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from: Secretariat
to: Delegations

Subject: Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents
- Meetings on 9 and 27 March 2012 of the Working Party on Information

Introduction

1. In December 2011 the European Parliament adopted its position at first reading¹ on the 2008 Commission proposal for a recast of Regulation 1049/2001² and the 2009 Commission Communication on the consequences of the entry into force of the Treaty of Lisbon for ongoing interinstitutional decision-making procedures.³ This vote in the EP resolved a long period of stagnation of this *dossier*. In response to this new situation, the Danish Presidency presented a non-paper to the Working Party on Information on 13 February 2012, where it identified a number of issues on which a possible compromise could be based (doc. 6439/12). The WPI discussed the same list of topics again in its meeting of 27 March 2012 on the basis of a presidency note (doc. 7995/12).

¹ doc. 18436/11

² doc. 9200/08

³ doc. 17193/09

State of play

2. The WPI agreed to the wording on **institutional scope** as proposed in doc. 7995/12, based on the compromise text agreed in the WPI in September 2011 (see doc. 14549/11).
3. The following issues from the presidency note have been identified as requiring further discussion:
 - definition of a document
 - selection procedures
 - alignment with the Århus convention
 - protection of privacy and personal integrity
 - scope of the regulation and individual examination
 - member states documents
4. There was a general acceptance to keep a wide **definition of a document** (as in the Regulation), with a possible update relating to data contained in databases, as reflected in case law. The main issue that remained concerns the question at what point a 'document would become a document' under the Regulation. Proposals from delegations included the degree of formalisation, such as putting it to the file; transmission beyond the body drawing up the document; authorisation by hierarchy. It was debated in the discussion, however, whether this point should be clarified in the article on definitions or under exceptions.
One delegation expressed a parliamentary scrutiny reservation concerning the approach proposed by the Presidency on this matter.
5. The question whether or not to introduce an exception relating to **selection procedures** is not yet resolved. However, the group generally agreed on the objective to clarify the protection of these procedures. One issue is the degree to which the current proposals manage to provide more clarity while taking into account the confidentiality of the comparative assessment, which is part of all selection procedure. Another element to be discussed further are the types of selection procedures to be protected, e.g. the appointment of staff, the selection of judges, the selection of Commissioners.

6. The Presidency proposed to more clearly identify the role of the the **Århus Convention** in the Regulation (beyond Article 2(6)). Most delegations agreed with this objective, but a number of issues were identified as meriting further reflection:

- whether the exception to intellectual property could be overruled when the request relates to environmental information;
- whether the Regulation should contain a reference in article 12 to making documents containing environmental information directly accessible;

One delegation expressed a scrutiny reservation on this point.

7. On the **protection of privacy vs. public access to documents**, the challenge is to balance two fundamental rights with each other. Delegations are yet divided on whether case law, in particular the Bavarian Lager case⁴, should be codified in the Regulation (and if how) or whether the current wording should be maintained. There is a general willingness to engage in exploring a possible codification, especially in the interest of clarity.

On the substance, a clarification of when and how personal data can be released remains a possible way forward. Here the following issues were discussed:

- whether public officials should be treated differently, e.g. depending on hierarchy;
- the need to take specific circumstances of individuals always into account; and
- the need to balance the public interest to access with the protection of personal data of e.g. private interest representatives.

One delegation entered a scrutiny reservation to explore more fully the case law of the European Court of Human Rights.

8. **The scope of the Regulation and the question of individual examination**, as well as the special protection of certain types of documents remains a major concern. For the Commission it is unconditionally necessary guarantee legal and procedural clarity for the documents related to the preservation of the single market and other core interest of the EU. An agreement on these issues is also a red line for several delegations.

⁴ C-28/08 Commission/Bavarian Lager.

Other delegations agree that these documents should be protected, but find the current level of protection satisfactory.

Three issues are raised here: a) the categories of documents meriting special protection, b) the means to protect them and c) the duration of that protection.

Ad a)

Progress has been made on identifying the types of documents meriting special protection:

- documents in competition cases (e.g. cartels, merger and state-aid cases);
- documents in the context of court proceedings; and
- documents in the context of infringement procedures.

These categories of documents each serve a very specific purpose. In addition, the processes and means through which they have been obtained (e.g. forcefully or through leniency) rely crucially on confidentiality. The right to access under the Regulation must not jeopardise the effectiveness of these policies.

Another type of document was addressed in this context, i.e. legal advice by the institutions' Legal Services. It was raised whether legal advice in the context of a legislative procedure should be treated differently from legal advice in other circumstances.

Ad b)

While there is agreement on the fundamental need to protect these documents, the means to do so remain contested. In the view of the Commission and several delegations, the sensitivity of requests for these categories of documents stems from their crucial role in core EU activities; the size of the request, which can encompass several 10 000 pages; and the experience that public access rules in these cases are used to circumvent specific rules established for party access in proceedings. Some delegations felt that carving them entirely from the scope of the Regulation could be problematic in the light of the Lisbon Treaty.

Three possible solutions are being discussed:

- block exemptions: i.e. taking these document categories out of the scope of the regulation;

- rebuttable general presumptions: a presumption for non-disclosure is introduced in the Regulation for these document categories, which are not released unless an overriding public interest for disclosure exists;
- the modification of procedural rules in the Regulation, since the current Regulation already protects these categories of documents and the main issue is to strengthen the dialogue between the applicant and the institution and also manage the handling of excessive requests.

Ad c)

This issue cuts across the others and concerns the duration for which those document categories are specially protected: the inclusion of pre-litigation phases; the definition of end points for different types of proceedings etc.

9. It was agreed that the provision on **Member State documents** would apply to the initial and confirmatory stages of requests for public access to documents. General agreement was obtained on extending the time limits for member states to examine documents. Issues to be resolved include the codification of case law, in particular cases C-64/05 P Sweden v Commission and T-59/09 Germany v Commission, and the inclusion of a reference to national law.

Follow-up

10. The Presidency will present a draft text on the issues presented in points 4 to 9 for the next meeting of the Working Party, which is planned for 13 April 2012.
11. Some **other issues** remained also unresolved:
 - discussions were held on the possible introduction of access to document officers;
 - ~~the question of privileged access for research purposes;~~
 - how to make which (additional) documents in legislative procedures public. Questions include whether the Lisbon treaty framework requires more openness than before; where additional transparency could be provided etc.

In particular the fact that these issues were not part of the Commission's recast proposal was noted. The Presidency concluded that further, separate discussions were needed on these topics. In parallel, work should be done in cooperation with the Parliament in order to facilitate access to those documents already made public and increase user-friendliness in this regard.
