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Committee on Civil Liberties, Justice and Home Affairs

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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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United in diversity

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... Therefore, the practice has not been updated accordingly.

7. By only taking into account the institutions annual reports, everything seems fine. The perspective is different when one looks to the work of the European Ombudsman which moved the **understanding of transparency in the EU context away from an individual and passive focus** (the legal right of every citizen to have access to certain documents) **to a much broader and pro-active duty** of EU administration to ensure that information about its policies and actions are made genuinely accessible. Maladministration has been defined as occurring when a public body fails to act in accordance with a rule or principle, which is binding upon it¹. In order to bring a complaint to the Ombudsman the complainant does not need to show a legal interest or be personally affected by the maladministration. This possibility of *actio popularis* complaints is an important procedural route enabling citizens to have a low threshold interface with EU administration and to initiate a process of accountability. The Ombudsman according to the Implementing Rules "*as far as possible cooperates with the institution concerned in seeking a friendly solution to eliminate the misadministration and to satisfy the complainant*"².

8. The Ombudsman cannot force an institution to comply. Nor may he refer questions to the courts in Luxembourg on a point of law (on behalf of the complainant)³. However, the Ombudsman has had a particularly important role in ensuring transparency in the EU. **Currently, about one third of his inquiries deal with lack of transparency, including refusal of information**⁴. In the early years the Ombudsman adopted a rather legal approach in his work and the emphasis was more on the structural aspects of the manner in which certain institutions, mainly the Council and the Commission, made information available or not⁵. The Ombudsman in his role as arbiter against maladministration has an interest in transparency, as good governance and the Code of Good Administrative Behaviour help to promote transparency through the formulation of policies in the form of rules and guidelines⁶. The Ombudsman's prerogatives allow him to access administrative files and to make files public during the proceedings. Therefore, they are perhaps the most potent machinery for opening closed administrative circles and going beyond the old bureaucratic logic of limited availability of information. They can also provide an alternative route for members of the public to access documents, taking into account the costs involved in the more formal 'legal'

¹ European Ombudsman Annual Report 1995.

² Article 6(1) of the Implementing Provisions (available at <http://www.ombudsman.europa.eu/en/resources/provisions.faces>).

³ The very long running *Bavarian Lager* saga is a good example of how even a very strong recommendation and subsequent special report to the European Parliament and a clear finding of maladministration had no effect on the behaviour of the institution (Commission) accused of maladministration. Indeed it took two further court cases over a span of six years for a clear ruling to emerge at the highest judicial level as to the correct way to "interpret" a complex relationship between access to documents on the one hand and data protection and the right to privacy on the other. Only an affluent, litigious and persistent complainant will be able to afford the very long march through the courts (concerning the minutes of a meeting that took place 14 years earlier!).

⁴ European Parliament resolution of 25 November 2010 on the annual report on the European Ombudsman's activities in 2009 (P7_TA(2010)0435) (available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0435+0+DOC+XML+V0//EN&language=EN>).

⁵ For an overview of the activities of the Ombudsman in this respect see, Ian Harden, 'The European Ombudsman's efforts to increase openness in the Union', in Veerie Deckmyn (ed.), *Increasing transparency in the European Union*, Maastricht, European Institute of Public Administration, 2002, p. 123-145, at p. 130 et seq.

⁶ European Ombudsman, *European Code of Good Administrative Behaviour*, available in the latest version at <http://www.ombudsman.europa.eu/en/home.faces>.

route. Thus the Ombudsman acts as an important catalyst for openness and transparency¹.

9. **The Ombudsman's review of instances of maladministration provides remedies to breaches of participation beyond the purely legalistic scope.** For instance, the Ombudsman has confirmed that it is within his powers to review compliance with the minimum standards on consultation adopted by the Commission, and has indicated his willingness to do so in a pro-active way². Administrative practices that escape judicial review can therefore be reviewed. Unlike the Courts, the Ombudsman may therefore contribute to countering some of the remaining flaws in the Commission's practice of consultation. However, his contribution in this respect is necessarily limited by the scope of application of the minimum standards on consultation³.

10. When faced with external criticism on their unwillingness to increase transparency of their activities, the institutions list all the initiatives taken to make their work more accessible. Some of these measures are extremely helpful, such as the webstreaming of ministerial legislative Council meetings or of the parliamentary committee meetings. But even these positive initiatives appear sometimes as confusing because of the **lack of coordination and interoperability**, even if the institutions are deemed to work together. The most surprising fact is the lack of a common information model for the institutions' registers or for their websites, as well as for their informatics applications dealing with data linked with interinstitutional workflow. According to a recent external contribution for an EP working group, most EU citizens use on the Internet general search engines, such as Google, and they either get a 'hit' in terms of the document or information they are looking for, or they do not. These 'passive' users, as they might be called, will however benefit greatly from the front-running 'active' by a minority of often highly critical users who monitor the various registers and at times rather systematically request the institutions to put on the internet documents registered but not available. Without taking the role of this active minority into account, it is sometimes **wrongly argued that the legal regulations on access to documents are not significant due to the comparatively modest use by the public** of their legal right on access to documents, and taking into account the limited the range of 'users' (mostly students and researchers (40%), and lawyers (8.8%))⁴.

11. Following the approach of the "Freedom Information Act", it is increasingly considered an obligation on the part of all institutions, as well as bodies and authorities within the EU framework, to make available via internet extensive information about their tasks, organization structure, activities, meeting agendas, as well as information on the most important documents under discussion. The granularity of this information varies from one institution to another, and often even inside the same institution. However, with the development of registers of documents in recent years, in particular that of the Council and of the Commission, more documents are being placed on the internet at an earlier stage of the decision-making process, including documents that are not necessarily published somewhere else. In recent years the Commission in particular has set up several different specific

¹ See too, Carol Harlow, 'Transparency in the European Union: weighing the public and private interest', in Jan Wouters, Luc Verhey and Phiiipp Kiiiver (eds.), *European constitutionalism beyond Lisbon*, Antwerp, Intersentia, 2009, pp. 209-238.

² See Decision of the Ombudsman on complaint 948/2004/OV against the Commission (4.5.2005), paragraphs 1.1 to 1.4, 3.8, and 3.18, as well as Decision of the Ombudsman on complaint 3617/2006/JF against the Commission (3.7.2008).

³ On these limits, see Joana Mendes, *Participation in EU rulemaking*, cit. Chapter 3, Sub-section 3.3.3.

⁴ See for example, Lorenzo Cotino, 'Theory and Reality of Public Access to EU Information'.

document registers. They include a very detailed 'comitology' register¹ and other specific web sites by the various Directorate Generals, as well as a specific register on expert groups. Taking into account these positive improvements, it is nevertheless frustrating that ten years after the entry into force of Regulation (EC) No 1049/2001 and hundred thousands of Euros spent by the EU **institutions we are still lacking a common approach and even common “metadata” accompanying the same kind of documents.**

12. All of these specific registers and websites relate more generally to the tasks of the administration in a general sense and may include some documents of a more internal nature (for example minutes of committee meetings, meeting documents and minutes of meetings, as well as draft decisions). They could be particularly relevant for EU citizens and even for national parliaments **to understand decision-making processes supporting EU enactment of implementing and administrative rulemaking.** An interesting example is the 'Register on Expert Groups'², which lists formal and informal advisory bodies established either by Commission decisions or created informally by the Commission services, and provides key information on those groups. Also the Commission's register of interest representatives is a voluntary register intended to contribute to the transparency of the administrative activity in the ascendant phase of the legislative procedure³. At the same time the Commission and the Parliament are working towards establishing a common register of interest representatives in the near future⁴.

13. In last years the increased prerogatives and pivotal role of the European Parliament in legislative work has become evident to other institutions and the external world. Such an increase in the political role (including new sensitive prerogatives in the field of criminal law – the core of national sovereignty where the most basic human rights are at stake) has to be accompanied by proper procedures and practices guaranteeing proper information sharing, overview and transparency. In that regard the main improvement required within the European Parliament when looking at a specific legislative procedure, is still the need of a **common virtual space** where all the actors which have a right to intervene could be involved and interact in a transparent way whilst simultaneously preserving their own specificities and autonomy. A proper “virtual working space” could include the following data: 1) the main and the opinion committees rapporteurs and shadow rapporteurs (something that, for example, the public accessible “OEIL”⁵ partly provides), 2) the desk officers of the secretariat of the committees concerned, 3) the advisors of the political groups, - the texts and communications linked to the procedure from the different institutions involved, 4) an event management tool which defines and updates dates of the activities associated with the legislative work (committee meeting, working groups, debates, votes, etc.), 5) the internal messaging shared in the “virtual community”, 6) the positions taken by the “external world” (national parliaments,

¹ See <http://ec.europa.eu/transparency/regcomitology/index.cfm>.

² See <http://ec.europa.eu/transparency/regexpert/search.cfm>.

³ See Commission Register of Interest Representatives,

<https://webgate.ec.europa.eu/transparency/regrin/welcome.do?locale=en#en>. See the critical initial report by ALTER-EU (The Alliance for Lobbying Transparency and Ethics Regulation), Commission Lobby Register Fails Transparency Test, <http://www.alter-eu.org/en/system/files/publications/Commission+Register+Fails+Transparency+Test.pdf>.

⁴ See press release of end of October 2010,

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/544&format=HTML&aged=0&language=EN&guiL>.

⁵ In that regard the public accessible “OEIL” (www.europarl.europa.eu/oeil) presents a rudimentary form but would require further improvements.

civil society, lobbyists) 7) research available (from the impact assessment) and from other relevant public and unofficial sources. A subset of this working information could and should be shared with the other institutions, as well as, last but not least, diffused to the external world (citizens) via appropriate means (for instance an updated and more recent version of “OEIL”).

14. Even if the main objective of this report is not to propose amendments to EU legislation, its **findings could be helpful for the legislative work currently underway** in the framework of the revision of Regulation (EC) No 1049/2001 (see Cashman Report (2008/0090(COD))¹. A reflection of the current situation could be used to verify the need for changes and to identify areas where an intervention of the legislature could be necessary (due to legal lacunae, unclear definitions, too broad discretion, recent court judgments, etc.).

¹ See: <http://www.europarl.europa.eu/oeil/file.jsp?id=5632032>.