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REPORT

from: General Secretariat of the Council
to : Delegations

No. Cion prop.: 9200/08 INF 103 API 23 JUR 192 CODEC 946 + COR 1 (COM(2008) 229 final)
No. prev. doc. 16343/1/08 REV 1 INF 252 API 88 JUR 532 CODEC 1661
5671/09 ADD 1 JUR 26 INF 5 CODEC 74 API 4
5671/1/09 REV 1 INF 5 API 4 CODEC 74 + COR 1 + COR 2
7791/09 INF 58 API 32 CODEC 380

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

Following the examination of Articles 2 and 3 of the Commission's recasting proposal at the IWP meeting on 21 April 2009, it was agreed to dedicate the next meeting of the Working Party, scheduled for 14 May 2009, to an examination of the modifications proposed by the Commission regarding Article 4 of Regulation (EC) 1049/2001.

In the context of this examination, the IWP should also take into account the relevant amendments, which were adopted by the European Parliament during its plenary session on 11 March 2009.

Delegations are aware that, as anticipated, the European Parliament has decided, in the meantime, to postpone the formal conclusion of its first reading of the Commission's proposal until the next legislative term. This decision does not, however, prevent the Council from continuing its "article by article" examination of the recasting proposal with a view to establish a *general approach* on the recast within a reasonable timeframe.

It is therefore suggested to continue the work on the access to documents Regulation at the forthcoming meeting on the basis of:

- the Commission's proposal for a recast of Regulation 1049/2001 (doc. 9200/08)
- the comments made by delegations during the first examination (doc. 5671/1/09 REV 1 + COR 1 + COR 2)
- the observations made by the Council Legal Service on the recasting proposal (doc. 5671/09 ADD 1)
- the admissible amendments tabled by the EP (as listed in annexes I and II to document 7791/09).

In line with the thematic approach applied during the first examination of the Commission's proposal, it is suggested to structure the discussion on the provisions of Article 4 of the recasting proposal around the following themes:

- (1) the extension of the first indent (point (a)) in paragraph 1 concerning the protection of public security to include **the safety of natural or legal persons** (Article 4, paragraph 1, point (a));
- (2) the insertion in Article 4, paragraph 1, of 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** (Article 4, paragraph 1, point (e));
- (3) the division of the provision in Article 4, paragraph 2, concerning **the protection of commercial interests and intellectual property rights** into *two separate parts* (Article 4, paragraph 2, points (a) and (b));
- (4) the extension of the third indent (point (c)) in paragraph 2 on the protection of court proceedings and legal advice to include **arbitration and dispute settlement proceedings** (Article 4, paragraph 2, point (c));
- (5) the insertion in Article 4, paragraph 2, of an additional exception to the right of access, where the disclosure of a document would undermine the protection of **the objectivity and impartiality of selection procedures** (Article 4, paragraph 2, point (e));

- (6) the insertion in Article 4, paragraph 4, of the recasting proposal of an additional 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** (Article 4, paragraph 4)
- (7) the **transfer of the provision in Article 4(1) (b)** of the current Regulation (EC) No 1049/2001 regarding **the protection of personal data** to a **new Article 4(5)**; this provision is reworded in order to clarify the relationship between the transparency rules and the rules concerning protection of personal data as laid down in Regulation (EC) No 45/2001 (Article 4, paragraph 5).

The table at annex sets out

- in its first column: the text proposed by the Commission
- in its second column: the relevant amendments tabled by the European Parliament
- in its third column: amendments proposed by delegations as well as references to the comments and observations made by delegations and the European Commission during the first examination of the recasting proposal as set out in document 5671/1/09 REV 1 + COR 1 + COR 2.

Commission proposal for Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Observations
<p style="text-align: center;"><i>Article 4</i></p> <p style="text-align: center;">Exceptions</p> <p>1. The institutions shall refuse access to a document where disclosure would undermine the protection of of <u>the</u> public interest as regards:</p>		
<p><u>(a)</u> public security ⇒ including the safety of natural or legal persons ⇐ of <u>the</u></p>	<p>Amendment 47 Article 4 – paragraph 1 – point a (Art. 6(1)a)</p> <p><i>(a) the internal public security of the European Union or of one or more of its Member States;</i></p>	<p>For comments and observations made by delegations, see document 5671/1/09 REV 1, page 10, footnote 6.</p>
<p><u>(c)</u> international relations;</p> <p><u>(d)</u> the financial, monetary or economic policy of the Community or a Member State;</p>		

Commission proposal for Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Observations
(e) the environment, such as breeding sites of rare species.		For comments and observations made by delegations, see document 5671/1/09 REV 1, page 11, footnote 7.
(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) <i>(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 Article 1c) of this Regulation.</i>	
<p>2. The institutions shall refuse access to a document where disclosure would undermine the protection of:</p> <p>(a) commercial interests of a natural or legal person, including intellectual property;</p> <p><input checked="" type="checkbox"/> (b) intellectual property rights; <input type="checkbox"/></p>		For comments and observations made by delegations, see document 5671/1/09 REV 1, page 12, footnotes 8 and 9.

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<p>(c) ☒ legal advice and ☒ court proceedings ⇒, arbitration and dispute settlement proceedings ← and and.</p> <p>(d) the purpose of inspections, investigations and audits;</p> <p>e) the objectivity and impartiality of selection procedures. unless there is an overriding public interest in disclosure.</p>	<p>Amendment 51 Article 4 – paragraph 2 – point e (Art. 6(2)e)</p> <p>(e) the objectivity and impartiality of <i>public procurement</i> procedures <i>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.</i></p>	<p>One delegation suggested that the provision in Article 4 (2) (c) be deleted and replaced with a new Article 4 (1) (f) 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 <i>mandatory</i>. The new Article 4 (1) (f) should read as follows: <u>"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; ←"</u> (see doc. 16338/08, p. 4).</p> <p>Another delegation proposed to introduce an additional exception in Article 4 (2) on the protection of infringement proceedings, including the preparatory stages thereof: <u>"The institutions shall refuse access to a document where disclosure would undermine the protection of (...) (d) infringement proceedings, including the preparatory stages thereof"</u> (see doc. 16338/08, pp. 6-7).</p>

Commission proposal for Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Observations
<p>3. Access to <input checked="" type="checkbox"/> the following documents <input checked="" type="checkbox"/> a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if <input checked="" type="checkbox"/> their <input checked="" type="checkbox"/> disclosure of the document would seriously undermine the institution's decision-making process <input checked="" type="checkbox"/> of the institutions: <input checked="" type="checkbox"/> , unless there is an overriding public interest in disclosure.</p> <p><input checked="" type="checkbox"/> (a) documents relating to a matter where the decision has not been taken; <input checked="" type="checkbox"/></p> <p><input checked="" type="checkbox"/> (b) documents <input checked="" type="checkbox"/> Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institutions 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.</p>		<p>For comments and observations made by delegations, see document 5671/1/09 REV 1, page 14, footnote 12.</p>

Commission proposal for Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Observations
<p>⊗ 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. ⇐</p>	<p>Amendment 53 (Cederschiöld) Article 4 – paragraph 4 (Art. 6(3))</p> <p>4. The exceptions under paragraph (2) shall apply unless there is an overriding public interest in disclosure. <i>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.</i></p>	<p>For comments and observations made by Cion. and by delegations, see document 5671/1/09 REV 1, page 14, footnote 13.</p>
	<p>Amendment 54 Article 4 – paragraph 4 b (Art. 6(5))</p> <p><i>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 bodies¹.</i></p> <p>¹ OJ L 264, 25.9.2006, p. 13.</p>	

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<p>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.</p>	<p>Amendments 90, 96 and 102 (Jäättelmäki; Frassoni; Cashman and Fava) Article 4 – paragraph 5 (Art. 6(6))</p> <p><i>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:</i></p> <ul style="list-style-type: none"> <i>– 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;</i> <i>– 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;</i> <i>– if the data have already been published with the consent of the person concerned.</i> <p><i>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.</i></p> <p><i>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.</i></p>	<p>During the first examination of the recasting proposal, one delegation proposed the following wording of Article 4 (5): : <u>"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."</u> (see doc. 16338/08, p. 5).</p>

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<p>6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.</p> <p>7. The exceptions as laid down in paragraphs 1 to 3 <u>this Article</u> 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 <input checked="" type="checkbox"/> the protection of personal data <input checked="" type="checkbox"/> or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.</p>		
