



Legal Service

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LEGAL OPINION

Re : Public access to documents of the institutions - proposal for a recast of Regulation (EC) No 1049/2001 - amendments adopted by Parliament - comments of the Council Presidency

I. Introduction

1. By letter of 31 March 2009 (annexed), received at the Legal Service on the same day, Mr Gerard DEPRez, chairman of the Committee on Civil Liberties, Justice and Home Affairs, requested the Legal Service to provide an opinion on the comments of the Council Working Party on Information (the “Working Party”) on the amendments adopted by Parliament on 11 March 2009¹ on the proposal for a recast of Regulation 1049/2001.²
2. It appears from Council Document No 7791/09 of 20 March 2009 that the Council Presidency takes the view that a number of these amendments fall outside the scope of Article 255 EC.³ Mr Deprez has indicated that the rapporteur, Mr Michael CASHMAN, is seeking to explore the possibility of drafting compromise amendments to revise the original Commission proposal.

¹ P6_TA-PROV(2009)0114.

² Regulation, OJ L 145, 31 May 2001, p. 43; proposal, COM(2008)0229 final of 30 April 2008.

³ The legal justification for a number of these amendments has already been presented by the rapporteur in the plenary debate of 10 March 2009 which the Council Presidency chose not to attend.

3. It should be noted that the Council Document does not indicate the grounds on which it is considered that a particular amendment is considered to be beyond the scope of Article 255 EC, and that the present opinion is based on an estimation of what the Presidency's thinking might be.

II. Preliminary remarks

4. Article 255 EC and Regulation 1049/2001 must be interpreted in the light of the case law of the Court of Justice, and in particular the recent judgment in the *Turco* case.⁴ There the Court held that "*Regulation No 1049/2001 ... reflects the intention expressed in the second paragraph of Article 1 of the EU Treaty ... to mark a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen. As recital 2 of the preamble to Regulation No 1049/2001 notes, the right of public access to documents of the institutions is related to the democratic nature of those institutions*" (emphasis added).⁵
5. A number of the amendments which are said to go outside the scope of Article 255 EC are related to measures which seek to improve the effectiveness of the right of public access to documents. The Court has long held, however, that the legislature may include in a given act provisions which are merely incidental to the main or predominant purpose or component without being obliged to modify or supplement the legal basis.⁶
6. It follows in the present case that, provided its main purpose and material content remains within the scope of Article 255 EC, the revised Regulation may include complementary measures to improve the effectiveness of the right of access, including through the adoption of common rules by the institutions. This is perfectly in conformity with Article 255(3) EC which expressly provides for the adoption by each institution of specific internal rules regarding access to their documents to cover matters not regulated by the Regulation, either in its current form or as revised.

III. Amendments

7. Given that the preamble of a legislative text does not itself establish legal obligations, amendments to the recitals will only be examined along with those which concern the enacting terms. The numbering of the amendments is that of the consolidated text prepared by the plenary services.⁷

⁴ Joined Cases C-39/05 P and C-52/05 P *Kingdom of Sweden and Maurizio Turco v Council*, judgment of 1 June 2008 (not yet reported).

⁵ Paragraph 34.

⁶ Case C-36/98 *Spain v Council* [2001] ECR I-779, paragraph 74; and Case C-211/01 *Commission v Council* [2003] ECR I-8913, paragraph 48.

⁷ P6_TA-PROV(2009)0114.

(i) Agencies

(Article 1(a) - Amendment 24)

8. Both Recital 8 of the current Regulation, which provides that "*all agencies established by the institutions should apply the principles laid down by this Regulation*" and the joint declaration adopted by Parliament, the Council and the Commission on 30 May 2001⁸ seek to ensure that the right of public access to the documents of the principal political institutions is not undermined by the delegation of tasks to the agencies and other ancillary bodies which they create.
9. Amendment 24 does not extend the application of the Regulation *ratione personae* to such bodies. Article 3 (Amendment 35) specifies that the Regulation "*shall apply to all documents held by an institution*", to the exclusion of those held by agencies. The amendment should therefore be interpreted as meaning that the Regulation only defines "*the principles, conditions and limits*" on access, which the agencies and other bodies would be expected to respect in their own rules on access to documents. It also reflects the scope of Article 42 of the Charter of Fundamental Rights of the European Union which is scheduled to apply from the entry into force of the Lisbon Treaty, and which would grant access to documents of "*bodies, offices and agencies*" of the European Union, as well as those of the institutions.
10. It should be recalled that Article 9(1) of the current Regulation already applies, albeit somewhat marginally, to agencies, in so far as it defines "sensitive documents" to include those "*originating from the institutions or the agencies established by them*" (emphasis added). The inclusion in the revised Regulation of a reference to agencies does not therefore appear in principle to go beyond Article 255 EC as currently understood.

(ii) Associations of natural or legal persons

(Article 2(1) - Amendment 28)

11. Article 255(1) EC grants a right of access to documents to "*any natural or legal person residing or having its registered office in a Member State*". It does not preclude either explicitly or implicitly the granting of such rights to associations of legal or natural persons. Moreover, this amendment is clearly consistent with the objectives of the Regulation, as identified by the Court of Justice in the *Turco* judgment.⁹

(iii) Classified documents

(Recitals 20 and 28, Articles 4(b) and 5 - Amendments 13, 15, 37 and 44)

12. Parliament's amendments concerning the classification of documents seek to ensure a common approach and, in line with Article 9(7) of the current Regulation, clarify the access of Parliament to such documents.

⁸ Joint declaration relating to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 173, 27 June 2001, p. 5.

⁹ Joined Cases C-39/05 P and C-52/05 P cited above, paragraph 34.

13. Contrary to the view expressed by the Commission in its explanatory statement of the present proposal,¹⁰ the classification of documents is directly relevant to the possibility that the public enjoy access to such documents. The current Regulation establishes a clear link between the classification of a document and grounds for the limits on public access to such documents. Article 9(1) of Regulation 1049/2001 provides that:

"[sensitive] documents are documents ... classified ... in accordance with rules ... which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a)" (emphasis added).

14. According to Article 4(1)(a) of Regulation 1049/2001, the disclosure of documents which would undermine the protection of the interests listed is excluded without exception. Furthermore, Article 9(3) of the Regulation provides that documents shall be recorded in the register or released *only* with the consent of the originator. The classification of a document as "*sensitive*" therefore directly creates limits on public access to the document and even to the information available on its existence.
15. It follows that the amendments in question do not fall outside the scope of Article 255 EC as it was interpreted in 2001.

(iv) Archives

(Recital 19 and Articles 4(1)(f) and (g), and 4(2) - Amendments 10 and 41 to 43)

16. Amendments 41 and 42 provide definitions of "*archives*", while Amendment 43 would provide for the adoption by the institutions of "*their common criteria for archiving*".
17. Council Regulation No 354/83 of 1 February 1983 lays down common rules concerning the historical archives of the European Community and Euratom.¹¹ According to Article 1 thereof, this Regulation "*seeks to ensure that documents of historical or administrative value are preserved and made available to the public whenever possible*". The object of this Regulation clearly falls within the scope of the "*general principles ... governing the right of access to [such] documents*" which Parliament and the Council must adopt by virtue of Article 255(2) EC.
18. Regulation 354/83 was adopted on the basis of, what is now, Article 308 EC prior to the inclusion of Article 255 EC in the EC Treaty. Had Article 255 EC existed at the time, it could have been used as the basis for the adoption of rules on the public archives for the Parliament, Council and Commission documents. Nonetheless, Article 308 EC remains the appropriate legal basis for rules concerning the archives of the other institutions and bodies covered by Regulation 354/83.¹²

¹⁰ Section 2.1.3, COM (2008) 229 final of 30 April 2008.

¹¹ OJ L 43, 15 February 1983 p.1, as amended by Council Regulation (EC, Euratom) No 1700/2003 of 22 September 2003 OJ L 243, 27 September 2003, p. 1.

¹² Council Regulation (EEC, Euratom) N° 354/83 applies to the Court of Justice, the Court of Auditors, ECOSOC and the Committee of the Regions, as well as to Parliament, the Council and the Commission.

(v) National parliamentary scrutiny

(Article 7(3) - Amendment 60)

19. Amendment 60 merely clarifies that the revised Regulation would not impinge upon the rules of the Member States on national parliamentary scrutiny and as such reflects the principle of subsidiarity formulated in the second paragraph of Article 5 EC. The text clearly does not seek to regulate national parliamentary scrutiny, which would indeed be beyond the scope of Article 255 EC. It is therefore not clear in what respect such a clarification could be considered to be beyond the scope of Article 255 EC.

(vi) Good administration

(Recitals 4, 5, 18 and 29 and Articles 9 and 12(1), (2) and (3) - Amendments 1, 92, 9, 17, 78, 79, 80 and 107)

20. In their handling of requests for access to documents, the institutions are obliged to apply the principle of good administration, as is already recognised in Article 15 of the current Regulation and by the Community courts. Recently, the Court of First Instance has held that "*Article 6(2) of Regulation No 1049/2001 ... formally transcribes the principle of good administration, which is one of the guarantees afforded by the Community legal order in administrative procedures ... The duty to provide assistance is therefore essential in order to ensure the effectiveness of the right of access established by Regulation No 1049/2001" (emphasis added).¹³*
21. These amendments set out in more detail the complementary measures which the institutions should take, including, in particular, the adoption of common rules and procedures on various aspects of the administrative management of documents in order to improve the effectiveness of the right of public access to these. The amendments are thus ancillary to the main aim of the revised Regulation and within the scope of Article 255 EC.
22. Amendment 107 requires the institutions to produce guidelines on the obligations of confidentiality and professional secrecy and on the sanctions in the Staff Regulations in order to help officials to understand their duties in relation to the revised Regulation and thereby improve the implementation of the revised Regulation. In so far as the Regulation is "*binding in its entirety and directly applicable in all Member States*" and could be said in some circumstances to create obligations for officials rather than the institution, such an obligation could be seen as ancillary to the rules on access to documents of the institutions and hence within the scope of Article 255 EC, particularly as Article 17 of the Staff Regulations prohibits an official from disclosing information without authorisation. It is clear, however, that it is the Staff Regulations, rather than any "guidelines" which determine both the procedure and the substantive rules governing the imposition of sanctions on Community officials and other agents.

¹³ Case T-42/05, *Williams v Commission*, judgment of 10 September 2008 (not yet reported), paragraph 74.

(vii) Quality of legislative drafting

(Recital 12 and Article 10(3) - Amendments 8 and 103)

23. Amendment 103 would inter alia require the institutions to "*agree common drafting guidelines and models improving legal certainty*". Such guidelines already exist in the form of the "Joint Practical Guide for the drafting of Community legislation",¹⁴ the legal pertinence of which has been recognised on a number of occasions before the Court.¹⁵ As Advocate General Geelhoed stated, "*there are two aspects to a legislative act as an expression of the legislature's will. On the one hand, it is an instrument for pursuing and, if possible, achieving justified objectives of public interest. On the other hand, it constitutes a guarantee of citizens' rights in their dealings with public authority. Qualitatively adequate legislation is characterised by a balance between both aspects.*"¹⁶
24. The right of public access to documents includes an obligation on the institutions to ensure that the drafting of legislation is of a sufficient quality that the citizens can understand it. An amendment to render the documents of the institutions more "accessible" in the sense of "understandable" as opposed to "accessible" in the merely procedural sense would contribute to the achievement of the objectives of Article 255 EC as identified by the Court in *Turco* (cited above). The inclusion in the Regulation of a provision to this effect would therefore not exceed the material scope of Article 255 EC.

(viii) Third party documents

(Recital 13 and Article 10(5) - Amendments 11 and 103)

25. This amendment seeks to ensure that documents submitted by third parties with the aim of influencing the decision-making process are made public and is clearly within the scope of Article 255 EC, in particular, in the light of the ruling in the *Turco* case. The amendment to the recitals on a register of lobbyists may be viewed as corresponding to this amendment.

(ix) References to national legislation

(Recitals 16 and 17 and Article 10(7) - Amendments 100, 20 and 103)

26. These amendments seek to remind Member States that they have obligations under Article 10 EC not to undermine the implementation of Regulation 1049/2001. As the Court noted in the *Heinrich* case, in order to comply with the principle of legal certainty "*national measures which, to implement Community legislation, impose obligations on individuals, must be published in order for the individuals to be able to ascertain those*

¹⁴ Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, OJ C 73, 17 March 1999, p. 1.

¹⁵ See for example, Joined Cases C-154/04 *Alliance for Natural Health Nutri-Link Ltd v Secretary of State for Health* and C-155/04 *National Association of Health Stores, Health Food Manufacturers Ltd v Secretary of State for Health and National Assembly for Wales* ECR [2005] I-06451, paragraph 92.

¹⁶ Opinion of Advocate General Geelhoed delivered on 5 April 2005 in Joined Cases C-154/04 and C-155/04, cited above, paragraph 88.

*obligations.*¹⁷ The amendments neither impose new obligations on Member States nor exceed the scope of Article 255 EC.

(x) Publication in the Official Journal

(Recital 12 and Article 11 - Amendments 8, 74 and 105)

27. Article 11(1) as amended would require the institutions to agree on the structure and presentation of the Official Journal, taking into account the pre-existing interinstitutional agreement, and provide a list of documents to be published in addition to those mentioned in Article 254 EC, while Article 11(2) provides for the adoption of a decision identifying other documents to be published in the Official Journal. These amendments would imply a change to the existing procedures for making decisions in relation to the Official Journal.¹⁸
28. These amendments are in line with the interpretation of Article 255 EC adopted by Advocate General Sharpston her Opinion in the *Heinrich* case, who noted that "*[if] it is considered desirable, in the interests of transparency and more open government, to make publicly available any categories of document not covered by the mandatory publication requirements of Article 254(1) and (2), other (additional) mechanisms need to be put in place ... Article 255 makes it clear that that should happen*".¹⁹
29. As publication in the Official Journal is clearly a means of ensuring public access to documents of the institution, provisions concerning the publication of documents other than those mentioned in Article 254 EC and matters related to the management of the Official Journal would fall within the scope of Article 255 EC.

(xi) Role of the Ombudsman

(Article 17(3) - Amendment 104)

30. This amendment provides for the possibility of the applicant seeking the opinion of the Ombudsman on the issue of "*harm or overriding public interest*" and for the suspension of the statutory time-limits pending the delivery of his opinion. This provision would involve the Ombudsman in the internal decision-making procedures of the institutions, which would in principle be inconsistent with his duty under Article 195(1) EC to investigate cases of alleged maladministration after they have occurred.

¹⁷ Case C-345/06, cited above, paragraph 45.

¹⁸ Decision of the European Parliament, the Council, the Commission, the Court of Justice, the Court of Auditors, the Economic and Social Committee and the Committee of the Regions of 20 July 2000 on the organisation and operation of the Office for Official Publications of the European Communities (2000/459/EC, ECSC, Euratom), OJ L 183, 22 July 2000, p. 12. A proposal for the revision of this Decision was approved by the plenary on 19 February 2009.

¹⁹ Opinion of Advocate General Sharpston of 10 April 2008 in Case C-345/06, cited above, paragraphs 56 and 57 (emphasis added).

IV. Conclusions

31. In the light of the foregoing analysis, the Legal Service comes to the following conclusions:
- (i) Article 255 EC and Regulation 1049/2001 must be interpreted in the light of the case law of the Court of Justice, including, in particular, the ruling in the *Turco* case.
 - (ii) In the current state of the file, there is no reason to conclude that the following amendments adopted by the Parliament on 11 March 2009 exceed the scope of Article 255 EC: Amendments 1, 8, 9, 10, 11, 13, 15, 17, 20, 24, 28, 37, 41, 42, 43, 44, 60, 74, 78, 79, 80, 92, 100, 103, 105 and 107.
 - (iii) Amendment 104 is incompatible with Article 195 EC.

(signed)
Kieran BRADLEY
Head of Unit

(signed)
Margaret DEAN

Approved: (signed)
By delegation of the Jurisconsult
Ezio PERILLO, Director

Annex: Letter from Mr Gerard DEPREZ of 31 March 2009



Commission des Libertés Civiles, de la Justice et des Affaires Intérieures
Le Président

IPOL-COM-LIBED(2009)18204

Mr Christian Pennera
Jurisconsult
Legal Service
European Parliament

305589 31.03.2009

Dear Mr Pennera,


I am writing to you concerning the proposal for a recast of Regulation (EC) No. 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (COM (2008)229), and in particular, the comments of the Council Working Party on Information (WPI) concerning the amendments adopted by Parliament on 11 March 2009 (P6_TA-PROV(2009)0114).

According to the attached working document of the General Secretariat of the Council (Document No. 7791/09 of 20 March 2009), which was obtained informally by the secretariat of my committee, the Presidency of the Council intends to reach a general approach of the Council on this dossier during the next meetings of the WPI on 2 and 21 April 2009.

In principle, the adoption by the Council of a position would be helpful in launching a fruitful interinstitutional dialogue, in line with Parliament's vote of 11 March 2009; however, it appears from the Council working document that the Council may take the view that a number of Parliament's amendments fall outside the scope of Article 255 EC.

Bearing in mind that we are now negotiating on the basis of text adopted by the plenary, the rapporteur, Mr Cashman, would very much appreciate your opinion on the matters raised by the WPI as soon as possible in order to explore possibilities of compromise amendments to revise the original Commission proposal.

Yours sincerely,



Gérard DEPRez

Annex: Working document of the Council 7791/09