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<Titre>on the proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents</Titre>

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Part 2: Explanatory Statement

<Commission>{LIBE} Committee on Citizens' Freedoms and Rights, Justice and Home Affairs</Commission>

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(* enhanced Hughes Procedure)

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(** Hughes Procedure)

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission)

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EXPLANATORY STATEMENT <EntPE>

Article 255 of the EC Treaty provides that:

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.

The Parliament has received the proposed Commission regulation implementing Article 255 which in fact only confirms the existing situation as defined in the Council/Commission code of conduct, the jurisprudence of the Court of Justice and the decisions of the institutions before the entry into force of the Amsterdam Treaty.

The Commission proposal takes a very narrow view of the right of access to documents. This has been broadly criticised both within and outside the Parliament as not providing any improvement from the present situation, and even being a step backwards for citizens' access. It is clear that Article 255 of the Treaty permits a broader interpretation of citizens' access to documents of the institutions.

It is clear that a broader interpretation of Article 255 is necessary bearing in mind:

- the five years experience of the functioning of the code of conduct (which shows that access to documents is more of a reality for lobbyists in Brussels than for European citizens) and,
- the best practices existing in Member States and/or in other countries which have spent many years considering this issue, like the United States (such as the Freedom of Information Act). A comparative analysis of the national legislation and, where possible, the real functioning of the Member States' legislation has been taken into account.

In this framework, in the amended proposal drafted by the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, with the close collaboration of the Committee on Constitutional Affairs and other parliamentary committees (Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy, Committee on Legal Affairs and the Internal Market, Committee on Petitions, Committee on Budgetary Control and Committee on Culture, Youth, Education, the Media and Sport), the Parliament has sought to improve the original proposal for the implementation of Article 255 of the EC Treaty by introducing a number of principles which are set out below:

1) The right of access to documents has to be seen as an effective means to ensure transparency and democratic accountability as foreseen by Articles 2 and 6 of the EU Treaty and Articles 41 and 42 of the EU Charter of Fundamental Rights.

The proposed regulation on public access to documents must fulfil two fundamental conditions :

- the principle of transparency set out in Article 2 of the EU Treaty which states that decisions must be taken as openly as possible and as close as possible to the citizens, and;
- the principle of democracy on which, according to Article 6 of the same Treaty, the Union is founded.

Access to documents and information regarding the activities of the institutions enables citizens to hold the EU governing bodies accountable and stimulates greater efficiency and reform within the institutions. Therefore, the right of the citizen cannot be reduced to the acquisition of "a piece of paper" (a document) - it is a right to the information contained within that document. As occurs in many Member states and is testified by thirty years of experience in the US access to documents policy, **the right to access cannot be disassociated from the right to information on the institutions' activities.**¹

This means that a primary duty of the EU institutions is to present in a clear and neutral manner their activities, their working procedures, the internal responsibility and the procedures that are to be followed in order to make decisions. Aspects of a more active approach include a requirement that the institutions publish their internal procedures (already the case for the EP and the Council) and user-friendly information about their structure.

Obviously, many other initiatives have already been taken by the Council and the Commission, in part, on the basis of demands from the European Council. These have developed either in the form of interinstitutional agreements or on the basis of internal initiatives and have been aimed at improving the clarity of the text, e.g. the interinstitutional agreement on the quality of legislation (drafting, consolidation, codification). But these initiatives have not been developed on a specific legal basis in the Treaty.

The link between the right to be informed and the right to access to documents has already been stressed by the Parliament in its LÖÖW s report (12 January 1999). The absence of such a link is a fundamental flaw in the Commission proposal and therefore needs to be tightened. **A right to request information is not enough, the requirement should be to supply information voluntarily.**

The Commission proposal *only* refers to access to documents based on a specific request from an individual. Article 255 is wider and refers generally to a right of access to documents of

¹ Currently, the European institutions spend more than 100 million ecu per year on this activity, but it actually has no specific legal base in the Treaties. The European Institutions information policy and also the legal base for the Official Journal are based on art. 308 (former 235 TCE) which supports activities which have no other specific legal base in the Treaty.

the institutions. Therefore, in the amended proposal, access to documents must be given as follows:

- a) Documents which must be published in the Official Journal. This includes all **legislative proposals**, common positions and final decisions. This is generally current practice but it is not always the case with second and third pillar documents. Furthermore this should be based on an obligation and not just on the goodwill of the institutions. (Article 254 of the Treaty imposes an obligation in relation to certain documents but this provision is no longer sufficient);
- b) Documents which will be made available without a request, **via a register in the institution**. e.g. Parliament reports, Commission white papers and green papers, annual reports **but also preparatory documents of internal bodies in the institutions (as they are approved by the relevant body)** are to be made available on the Internet;
- c) Documents which are not directly accessible because they are totally or partially covered by an exception but can be disclosed on a specific request.

This right to information covers all Union activities regardless of which pillar it falls under. This is indicated in Articles 28(1) and 41(1) TEU, which expressly provide that the right of access also applies to documents relating to the common foreign and security policy and police and judicial cooperation in criminal matters¹.

The right of access is a fundamental right of all those affected by the activities of the EU institutions and should not therefore be restricted only to those enjoying citizenship of the Union or those who are legally resident. Consistent with the current rules, the institutions should have a discretion to treat those who are not legally resident in the same way as those that are resident. In practice, this constitutes a very small percentage of total requests. (As non-residents are not included in Article 255, to grant non-residents a right of access to documents may require an additional legal base and this approach has not been followed).

For the right to be effective it must be easily enforceable within the institutions and the Member States and can be effectively relied upon in the courts.

2) All the institutions and bodies covered by Article 255 should be expressly stated in the Regulation and should include not only committees and working groups but all agencies created by the institutions

Article 255 is binding on the Parliament, the Council and the Commission. However, it will be constitutionally incoherent if agencies and bodies created by or working for these institutions are not similarly bound and can therefore escape the transparency obligations. This means that not only should the committees and working groups set up by the institutions

¹ As explained by the Commission, in accordance with the case-law of the Court of Justice, the Regulation must also apply to documents relating to activities under the ECSC and Euratom Treaties (Case 328/85 Deutsche Babcock, [1987] ECR 5119 (Judgment given on 15.12.1987).

be covered, but also the more permanent and independent bodies such as the European Environment Agency, the European Agency for the Evaluation of Medicinal Products and the Office of Harmonisation in the Internal Market (Trade Marks and Designs). Therefore, **access to documents of the institutions must be defined to include access to documents of agencies and bodies created by and responsible to the Parliament, Council and Commission.** This should be ensured from the date of entry into force of the regulation. These agencies should include Europol, for which the Council is responsible, but for Europol a transitional period may be needed.

The institutions, e.g. the European Central Bank, which are not covered by Article 255 should be reminded that, as a matter of good administration (Article 41 of the EU Charter of Fundamental Rights), they could follow the principles in this Regulation

3) In principle, all documents should be accessible and exceptions to the right should be limited as far as possible. The harm test should be applied on a case by case basis

The principle on which the amended proposal is based is that all documents of the institutions should be public unless there is good reason why they should not be based on a harm test and on a limited number of exceptions. Documents could be classified by the author at the time the document is produced or received, i.e. the author would have to consider whether the document can be made available to the public and if not identify the reason based on one of the exceptions. Classification should be made by reference to the content and should generally be limited in time.

The majority of documents should be public documents and so would require no classification. In the case of some documents, like legislative proceedings and measures adopted according to comitology procedures, the presumption must be that these will always be public and will be made directly available to the public.

The main exceptions that are specified in the amended proposal are:

- the respect for privacy (art. 286 EC Treaty)
- public security
- monetary stability
- defence and military matters
- international relations
- commercial secrecy

However, documents that Member States or third parties give to the institutions and its bodies are public unless a request for confidential status is justified under this regulation. When these exceptions are invoked by a Member State or third party they must be carefully scrutinised, if necessary, with an arbitration procedure between the third party and institution concerned (for example, an appeal to the European Court of Justice or the Ombudsman or to the data control authorities in the institutions).

It is clear that documents from Member States on security issues and organisations such as NATO cannot be treated in the same way as requests from companies and non-governmental organisations so guidelines for the institutions should be agreed by the institutions. Over the summer, the Council amended its decision on access to documents

to exclude confidential documents concerning security and defence of the Union or one or more of its Member States and the management of crises from the scope of its existing Decision on public access to documents. These documents cannot be excluded as a category from the scope of the Regulation and therefore the Regulation will repeal this Council decision.

The existing rules on confidentiality adopted according to the Schengen Convention should be repealed as they now form part of the Community acquis and will be replaced by this Regulation. The Council should adapt the existing rules on confidentiality adopted according to Europol Convention within a reasonable deadline after the adoption of the proposed regulation implementing Article 255¹.

In any event, access to all documents excluded from public access (whether they are adopted in the case of the I, II or III pillar) must be granted to the Parliament in accordance with a formula to be agreed in the framework of an interinstitutional agreement. The democratic principle mentioned above is the justification for this requirement. In case of adoption or amendments of confidential acts, the Parliament will participate in such a way that confidentiality would be preserved.

The regulation must define the time limit for the disclosure of confidential documents, i.e. the date beyond which a document is no longer classified as confidential. It is suggested that the thirty year period in the current regulation on the Community archives is maintained and that the existing regulation is repealed.

The Commission proposal sets out a blanket exemption for all the specific rules, without identifying those rules. The minimum should be that the specific rules should be specified in the Regulation and that they should be reviewed for consistency with the Regulation. A non-exhaustive and purely indicative Commission list indicates that these rules cover access to documents for the investigation of fraud, the correct application of Community law, (e.g. in relation to customs), investigations into state aid and competition matters, the processing of individual data, environmental information and the historical archives. **In any event, to prevent a violation of the principles defined in Article 255, in the case of conflict, the Regulation must take precedence over the specific rules.**

4) The term "document" should be interpreted widely and must include the internal documents of the institutions although informal documents (e.g. personal opinions and brain-storming) can be excluded

Consistent with the aim of Article 255 and its position in the Treaties, the term document as indicated in the amended proposal means, concurrently:

- a) its physical form (written, electronic form, sound, visual, audiovisual) and the elements which distinguish it (provisional and final versions). E-mails should be regarded as "documents" when their content is relevant for the institutional proceeding.
- b) the information it contains (and, if necessary, the author should distinguish

¹ This regulation must foresee the adaptation of the rules concerning statistics covered by secrecy - Europol regulation on the protection of secret information 3 November 1998. The actual decision document classification has to be founded on the General Secretariat of the Council decision on 30 January 1995 6/95.

- between information that can be accessed and that which cannot).
- c) regardless of whether it is of a legislative or administrative nature at least until the Treaty itself creates such a distinction.
 - d) regardless of whether it is a preparatory or a definitive document (unless there is a justification arising from its context and background, e.g. the stage in the procedure, but as the internal rules should be published, it may be clear at which stage documents become public

In the amended proposal, there is a distinction between informal documents, such as personal correspondence which can be excluded from the scope of the Regulation and internal documents which must not be excluded. Under the current system access can and often is granted to internal documents. The Commission proposal seeks to take internal documents outside the scope of the Regulation and this reduction of access for citizens is not acceptable to the Parliament.

Responsibility for the document (and to provide access to it) falls on the institution which has the document in its possession (even if it is not the author of the document). The institutions therefore need to agree procedures for example on resolving conflicts between the institutions on the classification of documents. (Every document must have a recognisable author (person or administrative unit). The author is responsible for its accuracy.)

5) The modes of access should be made as easily and widely available as possible and where ever possible (particularly in the case of legislative documents) documents should be made directly available in electronic form

Access to documents must be non-discriminatory (in order to avoid preferential treatment) and free of charge or at a rate which is reasonable and does not exceed the actual cost. Where documents are already available in alternative formats, e.g. in large print or braille, they should be made available in that format when they are requested.

As in the Commission proposal, a register of documents should be established. The register should contain those documents which are to be directly accessible through the register, mostly the documents relating to the legislative procedures and including all proposals, opinions, working documents, agendas, documents for discussion at formal meetings, minutes, declarations and positions of Member States. It should also include documents which are classified as non-public with the exception that applies so that the public know of the documents and can challenge their classification as non-public. Over a transitional period, the register could become more comprehensive.

The system should not be centralised more than is necessary and therefore any officials should be able to disclose public documents. Each institution should establish one or more Information Officers, who would have sufficient authority to take the final decision on confirmatory applications. At the moment, this is mostly done by the Secretary-Generals.

National, regional and local authorities in the Member States should cooperate in the provision of information for the European institutions. For instance, it could be foreseen that electronic versions of the Official Journal and of the internal registry of each institution could be accessible in reading rooms everywhere in the Union. Local

authorities could be asked to allow this facility in view of allowing European institutions to reach the transparency objective (see Art. 10 of the EC Treaty).

Furthermore, access to documents must be in a user-friendly way by electronic means (a common home page could be created as is the case for the US agencies) or, also via traditional means (e.g. in an interinstitutional framework as is the case of the Office of Official Publications of the European Communities). Such measures could be agreed by the institutions in the framework of an interinstitutional agreement.

6) Rights under national and international law should not be reduced

Where a Member State is asked for a document of one of the institutions, then the Member State should take the final decision in accordance with its own national rules (or international law), which should not be changed by the regulation. However, in accordance with the spirit of loyal cooperation, the amended proposal suggests that the Member States should inform the institutions of requests for documents of the institutions and fully take into account their views. This may be important where the proposed disclosure may prejudice the development of Community policy.

7) Future procedure

The Parliament is also conscious of the deadline in the Treaty of 1 May 2001, which is rapidly approaching, and that the Parliament, in this first reading, has substantially changed the proposal of the Commission. Therefore, much work must be done in a relatively short period to complete this Regulation in the course of negotiations with the Council, and with the assistance of the Commission, to meet the deadline imposed by the Treaty. Nonetheless, it is incumbent upon the European institutions to deliver a real right of access for citizens.