

Brussels, 4/03/2010  
C/2010/1218

Dear Lord Roper,

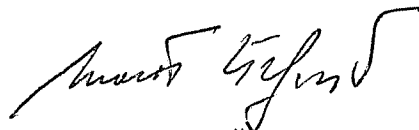
Thank you for sending us the Report on Access to EU Documents drawn up by the European Union Committee of the House of Lords COM(2008)229}.

I take this opportunity to thank the European Union Committee of the House of Lords once again for its continuous interest in this matter and its constructive contribution to the debate. The Commission will take this proposal forward and will carefully consider the view expressed by the Committee in this report.

In line with the Commission's decision to encourage National Parliaments to react to its proposals to improve the process of policy formulation, we welcome this opportunity to respond to your comments. I enclose the Commission's reply and hope you will find this a valuable contribution to your own deliberations.

I look forward to developing our policy dialogue further in the future.

Yours sincerely,



Maroš Šefčovič

Vice-President of the European Commission

Lord Roper  
Chairman of the European Union Select Committee  
House of Lords  
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EUROPEAN COMMISSION

**COMMENTS OF THE EUROPEAN COMMISSION ON THE REPORT OF THE HOUSE OF LORDS ON "ACCESS TO EU DOCUMENTS" {COM(2008)229} PROPOSAL FOR A REGULATION OF THE EP AND OF THE COUNCIL REGARDING PUBLIC ACCESS TO EUROPEAN PARLIAMENT, COUNCIL AND COMMISSION DOCUMENTS**

This report contains a very accurate analysis of the substantive changes proposed by the European Commission to Regulation (EC) No 1049/2001 regarding public access to documents of the European Parliament, the Council and the Commission.

It goes without saying that the Commission will carefully consider the comments and recommendations of the European Union Committee when it will review its proposal. It is still unclear when this review will take place as the European Parliament has not voted on a legislative Resolution stating its position at first reading on the Commission's proposal.

Therefore, the Commission cannot anticipate any changes or new proposals the incoming Commission might submit in the course of the legislative process. I would like, however, to respond to the comments and questions made by the Committee in its report.

**1. Court Documents**

The Commission agrees that it is appropriate, in principle, that the courts decide themselves on disclosure of documents submitted to them by parties in the course of judicial proceedings.

**2. Investigation Documents**

The Commission appreciates that the Committee recognises the need for confidential treatment of documents submitted by third parties in the context of investigations, proceedings and law enforcement as a legitimate concern.

**3. Policy formulation**

The Commission would like to clarify that the proposed definition of "document" is not intended as a way to create a space for policy formulation. The proposed definition aims at clarifying that a "document" drawn up by an institution starts to exist when it has been "formally" transmitted to its recipients or been "otherwise registered". The purpose of this definition is to exclude documents in progress from the scope of the Regulation. The term "formally transmitted" means that the document has been finalised by its author and sent to its recipients, within or outside the institution. The term "otherwise

registered" is intended to cover documents which have not been transmitted to anyone but have been added to a file or record.

The Commission considers that Article 4(3) of the Regulation adequately addresses the issue of protecting the "space to think". Therefore, it did not propose any substantive changes to this provision.

As regards the specific issue of legal advice, The Commission shares the Committee's view that the Court's ruling in *Sweden and Turco v Council* does not lead to a conclusion that all legal advice must always be released when it has been given in the context of a legislative proposal.

#### **4. Member States' Documents**

The judgment of the Court of Justice in *Sweden v Commission* has radically changed the practice with regard to disclosure of documents originating from Member States. Since Member States can no longer unconditionally veto the disclosure of their documents, wider access is now being granted to such documents. On the one hand, the need for Member States to justify their objections to disclosure has led to a more selective use of their right to object. Furthermore, the Commission has decided to overrule objections from Member States when they were not motivated or where it considered that the exceptions invoked manifestly did not apply. As any third party, a Member State may challenge a decision to disclose a document originating from it against its express refusal. In fact, such a case is currently pending.

As the Committee correctly points out, a key question is the power of an institution to assess the reasons given by the Member State. Since the Regulation affords Member States a different treatment than other third parties, it seems logical that the institutions' assessment of objections to disclosure would take this into account. However, The Commission understands that this issue might require some clarification.

The Committee considers the ability for Member States to rely on provisions of their own legislation when objecting to disclosure as a reduction of the current level of transparency. The Commission would like to point out that the Court's judgment in *Sweden v Commission* is based on the current wording of Article 4(5) according to which Member states may request an institution not to disclose any document originating from them. A discretionary veto on all documents originating from Member States would indeed exclude a whole class of documents from the scope of the Regulation, as many of these documents are submitted in the context of EU decision-making. Therefore, the Commission has proposed a completely redrafted provision on Member State documents, according to which Member States are not consulted on the disclosure of "*documents transmitted in the framework of procedures leading to a legislative act or a non-legislative act of general application*". Such documents would not be considered as Member State documents but as Council or Commission documents. Consequently, the Member States' ability to oppose disclosure of documents originating from them would only apply to documents not related to the adoption of EU legislation. It is clear that the disclosure of such documents has a significant impact on the Member States' interests.

Against this background, the Commission considers that its proposal strikes the right balance: on the one hand it excludes documents related to EU law-making from the right to oppose disclosure and, on the other hand, it takes into account legitimate

confidentiality requirements in Member States. As the reference is made to national legislation, the right to oppose disclosure must be rooted in legal provisions.

## **5. Other issues**

The Commission notes that the Committee sympathises with the objective to grant any natural or legal person a right to seek access to EU documents, but considers that there is no legal basis for such an extension.

It welcomes the Committee's support for the proposal to align the Regulation with the legislation implementing the Aarhus Convention.

It notes that further justification is requested for the specific exemption aimed at safeguarding the objectivity and impartiality of selection procedures.

The Commission notes that the Committee's position on disclosure of personal data is very similar to the Commission's proposal.

It appreciates that the Committee shares the Commission's concern with regard to the handling of applications and supports the proposal to extend deadlines.

The Commission fully shares the Committee's view that there is scope for a more proactive dissemination of information. The suggestion for a subscription email service is very interesting in this regard.