Access to documents after Lisbon

Citizens' right to access documents of the EU institutions has been enshrined in EU Treaties and the Charter of Fundamental Rights. In 2008, the Commission proposed to change Regulation 1049/2001 which sets out the rules for access to such documents. The Council objects strongly to many of Parliament's proposed amendments to the Commission proposal. This has led to an "institutional impasse", which continues with little sign of any breakthrough.

Many MEPs feel that the proposal is a step backwards. For example, the current broad definition of "a document" would be changed in order to exclude preparatory and other draft documents, while the exceptions allowing the institutions to refuse access would be re-considered. Balancing personal data protection, the distinction between access to documents and to information, or between legislative documents and administrative documents, and the treatment of classified documents are other points of contention.

Both Parliament and NGOs argue for user-friendly access to all documents related to the legislative process of each act, its "legislative footprint". Besides updating the Regulation, Parliament also wants to tackle the malfunctions of daily administrative practice, as well as non-compliance with case law, in institutions' handling of access requests.

In this briefing:

Background

As stipulated in the Charter of Fundamental Rights and in the EU Treaties, the right of access to documents in the EU institutions is considered a fundamental right of citizens, which contributes to ensuring the accountability and legitimacy of a democratic political system.

Despite progress in the past ten years, the European Parliament continues to object that accessing documents still remains an obstacle-strewn path for requesters.

Article 255 TEC (now Article 15 TFEU) granted a right of access to European Parliament, Council and Commission documents. Regulation 1049/2001 sets out the principles and limits governing this right. Refusal to grant access may only be based on the exceptions provided for in this Regulation, while the basic principle is transparency. Complaints against final administrative refusal can be made to the European Ombudsman or a case can be brought before the European Court of Justice.

Further to the development of a body of case law, the settlement of a number of complaints by the Ombudsman, the launch of a "European Transparency Initiative" and the adoption of an EP resolution in 2006, the Commission adopted a proposal to amend the Regulation in April 2008.

In March 2009, the EP voted for considerable amendments to the proposal, but postponed its first reading vote on the legislative resolution. This was to enable the Commission to modify its proposal taking into

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account the expected entry into force of the Lisbon Treaty as well as the ECJ case law. The Commission, however, stated it would not consider the EP amendments until its formal first reading position had been adopted.

Parliament refused to do so because of the Council's dismissive stance: in the latter's view, 27 of the amendments went beyond the scope of Article 255, or beyond the object of the recast proposal[1]. The file was therefore handed on to the 2009-14 parliamentary term and the "institutional impasse" has lasted until the present.

In March 2011, the Commission put forward a new, very limited proposal to address the Treaty of Lisbon change which extends the right of access to documents to those of all institutions, bodies, offices and agencies of the EU, without prejudice to the ongoing co-decision process on the 2008 recast proposal.

Charter of Fundamental Rights, Article 42: "Any citizen of the Union...has a right of access to European Parliament, Council and Commission documents."

TFEU, Article 15: "In order to promote good governance and ensure the participation of civil society, the Union institutions...shall conduct their work as openly as possible. Any citizen...shall have a right of access to documents of the Union institutions...whatever their medium, subject to the principles and the conditions to be defined..."

Rapporteur Michael Cashman (S&D, UK), however, has indicated that, according to Parliament's legal service, the second proposal on its own brings no "added value" to the direct applicability of article 15 TFEU and article 42 of the Charter of Fundamental Rights. Therefore, he has incorporated the additional change from the 2011 proposal in a revision of his May 2010 report which remains based on the Commission's 2008 recast proposal. The JURI Committee supports this legislative strategy whereas the AFCO Committee would prefer to move forward on the second Commission Proposal while waiting for a broad consensus on the first one. The report also proposes changes in line with the Hautala-Sargentini Report on the working of the Regulation, adopted in the September 2011 plenary, and is expected to be voted by the LIBE Committee in November and in plenary in December so that negotiations with the Council could start under the Danish Presidency in 2012.

Contentious issues

Several aspects of the Commission proposal have met with criticism from MEPs and NGOs. Differences in views have mainly crystallised around the proposed definition of a document, the extension of the exceptions to access to documents, personal data protection and the treatment of classified documents.

What is a "document"?

The current Regulation applies to documents, meaning any content whatever its medium. The requester has to indicate or describe the document to which he wants access. In order to protect drafts and preparatory documents, the Commission now specifies that a "document" should be accessible only if it has been formally transmitted to its recipients, or circulated within the institution, or has been otherwise registered. Parliament's rapporteur proposes to delete the requirement of transmission or registration, arguing that rules cannot exclude entirely from their scope anything which is a document as defined by the Treaty.

"Space to think"

In relation to the previous issue, access to a document relating to a matter where the decision has not been taken by the institution shall be refused if disclosure would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

The institutions have been criticised for routinely using a strict interpretation of this power to deny access to documents "under discussion", such as legal opinions related to a legislative process and Member State positions.

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Parliament's rapporteur feels that by doing so the Council and the Commission are not taking into account the implications of the landmark Court of Justice ruling in the 2008 "Turco v. Council" case, which overturned the Council's decision to refuse access to one of its legal opinions, stating that disclosure of such opinions arising when legislative initiatives are being debated increases transparency and strengthens the democratic right of citizens to scrutinise the information which has formed the basis of a legislative act. This reasoning was subsequently taken up in the Lisbon Treaty, in article 15 TFEU[2].

Parliament also signals strongly that preparatory legislative documents and all related information on the different stages of a legislative procedure should in principle be directly accessible, in time to be of use[3].

Court proceedings, selection procedures and investigation-powers

The Commission's proposal extends refusal of access where disclosure would undermine the protection of legal advice and court proceedings, and in arbitration and dispute settlement proceedings (such as those related to the World Trade Organisation).

Refusal of access to documents revealing decision-making procedures for awarding contracts or staff selection would also be made easier, subject to the possibility of an overriding interest in disclosure[4]. There is criticism that access to documents related to the exercise of the investigative powers of an institution would be excluded until the decision can no longer be challenged by an action for annulment or the investigation is closed.

Documents from Member States

The current Regulation obliges the institutions to consult the Member State from which a document originates before granting access. Taking into account recent case law, the Commission clarifies that disclosure of requested documents may only be refused if the Member State gives adequate reasons, based on the exceptions in the Regulation or on relevant specific provisions in its national legislation. Parliament does not want Member States to have a veto right regarding access to such documents, whereas Member States are concerned about possible unwanted effects.

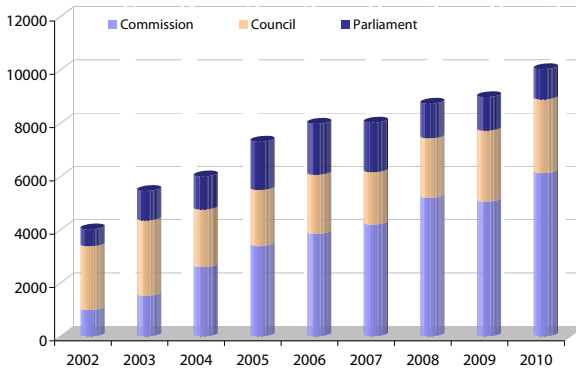
Another problem is the often lengthy delays when the Commission consults Member States or third parties about access to documents. The Ombudsman points out that the institutions should proactively ensure that Member States understand that the *basic rule* is public access. They should clearly identify any material to which one or more of the exceptions apply and give justification at the time a document is sent.[5]

Personal data protection

Access is refused where disclosure would undermine the protection of the privacy and the integrity of an individual in accordance with the EU's Data Protection Regulation. While the right to data protection must be protected, care should be taken that data protection is not used as a pretext for not being transparent. NGOs have criticised the common practice of blanking out personal data in documents to be disclosed as too restrictive, in particular where persons act in a public capacity.

The proposal clarifies that names, titles and functions of public office holders, civil servants and interest representatives shall be disclosed – in matters related to their professional activities – unless, given the particular circumstances, disclosure would adversely affect the persons concerned. Civil society organisations are concerned that, formulated like this, persons concerned

Figure 1: Applications for access to documents



Source: Annual reports on the application of Reg. 1049/2001

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will undoubtedly claim that disclosure will have an adverse effect on them even if it has no effect on their privacy or integrity. They point out that there is no overriding public interest test: when access is refused because disclosure would adversely affect the persons concerned, there is no room for possible counter-argument based on the public importance of the information.

Peter Hustinx, the European Data Protection Supervisor, has pointed out that the proposal lacks practical viability since the provision refers to data protection legislation which does not provide a clear answer of when a decision needs to be taken with regard to public access. He has also suggested clarifying the relationship between the two Regulations so as to ensure that the right of public access is without prejudice to the right of access to own personal data[6].

In Mr Hustinx's point of view, the Bavarian Lager case has demonstrated that complicated situations can arise when institutions fail to address the question of public disclosure until they receive a request for public access. He therefore advocates a proactive approach making clear in *advance* to the persons concerned which personal data would be subject to disclosure. This would ensure in principle that disclosure is fair and lawful: data subjects involved would be well-informed and able to invoke their rights under the data-protection Regulation. Such an approach could also reduce heavy ex-post administrative burdens.

Bavarian Lager case
(T-194/04 and C-28/08)

In 2004, Bavarian Lager sought annulment of a Commission decision not to disclose names of participants in a meeting on the basis of the protection of their private lives under the Data Protection Regulation. Whilst the Court of First Instance annulled the decision, saying that the mere entry of the names did not constitute an undermining of private life, the Court of Justice overturned this judgment on appeal in 2010, ruling that disclosure of the names would not be in line with data protection rules.

Classified documents

Whereas the proposal leaves the provision on "sensitive documents" unaltered, Parliament's rapporteur argues that the new Regulation should offer a *common* procedure across the institutions for (de-)classification of documents as the current system of classification functions only on the basis of inter-institutional agreements (such as the Framework Agreement between Parliament and Commission) and is prone to over-classification. A general principle with a proper legal basis applicable to classified information is lacking at the moment. Since reasons must be given why access to a document is refused, documents on legislative procedures should not be classified and any exemptions should apply only for a justified period.

More user-friendly access to systems

Institutions must already provide public access with an up-to-date electronic register of documents. To make access as user-friendly as possible, Parliament would like a single access-point or interconnected register including all documents related to a single legislative procedure.

Stakeholders' views

Although the Commission's proposal extends access to all beneficiaries and aligns itself with the Aarhus Convention on access to information in environmental matters, many MEPs and NGOs such as Statewatch, Client Earth and Access Info feel it represents a step backwards, does not incorporate the EP's previous demands, or reflect the transparency provisions of the Lisbon Treaty and is still far from a true EU "Freedom of Information Act". They point out that if decision-making does not open up in Brussels, it is not likely to open up at national levels either.

They underline that malfunction in practice under the *current* Regulation is also a major problem to be tackled. The Commission often takes time extensions and now proposes to extend the deadline for handling confirmatory applications to 30 working days.

Another problem, they say, is repeated non-compliance with ECJ case law in responses

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to requests, for example in the case of non-disclosure of legal opinions. As a consequence, applicants have to go to the Court again only for it to reassert its own previous decisions. If institutions invoke exceptions, they have to demonstrate that the risk to the interest protected is excpected and not purely hypothetical, and define how access could effectively undermine the protected interest.

The European Ombudsman warns against a possible reverse of citizen's rights. He sees no reason to broaden the existing exceptions as he has never came across any case in which he thought the exceptions were too *narrowly* drawn to protect public or private interests under the Regulation. On the contrary, in those cases where he considered disclosure would be damaging there was no doubt that one or more of the exceptions applied[7].

He points out that the institutions have not yet properly considered the resources needed to put the right to access to documents into effect. Cases where a document is released only after a confirmatory application should be limited by having enough staff to handle initial applications promptly and accurately. Some initial applications could even be avoided altogether by adopting a proactive approach of putting documents into the public domain.

Problems could be avoided by appointing information officers in the institutions, charged with putting the right to access to documents into effect and playing an educational role in their institution to explain the legal obligations and the benefits of an open administration.

Main references

The Revision of Regulation 1049/2001 on Public Access to Documents / Ian Harden, European Public Law, 15, no. 2 (2009), pp. 239-256

Transparency in EU Institutional Law / Bart Driessen, 2008, 321 p.

Public access to EU documents: State of the law at the time of revision of Regulation 1049/2001, Policy Department C, PE 393.287, 2008, 46 p.

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Endnotes

1 Legal opinion on the Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents / Council of the EU, Working Party on Information, 24/02/2009. The ECJ ruled on 22 March 2011 that by denying access to certain information contained in this Legal Opinion, the Council had infringed the Regulation by refusing to disclose, on the basis of unsubstantiated arguments, who had made proposals in the note, which related precisely to access to documents (Case T-233/09 Access Info Europe v Council of the EU).

2 The provision in former article 207 TEC, which required transparency by the Council of the legislative preparatory works "while at the same time preserving the effectiveness of its decision-making process," was deleted.

3 European Parliament Resolution of 17 December 2009 on improvements needed to the legal framework for access to documents following the entry into force of the Lisbon Treaty, Regulation (EC) No 1049/2001.

4 The Revision of Regulation 1049/2001 on Public Access to Documents / Ian Harden, European Public Law, 15, no. 2 (2009), p. 247.

5 Speaking notes of Mr Diamandouros at the public hearing on the right to access to EU documents: implementation and future of Regulation 1049/2001 organised by the Civil Liberties Committee on 13 April 2011.

6 Opinion of the European Data Protection Supervisor on the Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (2009/C 2/03).

7 Speaking notes of Mr Diamandouros.

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