



Statewatch Analysis

Access to EU documents:

Article-by-Article commentary, 'Red Lines' for the negotiations, and the undemocratic recast procedure

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Introduction

On 10 May 2012, the Danish Presidency of the Council put on the agenda of Coreper (the EU body consisting of Member States' representatives to the EU) a draft deal on the proposed Regulation on access to documents. This deal, if agreed, would constitute the Council's position for negotiations with the European Parliament (EP), which has joint decision-making powers on this proposal.

It is not known whether this proposed deal was agreed at that time. However, since this is an important point in the negotiations, the proposed deal should be examined on an article-by-article basis, to see if each provision would raise or lower standards as compared to the status quo, and if so by how much.

This analysis also suggests the basic conditions the EP must set for negotiations with the Council so as to ensure that the revision of the Regulation leads to a significant increase in current standards rather than a reduction.

Finally, this analysis points out that the rules on the 'recasting' of EU legislation, which have constrained the EP from suggesting many amendments which would improve the text of the rules, are profoundly undemocratic and illegal, and should be denounced by the EP immediately.

Article-by-Article commentary

This commentary examines the draft deal on the proposed Regulation as suggested by the Danish Presidency (see the fourth column of the Council document), as compared to the existing Regulation on access to documents. It does not examine the original proposals from the Commission, or the EP's proposed amendments of December 2011.

Article 2(5a) - **significantly lower standard**

This provision is questionable since it excludes a category of documents entirely from the scope of the rules. It is doubtful whether this is permitted by the EU treaties and the EU's Charter of Rights (which includes a right of access to documents), in light of the principle of proportionality - ie the objective sought by this amendment could have been attained by less extreme means, such as clarifying the grounds for refusal in Article 4 of the Regulation.

Article 2(5b) - **significantly lower standards**

The second sentence of Article 2(5b) is questionable since it excludes a category of documents entirely from the scope of the rules. See the comments on Article 2(5a).

Article 3(a) - **higher standard**

This would be a useful clarification concerning documents in databases, which perhaps sets a higher standard compared to the status quo. However, arguably it merely confirms the status quo, since the EU courts have not yet clarified the extent to which the rules apply to databases.

Article 3(aa) - **higher standard**

The extension of scope of the rules, by means of the definition of 'institutions', would in some senses set a higher standard, but it should be noted that most of the EU bodies other than the Council, EP and Commission already have rules on access to documents. So the extension of scope would in most cases only raise standards if those existing rules set lower standards than the 2001 Regulation. Furthermore, this extension of scope simply reflects amendments to the Treaty made by the Treaty of Lisbon.

Article 3a - **very significantly lower standard**

The exclusion of massive numbers of documents from the scope of the rules, by means of this definition of document, is fundamentally objectionable. It is also of doubtful legality, since the definition of 'documents' is arguably an issue of EU primary law (ie a question of the interpretation of the EU treaties and the EU Charter of Rights), and would be a gross breach of the principle of proportionality, since the objective of restricting access to early drafts of documents would have a massive impact on public access and could be accomplished by more limited means (ie revising the exceptions in Article 4).

Article 4(1)(a), fifth indent - **lower standard**

This is a new mandatory exception from the right of access.

Article 4(1)(b) - **effect unclear**

It is not clear if this revision would set higher or lower standards, as these would only be factors to be taken into account.

Article 4(2), fourth indent - **lower standard**

This is a new exception from the right of access.

Article 4(5) - **confirms status quo**

The new wording on the 'Member State veto' reflects the case law of the Court of Justice. This would be useful to the extent that it would reduce the potential for misinterpretation of that case law.

Article 4a (and Article 4(3b)) - **significantly lower standard**

This new presumption regarding legal advice and decision-making would overturn important case law of the Court of Justice, which had stressed the importance of giving access to legal advice in such cases in order ensure the democratic rights of citizens.

Article 6(3) - **effect unclear**

It is not clear if the new wording would set a higher or lower standard.

Article 7(1) - **higher standard**

The new rule of the timing of replies would encourage quicker replies.

Article 7(1a) and (3) - **lower standards**

These provisions would allow for longer delays in replying, and new grounds for delay.

Article 8(1), (1a) and (2) - **lower standards**

These provisions would allow for extra delays.

Article 12(2) - **status quo**

This clarification reflects Treaty amendments.

Article 12(3) - **higher standard**

The change from 'should' to 'shall' means that 'other documents' will need to be made available directly. However, this change is not as significant as it first appears, in light of the revised definition of a 'document' (see above).

Article 15(1a) - higher standard

It would likely be useful in practice to have information officers. However, this amendment should not be agreed at the cost of significant lowering of standards elsewhere in the Regulation, particularly as regards the definition of 'document'.

'Red Lines'

If and when the negotiations begin on the Regulation, the EP will be judged on the extent to which it is able to secure a significant overall increase in the overall level of access to documents in the EU. Conversely, given that the 2001 Regulation already exists, it would be profoundly foolish and utterly unjustifiable for the EP to agree to a new Regulation which amounts to an overall reduction in the current level of access to documents.

As can be seen from the analysis above, the draft position of the Council would, taken as a whole, constitute a significant overall reduction in the level of access to documents, given that the modest increases in standards which it provides for as regards some Articles would be clearly outweighed by the significant reduction in standards which it provides for as regards many key Articles. In particular, the significant narrowing of scope of the legislation that would follow from the revised definition of a 'document' would undercut the effect of any changes which would *prima facie* raise the current standards.

It follows that the EP should not accept the Council proposal, or any variation thereof which would significantly reduce current standards. However, if the Council is willing to discuss changes to its text, the EP should be willing to negotiate the proposal with the Council as long as there is some prospect of agreeing a text which raises current standards. If the Council is inflexible from the outset, or if it becomes clear during negotiations that there is no reasonable likelihood of agreeing a text which raises current standards, then the EP should end negotiations and the EP plenary should vote to reject the proposal.

At the outset, though, the EP should make clear to the Council that it cannot in any circumstances accept the proposed definition of a 'document'. Since this definition would significantly narrow the scope of the Regulation, it would be impossible for any new Regulation which includes this definition to raise standards overall, and any Regulation including this definition would on the whole necessarily lower current standards significantly. If the Council is adamant on including this definition, the EP should instantly veto the proposal. Preserving the current level of the right of access to documents is more important than

achieving a negotiation ‘success’ for the current Danish (or incoming Cypriot) Presidency and EP negotiators, since in substance this would not be a success at all. **The EP should not be willing to do a deal at any cost.**

A revised Regulation which includes all or most of the provisions in the Council draft which would set higher standards, none of the provisions which would set significantly lower standards, and few or none of the provisions which would set slightly lower standards, would on the whole **increase the current standards**, but only **quite modestly**. It is questionable whether the EP should bother if the final outcome is so modest.

To obtain a **significant overall increase** in the overall level of access to documents in the EU, the new Regulation will have to contain many or all of the proposals of the EP (see the third column of the document) which would significantly increase standards. These are:

Article 4(3) - raising the threshold relating to the decision-making exception

Article 4(4) - also raising the threshold relating to the decision-making exception

Article 4(5) - the limitation of abuse of the ‘personal data’ exception by lobbyists

Article 4(7) - an exception from the exceptions for legislative acts, as broadly defined

Article 5(2) - narrowing Member States’ veto powers

Article 5a - a special rule for legislative procedures, as broadly defined

Article 15(2a) - a special rule regarding the transparency of EU spending

Taken as a whole, these key EP amendments would significantly transform the transparency of the EU, as regards the decision-making process, lobbyists’ activities and the accountability of EU spending. The EP needs to make clear that no reform of the rules would be acceptable without most or all of these changes being made.

The ‘Recast’ Procedure

From the outset of these negotiations, the negotiations were constrained by the Commission’s decisions to present them in the form of a ‘recast’, meaning that possible amendments in principle had to be limited to amendments to those provisions of the existing Regulation which the Commission had suggested amendments to. This has meant that most of the more ambitious amendments proposed by the EP were regarded as ‘inadmissible’ from the outset.

There are three problems with this. First of all, it is clear from the Council's negotiation document that despite these rules, the Commission has offered flexibility as regards the Council's amendments. It is therefore hardly justifiable for the Commission to refuse flexibility as regards the EP's amendments.

Secondly, given the fundamental importance of the rules on access to documents, it was unjustifiable and profoundly unprincipled for the Commission to present its proposed amendments to these rules in the form of a recast. This meant that from the outset the EP, the EU's democratically elected legislature, was prevented from pressing for most of the changes to the rules which it had previously unanimously voted for, in the form of the 'Cashman resolution'.

Thirdly, the very nature of the recast procedure is profoundly undemocratic and indeed surely illegal, due to its perversion of the EU's legislative process and the basic principles of parliamentary democracy. The mere *presentation* of proposals in a recast form is not objectionable - indeed, the clear distinction made between suggested substantive amendments to existing legislation and provisions of that legislation which remain unchanged is very welcome, since it enables legislators and the public to understand clearly the extent to which a proposal would amend the existing law or not. Nor, legally speaking, is it possible to deny the Commission's legislative prerogatives - the monopoly over proposing most legislation, the power to amend its proposals at any time, and the obligation for the Council to act unanimously (in most cases) if it wishes to amend the Commission's proposals without the Commission's consent. (Whether the EU Treaties should be amended to limit or abolish these prerogatives is another question).

The problem is that the recast procedure, as set out in an 'Inter-institutional Agreement' between the EU political institutions, as interpreted by the Commission, goes beyond that, by preventing the EU's legislators from considering any amendments at all to the existing text of legislation other than the existing provisions which the Commission has proposed to amend. Since for the Commission the Treaties do not (and should not) provide for any legislative prerogatives besides those referred to already, it is not (and should not be) possible for the EP and the Council to sign away their rights to propose amendments to legislation, given that these rights are inherent in the very nature of the legislative process, which is legitimated by the democratic election of the EP and the (national) democratic accountability of the members of the Council - along with the role in the EU legislative process which the EU Treaties give to national parliaments.

For these reasons, regardless of the developments in the negotiation of the access to documents proposals, the EP and the Council should immediately denounce the Inter-institutional agreement on the recasting of EU Acts. The sooner this agreement is denounced the better, most obviously because the agreement is pernicious and illegal, but also because it will strengthen the

EP's hand as regards the negotiations of this proposal. A replacement agreement which solely concerns the presentation of amendments (by the Commission *or* the Council or the EP) to existing legislation would be acceptable, if it does not prevent the EU's legislative bodies from exercising the power to suggest amendments to proposed legislation which is given to them by the Treaties.

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Sources

Recast of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (first reading) - Preparation of informal trilogies (9441/12):

<http://www.statewatch.org/news/2012/may/eu-council-access-reg-prep-trilogue-09441-12-1.pdf>

European Parliament, Council and Commission Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts (2002/C 77/01):

<http://www.statewatch.org/news/2012/may/interinstitutional-agreement-2002-c77-01.pdf>

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