



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 13 February 2012

6439/12

**Interinstitutional File:
2008/0090 (COD)**

INF 19
API 16
JUR 87
CODEC 366

NOTE

from: Presidency
to: Delegations

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

Delegations will find in Annex a non-paper by the Presidency on the recast of Regulation 1049/2001, as it was presented at the meeting of the Working Party on Information on 10 February 2012. This document will be the basis for discussions in the Working Party on Information at the meeting on 9 March 2012.

Presidency non-paper on the recast of Regulation 1049/2001

In this paper, a limited number of elements is presented, on which a possible compromise could be based:

1. Institutional scope
2. Definition of a document and other definitions
3. Exception relating to selection procedures
4. Århus alignment
5. Access for research purposes
6. Information officers

In addition, some other elements are presented, on which agreement is not excluded, but that need further reflection:

7. Protection of privacy vs. public access to documents
8. Scope of the Regulation and the principle of individual examination
9. Member State documents
10. Access to legislative documents

The Presidency will introduce this paper to the Working Party on Information at the meeting on 10 February 2012. A first round of discussion in substance on all elements identified in the paper will take place at the following working party meeting on 9 March 2012.

In order to help delegations navigate among the various proposals made during the four years of negotiating the recast of the Regulation, relevant text proposals are indicated at the end of the paper.

1. Institutional scope

The Commission proposal from 2011 on the institutional scope of the Regulation received the Council's support already in September 2011.

Preliminary view: The Presidency suggests to include the amendments proposed by the Commission, with the amendments agreed in the WPI in September 2011,¹ in a compromise deal.

2. Definition of a document and other definitions

In 2008, the Commission proposed a new definition for a 'document' by proposing that the Regulation would only apply to documents that are 'drawn-up by an institution and formally transmitted to one or more recipients or otherwise registered, or received by an institution' and to include a reference to data in electronic storage, processing and retrieval systems.ⁱⁱ

The European Parliament has proposed to abandon the Commission proposal and instead develop the current definition further and to include a reference to data bases, including external data bases (AM 30)ⁱⁱⁱ.

Preliminary view: The Presidency believes that if the definition of a document is to be opened for discussion, then certain updates in relation to databases would be useful for the purposes of clarity.¹ However, further discussion of the exact formulations proposed by the Commission and the European Parliament in this respect would be required.

A number of other definitions has also been proposed by the Parliament (AM 30), including on 'administrative task'^{iv} – the definition of which could be of particular interest taking into account that the ECJ, the ECB and the EIB are subject to the right of access to documents 'only when exercising their administrative tasks'.² Currently, a task force consisting of the three institutions is drafting such a definition. This draft could be considered when reflecting on the inclusion of such definition into the revised Regulation. The Presidency thus invites delegations to consider the need to include a definition of 'administrative task' in the Regulation.

¹ See the ruling of the General Court in Case T-436/09 *Dufour v the European Central Bank*, in which the Court confirmed that the current notion of a document also covers a dataset contained in a database (paras 150 and 152).

² Article 15(3) TFEU

3. Exception relating to selection procedures

In 2008 the Commission proposed adding a new Article 4(2)(e) on ‘the objectivity and impartiality of selection procedures’. The European Parliament has proposed to clarify the new exception by limiting its applicability to public procurement procedures and proceedings of a selection board.^v

Preliminary view: The proposal by the Parliament would help overcome the concerns expressed earlier in the Council concerning the abstract formulation of the exception. The Presidency thus wonders whether delegations could agree to adding this new exception, possibly with some of the clarifications proposed by the Parliament.

4. Alignment with the Århus regulation on access to environmental information

In 2008 the Commission proposed aligning Regulation 1049/2001 with the so-called Århus regulation³ by adding a new exception 4(1)(e) protecting ‘the environment, such as breeding sites of rare species’,. Moreover, Article 4(4) was proposed to be reformulated by adding a reference to overriding public interest when information relates to emissions into the environment. ^{vi}

The EP report seems to support adding a new exception 4(1)(e) as proposed by the Commission. Moreover, two amendments relating to Århus (see AMs 38 and 39) are included. It would seem necessary to discuss the aims of these proposals further with the EP.

Preliminary view: An alignment with the Århus regulation seems to be useful for clarity purposes. The Presidency proposes that Regulation 1049/2001 is aligned with the Århus regulation following the model proposed by the Commission in 2008. However, it would be necessary for the Council Legal Service to identify, in cooperation with the Commission, a way of carrying out the alignment in a legally correct manner that would still keep the Regulation 1049/2001 approachable and understandable from the point of view of citizens.

³ Regulation 1367/2006.

5. Access for research purposes

AM 42 of the EP report provides a new element in the Regulation in proposing the possibility of granting access for research purposes.^{vii} The Presidency wishes to draw attention to the fact that a similar possibility exists in data protection legislation.⁴

Preliminary view: The principle of privileged access for research purposes seems to deviate from two basic principles of the Regulation, i.e. public access on an *erga omnes* basis, and the absence of the need to motivate a request. The Council could, however, engage in a discussion on the principle of granting access for research purposes.

6. Information officers

Various elements in EP report relate to the ways in which the Regulation is implemented by the institutions. For example, AM 62 of the report proposes the appointment of Information Officers in the general administrative unit within each institution, body, office and agency.

Preliminary view: In constructive spirit towards the EP, the Presidency invites reflections on the proposal to appoint Information Officers with a responsibility to ensure compliance with the Regulation and good administrative practice, while at the same time allowing sufficient flexibility to the institutions with regards to their internal organization of this work.

7. Protection of privacy vs. public access to documents

Current Article 4(1)(b) of Regulation 1049/2001 establishes an exception to public access in case granting access would harm ‘privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data’. In practice, this provision has proved difficult to implement. In 2008, the Commission proposed to delete the provision and replace it with a new Article 4(5).^{viii}

⁴ See Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Article 11(2), Article 13(2), and the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS No.108, 28 January 1981, Article 9(3).

In Case C-28/08 P *Bavarian Lager*, the current Article 4(1)(b) was interpreted by the ECJ. The ruling has caused much discussion, and the EDPS called on the legislature to reformulate Article 4(1)(b) so as to re-establish the proper balance between public access and data protection. The EDPS argued that the harm to privacy should be a necessary threshold for refusal of access to documents containing personal details.⁵

Both the Council and the EP have acknowledged the need to reconsider the balance.⁶ The EP Report of 15 December 2011 (AM 40) includes the formulation for a new Article 4(5) previously proposed by the EDPS, which he has stated to be equally valid after the Court's ruling in *Bavarian Lager*.

Preliminary view: The Presidency suggests that Article 4(1)(b) is addressed in case Regulation 1049/2001 is to be amended. After the entry into force of the Lisbon Treaty, both principles, the protection of personal data and the right of access to documents, are fundamental rights included in the EU Charter of Fundamental Rights.⁷ The Charter further specifies that the rights included in it may only be limited when provided by law and if the essence of these rights and freedoms are respected.⁸ Consequently, a balance between these rights ought to be found that respects the core essence of both of these rights.

⁵ See "Review of relationship between transparency and data protection more urgent after Court ruling on Bavarian Lager", Press Release by the European Data Protection Supervisor, available at http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/PressNews/Press/2010/EDPS-2010-11_ECJ_Bavarian_Lager_EN.pdf

⁶ See Council Conclusions adopted by the JHA Council on 24-25 February 2011 relating to the reform of the data protection Directive 95/46/EC, recital 8: 'Considering that other relevant fundamental rights enshrined in the Charter, and other objectives in the Treaties, such as the right to freedom of expression and information and other values such as the principle of transparency have to be fully taken into account while ensuring the fundamental right to the protection of personal data'; EP Initiative report (2011/2025(INI)), recital E and sections 3 and 5. See also para 18 of COM(2012) 11 proposing a new data protection regulation: 'This Regulation allows the principle of public access to official documents to be taken into account when applying the provisions set out in this Regulation.' These statements are of a high relevance noting that Article 1 of Regulation 45/2001 defines its objectives with reference to Directive 95/46/EC. The negotiations on a new data protection regulation are ongoing and are not expected to come to an end after the adoption of the 1049 recast.

⁷ Article 8 and Article 42 of the Charter.

⁸ Article 52(1) of the Charter. Furthermore, limitations to rights 'may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'.

The presidency suggests reflection on the following elements, many of which can be found in the EDPS proposal:

- The relevant exception could, like the current Article 4(1)(b), be based on the examination of possible harm to privacy or personal integrity. If there is an infringement of either, public access should not be granted.
- The EU rules on the processing of personal data must be appropriately taken into account. It is clear that granting public access to a document should not lead to a situation where data is processed contrary to the provisions of EU data protection legislation.
- In order to secure that also the core essence of public access is preserved, situations in which public access should be granted as the main rule could be considered – situations in which privacy and integrity are not infringed.⁹

Part of the way forward could include consulting the EDPS on the proposed new formulation of the exception; the EDPS, being the independent supervisory authority that ensures that the EU institutions and bodies respect their data protection obligations.

8. Scope of the Regulation and the principle of individual examination

In 2008 the Commission proposed to limit the scope of the Regulation by removing certain documents relating to Court proceedings and ‘documents forming part of the administrative file of an investigation or of proceedings concerning an act of individual scope’ from the reach of public access rules either on a temporary or permanent basis.

The EP has proposed to delete the block exemptions proposed by the Commission in 2008.^{ix}

In its jurisprudence, the Court has shown a certain understanding for the Commission’s arguments about excessive workload.¹⁰ The Regulation does not include provisions on general presumptions.

The compatibility of such general presumptions with the new Treaty framework is also unclear.

Preliminary view: The Presidency would suggest that the three institutions would engage in a serious discussion about the ways in which the procedural rules of the Regulation, in particular current Article 6, could be developed to address the legitimate concerns relating to workload in case of exceptionally wide requests.

⁹ Examples of such situations could include names, titles and functions of public office holders, (senior) civil servants and interest representatives in relation to their professional activities.

¹⁰ See case T-2/03 VKI.

9. Member State documents

Article 4(5) of the Regulation concerns documents originating from Member States but in the possession of institutions: ‘A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.’

In interpreting the current Article 4(5), the Court has underlined the duty of loyal cooperation and dialogue between the institution and the Member State. The Court has also established a requirement for a ‘grosso modo’ or a *prima facie* appreciation by the institution to examine a) whether the Member State has provided reasons for its refusal, b) that the refusal is dressed in terms of Article 4, and c) that the exception provided is roughly applicable, considering the substance of the document.¹¹ It should not, however, replace the conclusion drawn by the Member State with its own conclusion, unless the reasoning of the Member State is clearly wrong or insufficient.

In 2008, the Commission proposed reformulating the current Article 4(5) and turning it into a new Article 5(2).^X The EP has in its report suggested another formulation.^{XI} Both of these formulations have been justified with reference to Court jurisprudence.

In practice, following an agreement in Coreper in March 2002, most documents submitted by delegations during discussions in the Council's preparatory bodies are considered as Council documents and therefore the rules on documents originating from 3rd parties do not apply to them. In such cases Member States are not consulted.¹²

Preliminary view: In the view of the Presidency, a valid option for the legislature would be to decide not to revise the provision and to maintain its current formulation.¹³

One concern seems to be the need for a reference to national legislation. Regulation 1049/2001 already contains a number of exceptions with general wording. Delegations are encouraged to consider whether legitimate interests covered by their national legislation are in fact covered by the current exceptions regime or further clarification of the exceptions is needed.

¹¹ Case C-64-05 P Sweden v Commission, para 85-88.

¹² See doc. 6203/02 and doc. 10425/03.

¹³ The scope of institutional discretion is currently being addressed by the General Court. See case T-59/09 Germany v Commission, pending before the General Court.

Another concern regards the applicable time limits. The current practice allows Member States approximately five working days to reply to an application. While the Commission in 2008 proposed to extend the time limit for dealing with confirmatory applications from 15 to 30 working days, it did not propose changes to the current deadline of fifteen days for dealing with initial applications, which is when the consultation of the relevant Member State takes place. In order to ensure that the Member State has the opportunity to form a solid and properly reasoned position to the question of possible disclosure, the Presidency encourages delegations to reflect upon the option of extending the time limit for the processing of initial applications in Article 7 from the current 15 days to 30 days when the application concerns a document originating from a Member State (or third party in general).

10. Access to legislative documents

Article 15(2) TFEU establishes that ‘[t]he European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act’.¹⁴ It is important to note that the Treaty refers to the Council’s considerations as well as the voting on legislative acts.

The Report by the European Parliament includes various provisions relating to access to legislative files. AM 44 introduces a completely new Article 5a on Legislative acts, which, in addition to elaborating on the principle of access to documents relating to legislative procedures, names a number of documents to be accessible on an interinstitutional site and a special series of the Official Journal.^{xiii} The Parliament proposes that further examples of documents to which immediate and direct access should be granted would be given in the recitals.^{xiiii} In the view of the Parliament, the exceptions in Article 4 should not be invoked at all in relation to legislative documents.^{xiv}

Preliminary view: The Treaty provisions set out an ambitious framework for transparent decision-making in legislative matters. A serious discussion on how to give effect to these Treaty provisions in a balanced way would seem appropriate. One option could be to add a new article on legislative acts, or it could be considered how the internet could be used to increase access. The Presidency invites delegations to consider whether (parts of) the proposals made by the European Parliament could form the basis of an initial discussion. In this context, the question of public access to legislative documents must be kept separate from an institution's privileged access to other institutions' documents.

¹⁴ See also Article 16(8) TEU.

Further reflections:

- Could the Turco judgment standard be ‘written into the Regulation’ with more specificity?
- Would the Lisbon Treaty provisions on transparency and participation in the legislative process allow categorical limitations to public access to legislative documents?
- At what stage of drafting should a document be covered by public access?¹⁵
- Would access to indicative reports require greater efforts in order to ensure that intervening delegations consider that their interventions are reported accurately? Would it lead to less specific reporting, thus resulting in *de facto* less transparency?

¹⁵ In general, in many Member States the idea would seem to be that public access begins when a document is finalised for the purposes for which it has been drafted; a document must have reached a certain form before the public has any interest in acquainting itself with its contents. Not even in the most open Member States absolutely every document in legislative matters is automatically placed on the web in real time. For example, documents drafted but lacking approval by a senior official and thus not necessarily final would hardly be granted public access; similarly if the position of the authority has not yet been formed. Even in preparatory stages, the authorities are granted ‘space to think’.

RELEVANT TEXT PROPOSALS AGREED BY THE COUNCIL OR PROPOSED BY THE COMMISSION, THE EUROPEAN PARLIAMENT OR THE EUROPEAN DATA PROTECTION SUPERVISOR:

-
- ⁱ The agreed amendments included a new recital (4bis), stating that “The right of access to documents is also recognised by Article 42 of the Charter of Fundamental Rights of the European Union”. In Article 1, point (a) of the Commission proposal is replaced by the following:
“(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of (...) access to documents of the institutions of the European Union, as defined in Article 3 (c), provided for in Article 15(3) of the Treaty on the Functioning of the European Union in such a way as to **ensure** the widest possible access to documents,”
- ⁱⁱ New definition for a document proposed by the Commission in 2008:
‘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.’
- ⁱⁱⁱ AM 30 by the European Parliament:
document *shall mean* any **data** content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) **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, **including external systems used for the institution's work, constitute a document, notably** if they can be extracted **using any reasonably** 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 as a fundamental right is guaranteed, 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;**
- ^{iv} AM 30 by the European Parliament: *‘(ac)‘administrative task’ shall mean measures dealing with the organisational, administrative or budgetary matters of an institution, body, office or agency concerned;’*
- ^v AM 36 by the European Parliament:
(e) the objectivity and impartiality of **public procurement** procedures **until a decision has been taken by the contracting institution, body, office or agency, or the proceedings of a selection board leading to the recruitment of staff until a decision has been taken by appointing authority.**
- ^{vi} Commission proposal for a reformulation of Article 4(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.

-
- vii AM 42 by the European Parliament:
7a. An institution, body, office or agency may grant privileged access to 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.
- viii Commission proposal for a new Article 4(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.
- ix AM 38 by the European Parliament:
[...] An institution, body, office or agency invoking one of the exceptions has to 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 could specifically and effectively undermine the interest protected.
- x Commission proposal for a new Article 5(2):
Where an application concerns a document originating from a Member State, other than documents transmitted in the framework of procedures leading to a legislative act or a nonlegislative act of general application, the authorities of that Member State shall be consulted. The institution holding the document shall disclose it unless the Member State gives reasons for withholding it, based on the exceptions referred to in Article 4 or on specific provisions in its own legislation preventing disclosure of the document concerned. The institution shall appreciate the adequacy of reasons given by the Member State insofar as they are based on exceptions laid down in this Regulation.
- xi AM 43 by the European Parliament:
Where an application concerns a document originating from a Member State, other than documents transmitted in the framework of procedures leading to a legislative act or a delegated or implementing act of general application, the authorities of that Member State shall be consulted where there is any doubt as to whether the document is covered by one of the exceptions. The institution holding the document shall disclose it unless the Member State gives reasons for withholding it, based on the exceptions referred to in Article 4 and take a decision on the basis of its own judgment as to whether the exceptions cover the document concerned.
- xii AM 44 by the European Parliament:
1. In compliance with the democratic principles outlined in Articles 9 to 12 TEU and with the case-law of the Court of Justice, institutions acting in their legislative capacity, including under delegated and implementing powers, as well as Member States when acting in their capacity as Members of the Council shall grant the widest possible access to documents relating to their activities.
2. Documents relating to legislative programmes, preliminary civil society consultations, impact assessments and any other preparatory documents linked to a legislative procedure, as well as documents relating to the implementation of Union law and policies linked to a legislative procedure shall be accessible on a user-friendly and coordinated interinstitutional site and published in a special electronic series of the Official Journal of the European Union.

3. During the legislative procedure, each institution, body, office or agency associated in the decision-making process shall publish its preparatory documents and all related information, including legal opinions, in a special series of the Official Journal of the European Union as well on a common Internet site reproducing the lifecycle of the procedure concerned.

4. Once adopted, legislative acts shall be published in the Official Journal of the European Union as provided for by Article 13.

See also AM 58 adopted by the EP, relating to Art 12(1):

The institutions, bodies, offices and agencies shall make documents directly accessible to the public in electronic form or through registers, particularly those drawn up or received in the course of procedures for the adoption of Union legislative acts or non-legislative acts of general application.

xiii AM 12 by the European parliament for amendments to recital 12:

In compliance with Article 15(3) TFEU, full access should be granted to documents in cases where, according to the Treaties, the institutions are acting in their legislative capacity, including under delegated powers in accordance with Article 290 TFEU and implementing powers in accordance with Article 291 TFEU when adopting measures of general scope. Preparatory legislative documents and all related information on the different stages of the interinstitutional procedure, such as Council working group documents, names and positions of Member States delegations acting as Members of the Council and first-reading trilogue documents, should in principle be made immediately and directly accessible to the public on the Internet

xiv See AM 42 on Article 4(7) stating that

The exceptions as laid down in this Article shall not apply to documents transmitted in 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 policymaking by lobbyists and other interested parties.

The exceptions 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.