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Committee on Petitions

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DRAFT OPINION

of the Committee on Petitions

for the Committee on Civil Liberties, Justice and Home Affairs

on the proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents
(COM(2008)0229 – C6-0184/2008 – 2008/0090(COD))

Rapporteur: Ágnes Hankiss

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SHORT JUSTIFICATION

According to Article 1(2) of the Treaty on European Union (TEU) Community institutions and bodies must take decisions as openly as possible and as closely as possible to the citizens. In order to enable them to effectively participate in the political process and call public authorities to account, citizens and elected bodies should therefore have the widest possible access to documents held by the European institutions.

The actual amendments the Commission has brought to the Regulation, however, are disappointing as in a number of cases the Commission's proposals represent a step backwards rather than a bold step ahead in "a drive towards more transparency".

First and foremost, the Commission should have completely reviewed its earlier proposal as the entry into force of the Treaty on the Functioning of the European Union provides a new legal framework based on Article 15(3). The Commission should have included its proposal in COM(2009)0665 on the consequences of the entry into force of the Treaty of Lisbon. The Commission did not formally withdraw the proposal and never replaced it with a new proposal that takes account of the new framework of the Treaty of Lisbon.

The most notable step backwards is the Commission's reformulated definition (Article 3) of "document", the concept that lies at the very heart of the Regulation. Your rapporteur is of the opinion that instead of narrowing down the definition, as the Commission in fact proposes, the term "document" should be opened up to focus on "official information" as access to pieces of information by applicants would make it possible to ask for specific information in a more precise, targeted and comprehensive way, avoiding the receipt of masses of unnecessary data, possibly generating extra costs. The new definition could also make it easier to get partial access to certain classified documents, and would make it possible to clearly differentiate unofficial and official information.

While easier public access to documents of EU institutions, bodies, offices and agencies remains the goal of this Regulation, making intermediary documents, such as draft notes or memoranda publicly available could shift official information flow to informal and/or intergovernmental channels resulting in less transparency and a weaker European Union.

Search and duplication fees should be limited to reasonable standard charges for document search and duplication. The Commission should make proposals on the aforementioned points.

For citizens it is of particular importance that, e.g. in the case of infringement procedures which often result from citizens' petitions, full access should be provided to all documents of closed infringement proceedings. This includes documents provided by Member States. Your rapporteur points out that the Commission's proposal to give Member States a right to refuse access to documents (Article 5) based on their own legislation is contrary to the jurisprudence of the European Court of Justice and therefore not acceptable. With regard to Article 9 ("Treatment of sensitive documents") it is important that the institutions, bodies, offices and agencies of the Union should lay down common rules for the classification of such documents and that these rules should be made public.

The Committee on Petitions considers the maintenance and increase of the trust of citizens in the EU institutions, bodies, offices and agencies of high importance. The EU must protect personal data and privacy at the highest possible standards and should not create rules allowing measures that are difficult to apply objectively. While EU case law exists regarding the interpretation of “overriding public interest”, it would be desirable for the Commission to provide an exact and concrete definition of the term

Classified information shall not be transmitted from the recipient to a third party without prior consent of the originator. The Committee on Petitions would welcome a common framework and procedure for declassification rules, including a possibility for the Union institutions, bodies, offices and agencies to review and reset the classification category of a document upon a request for public access to it. Thus formerly classified documents could be disclosed in a more flexible way.

In case an institution rejects an application for a document based on the provisions in this Regulation, the institution shall be obliged to provide notification as to whether and when partial or full access is likely to be possible at a later stage.

Your rapporteur is of the opinion that for the European Transparency Initiative to succeed applicants must be able to easily find and retrieve the information they want. In the context of this Regulation therefore the institutions should ensure that documents are supplied either through a common interface for their registers of documents or through an interface with direct links to each institution’s own register.

Furthermore, as was the case with the current Regulation, the Commission should be requested to provide a report on the implementation of the revised Regulation and make recommendations, where required, for improvements.

AMENDMENTS

The Committee on Petitions calls on the Committee on Civil Liberties, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a regulation

Article 2 – paragraph 2

Text proposed by the Commission

2. This Regulation shall apply to all documents held by an institution, ***namely, documents drawn up or received by it and in its possession*** concerning a matter relating to the policies, activities and decisions falling within its sphere of responsibility, in all areas of activity of the

Amendment

2. This Regulation shall apply to all documents held by an institution, ***body, office or agency of the European Union*** concerning a matter relating to the policies, activities, ***closed procedures concerning infringements of EU law*** and decisions falling within its sphere of responsibility,

European Union.

in all areas of activity of the European Union.

Or. en

Justification

The Regulation should apply to all documents (as defined in Article 3) held by an institution, body, office or agency of the European Union. Specific reference is made to documents concerning investigations into infringements of EU law that may be requested by parties (e.g. petitioners) to exercise their rights to redress or remedy.

Amendment 2

Proposal for a regulation Article 3 –point a

Text proposed by the Commission

(a) "document" means ***any content*** whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) ***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;***

Amendment

(a) "document" means ***a record, or set of records, serving official purposes*** whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) ***concerning a matter which falls within the sphere of responsibility of the European Union's institutions, bodies, offices or agencies. This shall not include drafts, notes and memoranda which are not intended to form part of a file;***

Or. en

Justification

The definition of "document" as proposed by the Commission is too narrow. A document would only be a "document" in the sense of the Regulation if it is formally transmitted or otherwise registered. This would be a step backwards for transparency. Making intermediary documents, such as draft notes or memoranda publicly available could shift official information flow to informal and/or intergovernmental channels resulting in less transparency and a weaker European Union which would be counter-productive.

Amendment 3

Proposal for a regulation

Article 3 – point b

Text proposed by the Commission

(b) "third party" means any natural or legal person, or any entity outside the institution concerned, ***including the Member States***, other ***Community*** or non-***Community*** institutions and bodies and third countries.

Amendment

(b) "third party" means any natural or legal person, or any entity outside the institution concerned, other ***Union*** or non-***Union*** institutions and bodies and third countries.

Or. en

Justification

Member States should not be considered third parties in their relations with the institutions or their communications on matters relating to the field of activities of the Union.

Amendment 4

Proposal for a regulation

Article 4 – paragraph 1 – point d

Text proposed by the Commission

(d) the financial, monetary or economic policy of the ***Community*** or a Member State;

Amendment

(d) the financial, monetary or economic policy of the ***European Union*** or a Member State;

Or. en

Justification

The formal correction is required by the entry into force of the TEU.

Amendment 5

Proposal for a regulation

Article 4 – paragraph 2 – point c

Text proposed by the Commission

(c) legal advice and court, ***arbitration and dispute settlement*** proceedings;

Amendment

(c) legal advice, ***except when provided in connection with procedures for the***

adoption of legal acts, and court proceedings;

Or. en

Justification

The Commission's amendment to Article 4 § 2(c) would lower standards compared to current rules. To improve standards and to take into account the Turco judgement (Cases C-39/05 P and C-52/05 P) this point is amended.

Amendment 6

Proposal for a regulation

Article 4 – paragraph 2 – point d

Text proposed by the Commission

(d) the purpose of inspections, investigations and audits;

Amendment

(d) the purpose of inspections, investigations, ***competition proceedings*** and audits;

Or. en

Justification

Disclosure of documents on competition proceedings shall be refused as it can undermine the protection of such proceedings.

Amendment 7

Proposal for a regulation

Article 4 – paragraph 5

Text proposed by the Commission

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

Amendment

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 protection of privacy and the integrity of*** the persons concerned. Other personal data shall be disclosed in accordance with the conditions regarding lawful processing of

the protection of individuals with regard to the processing of personal data.

such data laid down in EU legislation on the protection of individuals with regard to the processing of personal data.

Or. en

Justification

The formulation "adversely affect" is too broad and subjective. The paragraph is amended by reinstating the terms "privacy" and "integrity" as used in the original text of the Regulation and in the Bavarian Lager case (T-194/04).

Amendment 8

Proposal for a regulation Article 5 – paragraph 2

Text proposed by the Commission

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 non-legislative 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.***

Amendment

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 non-legislative act of general application, ***or information submitted to the Commission concerning the implementation of Union legislation, until such time as any court proceedings relating to it have begun,*** the authorities of that Member State shall be consulted. The institution, ***body, office or agency*** holding the document shall disclose it unless the Member State gives reasons for withholding it, based on the exceptions referred to in Article 4. The institution shall appreciate the adequacy of ***such*** reasons given by the Member State.

Or. en

Justification

Member States may request EU institutions, bodies, offices or agencies to refuse access to their documents only if such a request is based on the exceptions laid down in Article 4 (IFAW case C-64/05). Member States do not have a right of veto with respect to documents emanating from them, nor the right to refer to provisions in their own legislation in order to

justify confidentiality. Access should also be granted to MS information submitted to the Commission concerning the implementation of EU law, until proceedings before a Court commence (recommendation 4 Cashman resolution).

Amendment 9

Proposal for a regulation Article 7 – paragraph 3

Text proposed by the Commission

3. ***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.

Amendment

3. ***The institution shall notify the applicant whether, and if so when, partial or full access to the document is likely to be possible at a later point in time.***

The applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.

Or. en

Justification

The applicants shall be aware of the future possibility to get access to the required document.

Amendment 10

Proposal for a regulation Article 9 – paragraph 1

Text proposed by the Commission

1. Sensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as «TRÈS SECRET/TOP SECRET», «SECRET» or «CONFIDENTIEL» in accordance with ***the rules of the institution concerned***, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by ***Article 4(1)(a)***, notably public

Amendment

1. Sensitive documents are documents originating from the institutions or the ***bodies, offices or*** agencies established by them, from Member States, third countries or International Organisations, classified as «TRÈS SECRET/TOP SECRET», «SECRET» or «CONFIDENTIEL» in accordance with ***common rules laid down by the institutions, bodies, offices and agencies*** which protect essential interests of the European Union or of one or more of its Member States in the areas covered by

security, defence and military matters.

points (a) and (b) of Article 4(1), notably public security, defence and military matters.

Or. en

Justification

The Commission's proposal not to amend Article 9 is not consistent with the changes proposed to Article 4, which at present makes the reference in paragraph 1 of this article incoherent and incorrect. According to Article 15 TFEU also the conditions and limits to access to documents shall be laid down in co-decision. Therefore, it is imperative and in conformity with the legal base that the institutions, bodies, offices and agencies adopt common rules on classification.

Amendment 11

Proposal for a regulation Article 9 – paragraph 6

Text proposed by the Commission

6. The rules of the institutions concerning sensitive documents shall be made public.

Amendment

6. The **common** rules of the institutions, **bodies, offices and agencies** concerning sensitive documents shall be made public.

Or. en

Justification

The Commission's proposal not to amend Article 9 is not consistent with the changes proposed to Article 4, which at present makes the reference in paragraph 1 of this article incoherent and incorrect. According to Article 15 TFEU also the conditions and limits to access to documents shall be laid down in co-decision. Therefore, it is imperative and in conformity with the legal base that the institutions, bodies, offices and agencies adopt and make public common rules on classification.

Amendment 12

Proposal for a regulation Article 12 – paragraph 1

Text proposed by the Commission

1. **Documents drawn up or received in the course of procedures for the adoption of**

Amendment

1. **The institutions shall as far as possible make documents** directly accessible to the

EU legislative acts or non-legislative acts of general application shall, subject to Articles 4 and 9, be made directly accessible to the public.

public in electronic form or through a register in accordance with the rules of the institution, body, office or agency concerned.

Or. en

Justification

In order to maintain current standards the text of the current Article 12(1) is reinstated.

Amendment 13

Proposal for a regulation
Article 17 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

At the latest by, the Commission shall publish a report on the implementation of the principles underlying this Regulation and shall make recommendations, including, inter alia, a definition of the term “overriding public interest” and, if appropriate, proposals for revision of this Regulation and an action programme of measures to be taken by the institutions, bodies, offices and agencies.

Or. en

Justification

As was the case with the current Regulation a report on the implementation of the Regulation should be presented in which recommendations and proposals for improvements, where needed, should be made.