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► **Guide to the battle of transparency – UPDATED**

09/06

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A fight between governments with different cultural traditions, added a dosage of institutional power game. Or a battle between efficiency and democracy. Here are the major conflict areas in the negotiations for new EU access rules. **UPDATE: The latest changes in bold and italics although they were rejected by national experts June 8 and may only be of a historical interest, depending on the development.**

It's not only a conflict of rules and traditions. It is also a kind of philosophical boxing as the rules for citizens access to EU-documents are based on a compromise between two different sets of minds.

On the one hand there is the transparency or enlightenment

aspect: Citizens have a right to know, to understand and possible to interfere i matters decided in their names. Any disturbance that might result is the prize to be paid for democracy.

On the other hand there are the considerations of the system: Work in progress, do not disturb. What matters is the final outcome; not the bureaucratic process.

As the economical and political crisis have widened and deepened one could assume that the democratic arguments would gain grounds to strengthen the legitimacy of the EU.

This has so far not been the case.

The voices asking for openness and citizen's involvement are today weaker and fewer than they were when the present rules were decided in 2001 - at least amongst the Member State governments, and definitely in the Commission. It's more like the Empire strikes back.

Note for the reader: The area-by-area screening below basically follows the article numbers in the present regulation (1049/2001) with some exemptions.

UPDATE: Document 1397/12 based on previous 9441/12 (ANNEX), also known as the negotiating mandate or presidency compromise, is at the time of writing the most recent compilation of positions, although hardly criticized at a working party meeting in Brussels June 8. This document will not be put forward for endorsement by EU-ambassadors - see article - but might serve as a reference for further debate.

Proposal = The negotiating mandate given to the presidency by the Council majority.

The arguments "Why" and "Why not" are compiled for this summary based on official documents, leaked informations and talks with different actors.

Definition of documents (present article 3, proposed article 3, 3a + article 12)

Today: Any content, written or digital, whatever its medium, concerning an institution's sphere of responsibility.

Proposal: Documents are not accessible until received, or transmitted, or filed, or approved or "otherwise completed for the purposes for which it was intended." Data are to be accessible using "the available tools".

Unclear if a new article 12 on documents *directly accessible on the net*, emphasising that *legislative documents* and documents of *general application* shall be *accessible directly by the public*, will overrule, or be overruled by, the prolonged time for documents to be completed.

UPDATE: Definition also to cover most legislative documents, but not all, subject to exceptions and classifications in new article 3b. This is also partly regulated by article 12 on instant access to legislative document on the net.

New wordings in article 12 (obligations to put online) narrows this obligations to legislative, instead of all, documents. Specifications include preparatory documents and documents provided by lobbyists but NOT legal advices and, NOT Member States positions in working party papers and NOT trilogue documents. Also, all references subject to exceptions in article 4 (via new article 3b). This means a clear narrowing of what to put online compared to demands from the Parliament.

New demand to create a inter-institutional portal within two years.

Effect: Accessibility will be narrowed. Access to data not being part of written documents will be dependent on the available program by the originator.

Why: Clearing the lines, making the rules easy to understand, securing that notes, internal working papers, personal reflexions by civil servants, etcetera fall outside the scope.

Why not: Limits the present scope of access, gives institutions more "time to think" and "time to act" behind closed doors. Requested access is today often rejected with the argument that disclosure would "seriously undermine the institution's decision-making process". Critics fear this would be used even more frequently if the proposal is adopted. Pro-transparent Member States with similar provisions do not trust the EU institutions to handle such a definition in a correct way. Furthermore: Instead of data accessible by "the available tools", Parliament and the Ombudsman P. Nikiforos Diamandouros, suggest the wording by "**any reasonable available tools**". (Emphasis added)

Comment: EP-negotiators have suggested that preparatory documents, including legal advices, impact assessments, Member State positions, and influences by lobbyists and interest groups should be clearly covered by the articles 3a and 12, and thus accessible. If adopted these specifications would profoundly reduce legal uncertainty and open up the system.

Exceptions from access (present articles 4 and 9, proposed article 4)

Today: Documents on court proceedings, legal advices, commercial interest and investigations are generally not to be accessible "unless an overriding public interest in disclosure". Legal advices on legislative matters have since

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the present rules were adopted been judged accessible by European Court of Justice (Turco-case, C-39/05 P). In practice such documents are never the less to a high degree held back by the Council.

Proposal: Block exception also for documents related to *selection procedures* for the award of contracts and grants, and for assessment of merits of candidates for public offices. Strengthen exception for legal advices with a presumption of secrecy. "For the purpose of this article, the principles underlying this regulation do not in themselves constitute such an overriding public interest," according to minutes from EU-ambassador meetings [put online by Statewatch](#). In other words: Transparency (or democracy) is not regarded as an overriding public interest. **UPDATE: This is an outright attempt to adjust the regulation to the present practice which is in clear breach with the Turco-judgement (right to see legal advices). This is spelled out more clearly in the latest proposal, than in the previous.**

Alternate proposal:

Effect: Less documents available for requests.

Why: The Commission claims that investigations, infringements procedures, legal advices, commercial interests, and selection procedures – all different aspects of the Commission's administration of EU-policies – as well as court proceedings has to be protected from disclosure before final decisions are taken, sometimes also after. Without such protection the Commission and the Court cannot fulfil their obligations in a proper way. A majority of Member States follows this line of argument.

Why not: Access will be limited for large parts of the EU administration. Secrecy about court proceeding for outsiders, and secrecy on legal advices means reducing citizens' right to know what is decided in their name, how the laws should be interpreted, not to mention the possibility to influence the decisions.

Privacy/Data Protection (present article 4.1b, proposed article 4.1b)

Today: No access if disclosure would undermine privacy and the integrity of the individual.

Proposal: Basically the same wording as in the present regulation, with two additional paragraphs saying a person's *professional activity* and the nature of his or her *role and responsibility* "should be taken into account". The European Court of Justice found in 2010 that disclosure of the names of participants in a committee meeting about restricting the import of German beer to the UK would be an unlawful processing of personal data (Bavarian Lager-case C-28/08 P). An unchanged wording in the access rules would cement this judgement. In addition a [new package of data protection rules](#) has been proposed by the Commission. Negotiations on these rules are not expected to be finished until after the recast of access rules.

UPDATE: Specifications that names, titles and functions of public office holders, civil servants and interest representatives as a presumption shall be disclosed. This is an attempt to roll back the Bavarian Lager-judgement.

Effect: Data protection rules (now tabled for a change) will most likely overrule access rules.

Why: Adjustment of the access rules to case law (Bavarian Lager) or: **UPDATE an attempt to overturn this judgement.**

Why not: The Bavarian Lager-judgement is unbalanced as it disregards the right to access as a fundamental right, according to Peter Hustinx the European Data Protection Supervisor. Hustinx himself has suggested [an alternative wording](#) which takes the right to access into stronger account. This suggestion has been picked up by the Parliament, NGOs and pro-transparent Member States.

Member State Documents (present article 4.5, proposed article 4.5)

Today: A Member State *may request* the EU not to disclose a document from that Member State (but the decision is to be taken by the EU-institution).

Proposal: A Member State requesting for non-disclosure *may refer* to any relevant provision or rule in its *national law*.

Effect: Unclear, possible none, possible less transparency.

UPDATE: References to national law omitted.

Why: To take national legislation into account as legitimate ground for denying access.

Why not: Although the decisive power remains with the EU-institutions, the reference to national law is new and adds weight to arguments that Member States have a right to refer to a more restrictive legislation than has been agreed upon at EU-level.

UPDATE: Latest proposal rules out national law as a reference for grounds not to disclose documents.

Restrictions and time limits (present and future articles 6 and 7)

Today: For an applications of a very long document the institution *may* confer with the applicant to find a fair solution. An application for access shall be handled within 15 working days, this may be extended by another 15 working days.

Proposal: For an applications of a very long document the institution *shall* confer with the applicant to find a fair solution. If no such solution is found the institution may choose to disclose *a more limited number* of documents. Application to be extended by 5 working days if a Member State is to be consulted. Within that period the Member States shall be given 10 working days for its reply. Processing of a confirmatory application (= appeal of a refusal) shall be handled within 30 working days.

Effect: Reduced access, prolonged deadline to handle appeals.

Why: Adjustments necessary to cope with the workload within the EU-institutions and to counter misuse of access rules by lobbyist and lawyers.

Why not: Lowers the standard for access to documents. The workload is not a real reason but used as an excuse to limit access, a Commission representative is said to have admitted behind closed doors.

Other issues:

Remaining issues to solve not mentioned above include references to [the Aarhus convention](#) and [the EU-regulation](#) based on this convention on access to documents in environmental matters, references to classified document, and an EP-proposal to set up information, or transparency, officers.

UPDATE: Latest proposal includes transparency officers designated by the institutions to manage the Regulation (new article 15,1a) as suggested by EP-rapporteur Michael Cashman.

Other analysis and objections:

Letter to the presidency based on an analysis by [Access Info Europe](#), and [Client Earth](#) – see Documents Article-by-Article commentary, 'Red Lines' for the negotiations, and the undemocratic recast procedure, Statewatch analysis by professor Steve Peers – see Documents Also Statewatch Observatory: [the Regulation on access to EU documents: 2008-ongoing](#)

Staffan Dahllöf

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Tweets

- nmulvad: RT@tomjensen1966:Jens Rohde:Det der med at afskaffe landbrugsstøtten i EU: Glem det! Det ender bare med at den bliver renationaliseret.#fmdk
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15/06 - 13:17 | Denmark - Nils Mulvad
- rosenbaum6: RT@davison:Tweets and texts and emails, oh my! http://t.co/sEEC2wLT <Illinois judge rules theyre subject to FOI, even from personal accounts
15/06 - 12:51 | United Kingdom - Martin Rosenbaum
- Hackette7: RT @fishsubsidy: Parliament Env Committee draft opinion on the fisheries fund http://t.co/dqcBcHMZ. Deadlines for amendments June 27 #CF ...
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- Hackette7: Status of #Freedomofexpression in Denmark anno 2012 http://t.co/Da49gXD7
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