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## Public access to documents 2009-2010

P7\_TA(2011)0378

### European Parliament resolution of 14 September 2011 on public access to documents (Rule 104(7)) for the years 2009-2010 (2010/2294(INI))

(2013/C 51 E/09)

The European Parliament,

- having regard to Articles 1, 10 and 16 of the Treaty on European Union (TEU) and to Articles 15 and 298 of the Treaty on the Functioning of the European Union (TFEU),
  
- having regard to the Charter of Fundamental Rights of the European Union, and notably to its Articles 41 (right to good administration) and 42 (right of access to documents),
  
- having regard to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents <sup>(1)</sup>,
  
- having regard to Council Regulation (EC, Euratom) No 1700/2003 of 22 September 2003 amending Regulation (EEC, Euratom) No 354/83 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community <sup>(2)</sup>,
  
- having regard to 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 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies <sup>(3)</sup>,
  
- having regard to the case-law of the Court of Justice of the European Union and of the General Court on access to documents, and notably to the judgments of the Court in the cases of *Turco* (joined cases C-39/05 P and C-52/05 P) <sup>(4)</sup>, *Bavarian Lager* (case C-28/08) <sup>(5)</sup>, *Volker und Marcus Schecke* (joined cases C-92/09 and C-93/09) <sup>(6)</sup>, *Technische Glaswerke Ilmenau - TGI* (C-139/07 P) <sup>(7)</sup> and *API* (joined cases C-514/07 P, C-528/07 P and C-532/07 P) <sup>(8)</sup>, and to the judgments of the General Court in the cases of *Access Info Europe* (T-233/09) <sup>(9)</sup>, *MyTravel* (case T-403/05) <sup>(10)</sup>, *Borax* (cases T-121/05 and

<sup>(1)</sup> OJ L 145, 31.5.2001, p. 43.

<sup>(2)</sup> OJ L 243, 27.9.2003, p. 1.

<sup>(3)</sup> OJ L 264, 25.9.2006, p. 13.

<sup>(4)</sup> Judgment of 1 July 2008 in joined cases C-39/05 P and C-52/05 P, *Sweden and Turco v Council*, ECR 2008 p. I-4723.

<sup>(5)</sup> Judgment of 29 June 2010 in case C-28/08 P, *Commission v Bavarian Lager*, not yet published in the ECR.

<sup>(6)</sup> Judgment of 9 November 2010 in joined cases C-92/09 P and C-93/09 P, *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen*, not yet published in the ECR.

<sup>(7)</sup> Judgment of 29 June 2010 in case C-139/07 P, *Commission v Technische Glaswerke Ilmenau*, not yet published in the ECR.

<sup>(8)</sup> Judgment of 21 September 2010 in joined cases C-514/07 P, C-528/07 P and C-532/07 P, *Sweden, and API v Commission*, not yet published in the ECR.

<sup>(9)</sup> Judgment of 22 March 2011 in case T-233/09, *Access Info Europe v Council*, not yet published in the ECR.

<sup>(10)</sup> Judgment of 9 September 2008 in case T-403/05, *MyTravel v Commission*, ECR 2008 p. II-2027.

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T-166/05) <sup>(1)</sup>, *Joséphidès* (case T-439/08) <sup>(2)</sup>, *Co-Frutta* (joined cases T-355/04 and T-446/04) <sup>(3)</sup>, *Terezakis* (case T-380/04) <sup>(4)</sup>, *Agrofert Holdings* (case T-111/07) <sup>(5)</sup> and *Editions Jacob* (case T-237/05) <sup>(6)</sup>,

- having regard to the activities and documents produced by the European Ombudsman on the issue of access to documents, as well as by the European Data Protection Supervisor (EDPS) regarding the fair balance between transparency and data protection,
- having regard to the Commission proposal of 30 April 2008 for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (COM(2008)0229),
- having regard to the Commission proposal of 20 March 2011 for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (COM(2011)0137),
- having regard to the 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention),
- having regard to the 2008 Council of Europe Convention on Access to Official Documents,
- having regard to the Annual Reports for 2009 and 2010 from the Council, the Commission and the European Parliament on access to documents, in accordance with Article 17 of Regulation (EC) No 1049/2001,
- having regard to the 2010 Framework Agreement on Relations between the European Parliament and the European Commission <sup>(7)</sup>,
- having regard to the Interinstitutional Agreement of 20 November 2002 between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy <sup>(8)</sup>,
- having regard to its previous resolutions of 14 January 2009 on public access to European Parliament, Council and Commission documents <sup>(9)</sup>, 25 November 2010 on the annual report on the European Ombudsman's activities in 2009 <sup>(10)</sup>, and 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 <sup>(11)</sup>,
- having regard to Rule 48 and Rule 104(7) of its Rules of Procedure,
- having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs (A7-0245/2011),

<sup>(1)</sup> Judgment of 11 March 2009 in case T-121/05, *Borax Europe v Commission*, ECR 2009 p. II-27.

<sup>(2)</sup> Judgment of 21 October 2010 in case T-439/08, *Agapiou Joséphidès v Commission and EACEA*, not yet published in the ECR.

<sup>(3)</sup> Judgment of 19 January 2010 in joined cases T-355/04 and T-446/04, *Co-Frutta v Commission*, ECR 2010 p. II-1.

<sup>(4)</sup> Judgment of 30 January 2008 in Case T-380/04, *Terezakis v Commission*, ECR 2008 p. II-11.

<sup>(5)</sup> Judgment of 7 July 2010 in Case T-111/07, *Agrofert Holding v Commission*, not yet published in the ECR.

<sup>(6)</sup> Judgment of 9 June 2010 in Case T-237/05, *Éditions Jacob v Commission*, not yet published in the ECR.

<sup>(7)</sup> OJ L 304, 20.11.2010, p. 47.

<sup>(8)</sup> OJ C 298, 30.11.2002, p. 1.

<sup>(9)</sup> OJ C 46 E, 24.2.2010, p. 80.

<sup>(10)</sup> Texts adopted, P7\_TA(2010)0435.

<sup>(11)</sup> OJ C 286 E, 22.10.2010, p. 12.

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- A. whereas the Lisbon Treaty introduced a new constitutional framework of EU institutional transparency, with a view to an open, efficient and independent European administration (Article 298 TFEU), by establishing a firm fundamental right of access to documents of EU institutions, bodies, offices and agencies; whereas this right is afforded by the Treaty not only to EU citizens but also to any natural or legal person residing in a Member State, and should be exercised in compliance with the general principles and limits (set with a view to protecting certain public or private interests) laid down by the regulations adopted by the European Parliament and the Council (Article 15 TFEU),
- B. whereas it is now a general rule that access to legislative documents should be fully provided, while exceptions regarding non-legislative documents should be narrowed, and whereas the two approaches should not undermine each other,
- C. whereas the new Treaties no longer mention ‘the preserving of the effectiveness of the Council’s decision-making process’ (Articles 255 and 207 (3) of the former TEC) – the so-called ‘space to think’ – as a possible limit to transparency as far as legislative procedures are concerned; whereas for administrative procedures the ‘space to think’ should be framed in line with Article 1 TEU and Article 298 TFEU, which require an open, efficient and independent administration,
- D. whereas transparency is an essential part of participatory democracy, being complementary to representative democracy, on which the functioning of the Union is based, as explicitly stated in Articles 9-11 TEU, allowing the citizen to participate in decision-making and to exercise public scrutiny, and thus ensuring the legitimacy of a democratic political system,
- E. whereas citizens are calling for more democracy, transparency, openness of institutions and of political actors and a stronger fight against corruption; whereas access to documents and information is one of the ways to make sure citizens can be involved in the democratic process and that corruption is prevented and fought,
- F. whereas furthermore the EU progressively risks to become the target of criticism because of the continuous lack of transparency, openness and access to documents and information for citizens, as demonstrated by the impossibility to adopt a new Regulation on the right of access to documents, due to the Commission refusal to accept Parliament’s amendments and Member States’ unwillingness to open up their documents, discussions and deliberations to citizens and the Parliament,
- G. whereas further and more stringent measures against corruption should be taken at EU level to ensure that EU institutions are immune from it, at all levels and everywhere, and whereas Parliament should learn from recent negative experiences by drawing up rules, including rules providing for enhanced transparency, on the relations of MEPs and Parliament’s staff with lobbyists and interest groups,
- H. whereas, in order to guarantee the accountability and legitimacy of a democratic political system, citizens have a right to know how their representatives act, once elected or appointed to public bodies or representing the Member States at European or international level (principle of accountability), how the decision-making process works (including documents, amendments, timetable, players involved, votes cast, etc), and how public money is allocated and spent, and with what results (principle of traceability of funds),

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- I. whereas the current Regulation (EC) No 1049/2001 does not provide clear definitions of several important issues, such as Member States' veto right, limitations of the 'space to think', clear and narrow definition of the exceptions, classification of documents, and equilibrium between transparency and data protection,
- J. whereas with the entry into force of the Lisbon Treaty the EU acquired new competences in the fields of criminal law (Articles 82 and 83 TFEU) and police cooperation; whereas such new competences could affect basic human rights and highlight the need for a more open legislative procedure,
- K. whereas Article 15 TFEU and Article 42 of the Charter of Fundamental Rights introduce a broad notion of the term 'document' which covers information whatever its medium of storage,
- L. whereas the application of Regulation (EC) No 1049/2001 is not uniform as statistics show a variation between different institutions; whereas quantitative data contained in the Annual Reports for 2009 in relation to the application of Regulation (EC) No 1049/2001 by the EU institutions suggest a general decrease in the number and rate of refusals, to 12 % <sup>(1)</sup> (16 % in 2008) in Parliament (33 cases), 22,5 % <sup>(2)</sup> (28 % in 2008) in the Council (2 254 cases) and 11,65 % (13,99 % in 2008) in the Commission (589 cases), while reasons for refusal varied among EU institutions in 2009, one of the most used exceptions being the protection of the decision-making process (Parliament (39,47 % <sup>(3)</sup>), Council (39,2 % for initial applications) <sup>(4)</sup>, and Commission (26 %) <sup>(5)</sup>,
- M. whereas the General Court in the case *Toland v Parliament* <sup>(6)</sup> annulled the decision of the European Parliament refusing access to an Internal Audit Service report of 9 January 2008 entitled 'Audit of the Parliamentary Assistance Allowance',
- N. whereas, as regards sensitive documents, in 2009 the Commission and Parliament did not enter any such documents in their registers, while the Council entered 157 sensitive documents classified 'CONFIDENTIEL UE' or 'SECRET UE' out of 445 documents classified in that way,
- O. whereas international agreements have legal effects in the EU legal order similar to those of EU internal legislation, and whereas the public should be informed of the international agreements and be granted access to documents relating to them,
- P. whereas Regulation (EC) No 1049/2001 establishes an obligation for the institutions to consider partial access to a document if only some parts of it are covered by an exception; whereas the partial access granted is often unduly limited and only extends to the title or the introductory paragraphs of the documents, while access to the substantive paragraphs is denied,
- Q. whereas Article 41 of the Charter of Fundamental Rights establishes 'the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy'; and whereas serious gaps in the implementation of this right persist, which creates pressure to invoke rules of public access to gain access to one's own file,

<sup>(1)</sup> 9 % in 2010.

<sup>(2)</sup> 36,1 % without the partially disclosed documents. In 2010 the refusal rate was 13,3 % (29,1 % without the partially disclosed documents).

<sup>(3)</sup> 37 % in 2010.

<sup>(4)</sup> 33 % in 2010 for initial applications.

<sup>(5)</sup> Other main reasons in 2009 were: for the European Parliament the protection of privacy (26 %) and protection of the purpose of inspections, investigations and audits (15 %), for the Council (initial applications) the protection of public interests as regards international relations (22,7 %), public security (5,6 %), and defence and military matters (3,5 %), and for the Commission (initial applications) the protection of inspections (27,6 %) and of commercial interests (13,99 %).

<sup>(6)</sup> Judgment of 7 June 2011 in case T-471/08, *Toland v Parliament*, not yet published in the ECR.

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- R. whereas Article 15 TFEU establishes a clear obligation for all Union institutions, bodies, offices and agencies to 'conduct their work as openly as possible'; whereas this obligation also applies to the committees assisting the Commission in its duties; whereas this obligation is not respected in the Commission's standard rules of procedure for committees, which stipulate that all committee discussions and documents relating to 'comitology' procedures are to be confidential;

#### ***Access to documents as a fundamental right***

1. Recalls that transparency is the general rule and that with the Lisbon Treaty (and accordingly, with the acquisition of binding legal force for the EU Charter of Fundamental Rights) it became a legally binding fundamental right of the citizen, so that any decisions denying access to documents must be based on clearly and strictly defined exceptions founded on sound arguments and reasonably explained, allowing citizens to understand the denial and to use the legal remedies available to them effectively;
2. Considers that the EU should stand at the forefront, providing a model of institutional transparency and modern democracy for the Member States as well as for third countries;
3. Recalls that transparency is the best way to prevent corruption, fraud, conflicts of interest and mismanagement;
4. Calls on all the EU institutions, bodies, offices and agencies, including the newly created European External Action Service, to immediately and fully apply Regulation (EC) No 1049/2001 as required by the Treaties, and to publish in that regard an annual report as required by Article 17 of Regulation (EC) No 1049/2001;
5. Points out that interventions by the Court of Justice, the European Ombudsman and the European Data Protection Supervisor (EDPS), which basically take positions on individual cases, cannot replace legislative activity in terms of legal certainty and equality before the law; regrets that even when the Court of Justice has established a clear principle, as for example in the *Turco* case on legislative transparency, it is still not complied with; consequently repeats its call to institutions to abide by the *Turco* judgment on legal service opinions drafted in the framework of the legislative process; reaffirms that the legislator must address and overcome the problems highlighted by the Court of Justice jurisprudence and implement the right to access to documents fully and more extensively, in the spirit of the new Treaty modifications which clearly establish a fundamental right of access to documents;
6. Considers it necessary to revise Regulation (EC) No 1049/2001 in order to clarify some of its provisions, precisely define and narrow its exceptions and ensure that these exceptions do not undermine the transparency granted by the Treaties and the Charter; sees that this revision should strengthen the right of access to documents, without in any way reducing the existing standards for the protection of that right, and take into consideration the case-law of the Court of Justice; stresses in this context that the revised Regulation should be simple and accessible to citizens, to enable them to effectively use their right;
7. Considers that the Commission's proposal of 2008 for amending Regulation (EC) No 1049/2001 does not improve the Union's transparency to the level required by the Lisbon Treaty but, on the contrary, that many of the amendments proposed by the Commission actually reduce the existing level; in particular, considers that the amendment which the Commission proposed to Article 3, which substantially restricts the definition of 'document' in comparison with the status quo, is contrary to the Lisbon Treaty; calls on the Commission to present a revised proposal for a revision of Regulation (EC) No 1049/2001 which would take full account of the requirements for greater transparency enshrined in the Lisbon Treaty, stated in the case-law of the Court of Justice and expressed in the previous work of Parliament;

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8. Recalls that the Court of Justice clarified in the case *Sweden v Commission* (case C-64/05 P) <sup>(1)</sup> that Member States do not have an absolute veto right regarding documents originating from them, but only the possibility of a consultation procedure, the purpose of which is to assess whether or not an exception to access to documents set out in Regulation (EC) No 1049/2001 is applicable <sup>(2)</sup>; considers that a legislative clarification is needed in order to ensure the correct application of this case-law so as to avoid the persisting delays and controversies, as shown by the *IFAW* case <sup>(3)</sup>;
9. Recalls that Article 9 of Regulation (EC) No 1049/2001 on sensitive documents is a compromise that does not reflect any more the new constitutional and legal obligations after the Lisbon Treaty;
10. Stresses that classification of documents directly affects the citizen's right of access to documents; recalls that the current system of classification functions only on the basis of interinstitutional agreements and is prone to over-classification; calls for common rules of classification in the form of a regulation;
11. Calls especially on the Council to grant Parliament full access to classified documents connected with international agreements, as provided for by Article 218 TFEU, as well as classified documents connected with EU evaluation procedures, to avoid interinstitutional problems such as were encountered, for example, in connection with the EU's accession to the ECHR, the Schengen evaluation on Bulgaria and Romania, the Anti-Counterfeiting Trade Agreement (ACTA) and the EU-China human rights dialogue;
12. Stresses the important role of proper classification rules for sincere interinstitutional cooperation; welcomes in that regard interinstitutional agreements on classification and access to documents, although they cannot replace a proper legislative basis; calls in this context on the Council and the European External Action Service to follow the model of the new IIA between Parliament and the Commission and to conclude a similar agreement with Parliament as a matter of urgency;
13. Calls on the EU institutions to work towards more transparent EU rules on freedom of information which take full account of the proposals in this report, recent case-law and the new Treaties;
14. Recalls that the judgment of the Court of Justice in the joined cases *Sweden and Turco v Council* stressed an obligation of transparency in the legislative procedure, as 'openness in that respect contributes to strengthening democracy by allowing citizens to scrutinise all the information which has formed the basis of a legislative act' <sup>(4)</sup>; stresses therefore that any exceptions referring to the legislative procedure, including legal advice, should be precisely limited and the so-called 'space to think' narrowly defined <sup>(5)</sup>;
15. Emphasises that, regardless of this clear principle, this is still not implemented in practice, as shown by the recent judgment in the *Access Info Europe* <sup>(6)</sup> case regarding the refusal by the Council to disclose positions of Member States on the proposed recast of Regulation (EC) No 1049/2001, and by the case

<sup>(1)</sup> Judgment of 18 December 2007 in case C-64/05 P, *Sweden v Commission*, ECR 2007 p. I-11389.

<sup>(2)</sup> *Sweden v Commission*, para. 76.

<sup>(3)</sup> Judgment of 13 January 2011 in case T-362/08, *IFAW v Commission*, not yet published in the ECR.

<sup>(4)</sup> *Turco*, para. 46.

<sup>(5)</sup> *Turco*, para. 67.

<sup>(6)</sup> In its *Access Info* judgment (T-233/09) the General Court reaffirmed that (para. 69) 'if citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process within the institutions taking part in the legislative procedures and to have access to all relevant information'.

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*ClientEarth v Council* <sup>(1)</sup>, pending before the General Court, on a legal opinion regarding the recast of Regulation (EC) No 1049/2001; notes that the public disclosure of Member States' positions during the negotiation of Regulation (EC) No 1049/2001 and many subsequent adopted measures did not in any way undermine the decision-making capacity of the Council, since these disclosures did not prevent the successful conclusion of the relevant legislative procedures;

16. Calls on the Council to review its rules and increase transparency as regards legislative procedures of the working groups and internal Council bodies by providing at least the calendars, agendas, minutes of the discussions, documents examined, amendments, the documents and decisions approved, the identity of the Member States' delegations and lists of members, without prejudice to the possibility of the use of exemptions listed in Article 4(1) of Regulation (EC) No 1049/2001 as regard the publication of such lists; calls on the Council to make the decisions of such bodies accessible to the public; opposes the use of 'limited' documents (a term not deriving from Regulation (EC) No 1049/2001) as well as the practice of unregistered documents, such as room documents;

17. Believes that, in order to make the legislative process more accountable, comprehensible and accessible to the public, Parliament's committees should in all cases adopt, at least, orientation votes prior to entering into trialogues with the Council; the Council, for its part, should adopt 'general approaches' or approve negotiating positions agreed in Coreper prior to entering into trialogues with the Parliament, with all such Parliament and Council documents immediately made public;

18. Calls on the Commission to make publicly available agendas, minutes and declarations of interest relating to expert groups, and names of members, proceedings and votes of the 'comitology' committees, as well as all of the documents considered by such groups and committees, including draft delegated acts and draft implementing acts; calls on the Parliament to adopt a more transparent and open procedure, including internally, to deal with these documents;

19. Recalls that transparency as required by the Treaties is not limited to legislative procedures but also covers the non-legislative work of EU institutions, bodies, offices and agencies; stresses that Regulation (EC) No 1049/2001 is the only proper legal basis for assessing the right of access to documents, and that other legal acts, such as internal or founding regulations of institutions, agencies and bodies, cannot introduce additional grounds for refusing access;

20. Regrets that recent negotiations between the EU institutions for a 'common understanding' on delegated acts and for a new framework agreement between the Commission and the Parliament have not been fully transparent; commits itself to making fully transparent its negotiations with the Council and Commission on ongoing or future interinstitutional agreements or comparable agreements;

21. Praises again the work of the European Ombudsman to ensure greater transparency in the EU, as about one third of his inquiries deal with lack of transparency, as mentioned in his 2009 report, and highlights his role in influencing, for example, the change in transparency policy of the European Medicines Agency (EMA) regarding the disclosure of adverse reaction reports <sup>(2)</sup> and clinical study reports <sup>(3)</sup>; stresses that data produced by the EU entities should be in general available to the public;

<sup>(1)</sup> *ClientEarth v Council*, case T-452/10.

<sup>(2)</sup> Complaint 2493/2008/(BB)TS.

<sup>(3)</sup> Complaint 2560/2007/BEH.

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22. Recalls that the Court of Justice, in some of its recent decisions such as those in the cases of *API* and *TGI* as mentioned above, has established the existence of a 'general presumption', thus relieving the Commission in some cases of a duty to examine requested documents individually; stresses that this is in principle contrary to the core principles of Regulation (EC) No 1049/2001; recalls that the case law of the Court of Justice also highlights the need to revise the access rules for parties directly concerned in relation to their own files held by the institutions;

23. Emphasises that while Article 15 TEU only specifically applies to the administrative documents of the Court, the Court of Justice, like all other EU institutions, bodies, offices and agencies, must carry out its work 'as openly as possible', pursuant to Article 1 TEU; to this end, invites the Court to explore ways to increase the transparency of its judicial activities, 'as not only must justice be done; it must also be seen to be done' <sup>(1)</sup>, and fully to respect Regulation (EC) No 1049/2001 as regards its administrative activities;

24. Reiterates the importance of the principle of traceability, so to ensure that citizens can know how public money is allocated and spent, and with what results, and calls on the EU institutions to apply this principle in relation to the running of the institution and to policies and the funds allocated to implement them, at all levels;

### **Exceptions**

#### *'Space to think'*

25. Recalls that the new Treaties no longer make specific reference to the Council's obligation to define the cases in which it acts in a legislative capacity and to the need to preserve the effectiveness of its decision-making process (Article 207(3) of the former TEC) – the so-called 'space to think' – and that the current 'survival' of this concept is based only on Article 4(3) of Regulation (EC) 1049/2001 as far as legislative procedures are concerned;

26. In accordance with the best international standards developed by major non-governmental organisations <sup>(2)</sup>, highlights the need for a strict three-part test to be used in order to justify a refusal to disclose a document: (1) the information contained in the document must relate to a legitimate aim listed in the legislative act, (2) the disclosure of the document must threaten substantial harm to that aim, and (3) the harm to the aim must be greater than the public interest in having the information contained in the document;

27. Recalls that Regulation (EC) No 1049/2001 establishes a clear obligation for the institutions to grant access to all those parts of the document that are not covered by any of the exceptions; notes that the partial access granted is often unduly limited, and stresses that access should be given genuine consideration in relation also to those substantive parts of documents that are of interest to the applicant;

28. Points out that the current Article 4(3) of Regulation (EC) No 1049/2001 seeks to limit the scope of the 'space to think' by stipulating that, as a prerequisite for refusal to grant access, disclosure of the document must not merely undermine the decision-making process, but must 'seriously' undermine it, and in any case allowing this limit to be overstepped where there is 'an overriding public interest in disclosure'; stresses however that in spite of the above-mentioned considerations, Article 4(3) of Regulation (EC) No 1049/2001 contains an open-ended definition which does not provide clear conditions for application or take into account the case-law of the Court of Justice; stresses the need for an appropriate definition in accordance with the concept of legal certainty by narrowing the concept;

<sup>(1)</sup> *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER 233)).

<sup>(2)</sup> Article 19, 'The Public's Right to Know: Principles of Freedom of Information Legislation', London, 1999; Transparency International, 'Using the Right to information as an Anti-Corruption Tool', Berlin, 2006.



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29. Emphasises that trialogues and the conciliation procedures (as explicitly listed in Article 294 TFEU) are a substantial phase of the legislative procedure, and not a separate 'space to think'; believes especially that the current procedures as regards trilogues prior to a possible first reading agreement fail to ensure a satisfactory level of legislative transparency and access to documents both internally, to the Parliament, and externally in relation to citizens and public opinion; requests, therefore, that documents created in their framework, such as agendas, summaries of outcomes and the 'four column' documents drawn up for facilitating negotiations, should not in principle be treated differently from other legislative documents, and that they should be made public as regards trialogues prior to a possible first reading agreement; consequently instructs its competent bodies to standardise this procedure, and calls on other institutions to do the same;

#### *Data protection and transparency*

30. Highlights the need to establish an appropriate equilibrium between transparency and data protection <sup>(1)</sup>, as made clear by the *Bavarian Lager* case-law, and stresses that data protection should not be 'misused', in particular, for the purpose of covering conflicts of interest and undue influence in the context of EU administration and decision-making; points out that the judgment of the Court of Justice in the *Bavarian Lager* case is based on the current wording of Regulation (EC) No 1049/2001 and does not prevent the wording from being changed, which is necessary and urgent, notably after the clear proclamation of the right of access to documents in the Treaties and in the Charter of Fundamental Rights;

31. Welcomes the consensus reached by the European Data Protection Supervisor (EDPS) and the European Ombudsman on the appropriate balance between data protection and transparency, especially as regards the proactive approach meaning that 'institutions assess and subsequently make clear to data subjects – before or at least at the moment they collect their data – the extent to which the processing of such data includes or might include its public disclosure' <sup>(2)</sup>;

#### *Aarhus Convention*

32. Emphasises several divergences between Regulation (EC) No 1049/2001 and the Aarhus Convention, as being applied by Regulation (EC) No 1367/2006, such as the lack in the Aarhus Convention of 'absolute' grounds for refusal, and exceptions based on protection of military matters, financial, monetary or economic policy of the Union or a Member State, legal advice or inspections, investigations and audits, and the limitation of the commercial interest exception to cases where such confidentiality is protected by law in order to protect a legitimate economic interest';

33. Calls on all EU institutions, bodies, offices and agencies to apply Regulation (EC) No 1049/2001 in a way coherent with the provisions of the Aarhus Convention; calls in that regard on the Commission to make public the conformity-checking studies regarding transposition of EU environmental directives <sup>(3)</sup> and scientific studies, for example on the impact of biofuels <sup>(4)</sup>, and calls on the European Chemicals Agency (ECHA) to fully apply Article 119 of Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) <sup>(5)</sup> with regard to electronic public access, to only accept confidentiality claims that are

<sup>(1)</sup> 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, p. 1).

<sup>(2)</sup> EDPS, 'Public access to documents containing personal data after the *Bavarian Lager* ruling', 24 March 2011 ([http://www.edps.europa.eu:80/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/BackgroundP/11-03-24\\_Bavarian\\_Lager\\_EN.pdf](http://www.edps.europa.eu:80/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/BackgroundP/11-03-24_Bavarian_Lager_EN.pdf)) and 'Public access to documents and data protection', 2005 ([http://www.edps.europa.eu:80/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/BackgroundP/05-07\\_BP\\_accessdocuments\\_EN.pdf](http://www.edps.europa.eu:80/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/BackgroundP/05-07_BP_accessdocuments_EN.pdf)).

<sup>(3)</sup> See pending case *ClientEarth v Commission*, T-111/11.

<sup>(4)</sup> See pending cases *ClientEarth and Others v Commission*, T-120/10, and *ClientEarth and Others v Commission*, T-449/10.

<sup>(5)</sup> OJ L 396, 30.12.2006, p. 1.

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clearly justified as valid under Article 119(2) of REACH, and to interpret the information that is normally deemed to undermine the protection of commercial interests pursuant to Article 118(2) of REACH strictly and without prejudice to its obligation pursuant to Regulation (EC) No 1049/2001 to balance any granting of confidentiality against a possible overriding public interest on a case-by-case basis;

34. Stresses that any revision of Regulation (EC) No 1049/2001 should fully respect the Aarhus Convention and should define any exemption in full compliance with it;

### **International relations**

35. Stresses that documents relating to international agreements, including documents adopted by, or submitted to, any bodies which have the task of implementing or monitoring the application of such agreements, should be disclosed to the public, as they are not categorically excluded from public access, and that access to them should be refused only when there is real harm to international relations, and taking into account Article 4(4) of Regulation (EC) No 1049/2001 on consultations with a third party; emphasises that since international agreements have binding effects, a public interest test should be introduced with regard to the exception; points out that Parliament, which is elected by the EU's citizens, is entrusted by the Treaties with an institutional role in representing the public interest; expresses its firm determination to make sure that the new institutional prerogatives assigned to Parliament by the Lisbon Treaty (Article 218 TFEU) in the field of international agreements are fully respected, and that no bilateral agreements with third countries may prohibit this;

### **Good governance**

36. Stresses that transparency is closely connected with the right of good administration, as referred to in Article 298 TFEU and Article 41 of the Charter of Fundamental Rights; highlights the fact that administrative transparency guarantees democratic control of EU administrative tasks, the participation of civil society and the promotion of good governance (Article 15 TFEU);

37. Emphasises the current lack of coherent administrative law for EU institutions, bodies, offices and agencies, such as rules regarding the delivery of administrative decisions that can be appealed against<sup>(1)</sup>, or a clear concept of 'administrative tasks' as mentioned in Article 15(3) TFEU; calls, therefore, on the EU institutions to urgently define a common EU administrative law pursuant to Article 298 TFEU, and to provide a common and horizontally applicable definition of an 'administrative task', especially for the European Central Bank, the European Investment Bank and the Court of Justice; asks the Commission to provide a legislative proposal on this issue, pursuant to Article 225 TFEU, which should, inter alia, address the issue of the transparency and accountability of the Commission's conduct of infringement proceedings vis-à-vis complainants, the Parliament and citizens;

38. Stresses that Regulation (EC) No 1049/2001 lays down strict deadlines for handling requests for access to documents<sup>(2)</sup>; points out with great concern that the Commission has not respected them, even as regards the recommendation and strict action by the European Ombudsman, for example in case 676/2008/RT (the so called 'Porsche case'); regrets that since Parliament's last report in 2009 the practice has not changed as illustrated by two pending court cases brought by *ClientEarth and Others* (cases T-120/10 and T-449/10);

<sup>(1)</sup> The *Access Info* case (T-233/09) has revealed that there is a practice of sending confirmatory decisions by unregistered, normal mail, although the proof of date of receipt is essential to evaluate respect for deadlines for seeking further legal (court) remedies. See para. 20-29.

<sup>(2)</sup> Articles 7 and 8 of Regulation (EC) No 1049/2001.

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39. Points out that in several cases extensive delays have led to proceedings being started before the Court of Justice based on a lack of response, followed by a late Commission response, making the court case void and forcing the individual concerned to start the whole procedure once again<sup>(1)</sup>; calls on the Commission to fully respect the deadlines set in Regulation (EC) No 1049/2001; suggests introducing consequences, such as the obligation to publish the documents, if the deadlines are not respected;

40. Calls for annual reports prepared and published in accordance with Article 17 of Regulation (EC) No 1049/2001 to contain a calculation of the average time taken to handle applications, as provided for in the Council report on access to documents for 2009;

41. Reminds that good governance connects the concepts of 'access to documents' and 'access to information'; calls for a change in the current legislation applying Article 6(2) and (4) of Regulation (EC) No 1049/2001, as regards clarification of requests and assistance to the citizen, to cases of a 'request for information' where documents exist which are relevant to such a request;

42. Recalls that transparency is not only a matter of passive reactions by the EU institutions, bodies, offices and agencies, but also requires a proactive approach, as emphasised several times by the European Ombudsman; calls on the EU institutions to make as many categories of document as possible publicly accessible by default on their Internet sites (including budgets and lists of public procurement contracts awarded over the last three years); stresses that a proactive approach can prevent unnecessary litigation, which results in tax-payers' money being spent inefficiently, as well as causing unnecessary delays, costs and burdens for those requesting access;

43. Calls upon the Commission to ensure transparency in the administration of European funds by publication of the same categories of information on a single website, in one of the EU working languages, regarding all beneficiaries of those funds;

44. Considers that focal points as regards access to documents should be created, and proper training of officials provided in each DG or corresponding unit of the institutions, in order to create the best possible proactive policy, to evaluate requests in the most efficient way and to ensure that all deadlines laid down in Regulation (EC) No 1049/2001 are fully respected;

45. Reiterates that Parliament should be at the forefront of the proactive approach on publicity, transparency, openness and access to documents; highlights in that regard the success of webstreaming of hearings and committee meetings in addition to plenary sittings, and believes that this should become the norm and that the Legislative Observatory (OELL) should be expanded even further to include all EU official languages and information, both at committee and plenary level, such as amendments, opinions from other committees, Legal Service opinions, voting lists, roll call votes, present and voting MEPs, inter-institutional letters, names of shadow rapporteurs, a 'search by word' function, multilingual search, tabling deadlines, RSS feeds, an explanation of the legislative procedure, links to webstreamed discussions, etc., to ensure a full cycle of information for citizens, giving access to the documents as well to multilingual citizens' summaries of legislative proposals and summaries of existing EU legislation (SCADPLUS), for which adequate search and browsing facilities as described should be offered as well;

<sup>(1)</sup> See, for example, *Ryanair Ltd. v Commission* (joined cases T-494/08 to T-500/08 and T-509/08), and *Stichting Corporate Europe Observatory v Commission* (case T-395/10).

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46. Recalls the importance of protecting the independence of MEPs' mandates; believes at the same time that transparency has to apply to the work of Parliament's official bodies (such as the Conference of Presidents, the Bureau <sup>(1)</sup> and the Quaestors) and to MEPs' activities, such as participation in parliamentary work and parliamentary attendance, under the terms requested by Parliament in its resolution of 14 January 2009; considers that the question of MEPs' allowances should be dealt with in a transparent way, while fully respecting personal data protection rules;

47. Considers that transparency at EU level should be mirrored by Member States when transposing EU legislation into national law, notably by establishing correlation tables, drawing, inter alia, on best practice in terms of e-Parliament and e-government transparency;

48. Stresses that citizens' right to information is generally not complied with by the Member States' authorities and therefore calls on the Commission – taking into account the principle of good governance – to study the Member States' provisions on access to documents and to encourage them to draw up maximally transparent rules promoting citizens' access to documents;

49. Notes some improvements in the registers of the Council, but points to the continuing lack of coordination and interoperability among the institutions, as no common information model for their registers exists which would allow citizens to find the necessary documents and the information they include at a 'single point' or to use a common search engine integrally connected, notably, to the Legislative Observatory (OEIL), where documents pertaining to one legislative procedure are grouped together;

50. Calls on the Council and the Commission to negotiate with Parliament on amending the joint declaration on the codecision procedure and the interinstitutional agreement on better law-making to this end; commits itself, in the interim, to amending its rules of procedure, including the annexed code of conduct on codecision negotiations, to give full binding effect to these principles;

51. Considers that the Interinstitutional Committee established by Article 15(2) of Regulation (EC) No 1049/2001 should work more intensely and report to the competent committees on the issues discussed, the positions Parliament defends, the problematic issues raised by other institutions and the results achieved, if any; calls on it, therefore, to meet more regularly, and in any event at least once a year, and to open internal discussions and deliberations by ensuring that they are public and inviting and considering submissions from civil society and the European Data Protection Supervisor; the committee should work on an annual 'audit' report on transparency and openness in the EU, which should be prepared by the European Ombudsman; calls on it to address as a matter of urgency the issues mentioned in this resolution;

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52. Instructs its President to forward this resolution to the Council, the Commission, the governments and parliaments of the Member States, the European Ombudsman, the European Data Protection Supervisor and the Council of Europe.

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<sup>(1)</sup> For example, since 2009 Parliament's Rules of Procedure (OJ C 212 E, 5.8.2010, p. 145) have no longer included a list of EP documents directly accessible to the public but now give the Bureau the prerogative to establish such a list (Rule 104(3)).