

## **ERA Seminar “Access to Documents in the EU and Beyond: Regulation 1049/2001 in Practice”**

*Report prepared by Ana Koprivica, Research Fellow Max Planck Institute Luxembourg for Procedural Law*

On 20<sup>th</sup> and 21<sup>st</sup> November 2017 in Brussels, the Academy of European Law (ERA) hosted the seminar: “**Access to Documents in the EU and Beyond: Regulation 1049/2001 in Practice**”, bringing together national and EU civil servants, lawyers, active members of the NGOs and civil society, and academics. The seminar aimed at providing participants with answers to practical questions on access to information and documents in the European Union. The focus in particular was on the practical implementation of [Regulation 1049/2001](#) on access to documents by the EU institutions, on one hand, and by the relevant institutions in Member States, on the other. The seminar further provided for an overview of recent relevant case law of the Court of Justice of the European Union and the opportunity to deliberate about how best to implement those judgments in practice. Lastly, it offered a platform for a discussion of the future development of access to information. This post provides an overview of the presentations and of the discussions on the issues raised.

### **SETTING THE SCENE: THE RIGHT TO INFORMATION IN THE EUROPEAN UNION WITHIN DIVERSE LEGAL CONTEXTS**

Following the introductory remarks by the organisers, the scene was set for discussing the practical implementation of Regulation 1049/2001 by *Prof. Päivi Leino-Sandberg* (Law School of the University of Eastern Finland), who provided the audience with a comprehensive overview of the diverse European Union legal landscape in which the right to information operates: namely, the EU Treaties, the Charter of Fundamental Rights and the European Convention of Human Rights. Access to documents, as one of the four forms of the principle of openness, is guaranteed by Art 15 (3) TFEU and Art 42 CFR, and further elaborated in Regulation 1049/2001. While the Lisbon Treaty further developed legislative transparency, the outdated Regulation leaves much room for institutional discretion in its application. This had resulted in many matters being contested in this context, such as: the absence of the definition of “public interest”; the issues of data protection and privacy; the lack of access to the Court’s documents, and the problem of the “general presumption” as developed by the CJEU. It was further pointed out that both the CFR and the ECHR are rarely discussed in the context of the Regulation. Their relevance, however, should not be underestimated: openness, of which access to documents is the corollary part, is a fundamental right which shall be observed by the authorities as such (Art 51(1) CFR), and whose scope and meaning shall be the same as those laid down by the ECHR (Art 52(3) CFR). Nevertheless, as argued by the speaker, the level of protection offered by the EU at the moment falls below that of what a democratic society requires. Moreover, Art 53 CFR stipulates a duty to interpret all legislation in a manner that respects fundamental rights. It is in this context that more heed should be paid to the ECHR and the relevant jurisprudence which is often overlooked. As a matter of comparison between the two regimes within the context of access to documents, Prof. Leino-Sandberg referred to the Council of Europe Convention on Access to Official Documents (CETS No. 205, 2009). This detailed instrument on access to documents, which is not yet in force, contains one fundamental difference when compared to Regulation 1049/2001: the duty imposed on the institutions to consider public interest with regard to all the documents, meaning that the public interest test should apply to all the exceptions. In this respect, the case law of the ECtHR provides some useful pointers to consider when responding to a request for access to information. One example that was given was the case of *Magyar Helsinki Bizottság v. Hungary*, Application no. 18030/11 in which the Court laid out the threshold criteria for the right of access to State-held information. A particularly significant point to consider in the EU context is the function of public access in a democratic society, since the approach currently adopted in the EU is overly bureaucratic. It was proposed by the speaker that the importance of ECHR ought to be acknowledged in order to improve the implementation of

the Regulation. Thus far, however, the CJEU has been reluctant to refer to it. It was pointed out that although the Regulation builds on a different logic (e.g. the relevance of the applicant's role under the ECHR regime as opposed to the Regulation's idea that everyone enjoys access to documents), many of the general principles employed by the ECHR regime seem to be applicable here. One area where EU protection falls clearly below the ECHR standard is the protection of privacy: according to Prof. Leino-Sandberg, the EU legislation reaches too far in this respect, covering matters that do not strictly fall within the sphere of privacy protection. The ECtHR case law on the distinction between the activities of public figures and private persons, such as the case of the Hungarian Civil Liberties Union, was used as an example of a more adequate level of protection in this respect. Additional issues invoked by the speaker in relation to the implementation of the Regulation were the compliance with the Aarhus Convention and the applicability of EU legislation and national legislation in cases of shared management or administration. It was finally emphasized that public access plays a vastly important role in a democratic society and that it cannot be replaced by communication, which serves a separate function. In order to improve the principle of transparency, public information ought to be easily obtainable (e.g. through well managed registers and databases). While harm from disclosure of certain information is often difficult to manifest, the common arguments coming from policy makers against more transparency – e.g. the need for protection of the institutions from civil society, the effect of transparency in slowing processes down and the “citizens (being) a distraction”- are concerning and dangerous.

## **REGULATION 1049/2001 IN PRACTICE**

During this portion of the seminar the audience was given a valuable insight into the challenges that both the EU institutions and the relevant national authorities of several Member States (Sweden, Finland, and Poland) face when applying Regulation 1049/2001.

### **Access to documents: Institutions' experience in practice with Regulation 1049/2001 and differences in proceedings with requests**

*Martine Fouwels* (European Commission) presented the normative framework in which her Institution operates with regard to access to documents (Treaties, Regulation 1049/2001, Commission Decision 2001/937), as well as the statistics on the number of requests received and the data on the number of cases in which access was granted or refused. From the data provided, a general trend is detected towards an increase in the number of requests received with regard to both stages of the process – initial (6077 initial requests in 2016) and confirmatory (295 confirmatory applications in 2016). Ms Fouwels addressed the main challenges that the Commission faces when handling so many requests for access to documents. One of the issues identified in this respect are imprecise requests of a very wide scope, which is a direct consequence of a broad definition of a “document” under Commission Decision 2001/937. A similar issue arises as a result of the wide personal scope adopted by the same instrument, which grants also third-country nationals a right to submit applications. Another is the short deadlines which apply to the proceedings, especially at the confirmatory level, which are difficult to comply with given the robust procedure. In addition, some Member States wish to be consulted in their own language, which adds to the overall duration of processing and complicates the compliance process which is already subject to tight deadlines. According to the speaker, the Commission has adopted a proactive transparency approach: it provides for publication of a large number of documents and information on the DG's websites and it has introduced more transparency in a number of new areas, such as in the area of trade and negotiations or the Commission's mission costs. In this respect, a reference was made to the State of the Union Speech of 2017 in which commitment was made to provide for more proactive transparency.

Next, *Chiara Malasomma* (European Parliament) shared the European Parliament's experience in practice with Regulation 1049/2001. At the outset, she presented the

audience with the provisions applicable to the European Parliaments' implementation of Regulation 1049/2001, of which Rule 116 of Parliament's Rules of Procedure is the most relevant. This provision regulates the personal (beneficiaries) and material scope (definition of the Parliament document) and stipulates the obligation for the Parliament to establish and maintain a Public Register Website for Parliament documents. At present, 95% of the Parliament's documents are publicly available and easily accessible. The administrative procedure for dealing with applications for public access to Parliament documents is laid down in the Bureau Decision of 28 November 2001. According to this decision, the Transparency Unit receives and processes applications. In the exercise of these tasks, it relies heavily upon the coordination of the replies with the service of the originator of the document. Such cooperation is crucial due to the need for more expertise on the matter - typically the Transparency Unit lacks sufficient expertise on the matter and thus requires input from the originator. As one of the main challenges in the context of assessing access to Parliament documents, Ms Malasomma identified a difficulty in drawing the line between the documents drawn up by a member of the European Parliament (e.g. draft reports, opinions, motions for resolution, etc.) and those documents that pertain to the personal space of the individual MEPs (such as the documents linked to the expenditure of their allowances). The difference is crucial, as the latter are considered Parliament documents for the purposes of access to documents under Regulation 1049/2001 only if they are tabled in accordance with the Rules of Procedure. Similarly to the Commission, the main challenges remain the short time limits to assess the request, the number of applications received, and the overly wide scope of the requests made by the applicants. Interestingly, compared to the Commission, the Parliament has had an exceptionally low rate of confirmatory applications, which according to the speaker tends to indicate that applicants are generally satisfied with Parliament's responses to their applications. It was concluded that the Transparency Unit of the European Parliament has been attempting to establish a proactive transparency policy. One such example has been assisting applicants with using the register and drafting the application in a sufficiently precise manner - a practice which has proven to be successful thus far. Finally, according to Ms Malasomma, the original purpose of the Regulation has changed from the Parliament's point of view: it is not anymore about informing the citizens about how decisions are made but about making the MEPs accountable. A view was expressed that transparency should be introduced gradually: a sudden influx of an enormous load of access requests coming from and supported by civil society has made the work for the European Parliament extremely time consuming and costly.

*Emanuele Rebasti* (Council of the European Union) provided us with an insight into the delicate practices of the Council when handling public access requests concerning its documents. Articles 6-9 of the Council Rules of Procedure lay down the rules on proactive transparency, stipulating an obligation of disclosure of any legislative document that comes to the Council of the European Union. The preparatory debate, however, remains undisclosed. The procedure of handling the requests for access is laid down in Annex II to the Rules of Procedure. The Rules of Procedure provide for a wide personal scope: the right to submit requests is given to any natural or legal person; thus, in this respect, the Council goes beyond the requirements of the Regulation. One particularity regarding the Council is the challenge of qualification of documents originating from third parties when third parties are Member States. The difficulty in qualifying a MS document as a third-party document here lies in drawing a clear line between the MS acting as a member of the Council, and the Member State acting on its own. This is a relevant issue due to an obligation of consultation with regard to third-party documents. The Council has its own public register which is very well supplied with documents. Additionally, it keeps an online centralised internal database of the documents that have been shared with the MS, which makes it easier for the Council staff to identify the relevant documents. Mr Rebasti emphasised the importance of dialogue between the transparency service and the service in charge of the documents whose access is requested, due to the delicate nature of this exercise. Similar to the situation in the Parliament and the Commission, the very robust procedure employed by the Council is incompatible with the foreseen deadlines. Consequently, there is often an avoidance of

formal procedure, but unanimity is still required. One example of the complexity of the procedure is the requirement that the confirmatory reply is translated into all EU languages before it is approved by the Council. This rule is often stretched in order to keep within the deadline. Notably, the Council is subject to strict rules on financial accountability; thus there have been no problems with disclosing information about expenditures of its members. Unlike the other two institutions, the Council had no cases before the Court last year, save for several interventions in CJEU proceedings. Finally, Mr Rebasti acknowledged the need for a debate on the questions of how much transparency there should be, at what stages of the decision-making process there should be transparency, and on who we in fact empower by providing access to information.

### **Access to documents: Best practices from several Member States**

*Anna Pohjalainen* (Ministry of Justice Finland) provided an overview of the normative and structural framework for coordination of the procedures relating to access to documents in Finland. In this context, it is interesting to mention that all Finnish ministries have transparency coordinators, with the Ministry of Justice being a national contact point in the sense of the Regulation. In Finland, the main national legislative act applicable to access to documents is the Act on the Openness of Government Activities, which came into force before Regulation 1049/2001. In cases where Finnish authorities receive a request for an EU document which is in their possession, the position of the relevant EU institution must be taken into account, as has been established by the Finnish Supreme Court's case law. Notably, there have been diverging assessments by the Finnish and the EU institutions as a consequence of basing the assessment on the initial legislation; there is however no data on how common this occurrence is. According to Ms Pohjalainen, the main challenges for Finnish authorities have been the broad-scope of requests and the striking of the balance between the right to data protection and the right of access to documents. It was concluded that the scope of Regulation 1049 needs to be amended and extended to all the institutions, bodies and agencies, as this would help clarify the situation from the Member States' perspective as well.

At the outset, *Ewa Gromnicka* (Permanent Representation of Poland to the EU) emphasized that in Poland there is no access to documents but rather access to information. This right is enshrined in the Polish Constitution (Art 61 para 1) and further elaborated in the Law on access to public information (6<sup>th</sup> September 2001). Both the material and the personal scope are broadly defined: public information is any information about public matters and as such it has to be made available public; and, the Law guarantees each person right of access to public information without any requirement of justification. The focus is on facilitating the availability of information: fees can only be imposed if the authority has to bear additional costs, deadlines are tight and exceptions are very restrictive and have to be justified by the relevant authority. The Polish example is rather extreme where exceptions are concerned: access to information can only be rejected on the ground of protection of the right to privacy of natural persons or of a company's trade secrets. This makes Poland an attractive forum shopping destination in the context of document access requests. According to Ms Gromnicka, Polish authorities agree to granting access to documents in almost all cases; in fact, the Regulation offers more possibilities for refusal of access to documents than the national law. One of the challenges raised in the presentation was a poor compliance with statutory deadlines, with over 50% of requests not being processed within the required time limits. This is largely due to the fact that it is mostly press officers, who are not lawyers, that deal with the requests. Furthermore, it was pointed out that a vast amount of information in Poland is already in the public domain, but the awareness of citizens of where and how it could be found is limited: to an extent it is a matter of a cultural attitude towards transparency which will take time to change. Finally, a reference was made to a new national initiative in Poland, [New Law on Transparency of Public Life](#), which bears resemblance to the idea of the Transparency Register at the EU level.

*Sara Johansson* (Permanent Representation of Sweden to the EU) presented on the best practices from Sweden: a Member State with a longstanding tradition of transparency and during whose Presidency Regulation 1049/2001 was adopted. Consequently, one may note numerous similarities between the two systems. The principle of public access to information was established in Sweden already in 1766 and encompasses access to official documents, freedom of expression for officials, access to court hearings and access to meetings of decision-making assemblies. According to the speaker, it has been a priority for Sweden to work toward a high level of openness and transparency. It is to that end that Sweden has intervened in many cases before the CJEU. Among the most recent case law, these include e.g. *Turco and IFAW* judgments; *Commission v Breyer*, *French Republic v Carl Schlyter*. The ongoing cases in which Sweden has intervened are: *Izba Gospodarcza Producentów, Operatorów Urządzeń Rozrywkowych v Commission*, *ClientEarth v Commission*, *Leino-Sandberg v Parliament*.

## **RECENT DEVELOPMENTS**

### **Access to documents in the recent case law of the Court of Justice of the European Union**

*Katarzyna Szychowska* (General Court of the European Union) provided the audience with a comprehensive overview of the recent case law of the CJEU in matters relating to access to documents under Regulation 1049/2001. In this respect, a distinction was made between the different types of documents to which access has been requested and on which the Court has built its case law. Where a request for access to documents relating to administrative and judicial proceedings is concerned, questions of the applicability of Regulation 1049/2001, the meaning of the investigation, and the applicability of the general presumption of confidentiality arise. In the area of access to documents relating to judicial proceedings, the speaker analysed the decisions in C-514/07 P *Sweden v API* and *Commission v API* and the recent C-213/15 P *Commission v Patrick Breyer*, which concern access to written pleadings lodged in proceedings before the Court of Justice. Where access to documents relating to infringement proceedings is concerned, it is interesting to mention the Court's decision in C-562/14 P, *Sweden v Commission*, where access was requested to documents in the so-called EU Pilot proceedings (a cooperation procedure between the Commission and the Member States concerning the application of the EU law). Although soft proceedings by nature, they are treated the same as infringement proceedings due to their objective, which is to seek to efficiently resolve any infringements of EU law by avoiding the formal opening of an infringement procedure. Consequently, the documents produced in these proceedings enjoy the same level of protection as documents in other infringement proceedings, which further means that the general presumption of confidentiality applies until the EU Pilot procedure is closed. Where access to documents relating to the decision-making process is concerned, the speaker highlighted the issues of balancing the requirement of transparency with that of an effective decision-making process; as well as the question of applicability of the general presumption of confidentiality and the specificity of a highly sensitive and contentious decision-making process. The particularly relevant cases mentioned in this context were T-796/14, T-800/14 and T-18/15 *Philip Morris v Commission* and T-424/14 and T-425/14 *ClientEarth v Commission*. [Concerning the latter, there is an appeal pending before the CJEU, in which the Opinion by AG Bot was published on 28 November 2017, [here](#).] Ms Szychowska further addressed the CJEU case law relating to access to documents containing environmental information (C-673/13 P *Commission/Stichting Greenpeace Nederland et Pan Europe*, C-442/14 *Bayer CropScience et Stichting de Bijenstichting*), noting the tension between the requirement of transparency and the protection of commercial secrets and IP. Finally, the tension between the transparency requirement and data protection was illustrated by the landmark cases of T-214/11 *ClientEarth & PAN Europa v EFSA* and T-115/13 *Dennekamp v EDPS*.

## **Case Study: How to justify refusal to access a document? Practical conclusions from the jurisprudence**

During this workshop, prepared and conducted by *Emanuele Rebasti* (Legal Service, Council of the European Union) the participants were presented with a hypothetical problem. They were asked to handle a request for access to all the opinions on the suitability of candidates to EU judicial posts rendered by the Panel established pursuant to Article 255 TFEU since its establishment. The problem shed light on many challenges and various considerations to be examined when assessing such a request. The participants were encouraged to think about the complex applicable legal framework, the procedural steps, the possible applicable exceptions, and the nature of the assessment in the case at hand.

## **FUTURE PERSPECTIVES**

### **Transparency Register: Towards a new interinstitutional agreement**

*Vitor Teixeira* (Transparency International Brussels) presented the activities of Transparency International, oriented towards creating a new system of EU lobby transparency. It was pointed out that there are huge disparities between Member States in terms of the level of transparency that is ensured. Current rules lag behind international best practices and fall short of the objectives expressed by the Commission President Juncker. The instrument to address these deficiencies is a mandatory EU lobby register. The basic principles behind such a register were argued to be: mandatory prior registration in order to meet with decision-makers; the coverage of everyone involved in legislation/decision-making process; and, better definitions, monitoring and sanctions. The idea of establishing such a register is supported by the citizens, lobbyists and the European Commission, and blocked by the Member States/Council and the Parliament. Mr Teixeira concluded that, in order to complement the lobby register, it is desirable to reform the rules on access to documents rules, as well as to provide for independent ethics oversight and more transparency of legislative processes.

### **Round table: What and when should be disclosed? New ideas**

The conference closed with a round table discussion on new ideas with regard to access to documents. This prompted a lively debate amongst the participants and the audience.

*Helen Darbishire* (Access Info Europe) pointed out that the right to information has only been recently recognised. As a result, there are still conceptual discussions on its components. Despite being a very young concept, however, significant progress has been made to date: there are currently only a few European countries without a law on access to information, e.g. Luxembourg and Cyprus (albeit with draft laws in their parliaments). Despite the progress, there are numerous challenges in this area. Exercising one's right to information is not always easy: the proceedings for doing so are not very well known. Ms. Darbishire emphasised the necessity of providing for insight into how governments and judiciaries work: more transparency would lead to greater trust; more open processes lead to a strengthening of the judicial bench. By way of example, it was pointed out by the speaker that the arguments raising the non-transparency claims about the judiciary have been detrimental. It is thus vital to provide more information with regard to judicial appointments at the CJEU. As an example of an area in which the EU should be taking the lead in providing for more transparency, Ms Darbishire mentioned the disclosure of Commissioners' expenses. The fear of criticism seems to underlie this reluctance to publish (full) information. Other remaining issues in the area of access to documents seem to be records-keeping, time resources and privacy rights.

*Nick Aiossa* (Transparency International Brussels) noted an increased public demand for non-legislative documents related to accountability. As an example of an area in which there is a clear lack of transparency in this respect he raised the issue of the publication of MEP

expenses. Mr Aiossa further explored some paths to improve the implementation of Regulation 1049/2001, namely: an increase in resources dedicated to transparency units; the overhaul of institutional document storage/archiving infrastructure; and the redesign and centralisation of online EU transparency document registers – the ways in which documents are presented to the public. It was further argued that there should be a culture shift from serving “clients” or political considerations to adhering to legal obligations. Finally, a change of tone from an adversarial process to a dialogue between the institutions and the citizens is necessary. While the Regulation provides for deadlines, it does not provide for any possibility to engage in a dialogue afterwards. There are only two options for the applicant – appealing to the Ombudsman or the ECJ. Such dynamics set the tone of rejection and appeal which hampers the dialogue.

According to *Graham Smith* (Cabinet of the European Ombudsman) the FOI law and the law on access to documents should only be resorted to when things go wrong: free-flow of information should be the default situation. In the context of EU law, access to documents is part of the broader area of transparency and openness and sits at the heart of the Charter. It was further noted that Regulation 1049/2001 is a one-size-fits-all Regulation which does not correspond to the reality on the ground. Further, contrary to the pleas for narrowly defining public interest, it was argued by the speaker that public interest is so broad precisely in order to fit specific circumstances. Speaking of the necessity of a dialogue between the authorities and those seeking information, as an example of good practice Mr Smith mentioned the UK FOI Act which imposes a legal duty on public authorities to advise and assist those who try to make requests for access to information. This kind of a dialogue between the institution and the citizens is something that is missing from the EU. The official release of information is necessary so that one can actually use it. However, once the information is released you cannot control what happens with it. Thus, a more constructive approach is required - simply publishing everything is not an answer. Mr Smith expressed disagreement with the view of the previous speaker concerning the culture shift from that of serving political considerations to adhering to legal obligations: the EU has a legalistic culture, but the law should not be everything. It is a tool to make things happen; therefore, we should look at what *should* be disclosed and not put an emphasis on what *must* be disclosed. The speaker concluded that instead of amending the Regulation, one should think more creatively about how we can use the instruments we have.

In the lively discussion that followed, views were expressed on one of the main challenges that both the EU and national institutions face: the broad-scope of requests for documents. While these are sometimes seen as a “fishing expedition”, it was argued by the round table that such claims are exaggerated or misunderstood. The reality is that citizens are not aware of the types of documents, but are aware of what kind of content they are after. Therefore, it is rather a way of obtaining the information they need without having the knowledge of where that information is located.

The overall conclusion of the conference was that the debate on transparency and access to documents has become much more sophisticated since the adoption of the Regulation 1049/2001 and that a lot has been done in order to improve its implementation. The importance was stressed of the dialogue among all the stakeholders in order to better the situation.