Comments on the current discussions in Parliament about the revision of Regulation (EC) No 1049/2001 relating to public access

I. Introduction

1. The relation between Community rules on public access to documents and data protection has been an important field of interest of the EDPS since a number of years. In 2005, the EDPS published a Background Paper on the topic providing guidance to the Institutions on how to deal with obligations stemming from Regulation (EC) No 1049/2001 on public access to documents and Regulation (EC) No 45/2001 on data protection.[1] In 2006, he intervened in a leading case on the subject, the *Bavarian Lager* case (T-94/04), before the Court of First Instance which on 8 November 2007 delivered a judgment which is now under appeal before the Court of Justice (C-28/08 P).

2. After the Commission published its proposal on the recast of Regulation (EC) No 1049/2001 in April 2008, the EDPS took the opportunity to express his views on how the legal reconciliation of both regimes could be improved.[2]

3. In the past months, discussions about the Commission proposal have been progressing in the European Parliament and in the Council. The EDPS has followed these developments as closely as possible. The discussions in Parliament now seem to have reached an important stage.

4. The EDPS is glad to see that the relation between public access to documents and data protection rules is one of the main subjects of debate within the Parliament.

5. After reflecting on the way in which the discussion on the provisions relevant to data protection has developed so far, the EDPS decided to request for an exchange of views with the EP Rapporteur responsible for the dossier, Mr Cashman. With the current note the EDPS would like to restate and elaborate a bit further on what has been discussed with Mr Cashman. This note aims to translate the EDPS' views expressed in his earlier Opinion of 30 June 2008 to the current state of affairs.

6. Three issues will be addressed: (1) information contained in databases, (2) the right of access to someone's own personal data, and most importantly, (3) the provision which is supposed to reconcile the regimes on public access to documents and data protection.

[1] See the EDPS Background Paper available at the EDPS website (http://www.edps.europa.eu).
[2] Opinion of 30 June 2008, OJ 2008, C 2/7.

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II. Definition of 'document' - information contained in databases

7. One of the most heavily discussed proposals of the Commission concerns the provision which contains the definition of the notion of 'document' (Article 3(a)) and which to a large extent establishes the scope of the whole Regulation. The discussion focuses mainly on the proposal to delimit this definition by stating that a document only exists if it has been formally transmitted to recipients or circulated within the institutions or otherwise registered.

8. The Commission proposes to include in the definition 'data contained in electronic storage, processing and retrieval systems'. In his Opinion of 30 June 2008, the EDPS has raised questions relating to the text of this part of the proposal. In December 2008 the European Ombudsman published a Report in which he addressed the issue of access to information stored in EU databases.[3] The EDPS endorses the proposal for a different text in Article 3(a) as elaborated by the European Ombudsman in this report and is happy to see that the Ombudsman's proposal is reflected in several amendments to the proposed text of the Commission.

9. The EDPS would like to emphasise that an improved access to information contained in databases should be supported by a clear legal framework as regards the reconciliation with data protection rules (see below, under IV).[4]

III. The right of access to someone's own personal data

10. In his Opinion of 30 June 2008, the EDPS has touched upon the issue of access to someone's own personal data. On the basis of Article 13 of the data protection Regulation (EC) No 45/2001, people have a right of access to their own personal data. This right represents a private interest as opposed to the right of access on the basis of Regulation (EC) No 1049/2001 which represents the public interest in transparency. In his Opinion, the EDPS suggested to include in the amended Regulation (EC) No 1049/2001 two recitals stating respectively (1) that the provisions of Regulation (EC) No 1049/2001 are without prejudice to the right to someone's own personal data, and (2) that Article 13 of Regulation (EC) No 45/2001 shall be applied *ex officio* by the institutions in case a person requests access to data concerning him or her on the basis of Regulation (EC) No 45/2001.

11. The EDPS regrets to see that these suggestions have not been considered in the discussion in Parliament so far. He would like to emphasise that inclusion of these recitals would in fact strengthen the position of the citizens as regard their own personal data and would prevent them from being dragged into irrelevant bureaucratic procedures.

IV. Reconciling the rules on public access to documents with the rules on data protection

Commission proposal and comments of the EDPS

12. The most important issue from a data protection perspective obviously is the proposed text on the reconciliation of the regimes on public access to documents and data protection. In his Background Paper as well as before the Court of First Instance the

[3] Report of 10 December 2008, *Public Access to Information in EU Databases*, available on the website of the European Ombudsman (www.ombudsman.europa.eu).
[4] See also the remarks made in points 14 and 18 of the Opinion of 30 June 2008.

EDPS has consistently advocated a balanced approach between the right of access to documents on the one hand and the right to privacy and data protection on the other hand. In its judgment in the *Bavarian Lager* case, the Court of First Instance has endorsed this view. It has interpreted the current Article 4(1)(b) of Regulation (EC) No 1049/2001 in a way which reflects such an approach.

13. The main reason for the wide discussion on the interpretation of the current Article 4(1)(b) lies in the fact that its wording is rather ambiguous about the precise relation between the two regimes. It contains a reference to the right to privacy and integrity as well as to the Community rules on data protection. The Commission interpreted this Article as implying that requests for access to documents containing personal data should always be dealt with under the data protection rules. This theory was rejected by the Court of First Instance in the *Bavarian Lager* case. One of the reasons for doing so was that the data protection rules themselves do not decide on whether information must be disclosed for reasons of transparency or not. They could even be interpreted in a way which prevents disclosure of personal data for reasons of transparency.

14. The Commission has appealed against the judgment of the Court of First Instance, and the case is now pending before the Court of Justice. The interpretation given by the Court of First Instance could of course be confirmed by the Court of Justice, which would then leave the Institutions with guidance on how Article 4(1)(b) of the Transparency Regulation should be interpreted. However, at this stage this is not something which can be relied upon.

15. There is in any case enough reason to adjust the current text in such a way that the provision itself gives guidance on how to balance the interests concerned. In this respect, the proposal of the Commission (the new Article 4(5)) does not provide for a satisfactory solution. As the EDPS explained in his Opinion of 30 June 2008, the defined category of data which must be disclosed is far too limited and does not reflect the judgment of the Court of First Instance in the *Bavarian Lager* case. In addition, the obligation to disclose that category of data is subject to a vague exception (disclosure can still be refused if it 'would adversely affect the person concerned'). Article 4(5) furthermore still contains in its second part a reference to data protection rules without providing any further guidance.

16. In his Opinion of 30 June 2008, the EDPS has proposed an alternative solution which removes the ambiguity of the text by deleting the reference to rules on data protection and by referring to the privacy and integrity of the person concerned. The proposed solution furthermore defines several categories of data the disclosure of which is considered not to harm the privacy or integrity of the person concerned. The EDPS also proposes to make the whole exception subject to the overriding public interest test. This should result in a balancing of the interests at stake taking into account the circumstance of a specific case.[5]

17. The EDPS would like to emphasise that this alternative solution reflects the necessary balanced approach towards the reconciliation of both regimes. From a data protection point of view, the proposed solution improves the situation whereas, especially by deleting the reference to the rules on data protection, it formulates clearer obligations to disclose the personal data concerned, which is fully justified on the basis of Article 5(b) of Regulation (EC) No 45/2001.

[5] See for an elaboration of the proposed alternative solution, points 51-60 of the Opinion of 30 June 2008.

Discussion in Parliament

18. The EDPS welcomes the fact that amendments are discussed to include in Recital 10 a reference to the EDPS recommendations on the relationship between Regulation (EC) No 1049/2001 and Regulation (EC) No 45/2001.[6]

19. In relation to the amendments put forward in Parliament regarding the proposed Article 4(5), the EDPS observes that most of these amendments take the category of data as defined by the Commission as point of departure.[7] However, as already stated above, this category of data is too limited and does not fully reflect the judgment of the Court of First Instance in the *Bavarian Lager* case. Without broadening this category or without leaving room for other data to be disclosed, these amendments are not satisfactory as they do not represent the outcome of a balanced approach. In that respect, the rewording or even deletion of the part which formulates the vague exception to the provision (see point 15 above) does not improve the situation. Besides, entirely excluding the possibility of keeping a name secret (Amendment 127 of the LIBE Committee) could open the door to disclosure of personal data under special circumstances which would clearly harm the privacy or integrity of the person concerned.

20. The problem with restoring the current text of Article 4(1)(b), as some amendments propose, is that the ambiguity and uncertainty as set out above will still occur.[8] This is not remedied by adding an obligation to disclose the (limited) category of data as defined by the Commission. The situation would have been different if the exception of Article 4(1)(b) was transformed from an absolute to an relative exception by making it subject to the overriding public interest test. This however has not been proposed.

21. A more satisfactory solution has been put forward by the Committee on Constitutional Affairs. In Amendment 4 of its opinion, the Committee sets out a new Article which fully reflects a balanced approach, thereby taken into account suggestions made by the EDPS.

22. To sum up, Article 4(5) as proposed by the Commission is too limited and, because of the reference to data protection rules, still ambiguous. The amendments discussed in Parliament so far do not improve that situation, except for the amendment proposed by the Committee on Constitutional Affairs. For this reason, and without excluding the possibility of alternative texts which could achieve the same balanced result, the EDPS would strongly recommend following the proposal of the Committee on Constitutional affairs.

[6] See Amendment 7 of the LIBE Committee and Amendment 4 in the opinion of the Committee on Legal Affairs.
[7] See Amendments 62, 107 and 108 of the LIBE Committee.
[8] See to that extent Amendment 40 of the LIBE Committee, and Amendment 8 in the opinion of the Committee on Legal Affairs.

V. Conclusion

23. On the basis of the foregoing, the EDPS:

- expresses support for the way in which discussion is developing in Parliament on the issue of access to data extracted from databases;

- recommends introducing a recital on the *ex officio* application of the right to one's own personal data as provided for in Article 13 of Regulation (EC) No 45/2001;

- strongly recommends taking over Amendment 4 as put forward by the Committee on Constitutional Affairs.

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