

SEC/2003/260/3

## PUBLIC ACCESS TO DOCUMENTS RELATING TO INFRINGEMENT PROCEEDINGS

1. Infringement proceedings (Articles 226 and 228 EC), which form a major part of the Commission's role as guardian of the Treaties, are quite unique. The Commission is required to ensure the uniform application of Community law, inform the Member States of suspected infringements, negotiate with them on matters which are often highly sensitive while endeavouring to reach an out-of-court settlement, and, if these measures fail, finally bring the matter before the Court, whose decision will be final. This being so, it is hardly surprising that requests for access to documents relating to infringement proceedings may raise a great many questions of interpretation. Questions about infringement proceedings constitute a large proportion of the requests for access to documents.
  
2. The aim of this memo is to facilitate and standardise the processing of requests for access to documents relating to infringement proceedings in application of Regulation (EC) No 1049/2001<sup>1</sup> ("the Regulation") and the detailed rules on its application within the Commission (Decision 2001/937)<sup>2</sup> ("the implementing rules"). A draft classification has been prepared (see Annex) setting out conditions of access depending on the document requested and the moment in time at which the document was requested. – The infringement procedure itself is described in detail in the SG working paper of 21 November 2002 (Manual of operational procedures for the use of "infringement" managers and correspondents).

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<sup>1</sup> 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; OJ L 145, p. 43.

<sup>2</sup> Commission Decision (2001/937) of 5 December 2001 amending its rules of procedure (implementation of Regulation (EC) No 1049/2001) ; OJ L 345, p. 94.

## A. INFRINGEMENT PROCEEDINGS : REMINDER

3. Infringement procedures fall into **four categories** depending on their purpose:
  - Infringements of the Treaties, regulations and decisions ;
  - Failure to notify national measures transposing a directive ;
  - Non-conformity with Community law of national legislation transposing a directive;
  - Incorrect application of a directive in a Member State.
4. An infringement proceeding normally involves the **following stages**<sup>3</sup>:
  - It starts with a prelitigation stage: i.e. following the complaint (if any), possibly the "pre-226" letter, the so-called letter of formal notice and reply from the Member State, and finally the reasoned opinion and reply from the Member State.
  - During this stage it is still possible for action on an alleged or confirmed infringement to be closed (which often happens).
  - If the case is not dropped, the Commission may bring it before the Court of Justice for a litigation stage.
  - It is still possible that, in the light of developments in the case, the Commission will take the decision to discontinue.
  - If the case is not withdrawn, the Court will deliver a ruling which the Member State is bound to implement and which brings the case to a final close<sup>4</sup>.
5. The **documents** relating to an infringement procedure can be classified as follows:
  - The complaint (and any other letters from the complainant: "third-party documents") and the Commission's replies
  - Correspondence from the Commission to the Member State and correspondence from the Member State to the Commission (the latter also being "third-party documents")
  - Internal Commission documents: intra/interdepartmental memos, infringement forms, records of meetings (preparatory meetings, "package" meetings, meetings with the

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<sup>3</sup> In order to deal with cases of failure to comply with Community law, the Commission communication on better monitoring of the application of Community law (COM(2002)725fin) also contains a number of additional measures.

<sup>4</sup> Without prejudice to the initiation of proceedings under Article 228 EC, cf. paragraphs 34 and 35.

complainants or the authorities of the Member State concerned, Chefs de cabinet meetings, Commission meetings, etc.)

- Legal opinions
- The letter of formal notice (and supplementary letter of formal notice)
- Reasoned opinion (and supplementary reasoned opinion)
- Documents drawn up for the purposes of court proceedings in relation to a particular infringement (submissions and acts filed with the court, internal documents concerned with the case in progress, correspondence about the case between the Directorate-General concerned and the Legal Service or law firm, etc.)

## **B. LEGISLATION AND CASE LAW: REMINDER**

6. The **basic principles**, as regards access to documents, are as follows:

- Access may be requested to any document drawn up or received by the Commission.
- Requests for access must be considered on a case-by-case basis.
- Any document covered by an exception (other than public interest or the protection of privacy) must still be released if it is more important in the public interest to disclose the document than to protect it.
- Any exception provided for by the Regulation can apply only for the period during which protection is justified on the basis of the content of the document.

7. In the case of infringement procedures in particular, the wording of the third indent of **Article 4(2)** of Regulation (EC) No 1049/2001 should be borne in mind:

*"The institutions shall refuse access to a document where disclosure would undermine the protection of ... the purpose of inspections, investigations and audits, ... unless there is an overriding public interest in disclosure."*

8. Before the Regulation came into force, the Code of Conduct adopted by Commission Decision 94/90 contained a similar provision concerning the "the protection of the public interest (inspections and investigations)"<sup>5</sup>. In several judgments the Court interpreted this exception with regard to infringements.

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5 Commission Decision of 8 February 1994 on public access to Commission documents (94/90/ECSC, EC, Euratom), OJ L 46, p. 58. Furthermore, on the adoption of Regulation No 1049/2001, the Commission insisted on making the following declaration (not published in the OJ; available in a Council document 9204/01 ADD1): "In a spirit of compromise, the Commission is willing to accept that infringement proceedings will not be explicitly included among the exceptions provided for in Article 4(2) of the Regulation, because it considers that the text as it stands does not in any way affect current practice as regards the protection of the confidentiality it is granted for the exercise of its responsibilities as regards the monitoring of compliance with Community law."

9. Firstly, in the case of documents relating to a case which has been **closed** during the investigation stage, the Court held in *WWF* (T-105/95, judgment of 5 March 1997) that:

*"63. In this regard, the Court considers that the confidentiality which the Member States are entitled to expect of the Commission in such circumstances warrants, under the heading of protection of the public interest, a refusal of access to documents relating to investigations which may lead to an infringement procedure, even where a period of time has elapsed since the closure of the investigation."*

10. Where an infringement has been **brought before the Court**, the Court held in *Petrie* (T-191/99, judgment of 11 December 2001) that:

*"68. In the present case, the documents requested are letters of formal notice and reasoned opinions drawn up in connection with investigations and inspections carried out by the Commission. As the Court pointed out in paragraph 63 of its judgment in WWF (cited above in paragraph 59), the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure. This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgment of the Court of Justice. The preservation of that objective, namely an amicable resolution of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, justifies refusal of access to the letters of formal notice and reasoned opinions drawn up in connection with the Article 226 EC proceedings on the ground of protection of the public interest relating to inspections, investigations and court proceedings, which comes within the first category of exceptions in Decision 94/90."*

11. However, the Court further specified in *Petrie* that access may not be denied to just any document which might have a link of some kind with "inspections and investigations" and that the institution concerned must give reasons for its actions in this regard. According to the *Petrie* judgment:

*"79. As the Court pointed out in its judgment in WWF (cited in paragraph 59 above, at paragraph 64), the Commission is not entitled to confine itself to invoking the possible opening of an infringement procedure as justification, under the heading of protecting the public interest, for refusing access to the entirety of the documents identified in a request made by a citizen. The Court took the view that the Commission is required to indicate, at the very least by reference to categories of documents, the reasons why it considers that the documents detailed in the request which it received are related to the possible opening of an infringement procedure, by indicating to which subject-matter the documents relate and particularly whether they involve inspections or investigations relating to a possible procedure for infringement of Community law."*

### C. REQUESTS FOR ACCESS : TYPES OF CASES

12. As regards **requests for access to documents**, the following situations can be identified depending on the documents requested:
13. **"Ordinary" case: an applicant asks the Commission for documents it has produced itself**; it is for the Commission alone to assess the request.
14. **"Third party author": an applicant asks the Commission for documents sent to it by a third party (Member State, plaintiff, etc.)**. In this case the Commission is obliged to consult the author of the document, "unless it is clear that the document shall or shall not be disclosed" (Article 4(4) of the Regulation). The rules governing consultation are set out in Article 5 of the implementing rules (emphasis added):

"1. Where the Commission receives an application for access to a document which it holds but which originates from a third party, the Directorate-General or department holding the document shall check whether one of the exceptions provided for by Article 4 of Regulation (EC) No 1049/2001 applies. If the document requested is classified under the Commission's security rules, Article 6 of these Rules shall apply.

2. If, after that examination, the Directorate-General or department holding the document considers that access to it must be refused under one of the exceptions provided for by Article 4 of Regulation (EC) No 1049/2001, the negative answer shall be sent to the applicant without consultation of the third-party author.

3. The Directorate-General or department holding the document shall grant the application without consulting the third-party author where:

(a) the document requested has already been disclosed either by its author or under the Regulation or similar provisions;

(b) the disclosure, or partial disclosure, of its contents would not obviously affect one of the interests referred to in Article 4 of Regulation (EC) No 1049/2001.

4. In all the other cases, the third-party author shall be consulted. In particular, if the application for access concerns a document originating from a Member State, the Directorate-General or department holding the document shall consult the originating authority where:

(a) the document was forwarded to the Commission before the date from which Regulation (EC) No 1049/2001 applies;

(b) the Member State has asked the Commission not to disclose the document without its prior agreement, in accordance with Article 4(5) of Regulation (EC) No 1049/2001.

5. The third-party author consulted shall have a deadline for reply which shall be no shorter than five working days but must enable the Commission to abide by its own deadlines for reply. In the absence of an answer within the prescribed period, or if the third party is untraceable or not identifiable, the Commission shall decide in accordance with the rules on exceptions in Article 4 of Regulation (EC) No 1049/2001, taking into account the legitimate interests of the third party on the basis of the information at its disposal.

6. If the Commission intends to give access to a document against the explicit opinion of the author, it shall inform the author of its intention to disclose the document after a ten-working day period and shall draw his attention to the remedies available to him to oppose disclosure."

15. In the case of a Member State document, the "Member State may request the institution not to disclose a document originating from that Member State without its prior agreement" (Article 4(5) of the Regulation)<sup>6</sup>. **The Commission will not disclose a document relating to an infringement procedure originating in a Member State without the latter's consent**<sup>7</sup>.
16. In the particular case of the complaint and the documents provided by the complainant, it should be noted that the complainant must be consulted on the disclosure of the documents he has provided in the conditions laid down in Article 4(4) of the Regulation. Even though, in his complaint, the complainant may authorise the Commission to disclose his identity to the authorities of the Member State in question, such authorisation does not permit the disclosure of his personal details to other third parties; they must therefore be concealed (Article 4(1)(b)<sup>8</sup> or the third indent of Article 4(2) of the Regulation).
17. **"Disclosure by a Member State": a Member State plans to disclose documents originating in the Commission.** Such disclosure may be foreseen by national law. Nevertheless, the Member State must consult the Commission on the matter or submit a request to it, unless it is clear that the document shall or shall not be disclosed. Article 5 of the Regulation states:

" Where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation.

The Member State may instead refer the request to the institution."

The rules governing consultation are set out in Article 5(7) of the implementing rules:

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<sup>6</sup> Cf. Declaration No 35 on Article 255 of the EC Treaty, annexed to the Treaty of Amsterdam.

<sup>7</sup> An appeal was lodged against this interpretation before the Court of First Instance (Case T-168/02, Internationaler Tierschutz-Fonds (IFAW) GmbH v Commission, OJ C 202, 24 August 2002, p. 30).

<sup>8</sup> The Community instrument on the protection of personal data is Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 008, 12 January 2001).

"7. Where a Member State receives an application for access to a document originating from the Commission, it may, for the purposes of consultation, contact the Secretariat-General, which shall be responsible for determining the Directorate-General or department responsible for the document within the Commission. The issuing Directorate-General or department of the document reply to the application after consulting the Secretariat-General."

In deciding whether such disclosure would undermine the objectives of the Regulation, the Commission must take account, *mutatis mutandis*, of the state of progress of the case at the time at which the request for access was made. In its reply to the Member State the Commission should set out the reasons why the documents in question would have been covered by an exception if they had been requested from the Commission directly. The Member State must take the final decision based on its own legislation, while at the same time fulfilling its obligations to the Community.

18. A special case, not covered by Regulation (EC) No 1049/2001, is the possibility for a national court "to obtain the communication of certain information in the Commission's possession which it requires in order to exercise the powers conferred upon it by national law". This obligation, which originates in the Order of the Court in *Zwartveld*<sup>9</sup>, illustrates the "Community institutions' duty of sincere cooperation with the judicial authorities of the Member States which are responsible for ensuring that Community law is applied and respected in the national legal system".

#### **D. EXCEPTIONS: scenarios used in the annex**

19. For each document to which access is requested - or at least by category of document (Case *WWF*, referred to above, paragraph 79) - the Commission is obliged to consider whether, in the light of the information available to it, disclosure is in fact likely to undermine one of the facets of public interest protected by the exceptions allowed (Case T-174/95 *Svenska Journalistförbundet v Council*, judgment given by the Court of First Instance of 17.6.1998, paragraph 112).
20. A number of provisions of Regulation (EC) No 1049/2001 prohibit the Commission from disclosing a document relating to infringement procedures if its contents so dictate. The following examples will be illustrated in the annex on the basis of the Regulation and the case law cited.

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<sup>9</sup> Orders of the Court of 13 July 1990 and 6 December 1990 in Case C-2/88 Imm. *J. J. Zwartveld and others* [1990] ECR I-04405. See also SEC (1997) 1293 (Relations des services et des fonctionnaires de la Commission avec des juridictions nationales et des avocats).

### **D.1. "Investigation" exception**

21. The "investigation" exception is provided for in the third indent of Article 4(2) of the Regulation (*"the purpose of inspections, investigations and audits"*).
22. This is not an absolute exception; it is subject to the proviso *"unless there is an overriding public interest in disclosure"*.

### **D.2. "Court proceedings" exception and "legal advice" exception**

23. The "court proceedings" and "legal advice" exceptions are referred to in the second indent of Article 4(2) of the Regulation ("court proceedings and legal advice").
24. The "court proceedings" exception is used to protect documents produced solely for the purpose of specific court proceedings (for example, Commission pleadings, see Case T-92/98 *Interporc v Commission* (II), Judgment of the Court of First Instance of 7.12.1999, paragraphs 41 and 42).
25. The "legal advice" exception is intended to enable the institutions to continue to obtain independent legal advice (on the need to protect the opinions of the Legal Service see Case T-44/97 *Ghignone et al. v Council*, judgment given by the Court of First Instance on 8.11.2000, paragraphs 47 and 48 and the case law cited there).
26. Here again, these exceptions are not absolute; they apply *"unless there is an overriding public interest in disclosure"*.

### **D.3. Presumption of access**

27. The "presumption of access" category used in the table given in the annex shows that the case in question is generally no longer covered by the "investigation" or "court proceedings" exceptions.
28. However, it must be checked whether **other exceptions** provided for by Article 4 of the Regulation apply, namely:
  - the exception of the public interest as regards public security, defence and military matters, international relations, the financial, monetary or economic policy of the Community or a Member State: Article 4(1)(a);



- the exception of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data: Article 4(1)(b);
- protection of commercial interests of a natural or legal person, including intellectual property, *unless there is an overriding public interest in disclosure*: first indent of Article 4(2)(b).
- protection of the decision-making process; access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, *unless there is an overriding public interest in disclosure*: second subparagraph of Article 4(3).

#### **D.4. Partial access**

29. Lastly, even an exception does apply, it is always necessary to check whether partial access is possible. This is a legal obligation, confirmed notably by the *Hautala*<sup>10</sup> judgments of the Court of First Instance and the Court of Justice. This obligation also flows from Article 4(6) of the Regulation: *"If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released."* However, in specific cases where the volume of the document or the passages to be removed would give rise to an unreasonable amount of administrative work for the institution it may, in order to safeguard the interests of good administration, balance the interest in public access to those fragmentary parts against the burden of work so caused. The same goes for specific cases where the number of documents from which passages would need to be removed would involve an excessive administrative burden for the Commission, in which case it could confine itself to refusing access by categories of documents.

### **E. THE STAGES OF THE PROCEDURE: SCENARIOS**

#### **E.1. Requests submitted during the investigation (pre-litigation phase)**

30. It follows directly from the *Petrie* judgment (paragraph 68) **that when the case (investigation) is under way, the "investigation" exception applies.** The decision to refuse access should be justified by the fact that disclosure would jeopardise the

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<sup>10</sup> Cf. Case T-14/98 *Hautala v Council*, judgment of the CFI of 19.7.1999, paragraph 86; Case C-353/99 P *Council v Hautala*, judgment of the Court of 6.12.2001, paragraph 30; Case T-204/99 *Mattila v Commission and Council*, judgment of the CFI of 12.7.2001, paragraphs 68 and 69, and Case T-211/00 *Kuijer v Council* (II), judgment of the CFI of 7.2.2002, paragraph 57.

objectives of the investigation. The possible applicability of other exceptions should also be examined. In any case, an overriding public interest may, according to Article 4(2) of the Regulation, justify disclosure of the document in question.

## **E.2. The case is before the Court**

31. When the case is before the Court, **the "investigation" exception** ("court proceedings" exception for certain documents, see point 24 above) **applies** (see *Petrie* judgment, paragraph 68<sup>11</sup>). It should also be examined whether other exceptions apply.

## **E.3. Case closed/discontinued**

32. The closing of a presumed or established infringement or the discontinuation of an appeal lodged before the Court of Justice are decisions by which the Commission establishes, on the basis of the information at its disposal, that it is no longer appropriate to pursue the case. Unlike a judgment by the Court definitively closing a case, closing or discontinuation are provisional measures: if necessary, the Commission can take the case up again.
33. **After closing or discontinuation there is a presumption of accessibility.** In principle, when the investigation is over, the "investigation" exception no longer applies. Having said that, in the WWF judgment cited above, which was not explicitly reversed, the Court stated that *"the confidentiality which the Member States are entitled to expect of the Commission in such circumstances warrants, under the heading of protection of the public interest, a refusal of access to documents relating to investigations which may lead to an infringement procedure, even where a period of time has elapsed since the closure of the investigation."* There are no precise rules on how long the protection should be given for. This should be decided on a case-by-case basis, the basic principle being the broadest possible access and a restrictive interpretation of the exceptions.

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<sup>11</sup> "This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgment of the Court of Justice. The preservation of that objective, namely an amicable resolution of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, justifies refusal of access to the letters of formal notice and reasoned opinions drawn up in connection with the Article 226 EC proceedings on the ground of protection of the public interest relating to inspections, investigations and court proceedings, which comes within the first category of exceptions in Decision 94/90."

However, if the disclosure of documents relating to infringement proceedings which have been closed or discontinued could risk jeopardising another investigation under way, the "investigation" exception could continue to apply.

### **E.3. After an Article 226 EC judgment**

34. It is clear from *Petrie* that the "investigation" exception can apply until the judgment is issued. **After the judgment, this exception, in principle, no longer applies.** There is a **presumption of accessibility**<sup>12</sup>, which can nonetheless be reversed. This, then, is also decided on a case-by-case basis. This is the case for joined cases in particular, or when negotiations with the Member State concerned are being pursued with a view to achieving compliance, which may involve proceedings being launched under Article 228 EC. However, it should be noted that the purpose of any extension of the application of the exception is to protect the negotiation launched after the judgment issued pursuant to Article 226 EC or the investigations needed to ensure compliance.
35. **Infringement proceedings on the basis of Article 228 EC** include the same phases as proceedings on the basis of Article 226 EC. The analysis set out in this note concerning the applicability of exceptions to the documents produced in Article 226 infringement proceedings thus applies *mutatis mutandis* to documents produced in Article 228 proceedings. It should be noted that, apart from the form for calculating the penalty payment, the documents are similar to those produced in Article 226 proceedings.

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It should be noted that, in any case, the outline of the Commission's application and the defence of the Member State concerned become public from the time of the hearing (they are set out in the report for the hearing) and even more so in the conclusions of the Advocate-General and the judgment itself.

**Table of categories of public access to documents relating to infringement proceedings and the exceptions which may apply**

		<b>2. AT WHAT POINT was the request for access made?</b>				
		<b>During the pre-litigation phase</b>		<b>During the litigation phase</b>		<b>After the Court's judgment [2]</b>
		<i>The investigation is under way</i>	<i>The case is closed</i>	<i>After the case has been referred to the Court</i>	<i>The case is discontinued</i>	
<b>1. What TYPE of document is requested?</b>	<b>Letter from the complainant, [1] replies from the Commission</b>	"Investigation" exception	Presumption of accessibility	"Investigation" exception	Presumption of accessibility	Presumption of accessibility
	<b>Correspondence from the Commission to the Member State</b>	"Investigation" exception	Presumption of accessibility	"Investigation" exception	Presumption of accessibility	Presumption of accessibility
	<b>Correspondence from the Member State to the Commission [1]</b>	"Investigation" exception	Presumption of accessibility (except art 4.5)	"Investigation" exception	Presumption of accessibility (except art 4.5)	Presumption of accessibility (except art 4.5)
	<b>The letter of formal notice (and supplementary letter of formal notice)</b>	"Investigation" exception	Presumption of accessibility	"Investigation" exception	Presumption of accessibility	Presumption of accessibility
	<b>Reasoned opinion (and supplementary reasoned opinion)</b>	"Investigation" exception	Presumption of accessibility	"Investigation" exception	Presumption of accessibility	Presumption of accessibility
	<b>Internal Commission documents (intra/interservice notes, infringement forms)</b>	"Investigation" exception	Presumption of accessibility	"Investigation" exception	Presumption of accessibility	Presumption of accessibility
	<b>Special minutes of the chefs de cabinet and the Commission, minutes of meetings (preparatory, "package")</b>	Art. 4.3.1	Art. 4.3.2	Art. 4.3.2	Art. 4.3.2	Art. 4.3.2
	<b>Legal advice</b>	"Legal advice" exception				
	<b>Documents drawn up for the purposes of a specific court procedure (written submissions etc.)</b>	---	---	"Legal proceedings" exception	Presumption of access	Presumption of access

Footnote [1] : See paragraphs 14 to 16 of the document.

Footnote [2] : Judgment Art. 226/228; also, for the period between the two procedures: see paragraph 34.

<b>Terminology:</b>	
<b>"Investigation" exception:</b> see paragraphs 10, 11, 21, 22, 30, 31, 33, 34 and 35 of the note	<b>"Legal advice" exception:</b> see paragraphs 23, 25 and 26 of the note
<b>"Presumption of access":</b> see paragraphs 27, 28, 33, 34 –35 of the note	<b>"Court proceedings" exception:</b> see paragraphs 10, 23, 24, 26 and 31 of the note

**N.B.** If a Member State should envisage disclosing a document relating to infringement proceedings emanating from an institution, it must consult the institution concerned under Article 5. In order to establish whether such disclosure jeopardises "the attainment of the objectives of this Regulation", the institution concerned must take into account, *mutatis mutandis*, the state of progress of the dossier at the point at which the request for access was made.

## **FOR THE ATTENTION OF THE COMMISSION**

Following rulings by the Court of First Instance, and in particular the judgment handed down on 11 December 2001 in *Petrie*<sup>1</sup>, it was felt it would be appropriate to examine the principles applicable to the handling of requests from the public for access to documents relating to infringement proceedings in the light of Regulation (EC) No 1049/2001<sup>2</sup> and the rules for implementing it.<sup>3</sup>

The aim of this document is to lay down guidelines to facilitate and standardise the handling by Commission departments of requests for access to documents relating to infringement proceedings. For the sake of consistency it is essential that all departments handle requests for similar documents in the same way, while continuing to observe the basic principle that every request should be examined on a case-by-case basis.

The general approach suggested involves setting out the conditions of access in the light of the document requested and the point in time at which the request was made. The exception arrangements, designed to protect the purpose of investigations and provided for specifically by Article 4 of Regulation No 1049/2001, are intended to apply during the prelitigation stage or while the case is before the Court. Once a case has been closed or withdrawn, or a judgment has been handed down under Article 226 of the EC Treaty, these exceptions will, in principle, cease to apply. A "presumption of accessibility" applies but this can be overturned in certain cases. In any event, the possibility that other exceptions provided for in Article 4 of Regulation No 1049/2001 might apply should always be examined.

It goes without saying that these guidelines apply only to documents produced as part of an infringement proceeding under Article 226 EC, and cannot automatically be transposed by analogy into other sectors, such as competition.

The Commission is requested to take note of this working paper and to instruct the Secretary-General to ensure that it is applied by the Commission's departments and to publicise it in an appropriate manner.

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<sup>1</sup> T-191/99, ECR. 2001, p.II-3677.

<sup>2</sup> 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; OJ L 145, p. 43.

<sup>3</sup> Commission Decision 2001/937 amending its rules of procedure, OJ L 345, p. 94.