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WORKING DOCUMENT

on the Proposal for a Regulation of the European Parliament on the detailed provisions governing the exercise of the European Parliament's right of inquiry replacing the Decision of the European Parliament, the Council and the Commission of 19 April 1995 (95/167/EC, Euratom, ECSC)

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Introduction

The European Parliament's right to set up temporary committees of inquiry to investigate "alleged contraventions or maladministration in the implementation of Community law" was elevated to primary law by the Maastricht Treaty on European Union (Article 138(c)), entered into force on 1 November 1993. This article placed one specific limitation on committees of inquiry, namely that they would not be able to investigate facts which were *sub judice*.

The Treaty article also required Parliament to negotiate the ground rules for committees of inquiry with the Council and the Commission

An inter-institutional decision on the detailed provisions governing the exercise of the European Parliament's right of inquiry was negotiated and signed on 19 April 1995 (Decision 95/167/EC, Euratom, ECSC)¹, and that's still into force.

This agreement established the rules by which any committee of inquiry is bound to operate.

The European Parliament, at the request of one quarter of its Members may at any time set up committees of inquiry to investigate alleged breaches or poor application of Community law.

The provisions of the Interinstitutional Agreement include the following key points:

- A duty of confidentiality on the members of the Committee in respect of privileged information.
- Hearings to take place in public except in cases where confidentiality is requested by one quarter of its members, by the Community or national authorities concerned, where information under consideration is of a confidential nature or where requested by witnesses.
- A committee of inquiry may not investigate matters which are before a national or Community court of law.
- The committee of inquiry may call witnesses from an EU institution or the authorities of a Member State, which however have the right to nominate the official or servants to appear. These officials or servants shall speak on behalf of and as instructed by their governments or institutions.
- Other persons may be called by the Committee as appropriate in the performance of its duties.
- Information obtained in confidence shall not be made public, in particular if it contains material of a secret or confidential nature or names persons.
- All contacts with the public authorities of a Member State shall be made by way of that Member State's Permanent Representation to the EU.

¹ OJ L 113, of 19.5.1995

The powers of these committees are based on the provisions governing the exercise of the European Parliament's right of inquiry, as actually laid out in Rule 198 and Annex VIII of the Rules of Procedure.

Drawing on lessons learned from previous EP committees of inquiry¹, MEPs said that Parliament's currently limited investigatory powers, not in line with the political stature, needs and competences of the European Parliament should be strengthened to enable it to look into alleged contraventions or maladministration of Community law.

The Lisbon Treaty

The Treaty of Lisbon modified the institutional balance of the Union and strengthened the political stature of EP setting out expressly that Parliament exercises political control (Article 14 TEU).

The Treaty also changed the procedure for determining the secondary law governing the exercise of the right of inquiry. The Article 226 delivers to the EP the right of Initiative².

Since the procedure has changed, the EP (through the Report of David Martin³) does not simply made amendments to the old decision, but has proposed instead a new regulation.

Main points of the proposal

The starting point of the European Parliament proposal has been the belief that all conclusions of an inquiry should be based solely on elements which have evidential value.

Therefore, according to the regulation proposed, the EP enquiry committees could carry out any type of investigation, with detailed provisions for the most important ones, i.e.:

- to conduct on-the-spot investigations
- to request documents

¹ Since 1995, when the power of inquiry in its current form was introduced, Parliament has set up three committees of inquiry: TRANSIT to investigate VAT and customs duties fraud in the Community Transit System (1997), ESB1 on handling of mad cow disease (1997) and EQUI on financial debacle at the Equitable Life Assurance Society (2007). See: <http://www.europarl.europa.eu/parlArchives/comArch/staticDisplay.do?language=EN&id=157>

² "Article 226 TFEU (ex Article 193 TEC). 3In the course of its duties, the European Parliament may, at the request of a quarter of its component Members, set up a temporary Committee of Inquiry to investigate, without prejudice to the powers conferred by the Treaties on other institutions or bodies, alleged contraventions or maladministration in the implementation of Union law, except where the alleged facts are being examined before a court and while the case is still subject to legal proceedings.

The temporary Committee of Inquiry shall cease to exist on the submission of its report.

The detailed provisions governing the exercise of the right of inquiry shall be determined by the European Parliament, acting by means of regulations on its own initiative in accordance with a special legislative procedure, after obtaining the consent of the Council and the Commission."

³ A7-0352/2011

- to have access to any information which may facilitate their work
- to hear officials and other servants of the Union and Member States
- to summon witnesses and to request an expert's report
- entail appropriate penalties for the non-compliance with these obligations.

Adoption of the EP Proposal and Resolution

The Martin Report, as voted in Plenary on 23 May 2012, tried to reach some compromises, and the fact not to vote the Legislative Resolution wished to leave to the Trilogue negotiations at political and technical levels the solution of the main point of divergence.

In fact the main points of concerns from Council were on:

- Scope of the right of inquiry on Article 1 (relationship between the inquiries carried out by the committees of enquiry and by the Commission);
- *Sub iudice* exception on Article 5 (2) (discretion of the EP to investigate even if legal proceedings on the same facts are initiated, appear not compatible with the "doctrine of the separation of powers")
- Results of inquiries on Article 10 (3) (national judicial authorities forced to deal with matter investigated by a committee of inquiry)
- Investigative means on Article 11 (1) (as open-ended list) and nature of the investigative means (quasi-judicial prerogatives)
- Access to documents on Article 14 ((exceptions needed stemming from EU and national law as regards of secrecy)
- Summoning of EU and Member State Officials on Art. 17 (2) (to be put in line with EU Staff) and Art. 17 (3) (testimony by Member States' officials subject to exceptions and limits laid down by national law)
- Sanctions on Art. 20 (obligation to Member States to provide for criminal sanctions, goes beyond the remit of Art. 226 TFEU)

During the discussion in Plenary on 23 of May 2012 of the Martin Report, the competent Commissioner Maroš Šefčovič, Vice-President of the Commission, clarified the EC position, which considered the changes made by the Lisbon Treaty in Article 226 concerns only the procedure and the type of act, not the mandate of a committee of inquiry, which is a fundamentally political rather than legal tool, at Parliament's disposal for the exercise of political control. For this EC considered that:

- the investigative tools proposed in the Parliament draft, which still appear rather excessive;
- and the article 17 of the proposal, on the hearing of officials and other servants of the EU and of Member States, where the different treatment of national and EU officials cannot be objectively justified.

Having starting negotiations, but considering the impossibility to have an agreement, at the meeting of 6 November 2013, Parliament's negotiating team observed that, despite the undeniable progress which had been made, particularly with regard to confidentiality and the treatment of classified information it was unlikely that agreement could be reached on the proposal before the end of the parliamentary term.

To prevent the proposal from lapsing, it was suggested that Parliament should adopt the legislative resolution before the end of the parliamentary term. The negotiators also stressed the importance of safeguarding the progress made and of resuming the negotiations with the new Parliament which emerged from the 2014 elections.

This approach was endorsed first by the AFCO committee, and then by the Plenary which adopted on 16 April 2014 the legislative resolution, with 532 in favour, 81 against and 7 abstentions. As consequence, the Council and the Commission have been called "to resume negotiations with the newly elected Parliament, acknowledging the progress made in past negotiations at political level and during the informal contacts at technical level, notably concerning the issue of confidentiality and the handling of classified and other information."

Commission and Council Position

Some days before the vote, by letter 4th April 2014¹ to the EP Secretary General, both Secretary-Generals of the Council (Uwe Corsepius) and of the Commission (Catherine Day) signalled "that there are legal and institutional concerns", that could make it very difficult to find an agreement between the institutions on this file. And in a way to a constructive Institutional cooperation, they formally sent the positive results of the legal experts' work on:

- Incompatibilities, Art. 5,
- Confidentiality, Art. 8,
- Conduct of Investigations, Art 12, and
- Request for documents, Art. 14.

Proposals for solutions to the deadlock

It is up to the European Parliament to draft and adopt a regulation on the procedures for exercising the right of inquiry, as expressly mandated in Article 226 of the Lisbon Treaty.

When Parliament approved the corresponding proposal for a regulation on 16 April 2014, it acted within the limits of the powers conferred upon it for such purposes and in accordance with the procedures, conditions and objectives established by the Treaty.

The proposal was approved by a very large majority and it is, of course, completely consistent with the opinion given at the time by Parliament's Legal Service.

It is an inherent characteristic of a legislative chamber and a fundamental condition of the

separation of powers in a democracy worthy of such a name that a Parliament should be able to create committees of inquiry with real powers to call witnesses and obtain documents.

For this reason, the fact that the Commission and the Council have not yet accepted this proposal, which broadens the powers of the European Parliament and grants it this fundamental capacity to carry out its duties, requires an up-to-date explanation and, if necessary, an urgent solution.

However, the 'legal and institutional concerns' that the Secretaries-General of the Council and the Commission raised in their April 2014 letter, should not in themselves constitute an insurmountable objection. In the rapporteur's opinion, there are alternative solutions and more flexible wordings, which would enable the deadlock on the regulation to be resolved and would equip the Parliament with a regulation suitable for this crucial aspect of its duties.

For example, with regard to appearances before committees or problems with the calling of witnesses to testify, we can and should explore solutions with reference to national laws in force in Member States. The same could apply for access to documents, the use and management of which could be guaranteed through the European Parliament's institutional agreements for such cases.

So, with a view to a consensus and in a spirit of dialogue, the rapporteur suggests that we be open to flexibility in our positions, making clear Parliament's new political role as co-legislator, which entails the power of democratic control over any issue linked to the incorrect application of the Treaties and, consequently, a range of investigatory powers worthy of any legislative chamber.

The credibility of the whole European integration process is also determined by the capacity of the institution directly elected by the citizens of Europe to give clear, convincing answers based on serious research to questions and doubts which may arise about how the Treaties have been applied and the actions taken within the institutions.

In essence, we now need to resume the Trilogue negotiations as soon as possible, first at political negotiations first and then at technical level. Thus, either the Council and the Commission should formally respond to the Parliament's proposal, clearly setting out their alternative proposals (given that the adoption procedure for this act, laid down in Article 226, provides for their consent), or, the rapporteur would suggest that the AFCO committee itself should invite the Latvian Presidency and the Commission to meet in Trilogue to start tackling the political issues that have prevented these rules – which have always been a cornerstone of parliamentarianism – from being rapidly adopted.