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Legislative briefing

Recast of Regulation 1049/2001 regarding public access to European Parliament, Council and Commission's documents¹

EXECUTIVE SUMMARY

Access to information is fundamental to transparency, openness, and the democratic rights of European citizens, civil society, including media and non-governmental actors. According to its founding treaties, the European Union (EU) aspires to create 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.² It enshrines the principle of openness in the work of all its institutions.

Regulation (EC) 1049/2001 regarding access to European Parliament, Council and Commission documents is the legislation which sets out the conditions under which the public may have access to documents held by Community institutions. In an open society, the purpose of access to documents regulation is to uphold these principles while enabling the administration to function efficiently and with proper safeguards to withhold information in carefully confined and controlled circumstances.

In April 2008, the Commission put forward a proposal to recast the regulation. As it currently stands, the Commission's proposal is far from enshrining such openness. On the contrary, it attempts to unduly and substantively restrict the right of access to documents. The Commission's proposal does so notably by providing for a new definition of what shall constitute a document for the purpose of the regulation, requiring that a document has to be "*formally transmitted to one or more recipients*"; by adding new exceptions to the right of access to documents, in particular in relation to documents drawn up within dispute settlement proceedings initiated by the Commission against Member States; and by granting more discretion to Member States to refuse access to documents they transmit to the EU institutions.

In this briefing ClientEarth sets out its analysis of the Commission's proposal and presents proposals (with draft amendments where appropriate) to achieve a regulation that enables full and free access to the documents of EU institutions. We call on the EU legislators to amend the Commission's proposal so as to prevent the regulation from being more restrictive than before and to expand the right of the public to have access to EU institutions, bodies, offices and agencies' documents in specified circumstances.

The regulation should be updated by reference to the Lisbon Treaty, which has modified the legal basis of the regulation and extended the scope of the regulation to all bodies, offices

¹ Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents /* COM/2008/0229 final - COD 2008/0090.

² Article 1, Treaty on European Union.

and agencies in addition to the institutions but also in a more limited way to the Court of Justice, the European Central Bank and the European Investment Bank.

The regulation also needs to be updated with the relevant decisions of the Court of Justice which have applied the regulation and to a certain extent broadened public access to documents held by institutions such as legal advice from legal services of institutions and specified the way the provisions of the regulation shall be interpreted.

In environmental matters, the EU (and Member States) have committed under international law to guarantees of access to information for citizens and non-governmental actors. The regulation should also be aligned with the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-Making Process and Access to Justice in Environmental Matters (the Aarhus Convention) as transposed in Regulation 1367/2006 (the Aarhus Regulation).

1. Update of the regulation with the Lisbon Treaty

In its December 2009 communication on the consequences of the entry into force of the Treaty of Lisbon for ongoing inter-institutional decision-making procedures (COM(2009)0665), the Commission updated only the legal basis for the original proposal. It has so far failed to update the content of its proposal despite relevant changes in the Lisbon Treaty affecting access to documents.

1.1. Extension of the scope of the regulation to Union bodies, offices and agencies

The Commission's proposal only refers to documents held by institutions. However, article 15 on the Treaty on the Functioning of the European Union (TFEU), which replaces article 255 of EC Treaty and is the legal basis of Regulation 1049/2001, extends the scope of the regulation to the Union bodies, offices and agencies. The Commission acknowledges this change brought by the Lisbon Treaty in its explanatory memorandum and states that such an extension will be achieved when the Lisbon Treaty enters into force.

We support the amendment tabled by the rapporteur of the LIBE Committee adding "*bodies, offices and agencies*" following the word "*institutions*" throughout the whole regulation.

See notably amendments 28, 30, 32, 35, 38 amending respectively Articles 1 point a), 2, 3, 4 paragraphs 1 and 2 of the Commission's proposal.

1.2. Extension of the scope of the regulation to the Court of Justice, European Central Bank and European Investment Bank

Article 15 paragraph 3 TFEU provides that "*the Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks*".

However, access to these institutions and body's documents is not mentioned anywhere in the Commission's proposal. Aligning the regulation with this provision of the TFEU is crucial as it would facilitate the application of the regulation to the Court, the Central Bank and the EIB and would thus widen the public access to their documents. Indeed, these institutions and body should be subject to the fullest provisions regarding access to documents given their public functions and importance. The access to their documents will be proportionate as the regulation provides all appropriate exemptions to protect their activities.

The EIB already operate under an access to documents regime which draws from Regulation 1049/2001, the Court and The Central Bank should thus also put in place a transparency policy in compliance with the regulation.

In addition, these institutions and body are subject to the provisions of the Aarhus Convention and should thus comply with the obligations provided in the regulation on access to documents in environmental matters.

The regulation should specify that it applies to the Court of Justice, the Central Bank and the EIB in addition to all other institutions and bodies.

See table of amendments, Article 2 paragraph 1.

2. Definition of a 'document'

Under the Commission's proposal, a document would have to be "*formally transmitted to one or more recipients or otherwise registered, or received by an institution*" to be a document for the purpose of the regulation. Under Regulation 1049/2001 all documents held (drawn up or received) by an institution are considered as documents. The new definition implies that documents that are not meant to be *transmitted* to a natural or legal person, to another institution, to Member States or are not circulated within the institution will not be within the scope of the regulation and will not be publicly accessible (e.g. the meeting notes of a Commission official). In addition, the term "*formally*" may enable certain members of the institutions to avoid transmitting certain documents in a "formal" way to prevent the public from having access to them. The same applies to "*registered*" documents with the registration process. In other words, the regulation as proposed would encourage poor transparency and administration practices, rather than proper management of an institution's documents and information, and proper application of exemptions in valid cases. This change could substantially restrict the number of documents the public would have access to. For example, the majority of notes which are drafted for internal use is not registered or formally approved.

The Court in the *Hautala* case³ has held that the principle of access to documents did not apply only to documents as such but rather also to the information contained in them⁴. It is

³ Case C-353/99P, *Council v Hautala*, [2001] ECR I-9565.

⁴ Case C -353/99, *ibid*, para 23, "*It is therefore apparent even from the context in which Decision 93/731 was adopted that the Council and the Spanish Government are wrong in submitting that that*

thus the information contained in the document that must be taken into account to assess whether the document requested should be disclosed. This implies that neither the material form of a document nor any other characteristics of it are relevant to assess whether the public should have access to it. Whether a document has been transmitted to one or more recipient or circulated within an institution or registered is therefore not relevant to assess whether the requested document is a document for the purpose of the regulation. The content of a document should be the only criteria used to determine whether public access should be granted.

Requiring that the document has been transmitted to one or more recipients goes against the principles laid down in the subparagraph 1 of article 1 TFEU which enshrines the concept of openness, stating that the Treaty marks 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. Article 15 paragraph 1 TFEU also specifies that the EU institutions, bodies, offices and agencies are required to conduct their work as openly as possible.

The regulation also has to be aligned with the Aarhus Convention, and the Aarhus Regulation. Article 2 paragraph 1 (e) of Regulation 1367/2006 provides for a broad definition of environmental information. This information may well be contained in documents that need not be transmitted to any recipients or circulated within the institution, agency, body or office holding the document. Members of the public should nevertheless have access to it even though the document has not been transmitted to anyone.

If there is concern that the regulation requires all documents to be listed in the public registers held by institutions, bodies, offices and agencies and is therefore overly expansive, it is Article 11 of the Commission's proposal that should be amended to specify what documents should be put on public registers. However, the definition of a "document" should not be more restrictive.

We support amendment 32 tabled by the rapporteur of the LIBE Committee.

3. Update of the regulation with the case-law of the Court of Justice of the EU

The regulation should be updated with the case law of the Court of Justice of the EU. The case law of the Court has specified the way the provisions of Regulation 1049/2001 should be interpreted and to some extent widened the public access to the institutions' documents.

3.1. Test to be carried out to assess whether a document should be disclosed

It is settled case law of the Court of Justice of the EU that: "*the examination required for the purpose of processing an application for access to documents must be specific in nature.*

decision concerns only access to 'documents' as such rather than to the information contained in them".

The mere fact that a document concerns an interest protected by an exception under this Article is not sufficient to justify application of that exception. Such application may be justified only if the institution has previously assessed whether access to the document could specifically and effectively undermine the protected interest. In addition, the risk of a protected interest being undermined must be reasonably foreseeable and purely hypothetical⁵.

However, the institutions to which documents are requested regularly fail to comply with this test and refer only in general terms to the relevant provisions of Regulation 1049/2001 to refuse access to the relevant documents without stating the particular reasons. It is therefore necessary that the new regulation provides for the precise examination the institutions, bodies, offices and agencies shall carry out, in compliance with settled case-law of the court, to assess whether a document should be disclosed or not.

For the same reasons, the regulation should provide that institutions, bodies, offices and agencies "should provide the basis for a claim to exception and give detailed reasons during the administrative process. The failure to do so hinders issue development and judicial review. It also prevents the public and the Community judicature from determining whether the refusal is vitiated by error. For these reasons, any claims to exceptions and underlying reasons, if not stated in written reply during the administrative process, should be considered waived".

This would ensure that the institutions, bodies, offices and agencies take their responsibilities seriously and comply with the timeframes and avoid the problems the public currently encounter with delays which defeat the purpose of accessing documents within an active policy or decision-process.

See table of amendments, Article paragraph 4 and new recital.

3.2. Access to legal advice

Article 4 paragraph 2 (c) of the Commission's proposal provides that the institutions may refuse access to a document where disclosure would undermine the protection of legal advice - unless there is an overriding public interest in disclosure (Article 4 paragraph 4).

This provision does not take into account the findings of the Court of Justice of the EU in the *Turco* case (joined cases C-39/05 and C-52/05). In the context of the legislative process, the Court held that disclosure of documents containing the legal advice of an institution's legal service on legal questions arising when legislative initiatives are being debated should be disclosed. The Court considered that this increases the transparency and openness of the legislative process and strengthens the democratic rights of European citizens. The Court

⁵ See Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, paragraph 69; Joined cases T-110/03, T-150-03 and T-405/03 *Sison v Council* [2005] ECR II-1429, paragraph 75; case T-121/05, *Borax Europe Ltd v Commission* [2009] ECR II-27, paragraph 43; Joined cases C-39/05P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-0000, paragraph 35.

pointed out that the general and abstract submission that disclosure could lead to doubts as to the lawfulness of a legislative act, as the Council argued in this case, does not suffice to establish that the protection of legal advice will be undermined, since it is precisely openness in this regard that contributes to greater legitimacy and confidence in the eyes of European citizens. Similarly, the Court held that the independence of the Council's legal service would not be compromised by disclosure of legal opinions where there is no reasonably foreseeable and not purely hypothetical risk of that institution's interest in seeking frank, objective and comprehensive advice being undermined.

The regulation should incorporate this decision of the Court so as to guarantee that legal advice of legal services of institutions, bodies, offices and agencies provided within legislative processes are publicly accessible.

See table of amendments, Article 4 paragraph 2 c).

3.3. Documents originating from Member States

Article 5 of the Commission's proposal does not incorporate the findings of the Court of Justice in case C-64/05P *Sweden v Commission* correctly since it provides that a Member State from which the requested document originates but which is held by an institution, may refuse granting access to it by giving reasons based on the exceptions set out in Article 4(1) to (3) of the regulation **but also on the provisions of its national legislation.**

The Commission's proposal implies that access to documents of the same kind and of the same importance which would shed light on the EU decision-making process could be granted or refused solely depending on the origin of the document. Documents likely to have played a decisive role in the decision of an institution would thus sometimes be accessible to the public and sometimes not depending on the rules on access to documents of the Member State which would have transmitted the document to the institution to influence its decision.

This directly contravenes the jurisprudence of the Court that Member States do not have a veto. The judgment of the Court of Justice in case C-64/05P stated that:

"Article 4(5) of Regulation No 1049/2001 cannot be interpreted as conferring on the Member State a general and unconditional right of veto, so that it could in a discretionary manner oppose the disclosure of documents originating from it and held by an institution, with the effect that access to such documents would cease to be governed by the provisions of that regulation and would depend only on the provisions of national law.

On the contrary, several factors militate in favour of an interpretation of Article 4(5) to the effect that the exercise of the power conferred by that provision on the Member State concerned is delimited by the substantive

exceptions set out in Article 4(1) and (3), with the Member State merely being given in this respect a power to take part in the Community decision.”⁶

It is clear that the Member State should not be able to rely on the provisions of its national legislation except to the extent that such legislation implements or is equivalent to the exceptions set out by Article 4 (1) to (3) of the regulation as grounds for refusing access to documents.

The Commission’s proposal should thus be amended accordingly as the Member States constitute an important source of information and documentation which contribute to the Community decision-making process. The effectiveness of the right to public access would be substantially reduced if the States could rely on provisions of national legislation other than the one implementing article 4 of the regulation.

In addition, it should be clear that the final decision, to grant or refuse to grant access, lies with the institution, body, office or agency holding the requested document. Indeed, according to the court, *“the institution is itself obliged to give reasons for a decision to refuse a request for access to a document. Such an obligation means that the institution must, in its decision, not merely record the fact that the Member State concerned has objected to disclosure of the document asked for, but also set out the reasons relied on by that Member State to show that one of the exceptions to the right of access on article (1) to (3) of the regulation applies”⁷.*

The institution shall thus *assess* the reasons given by the Member States to decide whether the requested documents should be publicly accessible.

See table of amendments, Article 5 paragraph 2.

4. Access to official documents drafted within the infringement proceedings

Article 4(2) c) of the Commission’s proposal adds a new reference to “dispute settlement proceedings” in the list of exceptions to the right of access. A document will not be accessible if the institution, body, office or agency considers that its disclosure would undermine the protection of dispute settlement proceedings unless the institution considers there is an overriding public interest in disclosure. This new exception encompasses the infringement procedure initiated by the Commission under Article 258 TFEU against Member States. As a result, the public will not be able to ask to have access to letters of formal notice and reasoned opinions sent by the Commission to infringing Member States anymore. It will also consequently encourage the Member States to which the letters and opinions have been addressed to not to disclose them when requested by the public which some Member States currently do.

⁶ Case C-64/05P, *Sweden v Commission*, [2007] ECR I-11389, paragraphs 75 and 76 (emphasis added).

⁷ Case C-64/05P, *ibid*, paragraph 89.

If we accept that certain of the correspondence exchanged between the Commission and the Member States concerned by the infringement proceeding, (the informal correspondence exchanged before the Commission drafts the Letter of Formal Notice and the Reasoned Opinion), should rightly remain confidential, there is no legitimate interest for which access to letters of formal notice and reasoned opinions should not be granted. On the contrary, these documents should be publicly accessible to provide information on:

- why the Commission decided to open an infringement procedure: what is the state of compliance of the States concerned
- with what specific provisions of the relevant EU regulations the States involved have not been complying with
- for how long
- why the Commission considered the replies of the States to the letters of formal notice not satisfactory and decided to send a reasoned opinion
- what measure the Commission requires the States to take to bring about compliance
- why the Commission considered the replies of the States to the reasoned opinions not satisfactory and decided to take the States to Court.

Informing the public on these issues is fundamental to help the EU citizens and non-governmental organisations to have a better understanding of the European institutional framework, of the role of the Commission and of the position of their Member States through the infringement proceeding taking place at EU level.

The Court of Justice, in joined cases C-39/05 P and C-52/05 P (*Sweden and Turco v Council*), insisted on the need for openness and increased legitimacy and accountability of the EU institutions. Despite the fact that the applicants in the Turco case did not request to have access to letters of formal notice and reasoned opinions, a parallel should be made with a request to have access to the letters and opinions sent by the Commission.

The Court stated that *"it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole"*⁸.

The same can be said to support the disclosure of letters of formal notice and reasoned opinions. In both cases openness and transparency increases the legitimacy of the EU institutions' actions. The disclosure of these documents would indeed enable the public to know whether the Commission has properly discharged its legal responsibilities under article 17 paragraph 1 of the Treaty on European Union which requires the Commission to *"ensure the application of the Treaties, and measures adopted by the institutions pursuant to them"*.

⁸ Joined Cases C- 39/05 P and C-52/05 P, *Turco*, *ibid*, Para.59.

Indeed, the disclosure of the Commission's letters and opinions is a matter of public interest since it would enable the dissemination of the Commission's point of view in relation to fundamental questions of interpretation of the Treaties and of secondary Community law.

An amendment on the matter was adopted in the first resolution of the European Parliament of 11 March 2009 but was dropped in the draft report of the LIBE Committee rapporteur, M. Cashman, of 12 May 2010. The amendment stated that "*in order to ensure that the principle of institutional transparency is fully applied, free public access to documents concerning infringement mechanisms and proceedings should be guaranteed*". A similar provision should be inserted in the new regulation enhancing the transparency of the infringement proceedings initiated by the Commission.

The amendment would consist in deleting the words 'dispute settlement proceedings' and in specifying under article 4 of the regulation relating to exceptions after subparagraph c) of article 4(2) that infringement proceedings initiated by the Commission are not court proceedings until the matter has been brought to court and that official documents drafted within these proceedings, namely letters of formal notice and reasoned opinions addressed to the Member States, should be made public. The amendment placed there would amend a part of the Commission's proposal which already contains changes and should therefore be deemed admissible under Article 87 of the Rules of Procedure of the EP.

See table of amendments, Article 4 paragraph 2.

5. Compliance with the Aarhus Convention and Regulation 1367/2006

One of the reasons Regulation 1049/2001 is being recast is to incorporate the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-Making process and Access to Justice in Environmental Matters and of Regulation 1367/2006 (EC) of 6 September 2006 on the application of the provisions of the Aarhus Convention to Community Institutions and bodies. However the Commission's proposal does not either clearly refer to the access to information provisions of Regulation 1367/2006 or comply with some of them. Yet, the state and the protection of the environment is a global concern, access by the public to environmental information should thus be as wide as possible.

A more precise reference to the access to information provisions of Regulation 1367/2006, title II of the regulation, should be provided in the preamble of the new regulation (recital 9). Despite the fact that recital 9 of the Commission's proposal provides that the regulation on access to documents has to be interpreted and applied in compliance with the provisions of Regulation 1367/2006, mentioning the access to information provisions of Regulation 1367/2006 in the new regulation will provide the right level of clarity and accessibility by the public to the type of information they have the right to have access to in environmental matters. For the sake of clarity and coherence it is therefore necessary to refer to the relevant provisions of Regulation 1367/2006. Our analysis and proposals are set out below.

5.1. The definition of 'environmental information'

It is important that the definition of '*environmental information*' provided by Article 2 paragraph 1 (d) of Regulation 1367/2006 be mentioned in the new regulation as it is very

broad and is likely to give access to the public to a wide range of documents. The documents containing the information described in this provision should be publicly accessible.

See table of amendments, Article 3 c).

5.2. The exception on information relating to emissions into the environment

Article 4 paragraph 4 of the Commission's proposal does not implement Regulation 1367/2006 correctly as it provides that an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment only "*as regards paragraph 2(a)*" that is when commercial interests of natural or legal persons, mentioned under paragraph 2a) of article 4 of the regulation, are at stake. Yet, Article 6 of Regulation 1367/2006 provides that an overriding public interest in disclosure shall also be deemed to exist where this type of information is requested when inspections and audits, referred to under paragraph 2 d) of article 4, are carried out. The Commission's proposal therefore unduly restricts the scope of the application of the overriding public interest in disclosure principle. Article 4 paragraph 4 should thus also refer to paragraph 2d).

See table of amendments, Article 4 paragraph 4.

5.3. The restrictive interpretation of exceptions

The proposal does not mention or refer to the rest of article 6 of the Regulation 1367/2006 which requires that the other exceptions set out in article 4 of Regulation 1049/2001 shall be interpreted in a restrictive way taking into account the public interest in disclosure and whether the information requested relates to emissions into the environment.

The restrictive interpretation of the exceptions to access to documents is also a principle confirmed by the settled case law of the Court of Justice of the EU and should thus be referred to into the Regulation.

The amendment tabled by the LIBE Committee of the European Parliament does not align with Regulation 1367/2006 and is formulated in a much weaker way as it only requires 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 on a healthy environment*" (Amendment 42 of the draft report).

Another amendment should be tabled referring precisely to the wording of Article 6 of the Aarhus Regulation.

See table of amendments, Article 4 paragraph 4.

5.4. Documents the disclosure of which would undermine the protection of the environment

For the sake of clarity and coherence and in order to avoid the application of different criteria in different cases, indent (e) of article 4 paragraph 1 of the Commission's proposal should be deleted and replaced by the exact wording of Article 6 paragraph 2 of Regulation 1367/2006 which provides that "*in addition to the exceptions set out in article 4 of Regulation 1049/2001 Community institutions and bodies may refuse access to environmental information where disclosure of the information would **adversely affect the protection of the environment to which the information relates, such as the breeding sites of rare species***".

See table of amendments, Article 4 paragraph 1.

5.5. Collection and dissemination of environmental information

The new regulation should specifically refer to Article 4 of Regulation 1367/2006 on collection and dissemination of environmental information and should incorporate its paragraph 2 which provides for a list of the documents which should be included in the registers and databases of the Union institutions, bodies, offices and agencies. The members of the public should know to what documents containing environmental information they should have access to when they read the regulation on access to documents without having to have to search in another piece of legislation.

See table of amendments, new Article 12.

For further information please contact:

Anaïs Berthier

Lawyer, Environmental Justice Programme

ClientEarth

Email: aberthier@clientearth.org

Telephone: +32(0)2 808 34 68