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Analysis of Danish Presidency non-paper on Regulation 1049/2001

On 13 February 2012, the Danish Presidency of the Council of the European Union circulated a discussion paper on the reform of the EU's access to documents regulation, Regulation 1049/2001 on access to European Parliament, Council and Commission documents.

The Danish Presidency's discussion paper aims to provide a basis for a consensus to emerge between the Parliament, Council and Commission on the future of the EU access to documents rules.

Access Info Europe's analysis of the Danish non-paper follows same structure as the Presidency document, which can be found [online on the Council's website](#).

One issue that this analysis does not address is that of classification of documents as this is not addressed by the Danish non-paper. More details on this can be found in the Access Info Europe document analysing the Commission's and the Parliament's proposals.

I. Main Comments by the Presidency

1. Institutional Scope: The Danish Presidency proposes to expand the scope of Regulation 1049 to cover all EU institutions in line with the amendments proposed by the European Commission as agreed in the Council's Working Party on Information in September 2011.

Access Info Europe supports expanding the scope of Regulation 1049 in line with the Lisbon Treaty to ensure that the right of access to documents applies to all EU bodies.

Access Info Europe would prefer to see the right apply to the non-administrative functions of the European Central Bank, European Investment Bank and the European Court of Justice, even though this is not provided for in the EU treaties post Lisbon.

2. Definition of a document: In response to proposals for a rephrasing of the definition of a document by both the Commission and the Parliament, the Presidency has called for a discussion on the definition, in particular with the aim of achieving clarity on the right of access to databases.

Access Info Europe notes that the TFEU at Article 15 provides for "*a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium*" and does not contain any further specifications nor limitations. Hence, to be consistent with this, the definition of a document must not narrow the right of access.

Access Info Europe believes that a simple definition of a document which is consistent with the EU

Treaties would be sufficient and that there is no need to make an arbitrary distinction between an old-fashioned notion of a "document" and information recorded in a database. Inspiration should be taken from the PSI Directive and the Open Government Data movement, and consideration should be given to the Council of Europe Convention, which defines "official documents" simply as "all information recorded in any form, drawn up or received and held by public authorities".

The definition in Regulation 1049/2001 could therefore be that: "*document*" means all content, whatever its medium" and it should be made clear that this provision applies equally to all documents held by EU bodies whether drawn up or received by them.

In addition, consistent with the open government standards which the Commission is currently promoting, a requirement should be introduced to provide access to documents in an open, machine-readable format, free of copyright restrictions and without limitations on re-use.

2.1 Definition of administrative tasks: The Danish Presidency has raised the question of the necessity of having a definition of "administrative task" when it comes to accessing information from some EU bodies.

Access Info Europe defends the principle that the right of access applies to all information held by all public bodies irrespective of the nature of the task they perform, subject to limited exceptions as permitted by international law.

It is therefore regrettable that the TFEU post Lisbon limits the right with respect to the European Central Bank, European Investment Bank and the European Court of Justice to only administrative information.

In this context, if it is deemed that a definition is necessary, it should be sufficiently broad so as to achieve the goals of transparency consistent with recognition of this right by the TFEU.

Possible wording could be "*Administrative tasks constitute, at a minimum, all tasks related the structure, organisation, decision making and functioning of public bodies, including the spending of public funds.*"

3. Selection Procedures: The Commission in 2008 proposed an exception on selection procedures and the Parliament proposed adding public procurement proceedings. The Danish Presidency has invited Member States to consider the addition of this provision.

Access Info Europe finds this new exception unnecessary as both staff selection procedures and public procurement are clearly part of an institution's decision-making process and hence are sufficiently protected by the existing Article 4(3). Neither of the new exceptions is enumerated in the Council of Europe Convention on Access to Official Documents

There are two problems which could result from the proposed amendment. The first is to reduce access to information about selection procedures and public procurement which, in the context of the need for transparency to address concerns about revolving doors and probity in public spending, would be a worrying result.

The second is that this reform would undermine the existing Article 4(3), rendering it meaningless. Access Info Europe believes that protection of decision making is a legitimate exception but that if a new series of specific exceptions were to be introduced, this would strengthen the argument for abolishing the existing 4(3).

4. Aarhus alignment: The Commission has proposed a new exception relating to the breeding sites of rare species which is in line with the Aarhus Convention.

Given the need to ensure the smoothest possible relationship between Regulation 1049 and Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, the Presidency is calling for a review by the Council's Legal Service to find the most appropriate way to align the two regulations.

Access Info Europe notes that it is important that Regulation 1049 be amended to make clear that when a request submitted under Regulation 1049 refers to documents which contain information identified by Regulation 1367 as environmental information, there is a particularly strong presumption that the information will be disclosed unless the narrow exception of environmental protection applies.

It is also important that the exceptions in Regulation 1049 be amended to ensure that a public interest always be deemed to exist when the information relates to emissions into the environment.

Access Info Europe supports a full review of the interaction of the two regulations in order to ensure that they are properly applied in a way which gives requesters easy and rapid access to information.

The Danish non-paper also identifies Parliament's amendments 38 and 39 in particular. Amendment 39 directly refers to the Aarhus regulation, and does not therefore seem problematic or controversial.

In Access Info's analysis, amendment 38 is not actually about Aarhus compliance, it is about extending the public interest test to all exceptions. The Parliament is attempting to give examples of some instances in which the public interest in transparency should always override the potential harm in publication.¹ Access Info Europe believes that amendment 38 is crucial in that it applies a

1 The Parliament's proposal is: "When balancing the public interest in disclosure under paragraphs (1) to (3), an overriding public interest in disclosure shall be deemed to exist where the document requested relates to the protection of fundamental rights and the rule of law, sound management of public funds, or the right to live in a healthy environment, including emissions into the environment. 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."

harm and public interest to all the exceptions.

5. Access for research purposes: The Danish Presidency has raised a concern about the Parliament's proposal for a new provision which would grant "privileged access" to information for research purposes and that information "*shall only be released subject to appropriate restrictions regarding its use.*"

Access Info fully agrees that such a provision would run counter to basic standards on access for all as a fundamental right and introduce by the back door a requirement that requesters "motivate" requests explaining both who they are, why they want the information, and what they plan to do with it. Such a provision would be very hard to apply in practice in ways which are non-discriminatory: How would an EU public official determine if someone is a researcher or not? If academics are considered researchers where is the cut off point: doctoral students or those doing a masters thesis? And if an academic who has had access moves to work for industry or an NGO, will they still have access and what do they do with what they already know? Would journalists be included in the definition of researchers – and if so what about bloggers and citizen journalists?

There is a clear risk here of creating a two-track system where those who know how to justify their requests will receive preferential treatment whilst the vast majority of the European population may be sidelined.

There is also a doubt about which information this provision would apply to: if Regulation 1049/2001 is properly applied, only a limited quantity of information which genuinely falls under the exceptions because its disclosure would cause harm to a legitimate interest would be withheld from the public. It is questionable whether this information should be available to "researchers" using the access to documents mechanism. If any access were to be granted, for example to those conducting scientific research, this could be done via another mechanism rather than the rules governing the public's right of access to documents.

6. Information Officers: The Danish Presidency has invited the Council to consider the merits of the EP's proposed provision on establishing information officers in each EU body.

Access Info fully supports the idea of nominating Information Officers. Designating one person to be responsible for the adequate processing of access to documents requests would streamline the system and reduce the overall administrative burden.

Such a position does not imply creation of an entirely new post, as many bodies already have someone responsible for handling access to documents requests and for those which do not, this could be undertaken, for example, by the body's data protection officers.

7. Protection of privacy v Public access to documents: The Presidency recommends that the provision on protection of privacy, Article 4(1)(b) in the current regulation, be reviewed to take fully into consideration the fact that the right of access to documents is now recognised as a

fundamental right, and hence has to be balanced against the right to protection of private life (Article 7 of the Charter of Fundamental Rights) and data protection (Article 16 of the TFEU). This was not previously the case, as reflected in the jurisprudence of the European Court of Justice (for example, the *Bavarian Lager* case).

Access Info strongly supports the revision of Article 4(1)(b), in particular to introduce the harm and public interest tests which will permit an appropriate balancing of the right of access to documents and the right to protect personal data.

The EP has proposed language which we understand is in line with previous comments made by European Data Protection Supervisor (EDPS) and the Presidency suggests consulting with him as the independent expert charged with oversight of the right to protection of personal data and privacy.

Access Info Europe supports this suggestion. At the same time, we propose that consideration be given to simplifying the language. We do not believe that a high level of detail is necessary to ensure a proper balancing of the two rights as this can be done on a case by case basis in line with established European and international standards in the many countries which recognise both rights as fundamental rights.

8. Principle of Individual Examination: The Danish Presidency has raised concerns about the Commission's proposals for blanket exceptions to documents submitted to the Courts by third parties. The Commission has also proposed a blanket exception for documents relating to ongoing investigations and procedures and to all documents submitted by third parties both during and after the investigations/procedures.

One of the Commission's concerns which motivated this proposal is the workload involved in responding to requests about court cases and investigations, as many documents need to be examined to determine if existing exceptions apply. Hence the desire to rely on general presumptions. The Presidency, however, raises the concern as to whether this is in line with the newly-established right of access to documents in the TFEU.

Access Info Europe shares this concern and does not believe that the block exemptions proposed by the Commission are permitted by international standards on the right of access to information, which require case-by-case examinations of all documents to be requested. The overriding principle here is that exceptions must be applied in relation to the content of the document, not the author or its nature.

We note that under Article 6(3) when the request is for a very large number of documents, an EU body has the option to confer with an applicant with a view to reaching an amicable agreement.

9. Member State documents: The current Regulation 1049 accompanied by the jurisprudence of the European Court of Justice permits EU bodies to take into consideration the position of a Member State on the release of a document but are required to take an independent decision, particularly if the Member State does not provide clear reasons grounded in exceptions to be found in Regulation 1049.

The Commission in 2008 proposed changing this and offering Member States the right to veto disclosure based on the exceptions in their national law. The Parliament on the other hand proposed language which clarifies that *"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 judgement as to whether the exceptions cover the document concerned."*

There is however clearly some doubt about interpretation of the current rules as revealed by the fact that both the Commission and the Parliament's proposals go in different directions whilst claiming to be based on Court jurisprudence.

The Danish Presidency suggests that the current formulation accompanied by the Court's jurisprudence is sufficient. It invites member states to consider whether their exceptions match those of Regulation 1049 or whether "further clarification of the exceptions is needed."

For Access Info Europe, the current formulation is acceptable and we support the Parliament's proposal in the event that further clarification is deemed desirable; the current wording of the Regulation is preferable to the Commission's proposal.

Access Info Europe does not support the invitation by the Danish Presidency to propose new exceptions to the Regulation 1049 based on national laws. We note that extensive work and negotiation over almost three years went into the development of the list of exceptions in the Council of Europe Convention on Access to Official Documents and that many EU member states were involved in those discussions (Belgium, Bulgaria, Denmark, France, Germany, Hungary, Ireland, Italy, the Netherlands, Poland, Portugal, Slovenia, Spain, Sweden, and the UK all participated in the drafting). The list of exceptions in the Convention on Access to Official Documents should serve as a reference point, particularly as the Convention is posited as a "minimum core of basic provisions" (see the Explanatory Report to the Convention at Paragraph I.iii).

9.1 Timeframes for Confirmatory Applications and Member State Consultations: The Commission in 2008 proposed extending the timeframes for confirmatory applications to 30 days, with the possibility to extend that timeframe by another 15 working days. The Parliament proposed keeping the original 15 day timeframe for confirmatory applications. The Presidency has not taken a position on this.

Access Info Europe is of the opinion that the initial 15 day timeframe for a confirmatory application should be sufficient. What takes time is usually compiling information, which is done at the preliminary response stage. If an assessment of a document has already been made to identify which elements might fall under an exception, reviewing this should not take more than 15 working days.

The Presidency has, nevertheless, made a further proposal to extend the timeframes for consultations with third parties, including member states, by an additional 15 working days. This

seems to be in addition to the permissible 15 day extension for answering an initial request.

Access Info Europe further suggests that, in instances where a third party needs to be consulted, an additional five working days should be sufficient, rather than the 15 days proposed by the Presidency. This would mean 20 working days in lieu of the current 15, giving the third party 10 working days to respond instead of the current practice of giving them 5 working days.

10. Transparency of the Legislative Process

The Danish Presidency raises a series of questions about the legislative process in the light of the requirement in the TFEU for an open legislative process in which “The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures” and calls for a serious discussion on how to give effect to these Treaty provisions.

One option could be to add a new article on legislative acts as proposed by the Parliament which has suggested that *“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.”*

10.1 Access to legal advice: The original wording of Regulation 1049 allows for documents which would harm legal advice to be withheld unless there is an overriding public interest in disclosure. The jurisprudence of the European Court of Justice has established that when the legal advice relates to legislative process it should generally be accessible.

The Danish Presidency has raised a question as to whether this standard should be written in to Regulation 1049, particularly given the strong protection of transparency of the legislative process in the TFEU.

Access Info Europe notes that legal advice is not one of the exceptions permitted by the Council of Europe Convention on Access to Official Documents and that normally it could be protected by other exceptions (e.g.: protection of decision making or protection of court proceedings). It should also be noted that the functioning of the European Union is very particular in nature and that legal advice is heavily relied upon by the EU institutions for most if not all decisions taken by the EU institutions. Hence, citizens should be able to access those opinions in order to hold EU institutions to account in all but exceptional circumstances.

Therefore, if the exception is to be retained, Access Info Europe is of the opinion that the current wording in Regulation 1049 should stand and that it should be interpreted in line with the jurisprudence of the European Court of Justice and the general presumption in the TFEU on transparency of the legislative process.

[We note that the Parliament’s proposal is not acceptable as it narrows the protection of court proceedings to legal advice only which is not in line with international standards.]

10.2 Categorical limitations on Documents forming part of the Legislative Process: The Danish Presidency has raised the question as to whether the Lisbon Treaty provisions on transparency and participation in the legislative process allow for categorical limitations to public access to legislative documents.

Access Info Europe is of the opinion that not only should there be no categorical limitations but that the TFEU requires complete transparency of the legislative process. Only in very limited and exceptional circumstances should any documents relating to the legislative process be withheld from the public, and this would always require a case-by-case assessment based on the content of the documents requested.

10.3. Legislative documents: In the context of the TFEU requirement to “ensure publication of the documents relating to the legislative procedures”, the Presidency raises the question of when a document formally becomes a “legislative document.” This could include, for example, the question of whether the Presidency’s “non-paper” on the Regulation 1049 file is a legislative document or not.

Access Info Europe proposes that this question should be solved by virtue of the content of the document: if it refers to a legislative process or is in any way used in legislative decision making then it should be considered a legislative document.

For the purpose of determining when a document should be published proactively, Access Info Europe supports, as a minimum standard, the language proposed by the Parliament:

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.

10.4 Good administration in the legislative process: The Presidency has raised a question about the impact of transparency on the record-keeping in the legislative process. Access Info Europe is concerned at any suggestion that there will be less than detailed record keeping in an effort to avoid the TFEU transparency obligations. We do not believe that this is a matter for Regulation 1049 to solve but that as a matter of good administrative practice there should never be the option to take less than detailed notes or make less than specific reports in anticipation of publication. If this is a serious concern, Regulation 1049 could contain a provision requiring detailed record keeping by EU institutions, particularly in the context of legislative procedures.

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