

Transparency International's Position on the European Commission Proposal for a Regulation on Access to EU Documents

Transparency International (TI) is the global civil society organization leading the fight against corruption. Through more than 90 chapters worldwide (i.e. in almost every EU Member State and in many developing countries world wide) and an international secretariat in Berlin, Germany, TI raises awareness of the damaging effects of corruption and works with partners in government, business and civil society to develop and implement effective measures to tackle it. Transparency International supports the international efforts to have the right of access to information recognized and respected. The exercise of this right enables citizens to hold their governments and public bodies accountable, thus minimizing the risk of corruption.

General Remarks

- TI believes that public access to EU documents and information promotes greater transparency and accountability of the EU institutions. Therefore, weak public access to documents directly reflects anti-corruption concerns. It is TI's view that corruption flourishes in darkness and therefore any progress towards opening administrations to public scrutiny is likely to advance anti-corruption efforts.
- The right to access to information has not only been rightly established by Human Rights Conventions but is also anchored in the United Nations Convention (UNCAC) against Corruption (Article 13).
- It is robust and enforced 'freedom of access to information legislation' that allows civil society to act efficiently worldwide. Only the right to access information enables TI in 90 chapters worldwide to hold accountable governments and to fight corruption efficiently.
- TI welcomes that the EU institutions would like to further strengthen the right of access to EU documents within the framework of the European Transparency Initiative.
- TI thinks that the European Commission proposal for a regulation on 'access to EU documents' from 30 April 2008 (COM(2008) 229 final) needs modifications in order to be a real improvement to the current regulation on access to EU documents (1049/2001).

Specific Remarks

- **Preamble 3:** TI welcomes that the proposal emphasizes the role of transparency and openness in citizens' participation in the decision-making process which indeed

guarantees for administrations being more legitimate, efficient and accountable to their citizens.

- **Preamble 13:** TI further supports the Commission's proposal for 'active transparency', i.e. the automatic and pro-active dissemination of official documents which are part of the legislative process.

Recommendations to the Commission Proposal 'COM (2008) 229 final'

- **Article 2, 1:** Besides natural and legal persons, associations of legal and natural persons – e.g. citizens' groups – should also have a right of access to documents.
- **Article 3a:** Concerning the proposed definition of a document TI would welcome a phrasing that is more in favour of transparency than the one suggested by the European Commission. The proposal of the Commission is in TI's view a step back as it would exclude "documents" that have not been "formally transmitted to one or more recipients or otherwise registered." "Documents" would not even "be" documents unless registered or transmitted.

Although TI appreciates the effort to find a suitable definition of what constitutes a document, we think that such a definition should constitute an improvement to the current regulation. As the suggested definition bears in TI's view more risks than improvements, **TI would welcome a retaining of Article 3 as laid down in the currently applicable regulation 1049/2001.**

A definition more suitable than the one proposed by the European Commission can be found in the Council of Europe's Draft Convention on Access to Official Documents: "official documents means all information recorded in any form, drawn up or received and held by public authorities" (Article 1, 2b DH-S-AC(2007)007).

Many "Freedom of Information Acts" are in fact very effective without having included a more detailed definition of what a document is (see for example "*Freedom Information Act for the German Bundesland Schleswig-Holstein, IFG-SH*").

- **Article 4, 3:** TI regrets that the Commission proposal does not foresee general public access to legal advice given to the EU institutions by the Legal Services of the EU institutions in the framework of legislative procedures. **TI sees no reason why these documents shall remain non-accessible** even after a decision in the framework of the decision-making process was taken.

To mitigate possible concerns of confidentiality within the EU institutions, TI points to the fact that legal advice given by an institution's legal service is only binding for the author and not for the institution that eventually decides politically.

TI hopes that the Commission proposal will be changed towards more transparency and in line with the recent ruling of the European Court of Justice C-39/05 P and C-52/05 P from 1 July 2008 that says that also legal advice given to an EU institution should be made publicly available.

- **Article 4, 4:** TI suggests that ‘public access to EU documents’ shall be granted if the public interest or the private interest of the applicant override the protection of commercial interests (Article 4, 2a). This balancing of legally protected interests should in TI’s opinion not only apply related to emissions to the environment as laid down in the Commission proposal.
- **Article 5, 2:** TI believes that for documents originating from EU Member States, a more flexible rule should apply. TI fears that the current phrasing of Art. 5 will be too big a hurdle for citizens or other interested parties to obtain documents originating from an EU Member State.
TI thinks for example of cases in which EU Member States are in breach of EU procurement rules (e.g. through corrupt behaviour within national administration) in the framework of EU programmes. In cases like this and despite the public interest, the request for ‘public access to documents’ could be denied by the Member State not only at national level but also when an EU body consults the authorities of the respective Member State in the framework of a request for ‘public access to EU documents’ (Art. 5, 2).
In cases like this where the public interest clearly justifies disclosure, the decision on access must not depend solely on the Member States’ authorities.
- **Article 8, 1:** Extending the timeline for confirmatory applications from 15 to 30 working days, is in TI’s view a setback in the drive for more transparency. The 15 working days rule should be retained. This would be in line with most of the EU Member States’ legislation where the time limit is well below 30 working days.
- **Article 12:** TI believes that the new Article 12 should not be limited to documents that are drawn up or received within the framework of legislative and non-legislative acts of general application. TI would very much welcome retaining Art 12, 1 in its current form that in principle applies to all documents and not only to legislative (and non-legislative) acts.

TI looks forward to continue discussing these issues with you. If you need further information, please contact:

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