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Subject: Recast of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents
- Discussion paper

Introduction

On 25 September the Presidency addressed a questionnaire on public access to documents and / or information in Member States (doc. 14194/12) to delegations in the Working Party on Information. The objective of this questionnaire was to provide the Presidency with information on rules and practices on core issues relating to public access to documents and / or information in Member States and possibly to feed the debate on the recast of Regulation (EC) No 1049/2001 (hereafter 'the Regulation').

On 25 October 2012 the Secretariat had received replies from twenty-five Delegations (docs. 15196/12ADD 1 to 25).

The aim of this discussion paper is to draw conclusions from Member States' replies regarding the issues addressed in the questionnaire; and to launch a discussion on these issues on the basis of:

- a) conclusions from replies;
- b) the Council preliminary position on the recast of Regulation N° 1049/2001 adopted by COREPER on 10 May 2012;
- c) the position of the European Parliament at first reading (doc. 18436/11); and
- d) the Commission proposal (doc 9200/08 +COR1).

I. Discussion on the basis of question 1 of the questionnaire: Definition of 'document, preparatory documents, internal documents

1. Information drawn from replies to question 1 of the questionnaire

In a few Member States there is no general right of public access to documents or information.

In many Member States the provisions on public access rely on access to 'information' rather than on access to 'documents'. The following conclusions are drawn from replies concerning both types of systems.

a. Form/media/support

In most cases the definition of 'document' and of 'information' in the meaning of the acts on public access includes any support/form/material containing information.

In one Member State other media than the paper form may also constitute a 'document' if they are obtained as part of the processing of a case by the public authorities and are stored along with other documents concerning the case.

b. 'Space to think' through definition of 'document'/'information' or through issue of preparatory documents and internal documents

In all Member States a certain degree of 'space to think' is allowed, through one or several of the following means:

- Access to finished documents;
- Access to 'official information' (i.e., serving official purposes, with the exclusion of drafts and notes not intended to form part of a file) or to 'official documents';
- Access to 'official documents in the public domain';
- Principle of exclusion of internal documents, e.g., documents prepared by an authority for its own use; correspondence between units within the same authority; disclosure unless this would give rise to misunderstandings or cause alarm; protection of 'internal reasoning' of the body; restrictions to release of partially completed documents or documents which detail internal or preliminary discussions;
- Exclusion of preparatory documents until end of preparatory process through adoption of decision; or restrictions to access for a certain number of years from creation of a document serving as a basis for decision-making; or access to drafts only when they are sent for approval or presentation to the Government; or access to preparatory documents only if the applicant has a direct, real and existing interest; exclusion of documents containing positions, opinions in connection with ongoing or forthcoming negotiations; or other restrictions to access to preparatory documents or to information related to the 'formulation or development of Government policy';
- Exclusion of documents containing personal vision of civil services and politicians.

2. Discussion

The Working Party is invited to :

- discuss whether national experiences provide indications for adjusting Article 3 and/or Article 3a of the Council preliminary position adopted by COREPER on 10 May 2012; and to
- explore the possibility of taking into account the position of the European Parliament concerning in particular the creation of new electronic storage systems.

II. Discussion on the basis of question 2 of the questionnaire: Special rules for certain documents

1. Information drawn from replies to question 2 of the questionnaire

In some Member States, applications may be considered inadmissible due to formal exemptions, such as:

- manifestly unreasonable or clearly repetitive applications,
- manifestly vague requests,
- when requesting unfinished documents where the unfinished character of the documents can lead to misinterpretation,
- when requesting documents of a third-party that is given freely to the administration and non-disclosure is asked.

In nearly all Member States, certain information are given special treatment.

Although rules vary from one Member State to another, special treatment cover in most cases the following information:

- classified documents/information
- personal data
- protection of personal life, security of population, public safety, public order, defence
- fundamental rights/freedoms of citizens
- protection of deliberation of administration/government, of official decision-making process
- international relations
- criminal proceedings (and implementation)
- economic, financial or monetary interests
- commercial or industrial interests, intellectual property rights
- current judicial proceedings, a person's entitlement to a fair trial or investigations (criminal and/or civil proceedings), documents prepared by or obtained by an authority acting as a litigant in a trial for purposes of preparing for the trial
- legal professional privilege
- protected areas or species and their habitat.

Depending on the Member State and on the information concerned, special treatment is achieved through one of the following means:

- exclusion from scope of rules on public access to information/documents; or
- although in the scope, exception to the principle of public access; this can be either an absolute/mandatory exception or a relative/discretionary exception.

Depending on the Member States:

- the list of information given special treatment is more or less extensive and is exhaustive or not;
- the information given special treatment are more or less strictly circumscribed; in some cases the level of detail aims at limiting authorities' discretion in applying special treatment; and
- the information given special treatment are more or less restrictively interpreted.

2. Discussion

The Working Party is invited to :

- discuss whether national experiences provide indications for adjusting Article 2(5a) and (5b), Article 4 and Article 4a of the Council preliminary position adopted by COREPER on 10 May 2012; and in particular to
- explore whether the information given special treatment should be further defined.

III. Discussion on the basis of question 3 of the questionnaire: Applications for a very large number of documents

1. Information drawn from replies to question 3 of the questionnaire

When requests concern a very long document or a very large number of documents, many Member States allow to extend the time to reply. Such requests are thus treated as any non-standard, difficult request. In addition, a significant number of Member States allows recuperating reproduction costs from the applicant. Furthermore, in some Member States access to the requested documents may be provided in another form, e.g. orally or by allowing consultation of the original paper copies.

As a general rule, it is not possible to dismiss large requests based merely on their size. Some

Member States allow the exclusion of a request when amount of work necessary to respond to such a request is excessive. The institution concerned is responsible to assess such excess, but not many Member States have indicated objective criteria for metrics. Similarly, when the requests are deemed manifestly unreasonable, they may be rejected. Where such exclusion is possible, the concerned institution must first attempt to narrow down the request in cooperation with the applicant to make it more manageable.

2. Discussion

The Working Party - taking account of national systems and experiences - is invited to discuss whether:

- Article 6(3) as included in the Council preliminary position adopted by COREPER on 10 May 2012 adequately respond to the concern that human resources are efficiently used; or whether
- this provision should be further adjusted and if yes, how.

ANNEX

Topic 1: Definition of 'document' - Preliminary documents - Internal documents

1. Provisions relating to this issue in the Council preliminary position adopted by COREPER on 10 May 2012

'Article 3
Definitions

For the purpose of this Regulation:

(a) "document" **means** any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording), **including data contained in electronic storage, processing and retrieval systems that is held by an institution, if they can be extracted using the available tools for the exploitation of the system;**

This provision aims at updating the definition of 'document' so that it encompasses new media having developed since adoption of Regulation 1049/2001, and in accordance with case-law. Such updating is reflected in most Member States where a definition exists.

'Article 3a

Documents subject to this Regulation

A document becomes subject to this Regulation:

- 1) when it has been drawn up by an institution and either formally transmitted to one or more recipients, submitted for filing or registration, approved by the competent official, or otherwise completed for the purposes for which it was intended, or**
- 2) when it has been received by an institution.'**

This provision has been drafted with ideas stemming from the Swedish and from the Finnish systems and to enable a certain degree of space to think, as some degree of space to think exists, to various

extents, in all Member States.

2. Provisions relating to this issue in the position of the European Parliament at first reading (December 2011)

'Article 3

Definitions

For the purpose of this Regulation:

(a) "document" ~~means~~**shall mean** any *data* content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) ~~drawn-up by an institution and formally transmitted to one or more recipients or otherwise registered, or received by an institution; data concerning a matter falling within the sphere of responsibility of a Union institution, body, office or agency. Data~~ contained in electronic storage, processing and retrieval systems, ~~are documents~~ **including external systems used for the work of that institution, body, office or agency, constitute a document, notably** if they can be extracted in the form of a printout or electronic-format copy using *any reasonably* ~~the~~ available tools for the exploitation of the system **concerned. An institution, body, office or agency 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, ensure that the right of access is guaranteed as a fundamental right , and act so as to promote the objective of transparency. The functions for the retrieval of information stored in electronic storage systems shall be adapted in order to satisfy requests from the public;'**

3. Provisions relating to this issue in the Commission proposal

'Article 3
Definitions

For the purpose of this Regulation:

↓ 1049/2001 (adapted)
⇒ new

(a) «document» ~~shall mean~~ means 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~~ ⇒ 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 ⇐ [...]

Topic 2: Special rules for certain documents

1. Provisions relating to this issue in the Council preliminary position adopted by COREPER on 10 May 2012

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'Article 2

Beneficiaries and scope

[...]

5a. This Regulation shall not apply to documents submitted to Courts by parties other than the institutions.

5b. Without prejudice to specific rights of access for interested parties established by Union 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.

[...]

'Article 4
Exceptions

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

- public security,
- defence and military matters,
- international relations,
- the financial, monetary or economic policy of the **Union** or a Member State,
- **the environment, such as breeding sites of rare species;**

(b) privacy and the integrity of the individual, in particular in accordance with **Union** legislation regarding the protection of personal data. [\[1\]](#)

In its assessment of whether the exception in point (b) applies, the institution shall take into account:

- i) whether the individual was acting in the framework of professional activities in relation to Union matters; and**
- ii) the nature of the individual's role and responsibilities.**

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

- commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits,
- **the objectivity and impartiality of selection procedures for the award of contracts or grants under the Financial Regulation, or involving the comparative assessment of the merits of candidates or members of the staff of an institution, or involving the assessment of the merits of candidates for public offices,**

(...).

3. Access to 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 disclosure of the document would seriously undermine the institution's decision-making process **(...)**.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution 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 (...).

3a. The exceptions under paragraphs (2) and (3) shall apply unless there is an overriding public interest in disclosure.

3b. The exception regarding the protection of legal advice under the second indent of paragraph (2) shall apply under the conditions laid down in Article 4a.

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement, **setting out the reasons for its objection by reference to the exceptions referred to in Article 4. In explaining why a particular exception applies, a Member State may refer to any relevant provision or rule in its national law.**

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 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 or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.'

'Article 4a Presumption

1. Access to legal advice relating to issues which are the subject of a decision-making process until the relevant act becomes definitive or regarding a question of law which has not been decided, in last instance, by the Court of Justice, shall be presumed to undermine the protection of legal advice.

2. The applicant may demonstrate that there is an overriding public interest justifying the disclosure of the documents.

3. For the purposes of this article, the principles underlying this regulation do not in themselves constitute such an overriding public interest.'

2. Provisions relating to this issue in the position of the European Parliament at first reading (December 2011)

'Article 4
Exceptions

1. The institutions, bodies, offices and agencies shall refuse access to a document where disclosure would undermine the protection of the public interest as regards:

(a) public security ~~including the safety of natural or legal persons~~ *of the Union or of one or more of*

the Member States; [Am. 32]

- (b) defence and military matters;
- (c) international relations;
- (d) the financial, monetary or economic policy of the ~~Community~~*Union* or a Member State; [Am. 33]
- (e) the environment, such as breeding sites of rare species.

2. The institutions, *bodies, offices and agencies* shall refuse access to a document where disclosure would undermine the protection of: [Am. 34]

- (a) commercial interests of a natural or legal person;
- (b) intellectual property rights;
- (c) legal advice ~~and court, arbitration and dispute settlement proceedings,~~*relating to court proceedings*; [Am. 35]
- (d) the purpose of inspections, investigations and audits;
- (e) the objectivity and impartiality of ~~selection~~*public procurement* procedures *until a decision has been taken by the contracting institution, body, office or agency concerned, or the proceedings of a selection board leading to the recruitment of staff until a decision has been taken by the appointing authority.* [Am. 36]

3. Access to ~~the following~~ documents *drawn up by an institution, body, office or agency for internal use or received by it relating to a matter where it has not yet taken a decision* shall be refused *only* if their disclosure would, *due to their content and the objective circumstances of the situation, manifestly and* seriously undermine the decision-making process ~~of the institutions~~:

- ~~(a) documents relating to a matter where the decision has not been taken;~~
- ~~(b) documents containing opinions for internal use as part of deliberations and preliminary consultations within the institutions concerned, even after the decision has been taken.~~ [Am. 37]

4. ~~The exceptions under paragraphs (2) and (3) shall apply unless there is an~~*When balancing the public interest in disclosure under paragraphs (1) to (3), 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 document requested relates to~~*the protection of fundamental rights and the rule of law, the sound management of public funds, or the right to live in a healthy environment, including in terms of emissions into the environment. An institution, body, office or agency invoking one of the exceptions must make an objective and individual assessment and show that the risk to the interest protected is foreseeable and not purely hypothetical, and define how access to the document in question could specifically and effectively undermine the interest protected.* [Am. 38]

4a. Documents the disclosure of which would pose a risk to environmental protection, such as those relating to the breeding sites of rare species, shall only be disclosed in conformity with Regulation (EC) No 1367/2006. [Am. 39]

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. 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:~~

- ~~- 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;~~
- ~~- 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;~~

- if the data have already been published with the consent of the person concerned. Personal data shall nevertheless be disclosed if an overriding public interest requires disclosure. In such a case, the institution, body, office or agency 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.

Where an institution, body, office or agency refuses access to a document on the basis of this paragraph, it shall consider whether it is possible to grant partial access to that document. [Am. 40]

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in this Article shall ~~only apply for the period during which protection is justified on the basis of the content of the document.~~ *not apply to documents transmitted within the framework of procedures leading to a legislative act or delegated or implementing act of general application. Nor shall the exceptions apply to documents provided to institutions, bodies, offices and agencies for the purpose of influencing policy-making by lobbyists and other interested parties. In the case of documents covered by the exceptions relating to the protection of personal data or commercial interests and in the case of sensitive documents, The exceptions may if necessary, continue to apply after this period.* *shall only apply for as long as is justified by the content of the document and in any event for a maximum period of 30 years. [Am. 41]*

7a. An institution, body, office or agency may grant privileged access to the documents covered by paragraphs (1) to (3) for the purpose of research. If privileged access is granted, the information shall only be released subject to appropriate restrictions regarding its use. [Am. 42]'

3. Provisions relating to this issue in the Commission proposal

'Article 2

Beneficiaries and scope

[...]

5. This Regulation shall not apply to documents submitted to Courts by parties other than the institutions.

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. [...]

'Article 4

Exceptions

↓ 1049/2001 (adapted)
⇒ new

1. The institutions shall refuse access to a document where disclosure would undermine the protection of: ~~(a)~~ the public interest as regards:

(a) public security ⇒ including the safety of natural or legal persons ⇐ ⚡

(b) defence and military matters;⚡

(c) international relations;⚡

(d) the financial, monetary or economic policy of the Community or a Member State;

↓ new

(e) the environment, such as breeding sites of rare species.

↓ 1049/2001

~~(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.~~

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

↓ 1049/2001 (adapted)

~~(a) commercial interests of a natural or legal person; including intellectual property;~~

(b) intellectual property rights;

↓ 1049/2001 (adapted)

⇒ new

~~(c) legal advice and court proceedings ⇒ , arbitration and dispute settlement proceedings ⇐ and ;~~

~~(d) the purpose of inspections, investigations and audits;~~

↓ new

(e) the objectivity and impartiality of selection procedures.

↓ 1049/2001 (adapted)

⇒ new

~~unless there is an overriding public interest in disclosure.~~

3. Access to the following documents ~~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 their ~~disclosure of the document would seriously undermine the institution's decision-making process~~ of the institutions: ~~unless there is an overriding public interest in disclosure.~~

(a) documents relating to a matter where the decision has not been taken;

(b) documents ~~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.~~

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. ⇐

↓ new

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.

↓ 1049/2001 (adapted)

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in ~~paragraphs 1 to 3~~ this Article 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~~ the protection of personal data or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

Topic 3: Applications for a very large number of documents

1. Provisions relating to this issue in the Council preliminary position adopted by COREPER on 10 May 2012

'Article 6

Application

[...]

3. In the event of an application relating to a very long document or to a very large number of documents, the institution concerned **shall** confer with the applicant informally, with a view to finding a fair solution.

If no solution between the institution and the applicant can be found, the institution may choose to disclose a more limited number of documents that it considers to represent adequately the substance of the documents initially applied for.

This possibility exists only when the institution has genuinely investigated all other options and stated the reasons for which those options also involve an unreasonable administrative burden.'

2. Provisions relating to this issue in the position of the European Parliament at first reading (December 2011)

In its position at first reading, there is no amendment relating to this issue and Article 6(3) reads as in the current Regulation, i.e.:

'Article 6

Application

[...]

3. In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.'

3. Provisions relating to this issue in the Commission proposal

'Article 6

Applications

1. Applications for access to a document shall be made in any written form, including electronic form, in one of the languages referred to in Article 314 of the EC Treaty and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application.

2. If an application is not sufficiently precise ⇒ or if the requested documents cannot be identified ⇐, the institution shall ask the applicant to clarify the application and shall assist the applicant in doing so, for example, by providing information on the use of the public registers of documents. ⇒ The time limits provided for under Articles 7 and 8 shall start to run when the institution has received the requested clarifications. ⇐

3. In the event of an application relating to a very long document or to a very large number of

documents, the institution concerned may confer with the applicant informally, with a view to finding a fair ⇔ and practical ⇔ solution.

4. The institutions shall provide information and assistance to citizens on how and where applications for access to documents can be made.'

[1] [A recital will also be included as follows: '**The protection of personal data and the right of access to documents are both fundamental rights in the Charter of Fundamental Rights of the European Union and shall be exercised under the conditions and limits defined by the Treaties and can only be limited subject to the principle of proportionality, and only if such limitations are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.**']