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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

17484/08 INF 293 API 98 JUR 578 CODEC 1879

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)

At the meeting of the Information Working Party held on 2 April 2009, it was agreed to resume the work on the recast of Regulation (EC) No 1049/2001 in order to enable the Council to reach a general approach or a common position on the recast within a reasonable timeframe.

To that end, the Working Party should proceed to a second "article by article" examination of the recasting proposal, while taking into account the relevant amendments, which were adopted by the European Parliament during its plenary session on 11 March 2009.

It is therefore suggested to structure the work on the transparency Regulation at the forthcoming meetings 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's Legal Service on the recasting proposal (doc. 5671/09 ADD 1)
- a non paper from the Commission concerning the addition of two new Articles to Article 2 of the Regulation (doc. 17484/08)
- the admissible amendments tabled by the EP (as listed in annexes I and II to document 7791/09).

The discussion at the forthcoming IWP meeting will be dedicated to the modifications proposed by the Commission regarding Articles 2 of 3 of the Regulation. In line with the thematic approach applied during the first examination of the Commission's proposal, it is suggested to structure the discussion around the following themes:

- (1) the **beneficiaries** of the right of access to documents (Article 2, paragraph 1);
- (2) the **exclusion from the scope** of the Regulation of documents submitted to EU Courts by parties other than the institutions (Article 2, paragraph 5);
- (3a) the **temporary exclusion from the scope** of the Regulation of documents established within the framework of an investigation or of proceedings concerning an act of individual scope (until the investigation has been closed or the act has become definitive) ((Article 2, paragraph 6, first sentence),
and
- (3b) the **exclusion from the scope** of the Regulation of documents containing information gathered in the framework of such investigations. (Article 2, paragraph 6, second sentence);
- (4) the definition of the concept of "document" which comprises two "sub-concepts":
 - (4a) the existing definition of "document", where the crucial issue is to determine the moment in time, **when a document becomes a document** (Article 3 (a), first sentence),
and

(4b) **data**, which are **stored electronically** (in a database) , and which can be considered as "documents", if they can be extracted in the form of a printout or an electronic format copy using the available tools for the exploitation of the database (Article 3 (a), last sentence).

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.

<p>Commission proposal for Recast of Regulation 1049/2001 (COM (2008) 229 final)</p>	<p>Technically admissible EP amendments</p>	<p>Observations</p>
<p><i>Article 2</i></p> <p>Beneficiaries and scope</p> <p>1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has <input checked="" type="checkbox"/> shall have <input type="checkbox"/> a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.</p> <p>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.</p>		<p>For comments and observations made by delegations, see document 5671/1/09 REV 1, page 5, footnote 1.</p>

Commission proposal for Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Observations
<p>32. 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.</p> <p>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.</p>		
<p>54. Sensitive documents as defined in Article 9(1) shall be subject to special treatment in accordance with that Article</p> <p>5. This Regulation shall not apply to documents submitted to Courts by parties other than the institutions.</p>	<p>Amendment 32 (Cashman) Article 2, paragraph 5</p> <p><i>deleted</i></p>	<p>Three delegations have proposed the following wording of Article 2 (5) "<u>This Regulation shall not apply to internal legal advice given to an institution by its own legal service and to documents submitted to Courts</u>", the purpose of this amendment being (a) to protect both the Governmental interests and the functioning of the legislative procedure and (b) to put on equal footing all the parties that have submitted documents to Courts (see doc.16338/08, p. 2).</p>

Commission proposal for Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Observations
<p>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. 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.</p> <p>67. 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.</p>	<p>Amendment 33 (Cashman) Article 2, paragraph 6</p> <p><i>deleted</i></p>	<p>For comments and observations made by Cion. and by delegations, see document 5671/1/09 REV 1, page 7, footnote 3. (For further clarifications by Cion. see also doc. 17484/08, pp. 3 - 4.)</p>

Commission proposal for Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Observations
<p style="text-align: center;"><i>Article 3</i></p> <p style="text-align: center;">Definitions</p> <p>For the purpose of this Regulation:</p> <p>(a) «document» shall mean <input checked="" type="checkbox"/> means <input checked="" type="checkbox"/> 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 <input checked="" type="checkbox"/> 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 <input checked="" type="checkbox"/> ;</p>	<p>Amendment 36 (Cashman) Article 3, point a (Art. 4)</p> <p><i>(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;</i></p>	<p>For comments and observations made by Cion. and by delegations, see document 5671/1/09 REV 1, page 8, footnote 4.</p>

Commission proposal for Recast of Regulation 1049/2001 (COM (2008) 229 final)	Technically admissible EP amendments	Observations
<p>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 i;</p>	<p>Amendment 36 (Cashman) Article 3, point a (Art. 4) (continued)</p> <p><i>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;</i></p>	
<p>(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.</p>		