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on the Annual Report on public access to documents (Rule 104(7) of the Rules of Procedure) for 2009-2010

Committee on Civil Liberties, Justice and Home Affairs

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After the Turco judgement and the Lisbon Treaty the legal perspective has changed...

1. Since the entry into force of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents¹ the European Parliament has been keen in assessing periodically² how the principle of transparency is implemented by the EU institutions. This holistic approach has become even more justified after the ECJ “Turco” ruling³ regarding transparency in the legislative procedure and especially after the entry into force of the Lisbon Treaty that gave a legally binding status to the EU Charter on Fundamental rights. Moreover, **the issue of the relationship between citizens and the EU administration is becoming a particularly prominent one after the Treaty of Lisbon** due to the considerable reinforcement of both political and administrative executive power of the EU in recent years⁴. This explain why, since Lisbon, the obligation to grant access to documents does not only bind the Parliament, Council and Commission but also new actors, such as the European Council, the ECJ, the ECB, the EIB, and a growing number of EU agencies and authorities⁵, as well as bodies, such as the European External Action Service.

2. **Transparency has not only become a general principle of the EU legal order but it is now also linked with the principles of civic participation and of good administration.** Therefore, it can be considered as a core element of "democratic principles". Article 11 TEU explicitly embraces a more participatory understanding of democracy, complementary to representative democracy (Article 10 TEU). The new provisions of the Treaties could and should be read in the light of a deeper democratic meaning, explaining why openness, transparency and participation are important and will shape the relationship between the EU administration and EU citizens, as demanded by the Treaties⁶. In that regard, there is no more reference in the Treaties to “*the preservation of the effectiveness of the decision making process*” (see Articles 255 and 207(3) of the former TEC) as a possible limit to transparency. At the same time the new provisions of Article 15 TFEU and of Article 42 of the Charter have to be taken into account. They refer to documents “*whatever their medium*”, a definition which importance can not be stressed enough, in particular, in view of the extensive storage of information in various data bases.

3. **Although the transparency principles outlined above have been debated and endorsed at the highest political level in the EU, their daily implementation continues to be**

¹ OJ L 145, 31.5.2001, p. 43. See further, European Commission, 'Green paper: public access to documents held by the institutions of the European Community, A Review' (COM(2007)0185 final, 18 May 2007); Commission staff working document, report on the outcome of the public consultation on the review of regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (SEC(2008) 29/2, 16 January 2008).

² See Rule 104(7) of the EP Rules of Procedure.

³ Joined Cases C-39/05P and C-52/05P, *Turco v Council of Ministers*, paragraph 45, judgment of 1 July 2008, ECR [2008] I-4723, reiterating the preamble of Regulation 1049/2001.

⁴ See further, Deirdre Curtin, *Executive power of the European Union: law, practices and the living constitution*, Oxford, Oxford University Press, 2009.

⁵ The first two agencies have been created in 1975. In 2000 their number has raised to 10 and in the last ten years it has grown to more than 30.

⁶ Not only must "every citizen" have "the right to participate in the democratic life of the Union" but also "decisions shall be taken as openly as possible and as closely as possible to the citizen" (Article 10(3) TEU). In addition certain obligations regarding openness, transparency and participation are placed on "the institutions" (Article 11(1) to (3) TEU). Arguably, the democratic principles of Articles 10 and 11 will need to be respected and developed in the future regulations to be adopted following Article 298 TFEU.

jeopardised, as confirmed, for example, by the resolution of the Parliament of 14 January 2009 on the implementation of Regulation 1049/2001¹. This same fact appears from the Ombudsman periodic reports (more and more pointing out the lack of transparency), as well as from existing internal practices and administrative instructions of EU institutions, or even from interinstitutional initiatives, whereby their result or even aim is to go back to the pre-Amsterdam and pre-1049/2001 Regulation period.

4. The main source of resistance against the new legal framework comes from many EU Member States, as they are concerned about possible unwanted effects as a consequence of access to national information/documents exchanged in the framework of the EU decision-making process. Although, according to Regulation (EC) No 1049/2001 and the Court of Justice (ECJ) jurisprudence² a national veto right does not exist anymore, as the EU process is autonomous and the exceptions allowed are only those listed in Article 4(1) to (3) of Regulation (EC) No 1049/2001³, regardless if the information concerned negotiations, transposition or implementation of EU legislation. Therefore, by developing for the "ordinary" policies the notion of "European Union Classified Information" (EUCI) which was shaped initially only for the domains of defence and security and covering both European Union Institutions' and Member States' classified information, Council and the Commission are blurring again the borders between the EU and Member States⁴. This situation has become even more evident by the **refusal of access to documents about international agreements** and the non-transparent way of negotiations leading to certain agreements, with possible far reaching consequences for the rights of the individual (for example, the ACTA negotiations).

¹ See the Cappato Report: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:046E:0080:0086:EN:PDF>.

² "It follows that Article 4(5) of Regulation No 1049/2001 cannot be interpreted as conferring on the Member State a general and unconditional right of veto, so that it could in a discretionary manner oppose the disclosure of documents originating from it and held by an institution, with the effect that access to such documents would cease to be governed by the provisions of that regulation and would depend only on the provisions of national law."

Case C-64/05-P *Sweden v. Commission*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0064:EN:NOT>

³ Article 4(1) to (3)

"Exceptions

1. *The institutions shall refuse access to a document where disclosure would undermine the protection of:*

(a) *the public interest as regards:*

- *public security, - defence and military matters, - international relations, - the financial, monetary or economic policy of the Community or a Member State;*

(b) *privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.*

2. *The institutions shall refuse access to a document where disclosure would undermine the protection of:*

- *commercial interests of a natural or legal person, including intellectual property, - court proceedings and legal advice, - the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.*

3. ***Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.***

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."

⁴ See separate working document 3.

Although a certain degree of confidentiality in certain negotiations is understandable, at least an indirect control for the citizen (through his/her democratically elected parliamentary representatives) has to be established and possible. Especially, as the European Parliament has to give after the Treaty of Lisbon its consent for a variety of international agreements (Article 218 TFEU). Furthermore, although Member States and the EU institutions are obliged to act in the spirit of sincere cooperation (Article 4(3) TUE), there are **several worrying Council and Commission practices in place** which *de facto* hide the real content of Member States' positions in the Council/Commission preparatory bodies such as: - the growing number of working documents which are not timely cited in the institution's register (for example, the Council Meeting Documents (MD or SD) which are diffused only afterwards); - the fact of systematically hiding the names of Member States in the outcome of proceedings (when available) that makes it impossible to understand what kind of majority/minority is taking shape in the Council/Commission committees.

5. One of the exceptions, listed in Regulation (EC) No 1049/2001, which continues to be invoked not only by the Council but also by the Commission to refuse public access to preparatory works, is founded on Article 4(3) the Regulation. It states that access can be denied if “*disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure*”. It is worth noting that this exception was inserted in Regulation (EC) No 1049/2001 to mirror the spirit of a specific former Treaty provision (Article 207(3) TEC) which required transparency of Council legislative preparatory works, “*while at the same time preserving the effectiveness of its decision-making process.*” This **tension between transparency and effectiveness** has been highlighted by the Court of Justice, as it declared in its “Turco” ruling that “*increased openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system*”. This reasoning has been endorsed by the Treaty after Lisbon, and, therefore, there is no more reference to the concept of protection of the decision-making process in the new Treaties, and the current „survival“ of this concept is based only on Article 4(3) of Regulation (EC) 1049/2001.

6. Quite paradoxically the **reluctance towards increased transparency after Lisbon is increasing also in institutions traditionally more open to these objectives**. Even the European Parliament is reluctant in granting transparency to legislative negotiations with the Council even if the Treaty demands that legislative debates should be public. Even the European Court of Justice in Luxembourg, which was seeking to open-up the inner institutional workings of the EU for decades, has recently come under fire for what is perceived to be an unnecessarily generous interpretation of the scope and meaning of several key exceptions to the right to access to documents.¹ This is even more the case when it comes to its own documents and administration. In addition there is an attempt by the Commission to “turn the clock back”, in particular in the on-going revision of the access to documents regulation².

¹ See further, Joni Helliskoski and Päivi Leino, 'Darkness at the break of noon: the case law on regulation No. 1049/2001 on access to documents'

² See further, Francesco Maini, Jean-Patrick Villeneuve and Martial Pasquier, "'Less is more'?", The Commission proposal on access to EU documents and the proper limits of transparency', *Revue Française d'Administration Publique*, forthcoming.