Folketinget — Europaudvalget
Christiansborg, den 25. april 2007
EU-konsulenten

Til

udvalgets medlemmer og stedfortrædere

Notat om grønbog om offentlighedens aktindsigt i EU-dokumenter

Resumé

Kommissionen har fremlagt en grønbog om aktindsigt i Kommissionens, Rådets og Parlamentets dokumenter. Grønbogen skal ses i forlængelse af EU's generelle åbenhedsstrategi og gennemgår erfaringerne med anvendelsen af den generelle forordning om aktindsigt fra 2001. Med udgangspunkt i Kommissionens egne overvejelser om stramninger, udvidelser og præciseringer af reglerne om aktindsigt i EU-dokumenter, stilles 8 specifikke spørgsmål til orientering af debatten. Fristen for bemærkninger til grønbogen er sat til den 15. juli 2007.

Kommissionen har den 18. april 2007 fremlagt en grønbog[1], som lægger op til en revision af reglerne om aktindsigt i EU-institutionernes dokumenter. Fristen for bemærkninger til grønbogen er den 15. juli 2007.

Kommissionen anfører, at høringen er endnu et skridt på den vej til større gennemsigtighed, der blev lanceret ved **det europæiske åbenhedsinitiativ**[2], som Kommissionen lancerede i november 2005.

[1] Grønbog om aktindsigt i Det Europæiske Fællesskabs dokumenter – KOM (2007) 185.
[2] Initiativet er beskrevet nærmere på Kommissionens hjemmeside: http://ec.europa.eu/commission_barroso/kallas/transparency_en.htm

I grønbogen gennemgås udvalgte problemstillinger baseret på erfaringerne med regelsættet, og der lægges op til drøftelse af 8 specifikke spørgsmål.

Debatten om aktindsigt i EU-dokumenter har gennem mange år været et emne, der skilte EU-landene i to lejre, ikke mindst på grund af landenes egne retstraditioner. Hvor de progressive lande med Holland, Sverige og Danmark i spidsen gik ind for omfattende aktindsigt, har øvrige EU-lande, herunder Frankrig og Storbritannien, som traditionelt har haft en langt mere lukket offentlig forvaltning, argumenteret for udpræget lukkethed. I 2001 kulminerede flere års drøftelser i vedtagelsen af en forordning om aktindsigt i de 3 institutioners dokumenter[3]. Forordningen, som blev vedtaget med den nye hjemmel i Maastrichttraktaten[4], skabte for første gang en fælles EU-lovgivning om aktindsigt for alle 3 institutioner.

Efterfølgende er der i 2006 vedtaget en særskilt forordning, der bl.a. opstiller særlige regler om aktindsigt i miljøoplysninger[5]. Denne forordning gælder dog først fra den 28. juni 2007.

Grønbogens første del beskriver de erfaringer, der er høstet siden ikrafttrædelsen af den generelle forordning om aktindsigt i 2001, ligesom der gives statistiske oplysninger om antallet af begæringer om aktindsigt, hvilke typer dokumenter, der oftest er søgt aktindsigt i, hvem der har søgt, typiske begrundelser for afslag, m.v.

Derefter gennemgås **udviklingen i EF-Domstolens retspraksis** vedrørende anvendelsen af den generelle forordning. Således har Domstolen præciseret omfanget af retten til aktindsigt, og særligt **udstrækningen af undtagelserne** i forordningens artikel 4.

[3] Europa-Parlamentets og Rådets forordning (EF) nr. 1049/2001 af 31. maj 2001 om aktindsigt i Europaparlamentets, Rådets og Kommissionens dokumenter (*EFT L 145 af 31.5.2001, s. 43*).

[4] EF-traktatens artikel 255, stk. 2.

[5] Europa-Parlamentets og Rådets forordning (EF) nr. 1367/2006 af 6. september 2006 om anvendelse af Århus-konventionens bestemmelser om adgang til oplysninger, offentlig deltagelse i beslutningsprocesser samt adgang til klage og domstolsprøvelse på miljøområdet på Fællesskabets institutioner og organer (*EUT L* 264 af 25.9.2006, s. 13).

Domstolen har særligt fastslået:

- at undtagelsen om, at der ikke gælder aktindsigt for juridiske notater fra EU-institutionernes juridiske tjenester skal baseres på en konkret vurdering fra sag til sag
- at EU-landene bør garanteres fortrolighed under de undersøgelser, som kan føre til traktatbrudssager
- at såfremt et dokument hidrører fra et EU-land og dette land modsætter sig dets offentliggørelse, skal retten til aktindsigt bedømmes efter landets nationale regler og ikke efter EU-reglerne
- at mere specifikke regler om fortrolighed – såsom regler i vedtægten for EU-ansatte – har forrang for forordningens generelle regler om aktindsigt.

I grønbogens anden del giver Kommissionen sit bud på mulige ændringer i den gældende forordning baseret på analysen i grønbogens første del, og lægger således op til bred drøftelse af en række konkrete spørgsmål.

1. *En mere aktiv offentliggørelsespolitik*

Kommissionen ønsker bl.a., at EU-borgerne skal have lettere adgang til lovgivningsdokumenter, der er til rådighed, og foreslår, at institutionerne udvikler en politik, der mere systematisk stiller oplysninger til rådighed for offentligheden på en brugervenlig måde.

Spørgsmål 1: Er de informationer, der findes i EU-registrene, let forståelige ogtilgængelige?

Spørgsmål 2: Bør der sættes mere fokus på at fremme aktiv udspredning af informationer evt. med vægt på områder af særlig interesse?

2. *Indføjelse af reglerne om aktindsigt i miljøoplysninger i den generelle forordning om aktindsigt*

Den generelle forordning om aktindsigt og forordningen om adgang til miljøoplysninger m.v. udgør tilsammen EU-lovgivningen om aktindsigt i EU-dokumenter. Kommissionen foreslår, at alle regler om aktindsigt sammenskrives i den generelle forordning.

<u>Spørgsmål 3:</u> Vil en enkelt forordning om aktindsigt, som også omfatter miljøoplysninger, skabe større klarhed for borgerne?

3. *Afvejning af hensyn*

Af større principiel interesse er Kommissionens efterlysning af en generel debat om **undtagelserne til aktindsigten**, nærmere bestemt om afvejningen af hensynet til offentlighed kontra andre hensyn, særligt hensynet til beskyttelse af personoplysninger, af økonomiske og kommercielle interesser og af princippet om god forvaltning.

a) Hensynet til beskyttelse af personoplysninger

Med henvisning til en række verserende sager for EF-Domstolen om afvejning af offentlighed kontra beskyttelse af personoplysninger finder Kommissionen, at institutionerne bør **fastlægge kriterier for udlevering af persondata** baseret på følgende principper:

- om der foreligger en offentlig interesse i offentliggørelsen
- om det er åbenbart, at offentliggørelsen ikke krænker personers privatliv eller integritet.

<u>Spørgsmål 4:</u> Bør undtagelsen fra aktindsigt af hensyn til beskyttelse af personoplysninger gøres klarere for at sikre en passende beskyttelse af disse oplysninger?

b) Hensynet til beskyttelse af økonomiske og kommercielle interesser

Kommissionen fremfører, at det særligt i konkurrencesager, på udbudsområdet samt i svindelbekæmpelsessager er nødvendigt at sikre beskyttelse af økonomiske og kommercielle interesser **af hensyn til samarbejdet med de involverede parter**. Således foreslår Kommissionen, at det i forordningen præciseres, at der ikke kan gives aktindsigt i dokumenter med informationer, som kun er kendt i en begrænset personkreds, hvis offentliggørelsen må antages at forvolde alvorlig skade på ophavsmandens eller tredjemands legitime interesser. Dog bør der i sager om aktindsigt i miljøoplysninger tages særligt hensyn til, at økonomiske og kommercielle interesser må vige for den altovervejende interesse i at udbrede oplysninger om udledning i miljøet.

<u>Spørgsmål 5</u>: Bør undtagelsen fra aktindsigt af hensyn til beskyttelse af tredjemands økonomiske og kommercielle interesser gøres klarere for at sikre en passende beskyttelse af disse oplysninger?

c) Hensynet til at sikre god forvaltning

Kommissionen ønsker en generel drøftelse af aktindsigtsreglerne i forhold til EU-institutionernes mulighed for at varetage deres arbejdsopgaver.

Med henvisning til Kommissionens erfaringer med **behandling af særligt byrdefulde begæringer om aktindsigt** anfører den således, at den generelle forordning ikke indeholder regler, som forholder sig til store eller urimelige begæringer. Kommissionen finder, at det ikke er i offentlighedens interesse at bruge betydelige ressourcer på at betjene et begrænset antal meget omfattende eller på anden måde byrdefulde begæringer, og foreslår derfor, at der opstilles kriterier for retten aktindsigt, som bl.a. relaterer sig til:

- dokumenternes omfang,
- definitionen af et "dokument, som institutionen er i besiddelse af",
- hvilken betydning tidsforbruget har for, om aktindsigt kan meddeles.

<u>Spørgsmål 6</u>: Er der i lyset af de indvundne erfaringer grundlag for at fastsætte særlige bestemmelser om behandling af begæringer om aktindsigt, som er åbenbart for store eller urimelige, særligt på grund af den tid det tager at behandle dem?

Kommissionen ønsker endvidere en nærmere afklaring af begrebet "dokument, som en institution er i besiddelse af" i forordningens 3, stk. 2, som afgrænser de dokumenter, der er genstand for aktindsigt.

Særligt i forhold til oplysninger, som findes i elektroniske databaser, bør det ifølge Kommissionen fremgå af forordningen, hvorledes indholdet af databaserne kan indpasses i begrebet "dokument". Kommissionen finder, at kun specifikke og begrænsede sæt af informationer, som efter almindelige søgeprocedurer kan trækkes ud af databaser, kan betragtes som "dokumenter" og således omfattes af aktindsigten.

<u>Spørgsmål 7</u>: Bør begrebet "dokument" i relation til databaser omfatte sæt af informationer, som kan udtrækkes af en database ved hjælp af eksisterende søgeredskaber?

Endelig ønsker Kommissionen en drøftelse af, **hvilken betydning det tidsmæssige aspekt bør have** for anvendelsen af undtagelserne fra aktindsigten. Kommissionen finder, navnlig i relation til visse undtagelser angående dokumenter om inspektioner, undersøgelser, revisioner, retssager m.v., at forordningen - af hensyn til at undgå at overbebyrde institutionerne - bør angive begivenheder (dvs. skæringstidspunkter):

- <u>forud for hvilke</u> det er åbenbart, at bestemte kategorier af dokumenter er omfattet af undtagelserne,
- <u>efter hvilke</u> dokumenter må betragtes som offentlige.

<u>Spørgsmål 8:</u> Bør forordningen angive begivenheder forud for hvilke/efter hvilke undtagelserne finder anvendelse/ikke finder anvendelse?

Fristen for bemærkninger til grønbogen er <u>den 15. juli 2007</u>.

Med venlig hilsen

Thomas Fich
(3611)

./. Grønbogen vedlægges på engelsk (den danske udgave foreligger endnu ikke, men vil blive lagt på EU-oplysningens hjemmeside).

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 18.4.2007
COM(2007) 185 final

GREEN PAPER

Public Access to Documents held by institutions of the European Community

A review

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Public Access to Documents held by institutions of the European Community

A review

INTRODUCTION

During the last fifteen years, the institutions of the European Union have gradually become more open to the public. The principle of openness was introduced by the Treaty of Maastricht in 1991, with a view to strengthen the democratic nature of the institutions. The Council and the Commission subsequently adopted a Code of Conduct on public access to their documents as an additional and essential part of their information and communication policy.. In 1996, the public right of access was enshrined in Article 255 of the Treaty establishing the European Community, as amended by the Treaty of Amsterdam. Regulation (EC) No 1049/2001[1] gives effect to the right of citizens to obtain documents of the European Parliament, the Council and the Commission.

The Regulation, which became applicable on 3 December 2001, has led to a steep and sustained increase in requests for access to documents, as the annual reports published by the three institutions show[2]. In January 2004 the Commission published a report on the implementation of the Regulation, which provided a first overview of how the EU's regime for public access to documents works in practice[3]. It appeared that the number of access requests was increasing with around 50% every year. Since on average two thirds of requests were granted, the Regulation had opened to the public a considerable amount of previously unpublished documents. On the other hand, the exceptions set out in the Regulation provided adequate protection for legitimate interests. Even if the implementation of the Regulation put a burden on the institutions, the overall conclusion was that it had worked remarkably well. Therefore, the Commission considered that there was no need to amend the Regulation in the short term, but that improvements could be achieved without changing the legislation.

Three years have passed since this first evaluation, during which more experience has been gained, a body of case law has developed and a number of complaints have been settled by the European Ombudsman. Furthermore, the European Parliament and the Council have adopted a new Regulation applying the Convention of Århus[4]

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[1] OJ L 145, 31.5.2001, p. 43.

[2] These reports are available on the following websites:
Parliament: http://www.europarl.europa.eu/register/pdf/FINAL_605496_1_EN.pdf
Council: http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=305&lang=EN&mode=g
Commission: http://ec.europa.eu/transparency/access_documents/index_en.htm

[3] COM(2004) 45: Report from the Commission on the implementation of the principles in Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents.

[4] Convention on Access to Information, public Participation in Decision-making and Access to Justice in environmental Matters, done at Århus, Denmark, on 25 June 1998.

to the institutions and bodies of the European Community, which will have an impact on access to documents containing environmental information.

For these reasons, the time seems right to assess whether the Regulation needs to be amended. Therefore, when the Commission decided, on 9 November 2005, to launch a "European Transparency Initiative"[5], it included a review of Regulation (EC) No 1049/2001 as part of this drive to create more openness. In a Resolution adopted on 4 April 2006, the European Parliament called on the Commission to come forward with proposals for amending the Regulation[6].

The right of access to documents is one aspect of a policy on openness and the Regulation must be seen against the background of the information and communication policy of the institutions. In this context, the new policy of open meetings in Council is of particular significance.

In the present consultation document, the Commission first takes stock of the existing rules governing the public right of access to documents and their implementation, then outlines some options for improving the legislation and practical measures aimed at offering better access to documents of the institutions.

The public is invited to comment on the regime for obtaining access to documents of the European institutions and also to react to the options set out in this Paper. Through the questionnaire, the Commission is seeking the views of citizens, including civil society organisations, economic operators, public authorities and other organisations with an interest in European affairs.

The public consultation starts with the publication of this Green Paper and will last for three months. The Commission intends to analyse carefully the responses received, and will publish a report summarising the outcome of this public consultation and outlining follow-up action. On the basis of this report, the Commission will submit proposals for amending Regulation (EC) No 1049/2001.

The expected time schedule is as follows:

- Public consultation: from mid April to mid July 2007
- Report on the outcome: September 2007
- Proposals for amending the Regulation: October 2007.

Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Århus Convention to Community institutions and bodies (OJ L 264, 25.9.2006, p. 13).

5 Minutes of the Commission's meeting No 1721 of 9 November 2005, item 6; see also documents SEC(2005) 1300 and SEC(2005) 1301.

6 P6_A(2006) 052.

PART ONE : APPLICATION OF THE EXISTING RULES ON PUBLIC ACCESS

1. THE IMPLEMENTATION OF THE REGULATION

Statistics show that, overall, the Council and the Commission grant two out of three applications for access. Parliament grants more than 80% of the requests it receives, largely on account of the public nature of its proceedings.

There has been a steady increase in the number of initial access requests submitted to the Parliament and the Commission. The number of requests submitted to the Council remains stable, largely due to the increasing number of documents made directly available on the Council's register. On the other hand the number of confirmatory requests (i.e. applications asking the institution to reconsider a refusal to grant access) remains more or less stable[7]. Globally, only 4% of all initial requests submitted to the three institutions lead to confirmatory requests. Applications to the Court and complaints to the European Ombudsman represent only a very small margin of the total number of requests handled.

Against this background, the report on the implementation of the Regulation, published on 30 January 2004 concluded that the rules on public access had worked in a very satisfactory way. Recent experience tends to confirm the findings of this report, in particular as concerns access in relation to legislative procedures and the expansion of proactive information provision by the institutions. However, there is scope for greater clarity as concerns the application of the general right of access when applied simultaneously with balancing interests arising in relation to case-related work, such as data protection or specific rights of access.

1.1. Beneficiaries and types of documents requested

- Even if more and more citizens use their right of access, most requests are submitted by specialists in EU affairs: economic operators, law firms, NGOs and the academic world.

- The main areas of interest are competition cases[8], taxation, the internal market, the environment, public procurement (Commission) and Justice and Security (Council).

- Applications submitted to the Commission often relate to complete specific files or to "all documents" on a given subject, requiring the analysis of a large number of documents.

- Many access requests, in particular among those submitted to the Commission, are related to litigation; some applicants request access to material that can be useful for lodging complaints or bringing proceedings before a court of law.

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[7] The number of confirmatory requests submitted to Parliament has risen from 1 to 10 between 2004 and 2005.

[8] 13% of requests handled by the Commission concern competition policy and relate mostly to state aid cases.

1.2. Limitations on the right of access

Some exceptions are invoked in a limited number of cases. The exceptions most frequently relied on are:

the decision-making process	Council Commission
inspections and investigations (e.g. infringements, cartels, merger controls, State aids, trade defence cases, investigation by the anti-fraud office OLAF)	Commission
the interests of third parties involved in an administrative procedure (commercial interests, data protection)	Commission Parliament

1.3. Public access and data protection

The right of access to documents and the right of individuals with regard to protection of their personal data are both rooted in the EC Treaty (Articles 255 and 286 respectively). They have been implemented through two Regulations: (EC) No 45/2001 on data protection[9] and (EC) No 1049/2001 on public access to documents. However, the two rights may collide when access is requested specifically to information relating to an individual. The European Data Protection Supervisor has addressed this issue in a background paper, providing useful practical guidance for handling such requests[10]. Three cases concerning refusal by the Commission to disclose personal data are currently pending before the Court of First Instance[11]. Two other pending cases address the data protection issue amongst others[12].

1.4. General and specific rights of access

The purpose of Regulation (EC) No 1049/2001 is to grant <u>the public</u> the widest possible access to documents held by the Community institutions.

Specific rules grant parties involved in a particular procedure a privileged right of access to relevant documents which cannot be disclosed to the public. Under these rules, access is often subject to particular conditions and procedures, which together deliver a delicate balance between the rights of the defence and the need to protect the effectiveness of procedures.

The relation between public access and privileged access might need to be clarified in order to avoid inconsistencies.

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9 Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (OJ L 8, 12.1.2001).

10 "Public Access to Documents and Data Protection", Background Paper Series, July 2005, No 1.

11 Case T-194/04, *The Bavarian Lager Company Ltd. v Commission*; Case T-170/03, *BAT v Commission*; Case T-161/04, *Valero Jordana v Commission*.

12 Cases T-121/05 and T-166/05, *Borax Europe Ltd. v Commission*.

1.5. Active provision of information

Public registers enable citizens to identify documents that might be of interest to them and to effectively exercise their right of access. Where documents can be made accessible to the public, the institutions make them directly available on the Internet.

There is room for improvement as regards:
- the scope of the registers, in particular those of the Commission;
- the number of documents or the amount of information made directly accessible to the public;
- the user-friendliness of the electronic information systems.

Parliament, the Council and the Commission have already started looking at ways of improving the dissemination of information through the Internet. Such improvements can be achieved without amending the legislation.

2. THE CASE LAW ON REGULATION (EC) NO 1049/2001

Even if the number of cases brought before the Court of First Instance is very limited as compared to the number of access requests, the Court has, in a series of recent judgments, clarified some provisions of the Regulation and in particular the scope of some of the exceptions to the right of access. This has contributed significantly to improve the implementation of the existing rules. Incorporating settled case law in a new legal text would provide more legal clarity for citizens and better guidance for the institutions when handling access requests.

2.1. General characteristics of the Regulation

The Court of First Instance has clearly stated that the purpose of the Regulation is to ensure that every person has access to public documents. The specific interest of a person in obtaining access to a document, e.g. for the purpose of defending a position in litigation, is not relevant with regard to the decision whether or not to disclose the document when the institution applies the mandatory exceptions under Article 4(1)(a) or when a Member State opposes disclosure in accordance with Article 4(5)[13]. In a recent judgment, the Court of First Instance has ruled that it follows from Article 6(1) of the Regulation, whereby an applicant is not obliged to state reasons for the application, that a request for access must be handled regardless of the person who made the application[14]. In the same judgment, the Court has stated that an applicant's right of defence in a case is of a private nature. Therefore, it cannot constitute an overriding public interest in disclosure of a document[15].

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13 Judgment of the Court of First Instance of 26 April 2005, joined cases T-110/03, T-150/03 and T-405/03, *J.M. Sisón v Council*, confirmed by judgment of the Court of Justice of 1 February 2007, case C-266/05 P; Order of the Court of First Instance of 15 June 2005, case T-98/04, *Società imballaggi metallici Salerno Srl (SIMSA) v Commission*.

14 Judgment of the Court of First Instance of 6 July 2006, joined cases T-391/03 and T-70/04, *Franchet and Byk v Commission*, at paragraph 82.

15 Same judgment, at paragraphs 136-139.

2.2. Procedural issues

2.2.1. The need to carry out a concrete analysis of the documents to which access is requested

The refusal to grant access to documents must, in principle, be based on a concrete analysis of their content in order to assess the extent to which an exception to the right of access is applicable and the possibility of granting partial access. However, such an examination may not be necessary where, due to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted[16].

2.2.2. The handling of voluminous requests

According to the case law mentioned in the previous paragraph, the mere fact that an application for access concerns a large number of documents does not relieve the institutions of the obligation to carry out a concrete examination of the documents. In the same judgment, the Court indicated that in exceptional cases, where the administrative burden entailed by a concrete and individual examination of the documents would exceed what may reasonably be required, a derogation to the obligation to examine the documents may be permissible. However, the institutions must investigate all other conceivable options in order to limit their workload, while granting at least part of the applicant's request[17].

2.3. Clarification of exceptions

2.3.1. The protection of legal advice - Article 4(2) 2nd indent

The Court of First Instance has established that the exception aimed at protecting “legal advice”, set out in Article 4(2), second indent of the Regulation, applies to any legal advice given by the Legal Service of the institutions and is not limited to advice given in the course of litigation. However, as is the case with other documents relating to interests protected, refusal to disclose a document containing a legal opinion must be based on a concrete and individual examination[18]. An appeal to the Court of Justice against this judgment is pending.

2.3.2. The protection of investigations – Article 4(2) 3rd indent

The Court of First Instance has clarified the fact that certain types of documents relating to pending investigations are covered by the purpose of these investigations. With regard to infringement proceedings, the Court held that Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to infringement proceedings. This requirement of confidentiality remains even after the matter has been brought before the Court of justice[19].

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16 Judgment of the Court of First Instance of 13 April 2005, case T-2/03, *Verein für Konsumenteninformation v Commission*.

17 *idem*

18 Judgment of 23 November 2004, case T-84/03, *Maurizio Turco v Council*.

19 Case T-191/99, *David Petrie a.o. v Commission*.

More recently, the Court of First Instance indicated that acts of investigation or inspection may remain covered by the exception based on the protection of inspections, investigations and audits as long as the investigations or inspections continue, even if the particular investigation or inspection which gave rise to the report to which access is sought is completed. However, the possibility to grant access to such documents may not depend on an uncertain, future and possibly distant event[20]. The concrete application of these principles might require clarification.

2.3.3. *The ability of Member States to oppose disclosure of documents originating from them - Article 4(5) of the Regulation*

Declaration No 35 attached to the Final Act of the Treaty of Amsterdam provides that a Member State may request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement. This Declaration is reflected in Article 4(5) of the Regulation. The Court of First Instance held that, where the originating Member State has requested that a document not be disclosed, the application for access to that document is governed by the relevant national provisions and not by the Regulation[21]. In accordance with this case law, institutions will always consult the authorities of the Member State when they receive a request for access to a document originating from that Member State. It should be noted, however, that the judgment in case T-168/02, Internationaler Tierschutz-Fonds GmbH v Commission, is under appeal to the Court of Justice.

2.3.4. *The relation between the Regulation and specific rules on confidentiality*

In two judgments the Court of First Instance has ruled that the secrecy of the proceedings of selection boards, set out in Article 6 of Annex III to the Staff Regulations, is to be considered as a *lex specialis* derogating from the general rules on access to documents[22]. So far, this reasoning has not been extended to other areas, where specific rules on confidentiality exist. Furthermore, the secrecy of proceedings of a body does not mean that the documents established or considered by this body are covered by the same secrecy. However, there is a need for clarification of the relationship between the general regime for public access to documents and specific rules set out by the Community legislator in order to ensure the operational effectiveness of certain information gathering powers which are essential to the proceedings at issue.

2.3.5. *Transparency and the obligation of professional secrecy*

The principle of transparency established by Article 255 of the EC Treaty is balanced by the obligation of professional secrecy laid down in Article 287, which is explicitly mentioned in various acts of secondary legislation. It is of particular importance in

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[20] Joined cases T-391/03 and T-70/04, *Franchet and Byk v Commission*.

[21] Judgment of the Court of First Instance of 30 November 2004, case T-168/02, *Internationaler Tierschutz-Fonds GmbH v Commission*; see also judgments of the Court of First Instance in cases T-76/02, *Mara Messina v Commission* and T-87/03, *Scippacercola v Commission*.

[22] Judgments of 5 April 2005 in case T-376/03, *Hendrickx v Council* and of 14 July 2005 in case T-371/03, *Le Voci v Council*.

competition policy, where the Commission holds information supplied by or obtained from undertakings, but also in trade defence cases[23] and in public procurement. Article 28 of Regulation (EC) No 1/2003 stipulates that information collected through inspections and investigations or received further to a request for information must be used only for the purpose for which it was acquired and that no information of the kind covered by the obligation of professional secrecy should be disclosed. Whilst neither Article 287 EC Treaty nor Article 28 of Regulation (EC) No 1/2003 explicitly indicates what type of information is covered by this obligation, the Court of First Instance has already clarified the concept of 'business secrets', stating that this concerns information of which not only disclosure to the public but also mere transmission to a person other than the one who provided the information may seriously harm the latter's interests[24]. However, the obligation of professional secrecy may prevent disclosure to the public of information which does not require the special protection afforded to business secrets. These issues might merit further clarification.

3. FURTHER DEVELOPMENTS

3.1. Application of the Århus Convention to Community institutions and bodies

On 6 September 2006, Parliament and the Council adopted Regulation (EC) No 1367/2006 on the application of the provisions of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies[25]. The Regulation will apply from 28 June 2007.

This new Regulation covers various aspects of citizens' involvement in environmental policy:

- access to information on request
- active dissemination of information
- consultation on plans and programmes
- the right to request an administrative review of a decision or of a failure to decide.

In the context of this Paper, only the provisions regarding access to information on request must be considered.

Regulation (EC) No 1049/2001 lays down a general regime for access to documents. Due to the legal base being Article 255 EC Treaty, Regulation (EC) No 1049/2001 applies only to Parliament, the Council and the Commission and, by extension, to the Community Agencies. On the other hand, the provisions of Regulation (EC) No 1367/2006 regarding access to environmental information apply to all Community

23 See Article 19 of Regulation (EC) No 384/96, Article 29 of Regulation (EC) No 2026/97 and Article 9 of Regulation (EC) No 3285/94.
24 Case T-353/94, *Postbank v Commission*, [1996] ECR II-921, paragraph 87.
25 OJ L 264, 25.9.2006, p. 13.

institutions and bodies. There will be a certain degree of overlap between Regulation (EC) No 1049/2001, the new Regulation (EC) No 1367/2006 and voluntary rules on access adopted by other institutions and bodies. It should also be noted that the exceptions to the right of access laid down in both Regulations do not completely coincide.

As regards the scope and beneficiaries, the situation may be represented as follows:

<table>
<tr><td></td><td></td><td colspan="2">Scope and beneficiaries</td></tr>
<tr><td>Legal framework</td><td>Institutions and bodies covered</td><td>EU citizens and residents</td><td>Any natural or legal person</td></tr>
<tr><td>Regulations (EC) No 1049/2001 + (EC) No 1367/2006</td><td>Parliament
Council
Commission
Agencies</td><td colspan="2">Any document</td></tr>
<tr><td>Voluntary rules + Regulation (EC) No 1367/2006</td><td>Court of Auditors
European Central Bank
European Investment Bank
European Economic and Social Committee
Committee of the Regions
European Ombudsman</td><td>Any document</td><td>Only environmental information</td></tr>
<tr><td>Regulation (EC) No 1367/2006</td><td>European Data Protection Supervisor
Court of Justice (except when acting in a judicial capacity)</td><td colspan="2">Only environmental information</td></tr>
</table>

3.2. Transparency of Council meetings

The European Council, at its meeting on 15 and 16 June 2006, underlined the importance of enabling citizens to get first-hand insight into EU activities, notably through further increasing transparency. On 15 September 2006, the Council amended its rules of procedure in order to implement this new policy. Under the new measures, the Council's public deliberations and debates will be broadcast on the Internet in all the official EU languages. Openness of Council meetings goes beyond the scope of Article 255 EC Treaty and Regulation (EC) No 1049/2001. However, the fact that meetings are held in public will have an impact on disclosure of documents being considered at such meetings.

PART TWO : OPTIONS FOR IMPROVING THE ACCESS RULES

4. OVERALL ASSESSMENT

Taking into account the experience gained with the implementation of Regulation (EC) No 1049/2001, the case law of the Court of First Instance and of the Court of Justice and also the recent developments with regard to transparency in the European institutions, it is appropriate to consider amendments to the regime for public access to documents, with a view to:

- improving access to registers and direct access to documents;
- better informing the public at large on the activities of the European institutions;
- clarifying the legal framework;
- striking the right balance between the public's right to know and the protection of legitimate public and private interests.

5. A MORE ACTIVE DISSEMINATION POLICY

5.1. Transparency in the legislative process

The main purpose of laws on freedom of information is to enable citizens to participate more closely in democratic decision-making. Therefore, the first priority with regard to the implementation of Regulation (EC) No 1049/2001 has been to make the legislative process of the EU institutions more transparent and more easily accessible to the general public. The public registers of the three institutions contain mainly references to documents established and exchanged between institutions in the framework of EU lawmaking. Many of these documents are accessible with their full text. This practice is consistent with Article 12 of Regulation (EC) No 1049/2001, which stipulates that the institutions "shall, as far as possible, make documents directly accessible to the public", in particular "legislative documents".

Since the definition of "legislative documents" in Article 12 of the Regulation lacks precision, the Regulation could be amended in order to define which types of documents are part of the legislative process and should in principle be directly accessible in full and at which stage of the procedure. It is already foreseen that the EUR-LEX site will cover more preparatory legislative documents.

On the other hand, the information which is available is not always easily accessible to citizens. Parliament, the Council and the Commission are currently looking at ways of providing easier access to legislative documents.

5.2. Active dissemination in other areas

The institutions disseminate large amounts of information on their websites. Press releases, which explain complex or technical issues in plain language, are valuable sources of information for the general public.

This dissemination is largely voluntary. However, the new Regulation applying the Århus Convention to the EC institutions and bodies contains provisions regarding active dissemination of environmental information[26].

The institutions could develop a more systematic policy of making documents directly accessible to the public in the most user-friendly way. This would require additional human and financial resources as regards the management of the workflow and of databases and websites. On the other hand, as the experience of the Council suggests, it could reduce the number of access requests or, at least, make the handling of requests less burdensome.

The main websites operated by the institutions are:

EUR-LEX (EU Law):
http://eur-lex.europa.eu/en/index.htm

Legislation in preparation:
http://ec.europa.eu/prelex/apcnet.cfm?CL=en

EP legislative Observatory:
http://www.europarl.europa.eu/oeil/

Register of European Parliament documents:
http://www.europarl.europa.eu/registre/recherche/RechercheSimplifiee.cfm?langue=EN

Register of Council documents:
http://www.consilium.europa.eu/cms3_applications/showPage.asp?lang=en&id=549&mode=g&name=

Register of Commission documents:
http://ec.europa.eu/transparency/regdoc/registre.cfm?CL=en&testjs=1

Register on comitology:
http://ec.europa.eu/transparency/regcomitology/registre.cfm?CL=en

26 Regulation (EC) No 1367/2006, Article 4.

Question 1:	Would you qualify the information provided through registers and on the websites of the institutions as
A	comprehensive and easy to access?
B	comprehensive but difficult to find?
C	easy to access but insufficient as regards their coverage?
D	insufficient and difficult to access?
Other comments regarding registers and websites:	

Question 2:	Should more emphasis be put on promoting active dissemination of information, possibly focussed on specific areas of particular interest?	
YES	**NO**	**No opinion**
Explanation and comments:		

6. INTEGRATING THE RULES ON ACCESS TO ENVIRONMENTAL INFORMATION INTO THE GENERAL SYSTEM OF ACCESS TO DOCUMENTS

As mentioned in Section 3.1, there are some differences between the Regulation and the Århus Convention. As regards access to information, the Convention contains specific provisions on active dissemination of environmental information, which go beyond the obligation to provide information on demand. The co-existence of Regulation (EC) No 1049/2001 and Regulation (EC) No 1367/2006 results in two largely convergent and coherent regimes, even if some differences remain which could lead to divergent interpretations.

These differences could be addressed, either by operating a specific regime governing the right of access to environmental information or by amending the provisions of Regulation (EC) No 1049/2001 in order to clarify their full compatibility with those of Regulation (EC) No 1367/2006, thus maintaining a single regime for access to environmental and other information held by Parliament, the Council and the Commission. The second option would create more legal clarity for the citizen, although different regimes will exist for other Community institutions and bodies.

In order to set up a single access regime, the system of exceptions to the right of access laid down in Regulation (EC) No 1049/2001 should be revised. The following points should be considered.

- The public interest in disclosure and, in particular, the fact that the information requested relates to emissions into the environment should be taken into account when applying the exceptions.

- Where documents are covered by the exception aimed at protecting the financial, monetary or economic policy of the Community or of a Member State [Article 4(1) a, fourth indent of Regulation(EC) No 1049/2001], the environmental information contained in such documents would nevertheless be disclosed.

- A specific exception would be added in order to protect the environment to which the requested information relates (such as breeding places of rare species).

- Since Member States are bound by the Århus Convention and by the Directive on access to environmental information[27], it would be contrary to these provisions if they were to oppose disclosure of documents which they would have to disclose under national law. On the other hand, the Regulation must take into account Declaration No 35 to the Treaty of Amsterdam. Member States opposing disclosure by an institution of documents originating from them could be asked to give reasons for their position, based on exceptions, either under Regulation (EC) No 1049/2001 or on the basis of their national legislation.

<table>
<tr><td colspan="3">Question 3: Would a single set of rules for access to documents, including environmental information provide more clarity for citizens?</td></tr>
<tr><td>YES</td><td>NO</td><td>No opinion</td></tr>
<tr><td colspan="3">Explanation and comments:</td></tr>
</table>

[27] Directive 2003/4/EC.

7. BALANCING INTERESTS

7.1. Public access and the protection of personal data

It is advisable to await case law regarding the collision of these two rights[28] before outlining practical rules on the handling of requests for access to personal data. However, within the existing legal framework, the institutions could define criteria for the disclosure of personal data, based on the following principles:

– there is a public interest in disclosure of the personal data; this could be the case where persons are public office holders acting in an official capacity and the information to be disclosed relates only to the exercise of their official duties, unless there are specific reasons to protect their identity (e.g. investigators);

– it is obvious that the disclosure does not affect the person's privacy or integrity.

Question 4:	**How should the exception laid down in Article 4(1)(b) of Regulation (EC) No 1049/2001 be clarified in order to ensure adequate protection of personal data?**
A	Granting partial access to documents, expunged for personal data, is a satisfactory way of balancing transparency and the protection of personal data.
B	The disclosure of personal data should always be assessed under the criteria set by the Regulation on the protection of individuals with regard to the processing of personal data (Regulation (EC) No 45/2001).
C	There should be criteria for the disclosure of certain types of personal data in Regulation (EC) No 1049/2001, where the lawfulness of disclosure does not have to be assessed on a case-by-case basis under Regulation (EC) No 45/2001.
Explanation and comments:	

7.2. Public access and commercial or economic interests

The EC Treaty strikes a balance between the principle of transparency established by Article 255 and the obligation of professional secrecy laid down in Article 287, which concerns in particular information about undertakings, their business relations or cost components.

This balance between transparency and professional secrecy is especially relevant with regard to the Commission, which holds information provided by or obtained from private parties in the framework of investigations in State aid, anti-trust, merger, trade defence or anti-fraud cases, as well as in public procurement and grant award procedures. Appropriate protection of this information is crucial to the

[28] See pending cases mentioned in footnotes 11 and 12.

cooperation of the parties in these procedures, and hence the effectiveness of implementation of the Community policies concerned. Therefore the Community legislators have determined specific access rules in relation to such information. These rules need to be applied simultaneously with the Regulation and coherence between the two should be ensured.

In a judgment of 30 May 2006[29], the Court of First Instance established criteria for defining the kind of information falling within the ambit of the obligation of professional secrecy. In accordance with this case law, the Regulation could provide that no access can be granted to documents containing information, known to a limited number of persons, the disclosure of which is liable to cause serious harm to legitimate interests of the person who has provided it or to third parties. These criteria deserve to be clarified in operational terms, bearing in mind the potential burden on the legal or natural person providing the information, whose views will need to be obtained prior to any disclosure, as well as the inherent risk that the potential serious harm to legitimate interests will be more difficult to assess after a certain period of time.

On the other hand, under Regulation (EC) No 1367/2006 applying the provisions of the Århus Convention, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment and the exception concerns the protection of commercial interests.

A particular case is the protection of intellectual property, where international agreements apply.

Question 5:	**How should the exception laid down in Article 4(2), 1st indent of Regulation** (EC) No **1049/2001 be clarified in order to ensure adequate protection of commercial and economic interests of third parties?**
A	The current system where the protection of commercial interests is balanced against the public interest in disclosure strikes the right balance.
B	More weight should be given to the interest in disclosure.
C	The current rules do not sufficiently protect commercial and economic interests.
Explanation and comments:	

7.3. Public access and good administration

Experience has shown that the handling of requests can be burdensome. The purpose of Regulation (EC) No 1049/2001 being to disclose information in the public

29 Case T-198/03, *Bank Austria Creditanstalt AG v Commission*, in particular paragraph 71.

interest, the institutions have to balance the interest in disclosure against the workload entailed by the handling of a request. A situation where important resources are devoted to a limited number of voluminous, complex or otherwise burdensome requests would not be in the public interest. Therefore, it might be useful to define criteria with regard to the proportionality of access requests. In order to reconcile transparency with the principle of good administration, the following parameters could be taken into account:

- the volume of the requested documentation
- the definition of documents held by the institutions
- the effect of time frames on the relevance of exceptions.

7.3.1. Excessive requests

Unlike many national regimes governing access to documents or information, Regulation (EC) No 1049/2001 has no provisions regarding excessive or improper requests. In practice, a concrete examination of the documents of an entire file for the purpose of public access proves excessively burdensome when compared to the usefulness of the documents or parts of them that can be disclosed.

When handling a particularly voluminous or complex request, the institutions may only extend the time limit for a reply by 15 working days or may confer informally with the applicant in order to find a fair solution[30]. The latter provision could be clarified in order to enable the institutions to ask applicants either to specify or narrow down their request or to accept a realistic time frame for handling it.

Furthermore, requests which are clearly intended to block a service in its normal operations could be considered as improper and be rejected on that basis. Such considerations might be particularly pertinent as concerns the effectiveness of the exercise of the Commission's enforcement powers.

<table>
<tr><td colspan="3">Question 6: In the light of experiences made so far, is there a case for specific provisions for handling requests, which are clearly excessive or improper, in particular with regard to time frames ?</td></tr>
<tr><td>YES</td><td>NO</td><td>No opinion</td></tr>
<tr><td colspan="3">Explanation and comments:</td></tr>
</table>

[30] Article 6(3) of the Regulation.

7.3.2. *Concept of “document held by the institution”*

The current definition of a "document held by the institution" results from the combination of the definition of "document" in Article 3(a) of the Regulation and the scope as defined in Article 2(3)[31]. Merging both definitions could clarify the concept of a "document held by the institution".

Two aspects need to be clarified in particular:

– the relationship between the definition of a "document held by the institution" and the document management rules of that institution, more specifically the rules on registration;

– the status of information held in databases; since an increasing amount of information is held in electronic databases, the Regulation could define how the content of databases fits into the concept of "a document"; databases could be considered as an electronic library; specific and limited sets of information that can be extracted from a database through a normal operating process using the existing search tools would be considered as "documents" within the meaning of the Regulation.

Question 7:	**With regard to the content of databases, should the concept of "document" cover sets of information that can be extracted using the existing search tools?**	
YES	**NO**	**No opinion**
Explanation and comments:		

7.3.3. *Accessibility of documents and the passing of time*

There is no indication in the Regulation of the effect of passing of time on the application of the exceptions. A clear indication of the effect of passing of time, particularly in relation to certain exceptions (e.g. inspections, investigations and audits, court proceedings, pending decisions on non-legislative areas) would make it possible to reconcile the interests of transparency with those of good administration by avoiding placing an unnecessary burden on the institutions. The Regulation could indicate events:

[31] Article 2(3) : *This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.*
Article 3(a): *'document' shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility.*

- before which specific categories of documents are manifestly covered by exceptions, making operational under the Regulation the means to ensure consistency with principles which the Community legislator has set down in specific access rules elsewhere, always subject to the test of overriding public interest under the Regulation;
- after which documents become public.

Question 8:	**Should the Regulation indicate events before and after which exceptions would or would not apply?**	
YES	**NO**	**No opinion**
Explanation and comments:		

8. FINAL COMMENTS

Please indicate any other comments you would like to make with regard to the rules on public access to documents held by the European Parliament, the Council and the Commission

ANNEX

Statistics on the access requests handled by the institutions

		2002	2003	2004	2005	2006[2]
Initial requests	**Parliament**	**637**[1]	**165**	**186**	**298**	[3]
	Council	**2394**	**2830**	**2160**	**2100**	**2224**
	Commission	**991**	**1523**	**2600**	**3173**	**6712**
Confirmatory requests	**Parliament**	**1**	**1**	**1**	**10**	[3]
	Council	**43**	**45**	**35**	**51**	**40**
	Commission	**96**	**143**	**162**	**167**	**112**

Notes:

(1) This figure for initial requests handled by Parliament in 2002 includes requests for access to published documents.

(2) Figures for 2006 are estimates.

(3) Figures concerning the European Parliament are not available yet.