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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 note from the Presidency for the Working Party on Information on 27 March 2012.

Recast of Regulation (EC) No 1049/2001
Note from the Presidency for the meeting of the Working Party on Information
on 27 March 2012

The Presidency is pleased to note that the first substantial round of discussion in the Working Party on Information (WPI) on 9 March 2012 took place in a constructive and forward looking atmosphere with all delegations engaging in a serious discussion on ways to reform Regulation 1049/2001 (hereinafter referred to as 'the Regulation'). The Presidency appreciates the support given to its pragmatic and limited approach and the overall ambition of reaching an early second reading agreement during the Danish Presidency. It has also taken due note of the emphasis placed by delegations on allowing sufficient time for the negotiations and on the need to respect the Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique.

While the Presidency in its non-paper (doc. 6439/12) did take due account of the outcome of the previous work undertaken by the WPI with regard to the recast of the Regulation, it also welcomes comments and observations at the WPI meeting stressing the fact that the Lisbon Treaty has changed our legal norms and common values. The Presidency agrees that the way forward is an inclusive process engaging and giving voice to all stakeholders. The Presidency shares the view that case-law could serve as a pragmatic starting point for further discussions.

The Presidency remains convinced that there is a real window of opportunity for getting agreement on this important file, which has been pending for way too long already. The Presidency will continue to work hard to realise this potential.

1. Institutional scope

On 9 March 2012, the WPI agreed to proceed in accordance with the compromise already reached on 16 September 2011 (doc. 14549/11).

The Presidency suggests that the WPI proceeds accordingly and on the understanding that the technical update suggested by a delegation is done at an opportune time.

SUGGESTED DRAFTING

Recitals:

"(4a) The right of access to documents is also recognised by Article 42 of the Charter of Fundamental Rights of the European Union."

Articles: "Article 1: Regulation (EC) No 1049/2001 is amended as follows:

1. In Article 1, point (a) 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,"
2. In Article 2, paragraph 3 is replaced by the following:
   "3. This Regulation shall apply to all documents held by an institution, as defined in Article 3 (c), that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union. As regards the Court of Justice of the European Union, the European Central Bank and the European Investment Bank, this Regulation shall apply only when they exercise their administrative tasks."
3. In Article 3, the following point (c) is added:
   "(c)'institutions' shall mean institutions, bodies, offices and agencies of the European Union, including the European External Action Service.""

2. Definitions

At the last WPI meeting (on 9 March), delegations supported the Presidency proposal to preserve the wide definition of a document already contained in the Regulation. Many also supported the usefulness of a 'technological update' thus including what already follows from case-law, namely that the definition of a document also covers access to data contained in databases.

Several delegations wondered at what point a document would become a document under the Regulation. Most of these delegations identified a certain level of formalisation (by hierarchy or procedure) as necessary in this regard. It was, however, felt that the definition of a document would not be the correct place to regulate this question.

In light of the specific reference to the term in Article 15(3) TFEU, a number of delegations found a definition of "administrative tasks" useful, while others argued that this Regulation would not be the proper place to regulate this question or that this definition should rather be left to be interpreted by the Court.

Since the last WPI meeting, the following definition has arisen from the informal discussions of the services of the two institutions and the body in question (ECJ, ECB and the EIB), although their internal work on the topic has not yet been finalised:

"Administrative tasks' means all activities related to the management of the human or budgetary resources required for the functioning of the institution or body, such as the recruitment or contracting of staff, procurement, the purchase, sale or lease of property".

The Presidency suggests that the WPI should:

1) discuss the drafting provided below for the definition of a document,

2) taking into account the fairly early stage of deliberations within and amongst the two institutions and the body concerned, not at this stage seek to agree on a definition of ‘administrative tasks’, and

3) discuss - also on the basis of national experiences - whether the recast should touch upon the issue of unfinished documents so as to guide interpretation.

SUGGESTED DRAFTING

"Article 3(a)

"document" means any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording)**, including data contained in electronic storage, processing and retrieval systems if they can be extracted using any reasonably available tools for the exploitation of the system concerned**;"

3. Selection procedures

At the 9 March WPI, some delegations indicated that the exception as contained in the 2008 Commission proposal should be clarified. It was generally felt that current Article 4(3) of the Regulation already covers selection procedures, but that a specific exception could be added for the sake of clarity. There was a discussion on whether a time limit should be imposed for this possible new exception to apply, i.e., until a decision was taken. The Commission representative emphasised that the formulation of this exception should not allow circumventing specific rules, such as those in the Financial Regulation or the Staff Regulations.

The Presidency suggests that the WPI discuss the two options below:

Option 1:

In the previous meeting, it was agreed that the Presidency would invite the Council Secretariat and the Commission to think about a possible wording for an exception on selection procedures, which would be more specific than the wording proposed by the Commission in 2008. The Presidency has received the following drafting suggestion:

"Article 4(2)(e)

(…) selection procedures**, such as procedures for the award of contracts or grants under the Financial Regulation, or involving the comparative assessment of the merits of candidates, officials and other servants under the Staff Regulations or the Conditions for the Employment of Other Servants of the EU or under comparable rules, or involving the assessment of the merits of candidates for public offices."** [1]

Option 2:

Keeping in mind the general understanding that selection procedures are already covered by the current exception under Article 4(3), the Presidency invites comments on the possibility of not adding a new specific exception relating to selection procedures and thus relying on Article 4(3) for that purpose.

4. Århus alignment – environmental information

At the 9 March WPI meeting delegations agreed with the Commission objective of making an attempt at an explicit alignment to the Århus Convention, even though compliance with the provisions of the Aarhus Convention relating to access to documents is already ensured by Article 2(6) which states that the regulation is to apply without prejudice to rights of public access to documents following from international law or acts of the institutions implementing them.

Some delegations noted however that the regime of Aarhus Convention is complex and that it may prove difficult to import its substance into the Regulation. One delegation expressed the opinion that an alignment would be more appropriate in the Aarhus Regulation than in the Regulation on public access to documents.

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[1] The fundamental objective is to protect the work of selection panels and boards, in particular their comparative assessment of the merit of the different candidates/applicants. This includes
(a) the selection of staff at all levels; appointment of judges; appointment of Commissioners; the selection of experts. Currently the work of the responsible selection bodies is covered by different regimes, such as the Staff regulations, a Council decision [for the 255 panel selecting judges] etc.
(b) the procedures leading to an award/grant decision: expert panels etc. Here a differentiation between commercial contracts and research contracts might be envisaged.

In the last WPI meeting it was decided that the Council Legal Service and the Commission would together draft a proposal for alignment. In addition, another formulation was already discussed in the WPI in July 2009 (doc. 11669/09). The Presidency suggests a drafting which includes elements from doc. 11669/09 into the suggestion from the Council Legal Service and the Commission.

SUGGESTED DRAFTING

Keep Article 4(1)(e) of the 2008 Commission proposal, i.e.,:

"the environment, such as breeding sites of rare species;"

and

Keep Article 4(2)(a)and(b) of the 2008 Commission proposal:

"a) commercial interests of a natural of legal person;
b) intellectual property rights;"

and

Modify Article 4(4) of the 2008 Commission proposal as follows:

"The exceptions under paragraphs (2) and (3) shall apply unless there is an overriding public interest in disclosure. As regards paragraph 2(a) **and (d), with the exception of investigations, in particular those concerning possible infringements of Union law**, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment.

[As regards the other exceptions set out in Article 4, the institution must take into account the public interest served by disclosure and whether the information requested relates to emissions into the environment, if a request concerns access to environmental information.]"

Add a new paragraph to Article 12 as follows:

"Subject to Articles 4 and 9, documents containing environmental information shall be made directly accessible to the public in accordance with Article 4 of Regulation 1367/2006."

5. Access for research purposes

Many delegations supported the idea of access for research purposes, but many also found that granting such privileged access would be more appropriate elsewhere, as the latter approach would conflict with some of the Regulation's basic principles such as public access on an *erga omnes* basis. Another concern was the practical difficulties in defining 'research'. The fact that access for research purposes is not within the scope of the recast proposal was also raised.

The Presidency suggests that this topic is set aside for the time being.

6. Information officers

At the 9 March Working Party meeting the Presidency invited reflections on the idea behind the European Parliament's 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. The delegations which expressed their views highlighted that this topic was not within the scope of the recast proposal. On the substance, there was no explicit opposition to this idea.

The Presidency suggests that the WPI would discuss the drafting below.

SUGGESTED DRAFTING:

"Article 15

Administrative practice in the institutions

1. The institutions shall develop good administrative practices in order to facilitate the exercise of the right of access guaranteed by this Regulation.

1a. Institutions shall designate access to documents officers to promote compliance with this Regulation.

2. The institutions shall establish an interinstitutional committee to examine best practice, address possible conflicts and discuss future developments on public access to documents."

7. Protection of privacy and personal integrity

The 9 March WPI discussed the need to address the provision on the protection of privacy and personal integrity (Article 4(5) of the 2008 Commission proposal). Three elements were emphasised by the delegations in their interventions:

1) Since the entry into force of the Treaty of Lisbon, the right to protection of personal data and personal integrity, on the one hand, and the right of access to documents, on the other, constitute fundamental rights and an appropriate balance needs to be found between them.

2) All delegations underlined that privacy and personal integrity should be protected without exception, and that personal data should be processed in accordance with EU data protection legislation. Delegations expressed support for the Court's interpretation in the *Bavarian Lager* case, which underlines that when examining an application under regulation 1049/2001 in respect of documents containing personal data, the data protection regulation 45/2001 is, in principle, to be applied in full. In view of easy application of the two regulations, it was argued that the legislator should engage in trying to clarify the relationship between the two fundamental rights by rewriting Article 4(5) of the 2008 Commission proposal.

3) It was agreed that it should be reflected in greater detail what should be understood as situations in the public sphere where the general public could be presumed to have 'a right to know' without infringing privacy or personal integrity, in line with the principle outlined above.

Moreover, it was agreed that the Presidency should engage the European Data Protection Supervisor in a discussion on the matter.

On the basis of the discussions of 9 March, the Presidency believes that there is agreement among the delegations on the first two points.

The Presidency invites comments from delegations on the third point above in order to establish situations that would fulfil these criteria of a 'public interest to know' and non-infringement of privacy and personal integrity. In this context, the Presidency wishes to refer to the case-law of the European Court on Human Rights on the matter, where weight has been given to a person's identity as a high-level public servant or politician and the ensuing public interest in his conduct.[1] It is clear that the solution found needs to respect the principles established in the case-law of the European Court on Human Rights.

In this context it should be discussed, whether such situations could include e.g. names, titles and functions of public office holders, civil servants and interest representatives in relation to their professional activities. It would also be possible to specify that the seniority of officials and the nature of their role or responsibilities should to be taken into account when assessing whether privacy is affected or not.

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

The 9 March WPI confirmed that this continues to be a topic on which delegations have different but equally strong views. However, there is also agreement on a number of core issues, in particular that the level of protection of certain documents should not be lowered.

Several delegations indicated that the specificity of certain types of documents needed to be recognized and that this specificity merited special treatment. Documents in need of this special treatment were documents in the context of court proceedings; documents in the context of infringement procedures and internal legal advice.

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[1] As regards high-level public servants, see e.g. *Iltalehti and Karhuvaara v. Finland*, Case 6372/06. As regards politicians, the Court has also underlined "that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who [...] does not exercise official functions" (*Von Hannover v Germany*, Case *59320/00, §63; Observer and Guardian v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216*;Plon* (*Société*) *v. France*, no. 58148/00, 18 May 2004).

In this context, a first group of delegations suggested block exemptions for these documents. This idea was opposed to by a second group of delegations, which found the idea of block exemptions incompatible with the Treaty provisions on 'widest possible access' and favoured an adjustment of procedural rules in order to deal with the institutions' workload when handling excessive requests. Some delegations suggested finding a solution on the basis of case-law, which opens up the possibility for general presumptions. Finally, if some specific documents needed special protection, the issue would remain whether this protection should be limited to when the procedures concerned are ongoing.

According to the representative of the Commission, practice shows that the protection of certain types of documents, particularly in the area of competition policy, is inadequate. He added that while the Court had opened the possibility for rebuttable presumptions in some situations, legal uncertainty remained in others (e.g., cartels, mergers). He however also indicated that there had not been specific situations or cases under the current regulation, in which Commission had been required to hand out documents in need of protection.

The Presidency suggests that – due to the wide range in views on the topic – the first step is to identify what specific documents would merit special treatment, and then as a second step it could be discussed how to protect the particular interests involved.

It can be assumed that these interests will to a large extent already be well-known to us as explicit exceptions in the Regulation or as recognized by general presumptions of non-disclosure in case-law.

Following the discussions of 9 March, the Presidency also suggests that more reflection is given as to whether the procedural rules of the Regulation could be improved with regards to excessive requests, based on existing case-law and ideas presented by some delegations.

SUGGESTED DRAFTING (on excessive requests only)

"Article 6(3):

In the event of an application relating to a very long document or to a very large number of documents, the institution concerned **shall** confer with the applicant informally, with a view to finding a fair and practical solution. **If no solution between the institution and the applicant on limiting the number of documents can be found, the institution may choose a more limited number of documents to be handed out that represents adequately the substance of the documents initially applied for. This possibility exists only when the institution has genuinely investigated all other conceivable options and stated the reasons for which those options also involve an unreasonable administrative burden."**

9. Member States documents

In the 9 March WPI most delegations gave their support to the wording of current Article 4(5) of the Regulation, which establishes that 'A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement' and the way it has been interpreted by the Court of Justice in its jurisprudence, in particular Case C-64/05 P *Sweden v Commission* and Case T-59/09 *Germany v Commission*. Some delegations argued, however, for the specific insertion of the latter ruling in the wording of the current Article 4(5) of the Regulation.

As regards a possible reference to national law, some delegations spoke in favour of a reference, but a number of delegations found a specific reference problematic from a legal point of view, since this would place the institutions and the Court of Justice under an obligation to interpret provisions of national law. The Council Legal Service also raised the issue of interpretation of the provisions of national law by the Court of Justice. Against this background, some delegations and the Commission referred to the Court's ruling in Case C-64/05 P cited above, in which the Court established that

'while the decision-making process thus established by Article 4(5) of Regulation No 1049/2001 requires the institution and the Member State involved to confine themselves to the substantive exceptions laid down in Article 4(1) to (3) of the regulation, it is none the less possible for the legitimate interests of the Member States to be protected on the basis of those exceptions and by virtue of the special rules for sensitive documents laid down in Article 9 of the regulation.

In particular, there is nothing to exclude the possibility that compliance with certain rules of national law protecting a public or private interest, opposing disclosure of a document and relied on by the Member State for that purpose, could be regarded as an interest deserving of protection on the basis of the exceptions laid down by that regulation.' (paras 83-84)

As regards the extension of time limits for Member State consultation, it was generally felt that a time limit of ten days should be preserved for such consultation in the Regulation.

The Presidency suggests:

- to maintain the current formulation of Article 4(5) of the Regulation, as interpreted by the Court of Justice and the General Court in their jurisprudence

- to modify paragraph 1 and add a new paragraph 2a to Article 7 of the Commission 2008 proposal concerning the processing of initial applications:

"Article 7

Processing of initial applications

1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. **As soon as possible and at the latest w**ithin 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.

2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.

2.a. When a Member State is consulted according to Article 4(5), the Member State shall reply to the institution within 10 working days of receiving the institution's request and the time-limit provided for in paragraph 1 may be extended by 10 working days altogether."

10. Legislative documents

In the WPI meeting of 9 March an initial discussion on access to legislative documents took place. It was generally acknowledged that the Treaty of Lisbon creates a new framework for access to legislative documents. Many delegations felt that the Court's case law, in particular the ruling in *Turco*, creates the starting point for discussions in the matter, even if a number of delegations also highlighted legal advice as a specific category requiring protection. A number of delegations also pointed out that the general wording of the Treaty of Lisbon indicates that no categorical exceptions to transparency in legislative matters could be envisaged. Many delegations expressed their willingness to examine the possibility of adding a new Article on legislative matters into the Regulation, but it was pointed out that the Report of the European Parliament requires more extensive openness from the part of the Council than from the Parliament itself. The possibility of leaving the Regulation and current case law untouched was also mentioned. The linkage of this matter with the question of 'when something becomes a document' was also pointed out by a number of delegations.

It was decided to continue this discussion in the meeting of the WPI of 27 March. In particular, the Presidency invites delegations to discuss the current practice of the institutions and to look at Art. 12 of the 2008 Commission proposal in this regard.