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Access to the institutions' texts

European Parliament resolution with recommendations to the Commission on access to the institutions' texts (2004/2125(INI))

The European Parliament,

- having regard to Article 192, second paragraph, of the EC Treaty,
 - having regard to Rules 39 and 45 of its Rules of Procedure,
 - having regard to the institutions' reports on the implementation of Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents¹ and, particularly, to the Commission's first triennial report on implementation, as provided for in Article 17(2) of that Regulation,
 - having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs (A6-0052/2006),
- A. whereas, since ratification of the Amsterdam Treaty and the entry into force of Article 255 of the Treaty establishing the European Community, transparency has become a fundamental principle of the European Union the aims of which are to strengthen the democratic nature of the European institutions, enable citizens to participate more closely in the decision-making process, ensure that public administrative authorities enjoy greater legitimacy as a result of being more effective and more accountable to citizens and, finally, enable problems or errors to be detected in a more timely manner,
- B. whereas Regulation (EC) No 1049/2001 only partially implements Article 255 EC, in as much as:
- its implicit definition of legislative activity (found in Article 12) is too general and could create confusion with activities of an administrative nature; it does not provide that legislation should be debated and adopted in public by the Parliament and the Council or that, in addition to legislative initiatives, amendments advocated by the Member States should also be immediately accessible - by the same token, all preparatory legislative documents should also be accessible (regardless of whether they are drawn up by the legal services of the Community institutions) so that decisions can be taken on an equal footing and in loyal cooperation between the Parliament, the Council and the Commission in full knowledge of the domain to be regulated; furthermore, there is still no common understanding of the requirements regarding publication of legislative texts in the Official Journal or the way in which the Official Journal should be organised (for instance, as far as the electronic version is concerned),
 - there are no clear rules on access to documents of an administrative nature, the so-called time for reflection, better drafting, informing citizens of the procedure to be

¹ OJ L 145, 31.5.2001, p. 43.

followed by each institution, common rules for archiving documents or privileged access for persons with specific access rights,

- there remains a clear need to define the circumstances in which specific documents may be classified, wholly or in part, as confidential and to lay down rules requiring such classification to be reviewed regularly; furthermore, it is contrary to the democratic principle on which the Union is founded that the European Parliament does not have a clear legal basis for accessing classified EU information, notably where such access is also forbidden to or limited for national parliaments; moreover, provision must also be made to prevent third countries and international organisations from forbidding the Council and the Commission from allowing Parliament access to classified information,
 - the administrative machinery (the institutions' registers, databases and other IT applications) is still in an experimental phase and there is no common approach on the part of the three institutions; furthermore, even as regards inter-institutional procedures, there is still no common understanding among the institutions as to how to manage, share, and store the various types of documents; moreover, although some improvements have been made, there is still a clear lack of coordination between the institutions, notably in respect of documents connected with inter-institutional procedures, as a result of which not only ordinary citizens lose their way, but also professionals, researchers and national parliaments,
- C. whereas, even though provision was made in Regulation (EC) No 1049/2001 for its revision after three years, and despite the fact that Parliament has asked the Commission on several occasions to improve and strengthen Community legislation on transparency, no proposal within the meaning of Rule 39(2) of Parliament's Rules of Procedure has been brought forward,
- D. whereas the problems in applying the Regulation have in some respects arisen through inadequate implementation; whereas the case-law of the Court of Justice has also revealed the need to develop and clarify some of the provisions of the Regulation, particularly those concerning documents produced by the Member States and third parties, and the exceptions for investigations, legal advice and the 'time for reflection',
- E. whereas transparent and open negotiations and loyal cooperation between the institutions are better ways of ensuring the effectiveness of the decision-making process referred to in Article 207 EC than secret negotiations within the Council; whereas it therefore regrets that, in its Presidency Conclusions of 22 December 2005, the Council chose not to amend its Rules of Procedure so as to have transparent debates at ministerial level throughout the legislative procedure,
1. Requests the Commission to submit to Parliament in 2006, on the basis of Article 255 EC, a legislative proposal on 'the right of access to European Parliament, Council and Commission documents, and general principles and limits on grounds of public or private interest governing this right of access', a proposal to be prepared in inter-institutional discussions and which should follow the detailed recommendations set out below;
 2. Confirms that these recommendations respect the principle of subsidiarity, the fundamental rights of citizens, the case-law of the European Court of Human Rights,

particularly that on Article 8 of the European Convention on Human Rights, and Articles 7 and 8 of the Charter of Fundamental Rights;

3. Considers that the financial implications of the requested proposal must be covered by the institutions' operating budgets as the rules on transparency are indissociable from those relating to the establishment, adoption and publication of the texts of which they are the authors or which are addressed to them;
4. Stresses that any new rules on access to documents should apply as from the date of the entry into force of the prospectively amended Regulation and should, therefore, have no retroactive effect;
5. Instructs its President to forward this resolution and the accompanying detailed recommendations to the Commission and the Council, and to the governments and parliaments of the Member States and accession and candidate countries.

ANNEX

DETAILED RECOMMENDATIONS ON THE CONTENT OF THE PROPOSAL REQUESTED

Recommendation 1 (on Article 255 EC and Regulation (EC) No 1049/2001 from a constitutional perspective)

The Commission should improve the clarity of the citations and recitals in Regulation (EC) No 1049/2001 in order to make it quite clear that Article 255 EC¹, which is the legal basis for the Regulation itself:

- (a) is the main legal basis in the Treaties for implementing the founding principles of the Union, outlined in Article 1 of the Treaty on the European Union, according to which '... decisions are taken as openly as possible and as closely as possible to the citizen', and in Article 6 EU, according to which 'the Union is founded on the principles of ... democracy ... and the rule of law';
- (b) is the pivotal legal basis, as far as transparency and confidentiality are concerned, for all the activities of the Parliament, the Council and the Commission (the 'legislative triangle') when acting under the EC Treaty and the EU Treaty;
- (c) must be sincerely and fully implemented in the Rules of Procedure of the European Parliament², the Commission³ and of the Council⁴;

¹ Article 255 EC: *(1) Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3. (2) General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam. (3) Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.*

² Article 199 EC: *The European Parliament shall adopt its Rules of Procedure, acting by a majority of its Members
The proceedings of the European Parliament shall be published in the manner laid down in its Rules of Procedure..*

³ Article 218(2) EC: *The Commission shall adopt its Rules of Procedure so as to ensure that both it and its departments operate in accordance with the provisions of this Treaty. It shall ensure that these Rules are published.*

⁴ Article 207(3) EC: *The Council shall adopt its Rules of Procedure. For the purpose of applying Article 255(3), the Council shall elaborate in these Rules the conditions under which the public shall have access to Council documents. For the purpose of this paragraph, the Council shall define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in those cases, while at the same time preserving the effectiveness of its decision-making process. In any event, when the Council acts in its legislative capacity, the results of votes and explanations of vote as well as statements in the minutes shall be made public.*

- (d) must be applied consistently when the institutions act in a legislative capacity (as outlined in Article 207 EC) or implement EU or EC legislation (Article 202 EC)¹, irrespective of which institution implements the legislation or exercises implementing powers.

Recommendation 2 (on the concepts of legislative and non-legislative documents)

The Commission, following discussion in the inter-institutional committee provided for in Article 15 of Regulation (EC) No 1049/2001 and in compliance with the principles outlined in Recommendation 1, should amend the Regulation:

- (a) by re-defining **the concept of 'legislative documents'**, currently defined in Article 12(2), as documents '...drawn up or received in the course of procedures for the adoption of acts that are legally binding in or on the Member States', by adding a reference to the fact that the concept of (legislative) act should be reserved for secondary law only (with a direct legal basis in the Treaties);

As far as legislative documents are concerned, access should be granted:

- to all preparatory documents connected with an identified decisional procedure; access should be granted as soon as those documents are formally submitted by each institution taking part in the decision;
- to the record of Parliament or Council debates, where those institutions are acting in a legislative capacity, and to the documents discussed (if not classified, see Recommendation 3 below);
- to the identity of the author of each initiative or formal amendment;
- to relevant complementary information or documents relating to the meetings of the institutions' working groups, and to the contributions submitted by the secretariats of the institutions (including the legal services), where such documents are not simply administrative in nature.

The amended Regulation should also be the legal basis for establishing rules, good practice and inter-institutional agreements designed to improve the drafting of legislative texts and to ensure that final legislative texts are accessible, such as the rules to be followed for:

- drafting legislative acts,

¹ Article 202 EC: *To ensure that the objectives set out in this Treaty are attained the Council shall, in accordance with the provisions of this Treaty:*

- *ensure coordination of the general economic policies of the Member States,*
- *have power to take decisions,*
- *confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the opinion of the European Parliament.*

- publishing them in electronic form in the Official Journal,
 - consolidating basic texts with their amending acts, and
 - determining the format of the Official Journal, implementing multilingualism and defining the tasks of OPOCE;
- (b) by defining **the concept of 'non-legislative documents'** as documents connected with procedures for implementing legislative acts (whichever institutions are involved) and documents connected with procedures for adopting non-binding acts; it should be possible to apply less stringent transparency rules to such documents, given their administrative nature;

Therefore the institutions:

- should make public the procedure to be followed for non-legislative documents and lay down clearly when and how interested parties may take part in the procedure concerned and when and how the public may have access to the documents;
 - should also clearly indicate the organisational units involved in administrative procedures, the way in which documents are stored, both temporarily and permanently, and how they can be accessed.
- c) by defining **the concept of 'regulatory documents'**¹ as documents connected with procedures for adopting acts which complete or amend non-essential elements of legislative acts (as defined in point (a)) regardless of whether such regulatory documents are adopted by the Council or delegated to the Commission; such documents should be accessible 'mutatis mutandis' under the same conditions as those applicable to legislative documents (e.g., in comitology procedures, access should be granted as soon as a draft measure is formally submitted to a committee); similarly, access should also be granted to the relevant complementary documents (e.g. the agendas, minutes and result of votes of the committee).

Recommendation 3 (on documents to be treated as confidential)

Taking into account best practice in the Member States, Regulation (EC) No 1049/2001 should also be amended in such a way as to clearly define the '... limits on grounds of public or private interest', as referred to in Article 255 EC, which could delay or prevent access to the institutions' documents (or relevant parts of them); the Regulation should therefore contain rules for:

¹ Article 2(b) of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ L 184. 17.7.1999. p. 23.) stipulates that: *'measures of general scope designed to apply essential provisions of basic instruments, including measures concerning the protection of the health or safety of humans, animals or plants, should be adopted by use of the regulatory procedure; where a basic instrument stipulates that certain non-essential provisions of the instrument may be adapted or updated by way of implementing procedures, such measures should be adopted by use of the regulatory procedure'*.

- (a) ensuring that, regardless of the field of EU action, the grounds on which basic policy decisions are taken and on which legislation is adopted are in the public domain; there is also a need for clarification of the distinction between, on the one hand, the need for confidentiality as regards, for instance, planned or on-going operations by security services and, on the other hand, the requirements of accountability and a posteriori control,
- (b) ensuring that documents are not classified as confidential as a matter of routine, simply because they refer to a issue which is or might be of concern from a security point of view, and
- (c) ensuring adequate control by the European Parliament (democratic parliamentary scrutiny).

The Regulation should also clearly provide that bilateral agreements with third countries or international organisations may not prohibit the Council or the Commission from sharing confidential information with the European Parliament (in particular, where the relevant documents are not accessible to national parliaments, since they are EU documents).

Recommendation 4 (on the relationship between the EU and Member States as regards sharing information/documents)

Taking into account the principle outlined in Article 296 EC according to which 'no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security', the Regulation should be amended in such a way as to:

- (a) limit the right of Member States to limit access to their contributions/amendments in legislative/regulatory procedures;
- (b) give full access to information submitted to the Commission when dealing with the implementation of EC or EU legislation until such time as any proceedings before a court have begun.

Recommendation 5 (on the practicalities of ensuring citizens' access to documents)

Taking into account the experience of the first four-year period of the Regulation's being in force, the Commission should amend the Regulation by making a coherent proposal for:

- (a) ensuring a single point of access in a clear and structured way to all preparatory documents dealing with a legislative or regulatory procedure (see Recommendation 2);
- (b) reorganising the institutions' registers by adding a common interface so that the citizen/user is able to find the same functionalities in the three registers;
- (c) defining common rules for archiving documents, avoiding duplication and ensuring the authenticity of the various versions;
- (d) presenting in a clear and comprehensible way the work-flow of the Institutions and, where relevant, the point of access to the documents.