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COMMISSION STAFF WORKING DOCUMENT

Report on the Outcome of the Public Consultation on the Review of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents

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INTRODUCTION

On 9 November 2005, the Commission decided, as part of its "European Transparency Initiative"[1], to launch the review of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents[2]. This decision anticipated a European Parliament Resolution adopted on 4 April 2006, inviting the Commission to come forward with proposals for amending the Regulation[3]. As a first step in the review process, the Commission held a public consultation on the Regulation on the basis of a Green Paper published on 18 April 2007.

The Green Paper and the contributions received from citizens as well as from public and private bodies are available on a dedicated website[4]. The purpose of this report is to provide an overview of the reactions received from citizens, public bodies and civil society and to put them into perspective. This report does not anticipate proposals which the Commission will submit in due course with a view to amending the Regulation on public access to documents.

1. CONTRIBUTIONS TO THE PUBLIC CONSULTATION

The Commission received a total of eighty-one contributions to the Green Paper, from civil society (30), public authorities (25), the corporate world (14), and individual citizens (12). With regard to this last category, the Commission has received a number of reactions from citizens, which did not concern the working and the review of the rules on public access but addressed other issues, e.g. the technical set-up of websites. These contributions have not been taken into account in the assessment of the public consultation on Regulation 1049/2001.

At the start of the consultation period, a seminar organised by the Brussels based NGO *European Citizen Action Service* (ECAS) on 19 April 2007 enabled the Commission to explain the purpose of the Green Paper and to collect first reactions on how civil society perceived the working of the rules on access to documents of the European institutions.

In addition, several events were organised by Commission representations in a number of Member States, through which opinions from national civil society organisations, the local press, policy makers and other stakeholders were collected.

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1 Minutes of the Commission's meeting No 1721 of 9 November 2005, item 6; see also documents SEC(2005) 1300 and SEC(2005) 1301

2 OJ L 145 of 31.5.2001, page 43

3 P6_A(2006) 052

4 http://ec.europa.eu/transparency/revision/index_en.htm

Annex 1 contains a detailed list of respondents per category and subcategory and of events organised in the Member States.

2. POSITIONS ON THE ISSUES RAISED IN THE GREEN PAPER

The replies given and positions taken by the respective categories of respondents to the questions in the Green Paper can be summarised as follows. In each paragraph, a reference is made to the corresponding question in the Green Paper.

2.1. Information provided through registers and on the websites (question no 1)

In all four categories of respondents, a large majority considers that information is difficult to find on the registers and websites. For half of these respondents, the scope of these registers and websites is also insufficient.

More specifically, the following comments and suggestions were made:

- a single access point with links to the relevant websites would be useful; site maps could also be improved;
- more documents should be available in full text;
- documents should be available in more languages.

2.2. Active dissemination of information (question no 2)

The vast majority of **civil society** organisations are in favour of more active dissemination of information. However, two NGOs express reservations. The German Civil Liberties Union and Statewatch stress the need for enhanced passive transparency.

Public bodies unanimously support a more pro-active transparency. The Czech Senate and the Finnish Government call for direct access to documents having an impact on the legislative process. The House of Lords and the French Government suggest setting up an "alert service" to which users could subscribe.

The corporate sector, in particular the representatives of the chemical and biotechnological industries, sees no need for such a policy and fears uncontrolled spreading of confidential business information.

Citizen respondents are divided on this issue. One half would welcome a more active dissemination. The other half either fails to see a need for such a policy or shares the reservations expressed by the two NGOs mentioned above.

2.3. A single set of rules for access to documents, including environmental information (question no 3)

Civil society is almost unanimously in favour of aligning Regulation 1049/2001 with the provisions of the Århus Convention regarding access to information in environmental matters. The German Civil Liberties Union and the Portuguese

Consumer Organisation FENACOOP are of the opinion that a specific framework for access to environmental information is justified.

Two thirds of the **public bodies** also support a single regime for access to documents or information. This view is not shared by the European Ombudsman or by the Governments of the Czech Republic, Denmark, France and Hungary, who consider that merging the two regimes is neither necessary nor desirable.

The **corporate world** is generally not in favour of integrating access to environmental information into the general system. The chemical and biotechnological industries consider that the provisions stemming from the Århus Convention should remain a "lex specialis" vis-à-vis the general Regulation on public access. They are particularly concerned with regard to the protection of intellectual property rights, which they believe might be endangered by integrating access to environmental information into the general access regime.

The majority of **citizen respondents** are in favour a single access regime as it would provide more clarity and legal certainty.

2.4. Transparency and the protection of personal data (question no 4)

It is to be noted that the replies to this question were given before the Court of First Instance delivered its judgment in the *Bavarian Lager*[5] case. In this judgment, the Court ruled that the exception aimed at protecting personal data laid down in Article 4(1) (b) of Regulation 1049/2001 only applies where disclosure would concretely and effectively undermine the privacy or the integrity of the person concerned. When access to a document containing personal data is requested, the application should be assessed under the provisions of Regulation 1049/2001. If disclosure would not affect the person's privacy or integrity, there is no need to examine whether disclosure meets the criteria of Regulation 45/2001.

Civil society organisations are generally of the opinion that data protection rules should not prevent the disclosure of names of individuals acting in an official capacity or on behalf of their organisations.

The public sector generally shares this view. The European Ombudsman and the Swedish Ministry of Justice in particular consider that refusal to disclose personal data must be based on concrete harm to the individual concerned. In their view, there is no need to amend Regulation 1049/2001 or the Regulation on the protection of personal data. The UK Government believes that, once the case law has clarified the relation between the two potentially conflicting rights, the provision in Regulation 1049/2001 [Article 4(1) b] should be revised. Some public authorities, in particular the French and Polish Governments, consider that expunging documents for personal data before disclosure is a satisfactory way to reconcile both rights.

The corporate sector stresses the need for adequate protection of personal data. The biotechnological industry points out that some of their employees have been subject to criminal acts.

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[5] Case T-194/04, The Bavarian Lager Co. Ltd / Commission, judgment of the Court of First Instance of 8 November 2007, not yet reported

The European Ombudsman and one citizen raise the question of an individual's access to his own personal data. The Commission's view, until now, has been that this issue does not fall within the scope of the Regulation, which deals with public access in general, and that the issue of individual protection and access should be settled in the framework of the data protection legislation.

2.5. Transparency and the protection of economic and commercial interests (question no 5)

Opinions are divided on this issue.

A clear majority of **civil society** organisations expressed the view that more weight should be given to the public interest in disclosure of company-related information. They tend to consider that only real business secrets may be withheld. Moreover, they take the view that information regarding illegitimate behaviour of undertakings should be made public.

Most **public authorities** take the view that the current system, where the protection of commercial interests is balanced against the public interest in disclosure, strikes the right balance. The Slovenian Information Commissioner suggests setting up an exhaustive list of cases where it would never be justified to invoke professional secrecy, e.g. the use of public funds or the employment relationship of civil servants. The Czech Government and the Association of German Judges consider that the current system does not offer sufficient protection. For the German Judges, the existing provisions do not adequately protect information that was not supplied voluntarily.

The corporate world calls for better protection of confidential business information. There is particular concern about possible abuses of intellectual property rights and distortion of competition. The chemical and biotechnological industries point to the obligations under the WTO Trips Agreement. Furthermore, British Telecom expressed concern with regard to the protection of information supplied under EU competition rules.

Most **citizen respondents** share the view of civil society that the public interest in disclosure should prevail.

2.6. Handling excessive requests (question no 6)

Civil society is generally opposed to derogations from the normal rules on access where access requests are excessive. NGOs consider that such derogations would give the institutions too much discretion. In their view, the problem of voluminous or excessive requests should be solved through a dialogue between the institutions and the applicant. Article 6(3) of the Regulation, according to which *"an institution may confer with applicant informally, with a view to finding a fair solution"* provides for procedural flexibility in this regard. Two organisations, the Association for Information Management Professionals (ARMA) and the European Consumers' Organisation (BEUC) think that there is a case for such derogations. Statewatch is of the opinion that only extended time frames could be acceptable in exceptional cases. For the European and Swedish Federations of Journalists on the other hand, the

current time limit of 15 working days is already too long; they consider 48 hours as a reasonable time limit.

The public authorities are divided on this issue, which reflects different practices in the Member States. In any case, even those Governments which are in favour of derogations for excessive requests consider that they must be based on objective criteria. The European Ombudsman shares the view of civil society and considers that the current provision in Article 6(3) is sufficient to address the problem; he further considers that the institutions should allocate adequate resources to document and information management and to the handling of access requests. The German, Dutch, Slovenian and Swedish Governments also consider Article 6(3) to adequately address the problem of excessive requests. The UK Government points out that resources used in dealing with excessive requests preclude institutions from fulfilling other functions; since resources are not unlimited, a proper balance must be struck. Both the House of Lords and the UK Government refer to provisions regarding "vexatious" requests under the UK freedom of information legislation.

The corporate sector unanimously supports specific measures for handling voluminous requests. These could consist of asking the applicant to narrow down his request, extended time frames or setting a maximum number of documents per application. The chemical industry is concerned about unacceptable disclosure and calls for an appeal procedure with suspensive effect which would enable companies to prevent disclosure of confidential business information.

Citizen respondents are also divided on the issue; one half is opposed for the same reasons as set out by the NGOs; the other half is in favour but did not elaborate on the reasons for this opinion.

2.7. The concept of "document" in relation to databases (question no 7)

The question was whether the definition of "document" should include sets of information that can be extracted from electronic databases using existing search and retrieval tools.

Civil society organisations unanimously expressed the view that the content of databases must fall within the scope of the Regulation. Some NGOs and organisations of journalists consider that the current definition in the Regulation already covers the content of databases. Most civil society organisations call for a right of access to information, rather than to documents, regardless how and where the information is stored. In their joint contribution, nine associations of investigative journalists contest the condition that the information can be extracted using standard tools, which in fact corresponds to current practice in the Commission.

Public authorities also consider that the content of databases falls within the scope of the rules on public access, even if some governments take the view that the current definition already includes databases. The Danish, Finnish and Slovenian Governments share the reservations expressed by the nine associations of investigative journalists with regard to the existing search tools for extracting information from databases. They are concerned that this would create restrictions for access to information held in databases. The European Ombudsman, who has the

same concern, suggests establishing a general obligation to take into account the needs of transparency in the design and operation of databases.

The **corporate sector** considers that the rules on public access should cover information held in databases. They point out that the content of databases should be protected under the exceptions as any other document.

Most **citizen respondents** are in favour of clarifications with regard to access to the content of databases. One citizen considers that this is already included in the current definition.

2.8. Events before and after which exceptions would or would not apply (question no 8)

All respondents expressed reservations as regards withholding documents before a specific event. It is generally considered that this might be in contradiction with the harm test requirement under the Regulation and would nullify the overriding public interest test.

On the other hand, there is wide support for setting times frames after which documents become public, well before the 30-year time limit after which archives are open to the public.

3. OTHER COMMENTS

Three major issues were raised by respondents in their general comments.

3.1. The scope of the Regulation:

Many NGOs and some public authorities consider that the scope of the Regulation should be extended to documents held by all institutions and bodies of the European Union. It should be noted that under the current treaty provisions, there is no legal base for such an extension, but the Lisbon treaty contains provisions to address this issue.

3.2. Documents originating from Member States:

The European Ombudsman, the Finnish and Swedish Governments and Statewatch ask for a review of the Member States' ability to oppose disclosure of their documents. The German Government considers that an obligation for Member States to state reasons for refusal is a conceivable approach. The Commission did not expressly address this issue in the Green Paper as it is currently pending before the Court of Justice. It was however mentioned as a consequence of aligning the Regulation on the requirements of the Århus Convention.

3.3. The public interest override:

Statewatch regrets what it considers to be an excessively restrictive interpretation given by the Court of First Instance to the overriding public interest in recent judgments. Statewatch and ECAS as well as the Finnish Government call for a clarification of what would constitute a public interest that would prevail over

exceptions to the right of access. More civil society organisations would like the public interest test to apply to all exceptions.

4. CONCLUSIONS

The analysis of the contributions leads to the following main conclusions.

4.1. Active dissemination of documents

Registers and websites should be easier to access and more harmonised. The public would welcome a more pro-active disclosure policy.

4.2. The relation between Regulations 1049/2001 and 1367/2006 (implementing the Århus Convention)

Aligning Regulation 1049/2001 with the provisions of the Århus Convention on access to environmental information is widely supported by public bodies and individual citizens. Environmental NGOs have some concern that such an alignment might lower the transparency standard for environmental matters. The chemical and biotechnological industries consider that the Århus provisions should remain a "lex specialis" vis-à-vis the general rules on public access.

4.3. The protection of personal data under Regulation 1049/2001

Many respondents, in particular NGOs and journalists, call for greater openness where persons act in a public capacity. This issue will be reviewed as a follow-up to the judgment of the Court of First instance in the Bavarian lager case.

4.4. The protection of commercial interests

Public authorities consider that the current rules strike the right balance. Journalists, NGOs and a clear majority of citizens claim that more weight should be given to the interest in disclosure. Industry calls for better protection of business information.

4.5. Handling excessive requests

The question whether institutions should be able to derogate from the normal rules when dealing with excessive requests also led to diverging reactions. The private sector is unanimously in favour. A slight majority of those Member States which replied to the Green Paper, support specific measures for such requests, based on objective criteria. The Ombudsman, other Member States and NGOs are opposed to specific rules on excessive requests.

4.6. The concept of "document"

As regards the concept of "document", the general feeling is that the current wide definition should be maintained. A clarification with regard to databases as suggested in the Green Paper would be welcomed.

4.7. Temporal application of exceptions

There is no support for the idea of defining events before which documents would not be accessible. On the other hand, NGOs and a majority of Member States would welcome the systematic disclosure of documents after specific events and well before the 30-year limit for opening the archives.

5. NEXT STEP IN THE REVIEW PROCESS

The Commission will submit to the European Parliament and the Council a proposal for the amendment of Regulation 1049/2001 in the course of the first quarter of the year 2008.