



Statewatch analysis

Discussion of the new Access to Documents Regulation in the Council

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While the European Parliament (EP) has been moving towards its ‘first-reading’ vote on the proposed new Regulation on access to documents, the proposal has also been under discussion in the Council. The following analysis comments on the positions which Member States have been taking so far.

Scope of the Regulation (Art. 2)

Seven Member States object to expanding the scope of the rules officially to include non-citizens and non-residents of the EU, while five support this proposal. The seven Member States in opposition have enough votes for a ‘blocking minority’ (ie enough votes to block the proposal in Council if need be).

Comment: This amendment would only be a cosmetic change, since all the institutions in practice permit non-residents and non-citizens to apply for documents under their own rules implementing the current access regulation. As long as that remains the case, a change to this effect in the main Regulation, while useful, is not necessary.

New exception for court documents (Art. 2(5))

This new exception would significantly reduce access as compared to the current rules, which contain no such exception. The new exception would exclude such documents entirely from the scope of the Regulation - ie there would be no access on grounds of public interest, et al. The Commission asserts that the Court’s rules of procedure and Protocol rule out public access to such documents, but the Court of First Instance has ruled against this argument as regards documents submitted by the institutions (in the case of *API v Commission*, appeal pending). In any case, this argument, even if it is valid, begs the question - why not propose an amendment to the Court’s Protocol to remove the restriction (the Treaty allows the Commission to propose such amendments)?

Four Member States object that the proposal is too restrictive, while two want to leave the issue up to the Court and its rules (presumably supporting the status quo).

One Member State (Italy) has called for a far more restrictive proposal, which would exempt all documents submitted to Courts as well as all legal advice by institutions' legal services entirely from the scope of the Regulation. This would be an extreme reduction in access to documents compared to the current rules, overturning two judgments of the EU courts (*API* and the judgment of the ECJ in *Turco v Council*), and taking a much wider category of documents entirely outside the rules.

Comment: In order to ensure that there is no reduction in access in this area, the EP needs to join forces with the Member States who believe either that the proposed reduction in standards is too restrictive, or that the issue should be left to the Court's rules of procedure - because at least there is a chance that (as in *API*) the Courts will rule that their statute and rules of procedure do not prevent the release of such documents. If the proposal of Italy were adopted by the Council, the EP should vote down the Regulation completely rather than accept such a huge reduction in standards.

Legally it is dubious that an entire category of documents could be removed from the rules entirely.

New exception for investigation documents (Art. 2(6))

Six Member States object to this new reduction in public access, which aims at overturning several judgments of the Court of First Instance (VKI and TGI, which the Commission has appealed). One (the UK) supports it.

Comment: Again, in order to ensure that there is no reduction in access in this area, the EP needs to join forces with the Member States who object to this reduction in standards. And again, legally it is dubious that an entire category of documents could be removed from the rules entirely. The Commission has attempted to clarify its proposal, but it should be noted that the new exception would apply to investigations or to proceedings concerning an act of individual scope - so the exception would apply much more broadly than the Commission suggests to Member States.

More restrictive definition of 'document' (Art. 3(a))

Four Member States express doubts about this change, and two have asked for clarifications.

Comment: As pointed out in the Statewatch analysis (see below) of the proposal, this amendment entails a significant reduction in standards and should be rejected.

Definition of 'third party' (Art. 3(b))

Four Member States ask whether a Member State is a 'third party'. This definition would not change from the status quo.

Comment: It is explicit that a Member State would, at present, be a 'third party'. This should only be changed if this would improve standards as compared to the status quo. To answer the question posed by the German government, it would indeed seem that under the proposed new Art. 2(6), documents obtained from Member States in the course of state aid proceedings would be temporarily excluded from access.

Wider exception for ‘public security’ (Art. 4(1)(a))

One Member State suggests this amendment is not necessary; one wants a wider scope; and one wonders about the meaning of ‘legal persons’.

Comment: This amendment is probably unnecessary, although in principle it seems reasonable that there should be an exception regarding documents whose release would actually jeopardise the safety of individual persons in specific cases.

Exception for ‘the environment’ (Art. 4(1)(e))

Two Member States want to address this issue in this Regulation, while two want to address it in the separate 2006 Regulation on this issue.

Comment: Whichever legislative technique is chosen, the current levels of protection of the right of access should not be reduced.

‘Legal advice’ exception (Art. 4(2)(c))

The proposal on this issue (which maintains the status quo) was delivered before the ECJ judgment in *Turco*, which ruled that legal advice related to legislation should normally be disclosed. Five Member States (enough for a blocking minority) are concerned that the legal service opinions of the institutions should be protected, although it is not clear if they can accept the Commission’s proposal or would like to amend the proposal to this end. Five more liberal Member States argue that no legal advice should be disclosed until negotiations are over - which would be a retreat from the status quo. Three Member States want a mandatory exception for legal advice and court proceedings, et al, which would be a clear reduction from current standards in both the case law and the legislation, considering (apart from *Turco*) that in a number of cases applicants have won access to documents within the scope of the ‘court proceedings’ exception.

Comment: With opposition in Council to the status quo, the European Parliament will have to convince a large number of Member States to support it. If it cannot, then it will have to consider whether it is worth vetoing the proposal rather than reduce standards on this issue. The proposal is certainly worth vetoing as it currently stands, since it would not increase access to documents in any respect, but only reduce access. But the judgment on this issue would be more finely balanced if the EP is able to convince the Council to increase standards on some issues.

New ‘selection procedure’ exception (Art. 4(2)(e))

Several Member States suggest that this exception is too vague.

Comment: It would be preferable not to introduce any new exceptions to the right of access to documents, but this new exception would not be as problematic in principle as many others proposed by the Commission - provided that applicants have some access to documents concerning their individual applications, so that they can be sure that those decisions were taken fairly and objectively.

New rules on data protection exception (Art. 4(5))

Five Member States support an even more restrictive wording than the Commission's proposed reduction in standards, while five do not want to change the rules, and two support the view of the European Data Protection Supervisor, who is supportive of the recent *Bavarian Lager* judgment and critical of the Commission proposal.

Comment: The proposal would lower the current standards significantly and should be rejected. It is welcome to see that more Member States support this view than oppose it - but note that the latter group want to lower standards even further than the Commission does.

New rules on Member State veto (Art. 5(2))

The Commission's proposal would allow Member States, in some cases, to refuse access to their own documents based on their own legislation, rather than only on the exceptions in the EU legislation and *equivalent* exceptions in national law (as required by the *IFAW* judgment). This would be qualified by some ambiguous wording in the final sentence of the new proposal.

Nine Member States (enough for a blocking minority) support lower standards (ie Member State veto based on any provision of national law), while six support the status quo.

Comment: It looks like it might be difficult to overcome the view of a large group of Member States who want to lower current standards.

Procedural rules (Art. 6)

Three Member States suggest that the extra discretion for the institutions could be unnecessary.

Comment: These proposals should be rejected to support the status quo.

Delayed replies (Art. 8)

One Member State questions such a long extra period for replies to confirmatory applications.

Comment: These proposals should be rejected to support the status quo.

Fees (Art. 10)

Five Member States asked for clarification of a new rule on fees.

Comment: These proposals should be rejected to support the status quo.

Registers (Art. 11)

No substantive amendments suggested.

Comment: No amendments should be considered unless they would improve the status quo.

Direct access to documents (Art. 12)

Five Member States object to the Commission's proposal to reduce the current level of rights of direct access.

Comment: No amendments should be considered unless they would improve the status quo.

Intellectual property (Art. 16)

One Member State asked for a clarification.

Comment: No amendments should be considered unless they would improve the status quo.

Overall assessment

On the whole, the reaction by Member States is split between opponents of some of the amendments which would reduce the right of access, and supporters of those amendments, some of which would go even further to reduce the right of access. Since the latter group have more votes in Council, the prospect was either for a deadlock in Council or for a compromise where standards were lowered in some areas and merely maintained in others.

Since the EP is about to adopt its negotiation position in the form of its first reading opinion, presumably the Council will now begin to react primarily to the EP's position, rather than work further on its own position. This will change the negotiating dynamics in the Council, and so it remains to be seen whether the EP can attract a sufficient number of Member States to those amendments which would increase the current level of access, while rejecting all amendments which would lower it.

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Documentation

Council: <http://www.statewatch.org/news/2009/jan/eu-council-access-reg-5671-09.pdf>

Statewatch analysis: June 2008: Proposal on access to documents: Article-by-Article commentary on the Commission's proposals:

<http://www.statewatch.org/foi/sw-analysis-docs-june-2008.pdf>

Statewatch Observatory on the Regulation on access to EU documents: 2008-2009:

<http://www.statewatch.org/foi/observatory-access-reg-2008-2009.htm>

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