10 April 2012

Dear Minister,

Re: Recast of Regulation 1049/2001 on access to documents

Following the adoption of the Parliament first reading position (15 December 2011) on the Commission's proposal to recast Regulation 1049/2001 on public access to EU documents, the Working Party on Information of the Council is now considering possible compromises and will start discussing amendments this Friday, 13 April 2012.

We are writing to express our concern that there may be a backtracking in the standards of the right of access to EU documents enshrined in Articles 1 and 11 TEU and 15 TFEU. Furthermore, the introduction of blanket exceptions to cover documents related to infringement procedures, court proceedings or competition cases goes directly against international access to information standards, which require a case-by-case assessment of each exception applied, subject always to a harm and an overriding public interest test.

This concern is based on the content of the "state of play" document, dated 30 March 2012, which was drafted by the Danish Presidency and which outlines the main issues on which further discussion is required. In the attached annex, we address each point in turn.

The new provisions in the 'state of play' document, if adopted, would **restrict the fundamental right of the public to access information as provided in the Charter of Fundamental Rights.** They would expand confidentiality, allowing the EU institutions to take more decisions behind closed doors, without the possibility for the public to participate. They would reduce accountability, thus harming the legitimacy and democracy of the EU.

The adoption of these new exceptions would be in clear **violation of the requirements of the Lisbon Treaty** for increased transparency provided in Articles 1 and 11 TEU and 15 TFEU. The recast should be used to create more openness and accountability within EU institutions as intended by the Treaty, not as an opportunity to further reduce the existing level of transparency.

The proposals to restrict access to documents are not balanced by any significant improvements that would make the right of access more effective. Most of the positive proposals made by the Presidency (maintaining a broad definition of a document, making additional documents adopted within legislative processes publicly accessible, the appointment of information officers), are still unresolved, which raises concerns as to whether any improvements will actually be achieved.

We deeply regret the lack of consideration for the amendments from the European Parliament ensuring more openness, including the need for increased transparency within legislative processes. We call on the Danish Presidency and the Member States to reconsider those amendments, or, at a minimum to only allow changes that would align Regulation 1049/2001 with the Lisbon Treaty (extending the institutional scope) and the Aarhus Convention with regard to environmental information.

Yours faithfully,

Anais Berthier, ClientEarth, on behalf of the NGOs above

ANNEX

The **definition of a document.** Questions have been raised about the point at which "a document becomes a document". In our analysis, requirements that the document be put in a file, transmitted beyond the body drawing up the document, or otherwise registered or authorised by hierarchy are artificial distinctions, which may have the effect of excluding large amounts of information ex ante and without justification. This would contravene the obligation set out in the Regulation to ensure the widest access to documents.

A new exception to protect **selection procedures** is being promoted, which would protect the "confidentiality of the comparative assessment" in a selection procedure, but which fails to mention the "impartiality" of that process. We would like to point out that "confidential" and "impartial" are by no means synonymous, and we stress that there is no need for new exceptions of this nature, as the decision-making process is already covered by exception 4.3, and selection procedures are clearly a part of decision-making.

The consideration to align the **Regulation** with the Aarhus Convention is welcomed, although concrete proposals still need to be made to ensure that only exceptions allowed under the Convention apply to environmental information.

The protection of **privacy vs public access to documents** is not something that can be decided between the Member States alone. They should adhere to the European Data Protection Supervisor's advice, as he is the EU's independent authority on the subject.

The **Scope of the Regulation and the Principle of Individual Examination** has been called into question, in what seems to be an attempt to introduce, new, blanket exceptions to the public right of access to EU documents. This runs directly counter to international standards on the right of access to information, which require a case-by-case assessment of the documents in order to see if an exception applies. When an exception does apply, a

balancing exercise between the harm caused by publication and the public interest in that information must be carried out with a view to fulfilling the right of public access.

According to the Danish Presidency paper, the documents which are deemed to require "special protection" are:

- documents in **competition cases**
- documents in the context of **court proceedings**
- documents in the context of **infringement procedures**

The reasoning behind adding new categories of exemptions is three-fold, but nonetheless insufficient. We would like to address each argument in turn.

1. Perversely, it is claimed that the new exceptions are justified because "t*he sensitivity of requests for these categories of documents stems from their crucial role in core EU activities*". We maintain that if these documents are crucial for core EU activities, it is all the more reason to make them public.

2. The fact that many requests cover thousands of pages is not a reason for categorically excluding entire categories of documents. There are various other solutions, such as applying a 15 day extension, or conferring informally with the applicant with a view to finding a fair solution. More proactive publication would also avoid the need for particularly large requests.

3. The final reason mentioned is that public access rules are often used by lawyers in court proceedings to substantiate their cases. Again, this is not a reason to deny the public their right of access to information. Rather, it is some indication that the specific rules established for party access in proceedings are insufficient.

Access to Legal advice by the institutions' Legal Services was also brought up in the context of these discussions, according to the Danish paper. We reject any attempt to exclude legal advice as this forms the basis for many if not all the decisions that are taken by the institutions and which affect over 500 million citizens. The introduction of this new block exemption is an attempt to circumvent the decision of the Court of Justice in landmark case *Turco* in which it decided that legal opinions should be publicly accessible. Legal advice per se should never be an exception; it is only when the release of the legal advice would harm a legitimate interest that an exception could then be applied.

Therefore, the "possible solution" to include a block exemption must be rejected. Entire categories of documents cannot simply be removed from the scope of the Regulation, particularly if they play a crucial role in core EU activities. Likewise, presuming that these documents should not be disclosed unless an overriding public interest exists is an unsatisfactory solution as it places the onus on the requester to substantiate why a document should be released, when the burden of proof should be the other way around.

Member States Documents is the final issue mentioned in the Danish paper, but there is clear jurisprudence that no Member State veto exists and that a refusal to disclose a document can only be based on one of the exceptions provided by Regulation 1049/2001. As for time limits, if they are to be extended to allow for Member State consultation, the maximum reasonable extension should be of 5 working days. Any more, and the right of access to information would be seriously undermined. The European Court of Human Rights has ruled that "news is a perishable commodity" and therefore access to public information should not be delayed.