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Subject:	Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (recast)

I. INTRODUCTION

On 7 May 2008, the Commission forwarded to the Council and the European Parliament the above-mentioned proposal (COM (2008) 229 final) for a recast of the Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents.

The recast proposal is intended to update certain provisions of Regulation (EC) No 1049/2001 following the entry into force of Regulation (EC) No 1367/2006 (known as the "Århus Regulation") on access to environmental information [1], while at the same time taking into account recent case law on access to documents as established by the CFI and the European Court of Justice. Moreover, a number of the proposed modifications aim at clarifying issues linked to the practice of handling requests for public access to documents relating to the Commission's work of inspection, investigation and auditing. Altogether, the Commission proposes 20 substantive modifications of the current Regulation (EC) No 1049/2001.

On 6 November 2008, the Consultative Working Party of the Legal Services delivered its opinion on the recast proposal [2], pursuant to the Inter-institutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts [3].

While awaiting the opinion of the European Parliament, the Working Party on Information proceeded to a detailed, technical examination of the modifications proposed by the Commission during the last quarter of 2008 [4].

On 11 March 2009, the European Parliament adopted a total of 92 amendments to the Commission's text, but adjourned its vote on the legislative resolution and, hence, the formal conclusion of its first reading of the legislative proposal. Moreover, at its plenary session on 6 May 2009, the Parliament decided to postpone the vote on the legislative resolution until its next legislative term.

Although the European Parliament has so far not delivered a formal opinion on the legislative proposal, the WPI has, during recent months, continued its efforts with a view to enable the Council to reach a general approach on this proposal within a reasonable timeframe. Following the suggestions made by the Presidency [5], the Working Party thus decided, at its meeting on 2 April 2009, to proceed to a second "article by article" examination of the recast proposal, while taking into account those of Parliament's amendments, which are relating to the modifications envisaged in the recast proposal, as well as comments and suggestions made by delegations.[6]

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1 Regulation (EC) No 1367/2006 of 6 September 2006 on the application of the provisions of the Århus Convention to Community institutions and bodies (OJ L 264, 25.9.2006, p. 13). The alignment of the exceptions on the provisions of the "Århus Regulation" is reflected in Article 4 (1) (e) and 4 (2) (b).

2 See doc. 16343/1/08 REV 1.

3 JO C 77, 28.3.2002, p. 1

4 See doc. 5671/1/09 REV 1.

5 See doc. 7791/09.

6 See documents 8751/09, 9234/09, 10297/09 and 10857/09.

The purpose of this report is to summarize the outcome of the examination carried out by the Working Party on Information during the second quarter of 2009. With a view to facilitate the Council's further work on the recast, delegations will find, at annex, a synoptic overview of those parts of the recast proposal, which contain substantive changes to the current Regulation, together with the relevant amendments approved by the European Parliament as well as amendments tabled by delegations. Detailed comments and observations by delegations and the Commission are set out in the footnotes.

II. OUTCOME OF THE EXAMINATION OF THE LEGISLATIVE PROPOSAL

ARTICLE 2 - BENEFICIARIES AND SCOPE

Beneficiaries - Article 2 (1)

Two main positions dominated the debate on this issue. A number of delegations indicated that they could go along with the Commission's proposal to *extend the right of access to the documents of the institutions to any natural or legal person*, whereas other delegations objected to the proposed modification of Article 2 (1) on the grounds that Article 255 TEC specifically refers to citizens of the European Union and any natural or legal person residing or having its registered office in a Member State.

Exclusion of documents submitted to Courts by parties other than the institutions - Article 2 (5)

With regard to this issue, delegations were equally divided into two groups:

A large group of delegations were in favour of the principle of *excluding from the scope of the Regulation documents submitted to the Courts by parties other than the institutions*, as proposed by the Commission. Certain delegations could also go along with an amendment tabled by AT, GR and IT to the effect that any documents submitted to the Courts, as well as internal legal advice given to an institution by its own legal service, would be excluded from the scope of the Regulation ("option 1") [7]. DE made an oral amendment, suggesting that all documents submitted to the institutions in Court proceedings be excluded ("option 2")[8].

However, another group of delegations took the opposite view. They considered that the Commission's proposal would create block exemptions of different kinds and therefore preferred the amendments tabled respectively by the European Parliament and by FI, LT and SI, according to

[7] See doc. 16338/08, p. 2 as well as the synoptic overview set out below , p. 18.
[8] See the synoptic overview in the annex to this report, p. 18.

which the provisions of Article 2 (5) and 2 (6) of the Recast should be deleted altogether ("option 3") [9].

Exclusion of documents related to the investigative powers of the institutions - Article 2 (6)

According to the Commission's proposal, documents forming part of the administrative file of an investigation or of proceedings concerning an act of individual scope shall not be accessible to the public until the investigation has been closed or the act has become definitive. *Documents containing information gathered or obtained from natural or legal persons by an institution in the framework of such investigations shall not be accessible to the public*. The Commission considers, moreover, that disclosure of such information would cause serious harm to its capacity to carry out investigations [10].

The discussion on this provision was marked by two different approaches: Some delegations backed the Commission's proposal, whereas other delegations considered that the *protection given to confidential information in sectorial acts* should be reflected in the Regulation. Furthermore, in the view of certain delegations, documents relating to *infringement proceedings* should be covered by Article 2 (6), and hence *temporarily excluded* from the scope of the Regulation. One delegation would prefer this exclusion to be permanent[11].

As indicated above (see the last paragraph on page 3 of this report), a number of delegations shared, however, the position of the European Parliament with regard to Article 2 (6)[12], considering that the proposed amendment would *effectively limit the scope of the Regulation* and that any need to withhold documents relating to investigations and/or administrative procedures leading to an act of individual scope ought to be examined *on a case by case basis* in the light of the exceptions provided for in Article 4 of the Regulation.

ARTICLE 3 - DEFINITIONS

Definition of document - Article 3 (1)

With regard to the concept of "document", the Commission proposes, in Article 3(1), first sentence, to define it as *"any content whatever its medium (...) drawn up by an institution and formally transmitted to one or more recipients or otherwise registered, or received by an institution"*, and in Article 3(1), second sentence, to extend the definition to *"data contained in electronic storage,*

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9 See doc. 8751/09, pp. 5 - 6, 8778/09, pp.2-3, and the synoptic overview below, p. 18.
10 See also the background information provided in doc. 17484/08, pp. 3 - 4.
11 See amendment by DE reproduced in the synoptic overview below, p. 19.
12 See doc. 8751/09, pp. 5 - 6 and the synoptic overview below, p. 19.

processing and retrieval systems (...), if they can be extracted in the form of a printout or electronic format copy using the available tools for the exploitation".

For its part, the European Parliament proposes to maintain the existing definition of document in Article 3(1), first sentence, and to insert, *inter alia*, the following additional provision in Article 3(1), second sentence: *"The functions for the retrieval of information stored in electronic storage systems by the institutions shall be adapted in order to satisfy repeated requests from the public which cannot be satisfied using the tools currently available for the exploitation of the system".*In a joint proposal for an amendment, the NL, EE and DK delegations suggested to maintain the existing wide definition of document, laid down in Article 3(1) of Regulation (EC) 1049/2001, which they considered to be one of the cornerstones of the current Regulation. This definition should therefore only be modified for substantive reasons [13]. They welcomed however the Commission's proposal to define as "documents" *"data contained in electronic storage and retrieval systems".*

While most of the delegates who intervened in the debate on this issue shared or sympathised with the amendment of the NL, EE and DK delegations, a few delegations could, at least in principle, go along with the Commission's proposal.

None of the delegations pleaded in favour of the amendments to Article 3(1), first and second sentence, which had been tabled by the European Parliament.

ARTICLE 4 - EXCEPTIONS

Protection of public security including the safety of natural or legal persons - Article 4(1)(a)

In this provision, the Commission proposed to include the words "*safety of natural and legal persons*" in order to clarify that the exception also covers the security of *individuals*, such as members of military or civilian missions working in an unsafe environment, or of *legal persons* as, for example, humanitarian associations operating in unsafe countries.

The discussion in the Information Working Party demonstrated *widespread support for the aim* of the Commission's proposal, although it remained unclear whether all delegations could go along with the wording of the envisaged provision.

Some delegations accepted the proposal of the Commission as it stood, whereas other delegations asked the Commission for a clarification of the envisaged amendment in writing. A number of delegations expressed doubts about the need to modify the existing exception on the protection of

[13] See document 8778/09, p. 5.

public security and about the need to refer explicitly to *legal persons*, since legal persons should normally be covered by the exception concerning the protection of *natural persons.* Certain delegations wondered whether the definition of *"public security"* also covered the notion of the *"security of the state"*.

None of the delegations was in favour of EP amendment no. 47, which limited this exception to cover *"the internal public security of the European Union or one or more of its Member States"*. In reply to the observations made by delegations, the Commission confirmed that the notion of *"public security*" did include the notion of the *"security of the state"*. It moreover provided delegations with a note highlighting the need for protecting the safety of natural and legal persons, mentioning, by way of example, the security needs in the Gaza Strip. In the light of the concrete experience acquired in notably that geographic area, the Commission considered that the wording of the current exception on the protection of public security was too vague and - consequently - insufficient.

Protection of the environment, such as breeding sites of rare species - Article 4(1)(e)

With a view to align Regulation 1049/2001 with the provisions stemming from the Århus Regulation, the Commission proposes to insert *an additional exception to the right of access, where the disclosure of a document would undermine the protection of the public interest as regards the environment, such as breeding sites of rare species.*

It appeared from comments made during the examination of this provision that all delegations participating in the discussion *agree with the aim of the Commission's proposal*, but remain divided on the legislative approach to take.

Thus, although certain delegations could agree to the principle underlying the Commission proposal, they would prefer to introduce one single reference to Regulation (EC) No 1367/2006 into Regulation 1049/2001. They took the view that the provisions of the "Århus Regulation" constituted a *lex specialis* in relation to the general rules on access to documents set out in Regulation 1049/2001. The *lex specialis* would prevail in case of conflict between the two instruments (Regulation 1367/2006 and Regulation 1049/2001).

Other delegations were in favour of the Commission's proposal, considering that a simple reference to the relevant provisions of Regulation 1367/2006 would be insufficient. One delegation considered, moreover, that there was a clear need, for the benefit of the citizens and in the interest of legal clarity, to integrate all relevant exceptions concerning access to environmental information into the Regulation on access to documents of the EU institutions.

Protection of commercial interests of a natural or legal person and protection of intellectual property rights - Article 4(2)(a) and (b)

In Article 4(2), the Commission proposes to divide the provision concerning the protection of commercial interests and intellectual property rights into *two separate parts* (Article 4, paragraph 1, points (a) and (b)).

This modification shall be seen in the light of Article 4(4) of the recast proposal, where the *public interest in disclosure* of information concerning emissions into the environment *overrides by definition* the protection of commercial interests, but not necessarily the protection of intellectual property rights. This means in practice, that there is *no need for a balancing of interests*, in as far as the principle laid down in Article 4(4) second sentence applies, whereas *such a balancing should be made, where disclosure could harm the protection of intellectual property rights or other interests to be protected under Article 4(2) and 4(3).*

These provisions did not give rise to any comments by delegations.

Protection of legal advice and court, arbitration and dispute settlement proceedings - Article 4(2)(c)

- ***Dispute settlement***

In Article 4(2), point (c), the Commission proposes to clarify the provision on the protection of court proceedings and legal advice by including the words *"arbitration and dispute settlement proceedings".*

The discussion on this issue demonstrated that in spite of *widespread support* within the Working Party *for the aim* of the proposed amendment, a number of delegations questioned the need for any specific mentioning of *dispute settlement proceedings* in the Regulation.

Some delegations were in favour of the Commission's proposal, whereas other delegations opposed the idea of inserting the words *"arbitration and dispute settlement"* into this provision [14].

- ***Protection of legal advice.***

Given that the recast proposal was adopted by the Commission. before the ECJ handed down its ruling in case 39/05 P (*Turco v Council*), the consequences of this ruling have not been taken into account in the legislative proposal.

[14] See doc. 9716/09, pp. 2 – 3.

So far, two main approaches to the issue have emerged within the IWP:

Thus, a large number of delegations have backed or at least shown sympathy for the principle behind an amendment tabled by AT to the effect that the refusal of access to documents containing legal advice or relating to court, arbitration and dispute settlement proceedings (including the pre-litigation stages of infringement procedures) would become *mandatory* under Article 4(1) of the Regulation and therefore not subject to any public interest test ("option 1") [15] .

A second variant of this approach, reflected in an amendment by the DE delegation, implies acceptance of the wording of Article 4(2)(c) suggested by the Commission, introduction of a specific provision concerning infringement procedures (see below) and deletion of any reference to *"an overriding public interest in disclosure"* in Article 4(2) ("option 2") [16].

Other delegations considered that the "Turco" ruling involves no particular consequences that ought to be taken into account in the legislative proposal. These delegations pleaded in favour of maintaining the current provision on protection of legal advice, laid down in Article 4(2), second indent, of Regulation 1049/2001, where the protection of legal advice is balanced against the public interest in disclosure ("option 3") [17].

The representative of the Council Legal Service pointed out that the presumption of the confidentiality of the internal legal advice is an essential condition for the work of the Legal Service. Since the judgment of the 1 July 2008, that presumption is not guaranteed any more. That impacts on the content of the Legal Service opinions and, accordingly, on the Institution's interest in receiving *"frank, objective and comprehensive advice"*.

Infringement procedures

As mentioned above, several delegations suggested that a specific exception be introduced (either under Article 4(1) or Article 4(2)) concerning documents established within the framework of infringement proceedings - including the pre-litigation stages of such proceedings. A number of delegations were opposed to these proposals, as they considered that the current provision on the protection of the purpose of investigations already applies to documents relating to infringement procedures.

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[15] See doc. 16338/08, p. 4 and the synoptic overview in the annex to this report, p. 24. It should be recalled that three delegations (AT, GR and IT) have tabled an amendment to Article 2 (5) implying that *"internal legal advice given to an institution by its own legal service"* would be excluded from the scope of the Regulation altogether.

[16] See doc. 16338/08, pp. 6 - 7 as well as the synoptic overview below, p. 24.

[17] See doc. 9716/09, pp. 2 – 3 and the synoptic overview below, p. 24.

Protection of the objectivity and impartiality of selection procedures - Article 4(2)(e)

The Commission proposes to introduce a new provision in order to clarify that Regulation 1049/2001 should not be used to circumvent specific provisions of the Staff Regulations and the Financial Regulation, the purpose of which is to protect the objectivity and impartiality of recruitment procedures, public procurement procedures and procedures for distribution of grants from EU funds.

The European Parliament has tabled an amendment to the effect that this exception to the right of access should be *limited in time*. This means in practice, that it should be invoked only, until a final decision has been taken in procurement or in recruitment procedures [18].

In spite of general support for the aim of the Commission's proposal, a number of delegations requested a more precise wording of this provision.

One delegation pleaded in favour of the amendment tabled by the European Parliament.

Overriding public interest deemed to exist where the information requested relates to emissions into the environment - Article 4(4)

The Commission proposes to insert a new provision, stipulating that an overriding public interest in disclosure of a given document is deemed to exist where the information requested relates to emissions into the environment.

The European Parliament has tabled an amendment (no. 53) stipulating that *"A strong public interest in disclosure exists where the requested documents have been drawn up or received in the course of procedures for the adoption of EU legislative acts or of non-legislative acts of general application."* [19]

There was broad support within the IWP for the Commission's proposal, although a few delegations expressed doubts as to the benefits of incorporating the provisions of the Århus Regulation into Regulation 1049/2001.

None of the delegations were in favour of the amendments tabled by the European Parliament on this issue.

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[18] See doc. 9234/09, p. 6.

[19] The EP proposal foresees moreover, that *"when balancing the public interest in disclosure, special weight shall be given to the fact that the requested documents relate to the protection of fundamental rights or the right to live in a healthy environment."* See doc. 9234/09, p. 8.

Protection of personal data - Article 4(5)

The Commission proposal foresees, as a general rule, that names, titles and functions of public office holders and civil servants in relation with their professional activities be made public, whereas any other personal data should only be disclosed following a previous compliance check with the data protection legislation.

While there was no support among delegations for the solution proposed by the Commission, three different approaches emerged from the discussion on Article 4(5).

One group of delegations would prefer to keep the current wording in Article 4(1)(b) of Regulation 1049/2001, at least until the European Court of Justice handed down its final judgment on this matter (*Commission v Bavarian Lager* (C-28/08 P)). This position is shared by the European Data Protection Supervisor (EDPS).

As a second best solution, some of these delegations as well as the EDPS could go along with the proposed amendments 90, 96 and 102 of the European Parliament[20]. These amendments contain *no reference to the EC data protection legislation*. Following this approach, personal data would not be disclosed if disclosure would harm the *privacy* or the *integrity* of the person concerned, unless the data relate solely to the professional activities of a public person or there were an overriding public interest in disclosure. Another group of delegations took the opposite view and backed an amendment tabled by the UK delegation[21], according to which personal data are *disclosed only* in accordance with the relevant Community legislation on data protection.

ARTICLE 5 - CONSULTATIONS

Consultations on applications concerning documents from a Member State - Article 5 (2)

Following the judgment of the Court of Justice in case C-64/05 P (IFAW), the Commission proposes that this ruling be transposed as follows: The institutions shall consult the authorities of a Member State, where they receive applications for access to documents originating from that Member State (other than documents transmitted in the framework of procedures leading to a legislative act or a non-legislative act of general application). As a general rule, the institutions holding the requested document shall disclose it, unless the Member State gives reasons for withholding it – either on the basis of the exceptions laid down in Article 4 or on the basis of specific provisions laid down in its national law. The institutions shall appreciate the adequacy of

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[20] See also the the opinion of the EDPS on this matter (reproduced in doc. 11782/08, pp. 12 - 14) and his comments on the EP amendments set out in doc. 6884/09 pp. 4-6.)

[21] See doc. 16338/08, p. 5.

the reasons given by the Member State insofar as they are based on exceptions laid down in this Regulation.

In its amendment no. 91, the European Parliament refers to Article 296, paragraph 1, a), of the EC Treaty, which stipulates that *"no Member State shall be obliged to supply information the disclosure of which it considers it considers contrary to its essential security interests"*.

Two opposite approaches, none of which corresponded to the solution proposed by the Commission, prevailed in the discussion on this issue. The DK, EE FI and SI delegations proposed with the support of other delegations an amendment to the effect that Member State documents which were held by the EU institutions should be assessed by the institutions concerned on the sole basis of Regulation 1049/2001 ("option 1") [22], whereas another group of delegations were strongly opposed to the principle of assigning to the EU institutions the task of assessing the adequacy of the reasons given for refusing access to a document originating from a Member State ("option 2") [23].

One delegation took an *intermediate position* (close to the solution set out in the Commission's proposal) according to which Member States should also be able to rely upon provisions established in their national legislation, on the condition that these provisions fall within the scope of the exceptions provided for in Regulation 1049/2001. The Institutions should be entitled to make a *"marginal assessment"* of the reasons invoked by Member States ("option 3") [24].

None of the delegations pleaded in favour of amendment 91 tabled by the European Parliament.

A majority of delegations agreed that Member States need more time than the five days currently foreseen in the internal rules of the institutions to reply to consultations by the EU institutions concerning requests for public access to documents.

ARTICLE 6 - APPLICATIONS

Request by the institutions for clarification, where the documents requested can not be identified - Article 6 (2)

The Commission proposes that it be explicitly mentioned in Article 6(2) that the institutions shall ask the applicant to clarify his or her request in those cases, where the application for access to documents is too vague and/or where the requested document(s) can not be identified. The Commission moreover proposes to introduce an additional provision to the effect that *the time limits provided under Articles 7 and 8 shall start to run when the institution concerned has received the requested clarifications*.

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22 See doc. 10443/09, pp. 2 - 3 as well as the synoptic overview at p.29.
23 See doc. 16338/08, pp. 2-5 and the synoptic overview at p.29.
24 See doc. 11065/09, p. 2 and the synoptic overview below, p. 30.

In its amendment 62, the European Parliament suggests that the institution concerned contact the applicant within a time-limit of 15 working days with a view to clarify the request.

There was widespread support within the Working Party for the modifications envisaged by the Commission, although certain delegations thought that Article 6(2) as modified was too open-ended and raised the question of remedies available to applicants in case an application is found unclear. One delegation pointed out that a correct identification of the requested documents was in the interest of the applicant, and added that the applicant would, in case the institution concerned did not take appropriate action within 15 days from the reception of the request, be entitled to lodge a confirmatory request.

In reply to these observations, and commenting on the amendment proposed by the European Parliament, the Commission said that, from its own perspective, not even a time limit of 15 working days (as suggested by the European Parliament) would be needed, since the relevant Commission services would act immediately, if the documents requested proved impossible to identify.

ARTICLE 8 - PROCESSING OF CONFIRMATORY APPLICATIONS

Extension of the time limit for the processing of a confirmatory request from 15 to 30 working days - Article 8 (1)

The Commission proposal foresees an extension of the time limit for the processing of confirmatory requests from 15 to 30 working days, taking into account that the period for finalising and replying to confirmatory requests has to be extended in roughly 85 % of the cases. The extension of the time limit is in the interest of the applicants, since it will enable the institutions to thoroughly examine the often complex confirmatory requests which - in the case of the Council - also 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. [25]

The European Parliament prefers to maintain the current deadline of 15 working days.

While certain delegations questioned the need for a general extension of the time limit to 30 working days, most delegations backed the Commission proposal.

[25] In 2008, the average time for replying to *confirmatory request* was 24 days, which obliged the Council to extend the time limit for processing such requests in 20 out of 24 cases.

Reference to the external remedies provided for in Article 8 (3)

One delegation suggested that the words *"in accordance with Article 3"* be inserted into Article 8(1), second sentence, in order to clarify that the remedies available to the applicant at this stage are the *external remedies* mentioned in Article 8(3) of the recast proposal and made an oral amendment to that effect. The Commission welcomed the suggested modification.

ARTICLE 10 - ACCESS FOLLOWING AN APPLICATION

Enforcement of rules on payment for documents made available to the public on demand - Article 10 (5)

In Article 10(5), the Commission proposes to insert a new paragraph, which clarifies that access to documents may in certain cases be subject to the payment of a fee. The purpose of this paragraph is *not to create a new exception*, but to ensure that Regulation 1049/2001 is *not used to circumvent specific rules on payment* for documents that are made available to the public on demand, but which are not free of charge [26].

A number of delegations agreed with the principle of this amendment, although they considered that the wording of the new paragraph was unclear. One delegation made an oral amendment, suggesting that the words *"shall not derogate from specific modalities"* be replaced with the words "*without prejudice to specific modalities governing access laid down in EC or national law"*. At first sight, a large number of delegations seemed to be in favour of this suggestion.

ARTICLE 12 - DIRECT ACCESS TO DOCUMENTS

Direct access to legislative documents - Article 12 (1) and other categories of documents - Article 12 (4)

The Commission proposes to modify the wording of Article 12(1) with a view to ensure that direct access be granted to documents which are part of procedures leading to the adoption of EU legislative acts or non-legislative acts of general application, whereas the current Article 12(1) contains more vague terms (*"The institutions shall as far as possible make documents directly accessible ..."*). Other categories of documents that are already directly accessible to the public shall

[26] Such rules apply, for example, to documents issued by the Office for Harmonisation in the Internal Market (OHIM) in Alicante (see Regulation (EC) No 40/94 of 20 December 1993 on the Community Trade Mark (JO L 11, 14.01.1994, p. 1)) or the European Air Safety Agency (EASA) in Cologne (see Regulation (EC) No 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (OJ L 240/2002, p. 1)).

continue to be made public in accordance with the rules of procedure of each institution (Article 12(4)).

The European Parliament proposes, for its part, to maintain the wording of the current Article 12(1) and proposes furthermore, in a second amendment, that full electronic access be given to all documents, particularly those drawn up or received in the course of procedures for the adoption of EU legislative acts or non-legislative acts of general application.

The delegations intervening in the discussion on this article backed the Commission proposal, but would prefer that the current Article 12(1) be maintained as well, as suggested by the European Parliament, the two provisions being complementary.

ARTICLE 16 - REPRODUCTION OF DOCUMENTS

Consultation of documents "in situ" without possibility to copy, reproduce or exploit their content

The purpose of the Commission proposal is to clarify that where the information contained in a document, held by an institution, is *covered by the existing rules on copyright*, possible access granted to the document concerned will be limited to a right to *consult the document "in situ"* without any possibility to copy, reproduce or exploit the content of the document.

The European Parliament has tabled one amendment (no. 82) , suggesting that the current wording of Article 16 be maintained.

Most of the delegations, which commented on this Article, backed the Commission proposal. None of them pleaded in favour of the amendment proposed by the European Parliament.

III. CONCLUDING OBSERVATIONS

During the second quarter of 2009, the Information Working Party has proceeded to a comprehensive "article by article" examination of the Commission's proposal for a recast of Regulation 1049/2001 with a view to enable the Council to reach a *general approach* on this proposal within a reasonable timeframe.

The discussions which have taken place so far seem to indicate that there is *widespread support* among delegations *for the aim of the Commission's proposal* as regards the

- protection of public security including the safety of natural or legal persons - Article 4(1)(a), first indent;

- protection of the environment, such as breeding sites of rare species - Article 4(1)(e);
- protection of the objectivity and impartiality of selection procedures - Article 4(2)(e);
- the principle that an overriding public interest is deemed to exist where the information requested relates to emissions into the environment - Article 4(4);
- the institutions' obligation to ask the applicant for clarification of his or her request, where the applicant is too vague and/or where the requested document(s) can not be identified, and the principle that the time limits provided for in Article 7 and 8 of the Regulation shall only start to run when the institution concerned has received the requested clarifications - Article 6(2);
- extension of the time limit for the processing of confirmatory requests from 15 to 30 working days - Article 8(1);
- enforcement of rules on payment for documents made available to the public on demand - Article 10(5);
- the principle of granting direct access to documents which are part of procedures leading to adoption of EU legislative acts or non-legislative acts of general application - Article 12(1); and
- the rule on consultation of documents *"in situ"* without possibility to copy, reproduce or exploit their content - Article 16.

Moreover, <u>*all delegations*</u> seem to *accept* the modification proposed by the Commission as regards the current Article 4(2), first indent, of the Regulation concerning the protection of commercial interests of a natural or legal person and protection of intellectual property rights - Article 4(2)(a) and (b).

A <u>*large group of delegations*</u> prefer the current definition of documents set out in Article 3(1) of Regulation (EC) No.1049/2001.

The *more divisive issues* are the modifications proposed by the Commission with regard to

- the widening of the scope of the Regulation as regards the beneficiaries of the right of access - Article 2(1);
- the exemption of documents submitted to Courts by parties other than the institutions - Article 2(5);
- the exemption of documents related to the investigative powers of the institutions from the scope of the Regulation - Article 2(6);
- protection of legal advice and court, arbitration and dispute settlement procedures - Article 4(2)(c);

- the possible introduction of a specific exception on protection of infringement procedures under Article 4(1) or Article 4(2);
- the protection of personal data (Article 4(5)); and
- consultations on requests for access to documents originating from Member States (Article 5(2)); almost all delegations agree, however, that Member States need more time than the five days foreseen in the internal rules of the institutions to reply to consultations by the Institutions on requests for access to documents.

Commission proposal for Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Amendments tabled by delegations
Article 2 **Beneficiaries** [1] **and scope** 1. Any ~~citizen of the Union, and any~~ natural or legal person ~~residing or having its registered office in a Member State,~~ ~~has~~ ⌦ shall have ⌫ a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation. ~~2. The institutions may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State.~~		.
~~3~~2. This Regulation shall apply to all documents held by an institution, ~~that is to say~~ ⌦ namely ⌫ , documents drawn up or received by it and in its possession ⌦ concerning a matter relating to the policies, activities and decisions falling within its sphere of responsibility ⌫, in all areas of activity of the European Union. *3. Without prejudice to Articles 4 and 9, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register. In particular, documents drawn up or received in the course of a legislative procedure shall be made directly accessible in accordance with Article 12.*		

[1] A number of delegations objected to the proposed modification as regards the beneficiaries of the right of access on the grounds that Article 255 of the EC Treaty specifically refers to citizens of the Union and any natural or legal person residing or having its registered office in a Member State, whereas other delegations could go along with the modification or at least with the aim of the proposal.

Commission proposal for Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Amendments tabled by delegations
~~5~~4. Sensitive documents as defined in Article 9(1) shall be subject to special treatment in accordance with that Article 5. This Regulation shall not apply to documents submitted to Courts by parties other than the institutions.[2]	**Amendment 32** **(Cashman)** **Article 2, paragraph 5** *deleted*	**Option 1** (as set out in .16338/08, p. 2). **"This Regulation shall not apply to internal legal advice given to an institution by its own legal service and to documents submitted to Courts"**, **Option 2** - Oral amendment made by DE **Article 2,** paragraph 5 This Regulation shall not apply to documents submitted to Courts by parties other than the institutions**, and to documents submitted to the institutions in Court proceedings.** **Option 3** (see document 8778/09, p. 2) **Article 2,** paragraph 5 ***deleted***

[2] A large group of delegations were in favour of Cion.'s proposal to exclude from the scope of the Regulation documents submitted to the Courts by parties other than the institutions. Some of them were also in favour of the amendment set out under **option 1**, and hence of excluding any documents submitted to the Courts, as well as internal legal advice given to an institution by its own legal service, from the scope of the Regulation. DE suggested that the scope of Article 2 (5) be extended to include any document submitted to the institutions in court proceedings (**option 2**). Another group of delegations took the opposite view, considering that the Commission's proposal would create various sort of block exemptions. These delegations therefore backed the amendment set out under **option 3**, suggesting that the provisions of Article 2 (5) and 2 (6) of the Recast should be deleted altogether.

Commission proposal for Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Amendments tabled by delegations
6. Without prejudice to specific rights of access for interested parties established by EC law, documents forming part of the administrative file of an investigation or of proceedings concerning an act of individual scope shall not be accessible to the public until the investigation has been closed or the act has become definitive.[3] Documents containing information gathered or obtained from natural or legal persons by an institution in the framework of such investigations shall not be accessible to the public.[4] ~~6~~7. This Regulation shall be without prejudice to rights of public access to documents held by the institutions, which might follow from instruments of international law or acts of the institutions implementing them.	**Amendment 33** **(Cashman)** **Article 2, paragraph 6** *deleted*	**Amendment** (as set out in doc. 8778/09, p. 2) **Article 2,** paragraph 6 *deleted*[3] **Oral amendment** made by **DE** **Article 2,** paragraph 6, last sentence Documents containing information → **concerning natural or legal persons as well as Member States**← gathered or obtained by an institution in the framework of such investigations shall not be accessible to the public.

[3] Two different approaches emerged from the discussions on this provision: Some delegations backed the modifications proposed by Cion., whereas other delegations considered that the *protection given to confidential information in sectorial acts* should be reflected in the Regulation. Moreover, in the view of certain delegations, documents relating to *infringement proceedings* should be covered by Article 2 (6), and hence *temporarily excluded* from the scope of the Regulation.
A number of delegations shared, however, the position of the European Parliament with regard to Article 2 (6), considering that the proposed amendment would *effectively limit the scope of the Regulation.* They therefore suggested that Article 2 (6) be deleted.

[4] Cion.: Documents containing information obtained from individuals or undertakings gathered solely for the purposes of the investigations referred to above shall be excluded from the scope of the Regulation, since their disclosure would cause serious harm to the capacity of the Commission to carry out such investigations (see also doc. 17484/08, pp. 3 - 4).

Commission proposal for Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Amendments tabled by delegations
Article 3 **Definitions** For the purpose of this Regulation: (a) «document» ~~shall mean~~ ⌦ means ⌫ 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~~[5] [6] ⌦ drawn-up by an institution and formally transmitted to one or more recipients or otherwise registered, or received by an institution;	**Amendment 36** **(Cashman)** **Article 3, point a (Art. 4)** *(a) «document» shall mean any data or 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;*	**Amendment** (set out in doc. 8778/09, p. 5) **Article 3(a)** *«document» means any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) ~~drawn-up by an institution and formally transmitted to one or more recipients or otherwise registered, or received by an institution~~**;** data contained in electronic storage, processing and retrieval systems are documents if they can be extracted in the form of a printout or electronic-format copy using the available tools for the exploitation of the system.* [5]

[5] In their joint proposal for an amendment, the NL, EE and DK delegations suggested to maintain the existing definition of documents, laid down in Article 3 (1) of Regulation (EC) 1049/2001. They considered the wide definition of documents to be one of the cornerstones of the current Regulation, which should only be modified for substantive reasons. In their view, the Commission has not demonstrated why the current definition ought to be amended. They welcomed, however, the Commission's proposal to define as "documents" *"data contained in electronic storage and retrieval systems"*.

[6] Most of the delegations, which intervened in the debate on this issue, shared or sympathised with the amendment of the NL, EE and DK delegations. A few delegations could, however, go along with the Commission's proposal, at least in principle.

Commission proposal for Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Amendments tabled by delegations
data contained in electronic storage, processing and retrieval systems are documents if they can be extracted in the form of a printout or electronic-format copy using the available tools for the exploitation of the system ⇦;	**Amendment 36** **(Cashman)** **Article 3, point a (Art. 4) (continued)** *information contained in electronic storage, processing and retrieval systems (including external systems used for the institution's work) shall constitute a document or documents if it can be extracted in the form of one or more printouts or electronic-format copies using any reasonably available tools for the exploitation of the system. An institution that intends to create a new electronic storage system, or to substantially change an existing system, shall evaluate the likely impact on the right of access guaranteed by this Regulation and act so as to promote the objective of transparency. The functions for the retrieval of information stored in electronic storage systems by the institutions shall be adapted in order to satisfy repeated requests from the public which cannot be satisfied using the tools currently available for the exploitation of the system;* [7]	
(b) «third party» ~~shall mean~~ ⌦ means ⌫ any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries.		

[7] None of the delegations that intervened in the debate pleaded in favour of the amendments to Article 3 (1), first and second sentence, which had been tabled by the European Parliament.

Commission proposal for Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Amendments tabled by delegations
Article 4 **Exceptions** 1. The institutions shall refuse access to a document where disclosure would undermine the protection of: ~~(a)~~ the public interest as regards:		
(a) public security ⇨ including the safety of natural or legal persons ⇦ ~~;~~.[8]	**Amendment 47** **Article 4 – paragraph 1 – point a (Art. 6(1)a)** (a) *the internal* public security *of the European Union or of one or more of its Member States*;[9]	
(c) international relations~~;~~ (d) the financial, monetary or economic policy of the Community or a Member State;		

[8] Cion. pointed out that the inclusion of the words "*safety of natural and legal persons*" in this provision aimed at clarifying that the exception also covered the security of individuals (such as members of military or civilian missions working in an unsafe environment) or of legal persons (such as humanitarian associations operating in unsafe countries). Cion. moreover provided delegations with a note highlighting the need for protecting the safety of natural and legal persons, mentioning, by way of example, the security needs in the Gaza Strip.

[9] None of the delegations was in favour of EP amendment no. 47, which limited this exception to cover *"the internal public security of the European Union or one or more of its Member States"*.

Commission proposal for Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Amendments tabled by delegations
(e) the environment, such as breeding sites of rare species. [10]		
~~(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.~~	**Amendment 49** **Article 3, point b a (Art 6(1) b)** *(b a) the privacy and the integrity of the individual, in accordance with Community legislation regarding the protection of personal data, in particular the rules applicable to the institutions as laid down in Article 286 of the EC Treaty as well as the principle of transparent and good administrative practice outlined in Article1c) of this Regulation*	
2. The institutions shall refuse access to a document where disclosure would undermine the protection of: (a) commercial interests of a natural or legal person~~;~~ ~~including intellectual property;~~ ⌦ (b) intellectual property rights; ⌫[11]		

[10] Cion.: The exception aimed at protecting the environment, laid down in Article 6(2) of Regulation (EC) No 1367/2006, is added under Article 4(1) of Regulation (EC) No 1049/2001 in order to align this Regulation with the provisions stemming from the Århus Convention.
In spite of widespread support for the aim of Cion's proposal, delegations remain divided on the legislative approach to take. Certain delegations, which considered that the provisions of the "Århus Regulation" constituted a *lex specialis* in relation to the general rules on access to documents set out in Regulation 1049/2001, would prefer to introduce one single reference to Regulation (EC) No 1367/2006 into Regulation 1049/2001. Other delegations were in favour of the Commission's proposal, considering that a simple reference to the relevant provisions of Regulation 1367/2006 would be insufficient. One delegation considered, moreover, that there was a clear need to integrate all relevant exceptions concerning access to environmental information into the Regulation on access to documents of the EU institutions.

[11] This modification shall be seen in the light of Article 4 (4) of the recast proposal, where the *public interest in disclosure* of information concerning emissions into the environment *overrides by definition* the protection of commercial interests, but not necessarily the protection of intellectual property rights. It did not give rise to any comments by delegations.

Commission proposal for Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Amendments tabled by delegations
(c) ⌦ legal advice and ⌫ court ~~proceedings~~ ⇨ , arbitration and dispute settlement proceedings ⇦ ~~and~~[12] ~~=~~ ; (d) the purpose of inspections, investigations and audits~~=~~ ;		**Option 1** (see doc. 16338/08, p. 4) **Article 4,** paragraph 1: "The institutions shall refuse access to a document where disclosure would undermine the protection of the public interest as regards: (…) → **(f) legal advice and court, arbitration and dispute settlement proceedings including the pre-litigation stages of infringement procedures;** ←". **Article 4,** paragraph 2 (c) *deleted* **Option 2** (see doc. 16338/08, pp. 6-7) "The institutions shall refuse access to a document where disclosure would undermine the protection of **(…)** **Article 4,** paragraph 2 (c) ⌦ legal advice and ⌫ court ~~proceedings~~ ⇨ , arbitration and dispute settlement proceedings ⇦ ~~and~~ ~~=~~ ; **(d) (new) infringement proceedings, including the preparatory stages thereof"** (…) ~~unless there is an overriding public interest in disclosure~~. **Option 3** (see doc. 9716/09, pp. 2 - 3) **Article 4,** paragraph 2 (c) : legal advice and court proceedings

[12] A large number of delegations backed or expressed sympathy for **options 1 and/or 2**. It should be noted that **option 1** implies that any refusal of access to documents containing legal advice or relating to court, arbitration and dispute settlement proceedings become *mandatory* and will therefore not be subject to any public interest test. It should be noted, however, that **option 2**, proposed by **DE,** does not include any reference to the *"overriding public interest in disclosure"* either. Another group of delegations were opposed to this principle and pleaded in favour of **option 3**, i.e. of maintaining the current provision on protection of legal advice, where the protection of legal advice is balanced against the public interest in disclosure.

Commission proposal for Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Amendments tabled by delegations
e) the objectivity and impartiality of selection procedures.[13] ~~unless there is an overriding public interest in disclosure.~~	**Amendment 51** **Article 4 – paragraph 2 – point e (Art. 6(2)e)** (e) the objectivity and impartiality of *public procurement* procedures *until a decision has been taken by the contracting institution, or of a Selection Board in proceedings leading to the recruitment of staff until a decision has been taken by appointing authority*.	

[13] Cion: The purpose of this provision is to avoid that that Regulation 1049/2001 be used to circumvent specific provisions of the Staff Regulations and the Financial Regulation, the purpose of which is to protect the objectivity and impartiality of recruitment procedures or public procurement procedures. In spite of widespread support of the proposal, several delegations requested a more precise wording of this provision. There was no support for the amendment tabled by the European Parliament, which implied that this exception to the right of access would be *limited in time*.

Commission proposal for Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Amendments tabled by delegations
⌦ 4. The exceptions under paragraphs (2) and (3) shall apply unless there is an overriding public interest in disclosure. ⌫ ⇨ As regards paragraph 2(a) an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment. ⇦[14]	**Amendment 53** **(Cederschiöld)** **Article 4 – paragraph 4 (Art. 6(3))** 4. The exceptions under paragraph (2) shall apply unless there is an overriding public interest in disclosure. *A strong* public interest in disclosure *exists* where *the requested documents have been drawn up or received in the course of procedures for the adoption of EU legislative acts or of non-legislative acts of general application. When balancing the public interest in disclosure, special weight shall be given to the fact that the* requested *documents relate to the protection of fundamental rights or the right to live in a healthy* environment.	
	Amendment 54 **Article 4 – paragraph 4 b (Art. 6(5))** *4b. Documents the disclosure of which would pose a risk to environmental protection values, such as the breeding sites of rare species, shall only be disclosed in conformity with Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies[1]. [1] **OJ L 264, 25.9.2006, p. 13.***	

[14] This modification was supported by most delegations, whereas none of the delegations were in favour of the EP-amendments no. 53 and 54.

Commission proposal for a Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Amendments tabled by delegations
5. Names, titles and functions of public office holders, civil servants and interest representatives in relation with their professional activities shall be disclosed unless, given the particular circumstances, disclosure would adversely affect the persons concerned. Other personal data shall be disclosed in accordance with the conditions regarding lawful processing of such data laid down in EC legislation on the protection of individuals with regard to the processing of personal data. [15]	**Amendments 90, 96 and 102** **(Jäätteenmäki; Frassoni; Cashman and Fava)** **Article 4 – paragraph 5 (Art. 6(6))** 5. *Personal data shall not be disclosed if such disclosure would harm the privacy or the integrity of the person concerned. Such harm shall not be deemed to be caused:* *– if the data relate solely to the professional activities of the person concerned unless, given the particular circumstances, there is reason to assume that disclosure would adversely affect that person;* *– if the data relate solely to a public person unless, given the particular circumstances, there is reason to assume that disclosure would adversely affect that person or other persons connected with him or her;* *– if the data have already been published with the consent of the person concerned.* *Personal data shall nevertheless be disclosed if an overriding public interest requires disclosure. In such a case, the institution or body concerned shall be required to specify the public interest. It shall give reasons why, in the specific case, the public interest outweighs the interests of the person concerned.* *Where an institution or body refuses access to a document on the basis of paragraph 1, it shall consider whether it is possible to grant partial access to that document.* [15]	**Amendment** tabled by the **UK** (see doc. 16338/08, p. 5). **Article 4,** paragraph 5 : **"Personal data shall be disclosed in accordance with the conditions regarding lawful processing of such data laid down in EC legislation on the protection of individuals with regard to the processing of personal data."** [15]

[15] One group of delegations would prefer to keep the current wording in Article 4(1)(b) of Regulation 1049/2001, at least until the European Court of Justice handed down its final judgment on this matter (*Commission v Bavarian Lager* (C-28/08 P)). This position is shared by the European Data Protection Supervisor (EDPS). As a second best solution, some of these delegations as well as the EDPS could go along with the proposed amendments 90, 96 and 102 of the European Parliament. Contrary to Parliament's amendment no. 49, amendments no. 90, 96 and 102 contain *no reference to the EC data protection legislation*. Following this approach, personal data would not be released to the public if disclosure would harm the *privacy* or the *integrity* of the person concerned, unless the data relate solely to the professional activities of a public person or there were an overriding public interest in disclosure. The amendment tabled by the UK delegation reflect the opposite view, i.e. that personal data should be disclosed only following a previous examination in order to ensure that such disclosure take place in full accordance with the EC legislation on data protection. There was no support in the IWP for the intermediate solution set out in the Commission's recast proposal.

Commission proposal for a Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Amendments tabled by delegations
6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released. 7. The exceptions as laid down in ~~paragraphs 1 to 3~~ this Article shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to ~~privacy~~ ⌦ the protection of personal data ⌫ or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.		

Commission proposal for a Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Amendments tabled by delegations
Article 5 **⌦ Consultations ⌫** ~~4~~1. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception ⌦ referred to ⌫ in ~~paragraph 1 or 2~~ Article 4 is applicable, unless it is clear that the document shall or shall not be disclosed. ~~5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.~~		

Commission proposal for a Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Amendments tabled by delegations[16]
2. Where an application concerns a document originating from a Member State, other than documents transmitted in the framework of procedures leading to a legislative act or a non-legislative act of general application, the authorities of that Member State shall be consulted. The institution holding the document shall disclose it unless the Member State gives reasons for withholding it, based on the exceptions referred to in Article 4 or on specific provisions in its own legislation preventing disclosure of the document concerned. The institution shall appreciate the adequacy of reasons given by the Member State insofar as they are based on exceptions laid down in this Regulation.	**Amendment 91** **(Cashman)** **Article 5 – paragraph 2 (Art. 7(2))** 2. Where an application concerns a document originating from a Member State, - *which has not been transmitted by the Member State in its capacity as a member of the Council, or* - *which does not concern information submitted to the Commission concerning the implementation of EC policies and legislation* the authorities of that Member State shall be consulted. The institution holding the document shall disclose it unless the Member State gives reasons for withholding it, based on the exceptions referred to in Article 4 or *in equivalent* provisions *of* its own legislation *or objects on the basis of Article 296(1) (a) of the EC Treaty that the disclosure would be contrary to its essential security interests. The institution shall assess the adequacy of reasons given by the Member State.*	**Option 1** (set out in doc. 10443/09, p. 2) **Article 5**, paragraph 2, second and third sentence: The institution holding the document shall disclose it unless the Member State gives reasons for withholding it, based on the exceptions referred to in Article 4 ~~or on specific provisions in its own legislation preventing disclosure of the document concerned~~. The institution shall appreciate the adequacy of reasons given by the Member State ~~insofar as they are based on exceptions laid down in this Regulation.~~ **Option 2** (set out in doc. 16338/08, pp. 2-3**)**. **Article 5**, paragraph 2, second sentence: "The institution holding the document shall disclose it unless the Member State →, **within the time limit provided for in Article 7,**← gives reasons for withholding it, based on the exceptions referred to in Article 4 or on specific provisions in its own legislation preventing disclosure of the document concerned. ~~The institution shall appreciate the adequacy of reasons given by the Member State insofar as they are based on exceptions laid down in this Regulation.~~

Commission proposal for a Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Amendments tabled by delegations[16]
		Option 3 (set out in document 11065/09, p. 2): **Article 5**, paragraph 2, second and third sentence: The institution holding the document shall disclose it unless the Member State gives reasons for withholding it, based on the exceptions referred to in Article 4 **or based on provisions in its own legislation insofar as these provisions regard a public interest deserving protection on the basis of Article 4 (1).** ~~or on specific provisions in its own legislation preventing disclosure of the document concerned~~. The institution shall appreciate the adequacy of reasons given by the Member State ~~insofar as they are based on exceptions laid down in this Regulation.~~
3. Where a Member State receives a request for a document in its possession, ~~originating~~ ⌦ which originates ⌫ 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.		

[16] Two opposite approaches emerged from the debate on this issue, none of which corresponded to the solution proposed by the Commission. One group of delegations backed an amendment to the effect that Member State documents which were held by the EU institutions should only be assessed on the basis of Regulation 1049/2001 (**option 1**), whereas another group of delegations were strongly opposed to the principle of assigning to the EU institutions the task of assessing the adequacy of the reasons given for refusing access to a document originating from a Member State (**option 2**). One delegation took an *intermediate position* (**option 3**), according to which Member States should also be able to rely upon provisions established in their national legislation, on the condition that these provisions fall within the scope of the exceptions provided for in Regulation 1049/2001.

Commission proposal for a Recast of Regulation COM (2008) 229 final	Technically admissible EP amendments	Amendments tabled by delegations
Article 6 **Applications** 1. Applications for access to a document shall be made in any written form, including electronic form, in one of the languages referred to in Article 314 of the EC Treaty and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application. 2. If an application is not sufficiently precise ⇨ or if the requested documents cannot be identified ⇦, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents. ⇨ The time limits provided for under Articles 7 and 8 shall start to run when the institution has received the requested clarifications. ⇦	**Amendment 62** **Article 6 – paragraph 2 (Art. 16(2))** 2. If an application is not sufficiently precise the institution shall *within 15 working days* ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents.	

Commission proposal for a Recast of Regulation COM (2008) 229 final	Technically admissible EP amendments	Amendments tabled by delegations
3. In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair ⇨ and practical ⇦ solution. 4. The institutions shall provide information and assistance to citizens on how and where applications for access to documents can be made.		

Commission proposal for a Recast of Regulation COM (2008) 229 final	Technically admissible EP amendments	Amendments tabled by delegations
Article 8 **Processing of confirmatory applications** 1. A confirmatory application shall be handled promptly. Within ~~15~~ ⇨ 30 ⇦[17] working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her~~, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively~~.	**Amendment 66** **Article 8 – paragraph 1 (Art. 18(1))** 1. A confirmatory application shall be handled promptly. Within *15* working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her.	**Oral amendment** made by **CY :** **Article 8,** paragraph 1, second sentence: In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her → **in accordance with paragraph 3** ←.[18]

[17] While certain delegations expressed some doubts as regards the need for a general extension of the time-limit to 30 working days (one of them suggesting that the Council Secretariat and the Commission should produce a joint explanatory memorandum, substantiating the need for this extension) there was widespread support for the Commission's proposal.

[18] The CY delegation suggested that the words *"in accordance with Article 3"* be inserted into Article 8 (1), second sentence, in order to clarify that the remedies available to the applicant at this stage are the *external remedies* mentioned in Article 8 (3) of the Commission proposal and not any other (internal) administrative remedy procedure (set up by the institution concerned).

Commission proposal for a Recast of Regulation COM (2008) 229 final	Technically admissible EP amendments	Amendments tabled by delegations
Article 8 (continued) ~~2~~2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given. 3. In the event of a total or partial refusal, the applicant may bring proceedings before the Court of First Instance against the institution and/or make a complaint to the European Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively. ~~3~~4. Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and ⌦ shall ⌫ entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.		

Commission proposal for a Recast of Regulation COM (2008) 229 final	Technically admissible EP amendments	Amendments tabled by delegations
Article 10 **Access following an application** 1. The applicant shall have access to documents either by consulting them on the spot or by receiving a copy, including, where available, an electronic copy, according to the applicant's preference. ~~The cost of producing and sending copies may be charged to the applicant. This charge shall not exceed the real cost of producing and sending the copies. Consultation on the spot, copies of less than 20 A4 pages and direct access in electronic form or through the register shall be free of charge.~~ 2. If a document ~~has already been released by the institution concerned~~ ⌦ is publicly available ⌫ and is easily accessible to the applicant, the institution may fulfil its obligation of granting access to documents by informing the applicant how to obtain the requested document.		

Commission proposal for a Recast of Regulation COM (2008) 229 final	Technically admissible EP amendments	Amendments tabled by delegations
Article 10 (continued) 3. Documents shall be supplied in an existing version and format (including electronically or in an alternative format such as Braille, large print or tape) with full regard to the applicant's preference ⌦ 4. The cost of producing and sending copies may be charged to the applicant. This charge shall not exceed the real cost of producing and sending the copies. Consultation on the spot, copies of less than 20 A4 pages and direct access in electronic form or through the register shall be free of charge. ⌫ 5. This Regulation shall not derogate from specific modalities governing access laid down in EC or national law, such as the payment of a fee.		**Oral amendment,** made by **FR** **Article 10,** paragraph 4: **Without prejudice to specific modalities governing access laid down in EC or national law, such as the payment of a fee, the cost of producing and sending copies may be charged to the applicant.** **Article 10, paragraph 5**: *deleted*

Commission proposal for a Recast of Regulation COM (2008) 229 final	Technically admissible EP amendments	Amendments tabled by delegations
Article 12 **Direct access ~~in electronic form or through a register~~ ⌦ to documents ⌫** ~~1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.~~ ~~2~~1. ~~In particular, legislative documents, that is to say,~~ ~~d~~Documents drawn up or received in the course of procedures for the adoption of ⌦ EU legislative ⌫ acts ~~which are legally binding in or for the Member States, should~~ ⌦ or non-legislative acts of general application shall ⌫ , subject to Articles 4 and 9, be made directly accessible ⌦ to the public ⌫ .	**(Title III - Method of access)** **(Article 14)** **Amendment 71** **Article 12, paragraph -1 (Art. 14(1))** *1. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.* **Amendment 72** **(Cappato)** **Article 12, paragraph 1 (Art. 14(2))** 2. *The institutions shall make all documents directly accessible to the public in electronic form or trough a register, particularly those* drawn up or received in the course of procedures for the adoption of EU legislative acts or non-legislative acts of general application.	

Commission proposal for a Recast of Regulation COM (2008) 229 final	Technically admissible EP amendments	Amendments tabled by delegations
~~3~~2. Where possible, other documents, notably documents relating to the development of policy or strategy, ~~should~~ ⌦ shall ⌫ be made directly accessible ⌦ in electronic form ⌫ . ~~4~~.3 Where direct access is not given through the register, the register shall as far as possible indicate where the document is located. 4. Each institution shall define in its rules of procedure which other categories of documents are directly accessible to the public.		

COM (2008) 229 final	Technically admissible EP amendments	Observations
Article 16 **Reproduction of documents** This Regulation shall be without prejudice to any existing rules on copyright which may limit a third party's right to obtain copies of documents or to reproduce or exploit released documents.	**(Article 8)** **Amendment 82** **(Svensson, Liotard)** **Article 16** This Regulation shall be without prejudice to any existing rules on copyright which may limit a third party's right to reproduce or exploit released documents.	
