission sent its reply to this request for information on 22 January 2008. The Ombudsman forwarded this reply to the complainant, which sent its observations on 7 March 2008.

11. On 7 April 2008, the Ombudsman addressed a draft recommendation to the Commission.

12. The Commission sent its detailed opinion on 25 July 2008. The Ombudsman forwarded this opinion to the complainant, which sent its observations on 6 October 2008.

## **THE OMBUDSMAN'S ANALYSIS AND CONCLUSIONS**

### **A. Alleged failure to comply with obligations under Article 11 of Regulation 1049/2001**

*Arguments presented to the Ombudsman*



13. The complainant alleged that the Commission failed to comply with its obligations under Article 11 Regulation of 1049/2001 (1) since its register of documents only contained a fraction of the documents produced and received by it in the course of its activities and (2) because it offered several registers rather than a single one.

14. In its opinion and in its reply to a request for further information, the Commission provided the following comments:

- Article 11 did not oblige the institutions to list all their documents.
- Regulation 1049/2001 governed access to any type of document held by Parliament, the Council and the Commission. However, as recitals 1, 2 and 6 and Articles 12 and 13 showed, it had a particular focus on the legislative activity of these institutions. The legislative activity of the Commission was well covered by (a) the public register of documents opened by the institution on 3 June 2002, (b) by an additional register on documents regarding its decision-making process under delegated powers (the so-called 'comitology' procedures) that had been opened in December 2003 and (c) by a specific register on expert groups. Moreover, the Pre-Lex system ( <http://ec.europa.eu/prelex> [Link]) provided extensive information on the different stages in the decision-making process involving the institutions, as well as links to the sites containing the documents themselves.
- The Commission did not consider that its public registers should only cover documents relating to its legislative activities. The particular focus on legislation did not mean that the other activities of the Commission were left in the dark. All Directorates-General of the Commission had set up specific websites providing information on their policies and activities, as well as access to key documents.
- It was impossible to set up a fully comprehensive register, given the wide definition of the term "document" in Article 3(a) of Regulation 1049/2001. However, the Commission intended gradually to extend the scope of its public registers, as it had already done with the register on comitology and the register on expert groups.
- The Commission had no single electronic data base yet for the registration of its documents. Each Directorate-General or administrative unit had its own internal register of documents. However, these registers did not have a uniform data format. Furthermore, they had been set up for internal administrative purposes and their content could not simply be transferred to a public register. The data contained in the internal registers would have to be screened, selected and reformatted through interfaces before they could be fed into a public register. This would require important investments, which would be useless since the current system will be replaced with a single registration system. In the near future, a new centralised document management system should replace the software currently used. In the context of its development, a module for the export of document references from this system to a public register was foreseen.
- Under Regulation 1049/2001, the registers were intended to assist applicants in identifying relevant documents; they were search tools and did not in any way limit the scope of the right of access.
- It could not be concluded from Article 11 of Regulation 1049/2001 that the institutions should set up a single public register. The purpose of this provision was to enable members of the public to identify documents held by the institutions that might be of interest to them. Regulation 1049/2001 did not prescribe how this was to be achieved. Considering the number and diversity of documents held by the Commission, it was questionable whether a huge single register



would offer the best service to the public. The public registers of the Commission were complementary and their scope was well-defined.

15. In its observations, the complainant submitted that Article 11 of Regulation 1049/2001 was unambiguous and clearly referred to all documents within the meaning of Article 3(a). Furthermore, Article 11 did not refer to "registers", but to "a" register of documents. The complainant argued that the Commission could not blatantly ignore what was set out in Regulation 1049/2001. The complainant added that the Commission's response was even more worrying, since the Commission had an obligation, as guardian of the Treaty, to ensure the proper implementation of regulations.

The complainant submitted that Regulation 1049/2001 did not have a "particular focus" on legislative activities. In its view, the references to legislative activities in Articles 12 and 13 were clearly complementary to the provisions of Article 11 in that they referred not to a register but rather to direct access to the content of references listed. The complainant also expressed doubts as regards the Commission's statement that its legislative activity was well covered by public registers. As regards other sources of information, the complainant argued that these were by no means comprehensive and could not be said to meet the standards set out in Regulation 1049/2001. Moreover, the provision of information should not be confused with access to documents under Regulation 1049/2001.

As regards the Commission's statement that it would gradually extend the scope of its public registers, the complainant took the view that it was not for the Commission to take its time when it was obliged to provide a proper public register as from mid-2002. Moreover, and in light of the position taken by the Commission in its opinion, there was no guarantee that the new centralised document management system to which the Commission referred would lead to a proper public register of documents.

#### *The Ombudsman's assessment leading to the draft recommendation*

16. It should be recalled that the Ombudsman has already had occasion to consider Article 11 of Regulation 1049/2001 in the draft recommendation and the subsequent special report that he submitted in case 917/2000/GG, which concerned the Council of the European Union [2]. In that case, the Ombudsman arrived at the conclusion that the register maintained by the Council should comprise all the documents put before the Council. Given that the complainant in that case was only concerned about this type of document, the Ombudsman did not have to examine whether other documents, such as correspondence with other institutions or third parties, should also be included in the register. However, the Ombudsman noted that the relevant register was intended, as Article 11 of Regulation 1049/2001 underlines, "[t]o make citizens' rights under this Regulation effective". Article 2(3) of Regulation 1049/2001 provides that the Regulation shall apply to "all" documents held by an institution, "that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union". Recital 4 indicates that the purpose of Regulation 1049/2001 is to give "the fullest possible effect to the right of public access". In light of these provisions, the Ombudsman took the view that the register referred to in Article 11 could only achieve its aim "[t]o make



citizens' rights under this Regulation effective" if it were as comprehensive as possible.

17. The Ombudsman noted that the Commission put forward a number of arguments to support its view that Article 11 does not oblige it to include in its register(s) of documents all the documents that are in its possession and that concern its activities.

18. As regards the Commission's argument, which appeared to be based on the wording of Article 11, it was true that this provision does not explicitly state that *all* the above-mentioned documents need to be listed in the Commission's register of documents. However, Article 11(1) provides that "references to documents shall be recorded in the register without delay". Given that the term "document" is defined in Article 3(a) of Regulation 1049/2001 as "any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility", it was logical to assume that all these documents need to be included in the register. If the legislator had intended the term "document" to have a different, more limited meaning in Article 11 of Regulation 1049/2001, he could have been expected to include a provision to that effect. It should be noted in this context that Article 9 concerns the handling of "sensitive" documents and that Article 12(2) refers to "legislative" documents. This confirmed that the legislator distinguished between certain categories of documents in cases where he considered this to be appropriate. The absence of any such distinction in Article 11 could hardly be interpreted otherwise than as meaning that all documents within the meaning of Article 3(a) are meant to be covered by this provision.

19. In any event, the interpretation adopted by the Ombudsman in case 917/2000/GG would appear to be the only one that does justice to the *effet utile* of Article 11. As Article 11(1) expressly confirms, the aim pursued by this provision is "[t]o make citizens' rights under this Regulation effective". However, in order to be able to exercise their right of access to documents under Regulation 1049/2001, citizens must have sufficient information as to what documents are in the hands of the institutions. It was indeed difficult to see how a citizen could make proper use of his/her right of access, if she/he does not even know which documents are held by an institution. This was moreover confirmed by the Commission itself. In its report of 30 January 2004 on the application of Regulation 1049/2001 (COM(2004) 45 final, p. 39), the Commission noted that whereas the "vast majority" of applications for access submitted to Parliament and to the Council arise from the consultation of the registers, 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 [3] . (...) Moreover, the applications sent to the Commission do not usually concern legislative activities, but rather the monitoring of the application of Community law." The Ombudsman considered that this statement clearly confirmed that the scope of the register(s) maintained by the Commission was insufficient [4] .

20. As regards the Commission's argument that Regulation 1049/2001 focuses particularly on the legislative activity of the EU institutions, the Ombudsman considered that this argument was unconvincing. It should be noted that, among the recitals or provisions invoked by the Commission in this context, only Article 12 refers to registers. In addition to that, these recitals



and provisions are concerned not with the issue of access to documents, in general, but with the question of how such access is to be given. Article 12(2) provides that "legislative documents" should, to the extent possible, be made "directly" accessible. Since Article 12(1) stipulates that the institutions shall, as far as possible, "make documents directly available to the public in electronic form or through a register", this meant that legislative documents should preferably be made accessible not by being listed in a register but "directly... in electronic form". The importance thus assigned to the possibility of *direct access* to legislative documents clearly did not mean that the Commission should be entitled to refrain from listing other documents on its *register* .

21. The Ombudsman noted that the registers of documents maintained by the Commission at present only appeared to concern the legislative activity of the EU institutions and certain documents adopted by the Commission. As mentioned above, the complainant expressed doubts as regards the Commission's statement that its legislative activity was well covered by public registers. The Ombudsman considered, however, that the present case did not make it necessary for him to carry out further inquiries concerning this issue. In reply to a question put to it to that effect, the Commission confirmed that it did not consider that its public register(s) should only cover documents relating to its legislative activities. However, it was abundantly clear that the registers currently maintained by the Commission do not provide reference to many documents that concern the Commission's activities and are in the Commission's possession. It should be noted in this context that the Commission had not disputed the complainant's statement that only a "fraction" of its documents is listed on its registers. The fact that certain 'key' documents might be available on specific websites maintained by individual services of the Commission or that these websites provide additional information did not affect this conclusion.

22. The Ombudsman noted that the Commission also argued that it was impossible to set up a fully comprehensive register, given the wide definition of the term "document" in Article 3(a) of Regulation 1049/2001. The Ombudsman was not convinced that it would be impossible to set up a fully comprehensive register of the documents drawn up or received by the Commission. As the Commission had acknowledged, each of its Directorates-General or administrative units had its own internal register of documents. The Ombudsman therefore found it difficult to see why it should be impossible for the Commission to draw up a comprehensive register of documents on the basis of the existing internal registers.

23. In its reply to the Ombudsman's request for further information, the Commission stressed that the existing internal registers had been set up for internal administrative purposes and that their content could not simply be transferred to a public register. According to the Commission, the data contained in the internal registers would have to be screened, selected and reformatted through interfaces before they could be fed into a public register. The Commission added that this would require important investments, which would be useless since the current system will be replaced with a single registration system. The Ombudsman was not convinced by these arguments. As the complainant correctly observed, Article 11(3) of Regulation 1049/2001 provides that the public register of documents had to be operational by 3 June 2002. Given that the regulation was adopted on 30 May 2001, the Commission would appear to have had





enough time to adopt the arrangements necessary to make its register function properly. If the format or content of the data that were needed for this register differed between its Directorates-General or other units, it was difficult to see why the Commission did not take rapid action in order to adopt the measures necessary to harmonise these systems. This failure was all the more difficult to understand since the Commission was able, even before the entry into force of Regulation 1049/2001, to establish a register of the correspondence addressed to its then President as well as of the replies to this correspondence. According to information published by the Commission, on 31 December 2002, this register contained references to 34 383 documents [5] .

24. The Ombudsman noted that the Commission pointed out that its current system of registering documents would be replaced with a single registration system. However, and as the complainant pointed out, there was no clear guarantee that the new system would lead to a proper public register of documents. The Commission indicated that, in the context of the development of the new system, a module for the export of document references from this system to a public register was foreseen. However, the Commission failed to provide any indications or commitments as to the extent to which this possibility would be used. The Ombudsman noted in particular that the Commission did not provide any precise information as to whether it would extend the scope of the present register(s), once the new document registration system has been put in place. Besides, the Commission did not provide any specific information on when exactly this new system was expected to become operational.

25. Furthermore, and in the absence of any further information on this issue by the Commission, it could not be excluded that the new system for the registration of documents would only be applied to documents newly drawn up or received by the Commission. In that case, the introduction of this system would not represent any progress as regards those documents that had been drawn up or received by the Commission before that date and had not yet been included in the register.

26. As regards the Commission's statement that it intended gradually to extend the scope of its public registers, the Ombudsman considered that this intention was certainly laudable. However, the Commission did not indicate any precise date by which its register(s) should finally be in conformity with Article 11 of Regulation 1049/2001. In any event, regard needed to be had to the fact that nearly six years had passed since the Commission's register was meant to have become operational by virtue of Article 11(3) of Regulation 1049/2001.

27. In view of the above, the Ombudsman arrived at the conclusion that the Commission had indeed failed to comply with Article 11 of Regulation by omitting to include all relevant documents in its register of documents. A draft recommendation will therefore be made below.

28. As regards the question whether the Commission also erred by maintaining several registers rather than a single one, the Ombudsman considered that the wording of Article 11 of Regulation 1049/2001 ("a register of documents") indeed suggested that the legislator envisaged one single register per institution. However, the Ombudsman noted that the Commission stressed that the purpose of this provision was to enable members of the public to





identify documents held by the institutions that might be of interest to them. The Commission queried whether, considering the number and diversity of the documents held by it, a huge single register would really offer the best service to the public. The Commission also submitted that its public registers were complementary and their scope was well-defined. The Ombudsman considered that these arguments were not without merit. In the Ombudsman's view, it could not be excluded that the aim pursued by Article 11 of Regulation 1049/2001 can also be attained if the institution concerned maintains several registers rather than a single one, provided that the scope of these registers is clearly defined, that there are no overlaps and that their number and scope is not such as to create confusion and thus make it difficult for the citizen to find the information she/he is looking for. Upon a preliminary examination of the registers currently maintained by the Commission, the Ombudsman considered that these conditions appeared to be fulfilled at present. However, given that the draft recommendation set out below was meant to encourage the Commission quite considerably to increase the scope of its register(s), the Ombudsman considered that there were no grounds for further inquiries into the issue of how many registers could and should be maintained at the present stage.

29. In view of the above, the Ombudsman made the following draft recommendation to the Commission, in accordance with Article 3(6) of the Statute of the Ombudsman:

*The Commission should, as soon as possible, include references to all the documents within the meaning of Article 3(a) that are in its possession in the register foreseen by Article 11 of this regulation, to the extent that this has not yet been done.*

*The arguments presented to the Ombudsman after his draft recommendation*

30. In its detailed opinion, the Commission submitted that the very wide definition of the term "document" in Article 3(a) was not compatible with a fully exhaustive and comprehensive register of documents. It pointed out that countries with legislation on access to documents associated with public registers have included in their legislation a more precise and more limited definition of "documents". Conversely, in countries with legislation on "freedom of information" there are generally no registers. The Commission added that Regulation 1049/2001 combined both features. In the Commission's view, public registers are a very valuable instrument for citizens in identifying documents that might be of interest to them. It submitted, however, that the scope of the right of access exceeds the coverage of the public registers insofar as access can be requested to "any content whatever its medium".

31. The Commission acknowledged that the coverage of its registers needed to be extended. However, it took the view that it could not be inferred from the wording of Article 11 that the public register should cover all documents held by the institutions.

32. The Commission further submitted that the fact that a register does not contain references to all documents does not prevent applicants from making requests for access. The Commission's practice showed that requests are often formulated in broad terms, so as to include every conceivable document related to a given subject. The Commission pointed out that in such cases it was up to its services to identify the relevant documents.



33. The Commission recalled that its registers focused on the legislative activity of the EU, given that the need to assist citizens in searching through EU legislation and draft legislation was felt to be a priority. Contrary to the Ombudsman's view, it followed from Article 12 and recital 6 of Regulation 1049/2001 that the latter puts an emphasis on the legislative activities of the institutions. The Commission added, however, that this did not mean that the registers should not cover other documents. It reiterated that it intended further to develop its registers in order to include references to documents related to other activities.

34. The Commission pointed out that it was in the process of phasing out the existing system of registering documents and introducing a new centralised registration system. Some Directorates-General already operated the new system ("Ares"). This new system would gradually be introduced in the whole of the Commission. Substantial financial and human resources were being invested in this huge project (migration period 2008 to 2010). According to the Commission, the reason why under the current system ("Adonis") there was no single Commission-wide database was the lack of security levels in the system. For this reason, the information contained in the Adonis system could not simply be transferred into a public register. The Commission noted that it intended to start transferring records into a public register once the new internal registration system had become operational.

35. The Commission concluded by saying that it agreed that it still had to increase the coverage of its public registers and that it was committed to further developing them in the interest of enhanced transparency. However, it regretted that it was unable to accept the Ombudsman's draft recommendation, since it was logically impossible to combine a wide and imprecise definition of documents with a fully comprehensive register.

36. In its observations, the complainant took the view that the Commission's response was very disappointing and added little to what it had said before.

37. In the complainant's view, the Commission's response suggested that certain "security levels" were built into the new "Ares" system and that only certain documents would be placed on the public register. If that was the case, the Commission was actually constructing a registration system designed to ignore Regulation 1049/2001 and its Article 3(a) and 11 in particular. The complainant suggested that the Ombudsman might wish to seek further information or clarification concerning this issue either now or at a later stage.

38. The complainant pointed out that, when the Commission launched its public consultation on the review of Regulation 1049/2001, it did not suggest restricting the definition of the term "document". In its Report on the Outcome of the Public Consultation on the Review of Regulation 1049/2001 [6], the Commission had stated the following: "*As regards the concept of 'document', the general feeling is that the current wide definition should be maintained.*" According to the complainant, the first indication that the Commission intended to restrict this definition appeared in a draft circulated prior to a meeting on 30 April 2008, i.e., after the Ombudsman had made his draft recommendation on 7 April 2008. The complainant therefore queried whether it was unreasonable to ask whether there could be any connection between the



new "Ares" registration system, the Ombudsman's draft recommendation and the above-mentioned change regarding the definition of "document".

39. In the complainant's view, the Commission's position as regards the present complaint had not changed since its first response. The complainant added that this position could be described as a case of institutional intransigence. In the complainant's view, to allow such a situation to continue would set a very dangerous precedent for other Community institutions and agencies to follow.

40. The complainant concluded by expressing the hope that the Ombudsman would submit a special report to Parliament concerning this issue.

*The Ombudsman's assessment after his draft recommendation*

41. The Ombudsman considers that the Commission has not put forward any arguments that would make it necessary for him to reconsider his position. On the contrary, the Ombudsman considers that the Commission's detailed opinion reinforces his stance.

42. In its detailed opinion, the Commission pointed out that its practice showed that requests are often formulated in broad terms, so as to include every conceivable document related to a given subject, and that it was then up to its services to identify the relevant documents. The Ombudsman considers that it is fair to assume that the broad formulation of requests is in many cases due to the fact that no sufficient register of documents exists as yet. The Commission's explanation thus confirms precisely the point that the Ombudsman was making, i.e., that the register should enable citizens to identify which documents are in the possession of the Commission. Moreover, the Ombudsman takes the view that it can hardly be an economic use of resources to try and palliate the deficiencies of the existing register by forcing the Commission's staff to try and verify which documents might be covered by a request for access.

43. As regards the Commission's argument that the need to assist citizens in searching through EU legislation and draft legislation was a priority for it, the Ombudsman notes that the Commission itself accepts that this does not mean that the registers should not cover other documents. The Ombudsman notes, however, that even at the end of 2007, that is to say, more than five years after the date on which the register ought to have been operational, the Commission's registers are still basically limited to documents concerning the EU's legislative activities. The Commission reiterated that it intended further to develop its registers in order to include references to documents related to other activities. It stated that it was committed to further developing its registers in the interest of increased transparency. The Ombudsman considers, however, that this commitment, which was already expressed by the Commission at earlier stages, has so far not been backed up by convincing action.

44. The Commission has explained that a new centralised registration system ("Ares") was being introduced and that it intended starting to transfer records into a public register, once the new internal registration system had become operational. The Ombudsman understands, however, that the introduction of this system throughout the whole Commission is only



envisaged to be completed in 2010. Moreover, although the new system already appears to be operated by some of its Directorates-General, the Commission has not explained why the documents held by these Directorates-General have not yet been added to the Commission's registers. Most important of all, the Commission has not provided any explanations as to which documents will be added to these registers. Given that the Commission, in its detailed opinion, has gone as far as to claim that it was "logically impossible" to combine a wide and imprecise definition of documents with a fully comprehensive register, the effect of the introduction of the new registration system on the contents of the Commission's register remains far from clear.

45. The Ombudsman remains unconvinced that it would be impossible, or logically impossible, to maintain a register of all documents that are in the Commission's position. The register of the correspondence addressed to its President, which was available at the time when President Prodi was in office, shows that such registers are possible. However, even if one were to accept the said argument, the fact remains that more than seven years after the adoption of Regulation 1049/2001, and despite repeated commitments to enlarge its registers to documents that do not concern the EU's legislative activity, the Commission has still failed to live up to its word. Worse still, the only register the scope of which clearly went beyond that of the Commission's present registers, that is to say, the register of the correspondence addressed to the Commission's President, has been discontinued.

46. The Ombudsman therefore takes the view that the position he expressed in his draft recommendation remains valid, without there being any need, at least for the time being, further to examine the issues raised by the complainant in its observations on the detailed opinion.

## B. Conclusions

47. On the basis of his inquiries into this complaint, the Ombudsman makes the following critical remark:

*Article 11(1) of 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 stipulates that each institution shall provide public access to a register of documents. References to documents shall be recorded in the register without delay. According to Article 11(2) of Regulation 1049/2001, for each document the register shall contain a reference number. In the Ombudsman's view, the register referred to in Article 11 can only achieve its aim "[t]o make citizens' rights under this Regulation effective" if it was as comprehensive as possible. The Commission has not disputed the complainant's statement that only a "fraction" of its documents is listed on its registers. In view of the above, the Ombudsman arrives at the conclusion that the Commission has failed to comply with Article 11 of Regulation by omitting to include all relevant documents in its register of documents. This constitutes an instance of maladministration.*



48. Article 3(7) of the Statute of the European Ombudsman provides that after having made a draft recommendation and after having received the detailed opinion of the institution or body concerned, the Ombudsman shall send a report to the European Parliament and to the institution or body concerned.

49. The complainant has called upon the Ombudsman to submit its case to the European Parliament.

50. The Ombudsman considers that the present case raises an important issue and that making a special report would therefore be justified.

51. It should be noted, however, that on 20 November 2008, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs submitted a Report on public access to European Parliament, Commission and Council documents (implementation of Regulation (EC) No 1049/2001) [7] , which contains a motion for a resolution to be adopted by the European Parliament.

Point 6 of the proposed resolution

*" [u]rges the Commission to follow the recommendation of the European Ombudsman (Complaint 3208/2006/GG) on the Commission register as regards its obligation 'to include references to all documents within the meaning of Article 3(a) that are in its possession in the register foreseen by Article 11 of [Regulation (EC) No 1049/2001], to the extent that this has not been done yet' "*

52. Given that the Ombudsman's (draft) recommendation has therefore already been submitted to the plenary session of the European Parliament, the Ombudsman considers that a special report on this issue is not necessary. However, the Ombudsman will send a copy of this decision to the European Parliament, in conformity with Article 3(7) of his Statute. The complainant and the European Commission will also be informed of this decision.

P. Nikiforos DIAMANDOUROS

Done in Strasbourg on 18 December 2008

[1] OJ 2001 L 145, p. 43.

[2] Both documents are available on the Ombudsman's website (<http://www.ombudsman.europa.eu> [Link]).

[3] As regards this register, see point 23 below.

[4] It appears useful in this context to quote from point 2.1 (which concerns the issue of



registers) of the Commission's report (Commission staff working document) of 16 January 2008 on the outcome of the public consultation on the review of Regulation 1049/2001 (SEC/2008/29/2): "In all four categories of correspondents, a large majority considers that information is difficult to find on the registers and websites. For half of these respondents, the scope of these registers and websites is also insufficient."

[5] See point 1.3 of the Commission's report of 29 April 2003 on the application in 2002 of Regulation 1049/2001 (COM(2003) 216 final). For comparison, in its report of 10 October 2008 on the application in 2007 of Regulation 1049/2001 (COM(2008)630 final), the Commission's registers comprised 86 887 references at the end of 2005.

[6] (Undated) Commission Staff Working Paper, available on the relevant website of the Commission ( [http://ec.europa.eu/transparency/revision/index\\_en.htm](http://ec.europa.eu/transparency/revision/index_en.htm) [Link]).

[7] Reference INI/2007/2154 (A6-0459/2008).