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WORKING DOCUMENT

on the revision of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents

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Rapporteur: Michael Cashman

1. On 22 February 2006 the European Parliament addressed, by an overwhelming majority to the Commission under art. 192 of the EC Treaty, five recommendations which should have shaped the revision of Regulation 1049/2001 (from now on "the new proposal").
However, these recommendations have been only partially followed by the Commission as apparent from the June 2nd LIBE Hearing ([1]), but moreover during the Plenary debate on October 8th 2008 dealing with the consequences of the recent Court rulings on Transparency ([2]).

2. A vast majority of Irish citizens recently declared that they rejected the referendum on the Treaty of Lisbon due to lack of information. In light of this, it would be absurd for the EU institutions to continue a short-sighted policy. According to your Rapporteur, the Institutions must raise their ambitions and establish a programme which can show the electorate that it is taking them seriously and that the time of bureaucratic and diplomatic negotiations taking precedence over openness and transparency when adopting legislation for half a billion citizens, has come to an end.
If the Council and Commission accept this challenge it would be possible to conclude the revision of Regulation 1049/01 by, at the latest, the beginning of the new legislature (Letter President Deprez's to the French Presidency of 13 October 2008).
The possible objectives of future work could be the following:

... Strengthen the democratic principle and the institutions accountability...

3. In 2006 the European Parliament requested that the Commission improve the clarity of the citations and recitals in regulation 1049/2001 in order to make clear that Article 255 of TEC is the legal basis for implementing the principles of openness and proximity and the pivotal legal basis for transparency and confidentiality in the European Union decision making process.
The same perspective has recently been endorsed by the Court of Justice in its landmark ruling on the so-called "Turco" case ([3]). According to the judgement, the principle of transparency strengthens democratic accountability and the legitimacy of EU institutions. Furthermore, it is perfectly compatible with the "…effectiveness of the Institutions decision-making process" and could even override, in certain circumstances, some of the exceptions outlined in art. 4 of Regulation 1049/01.

4. Inspired by this Court judgement, the European Parliament considers that by implementing article 255 of the EC Treaty, the revised Regulation 1049/01 should also take into account the related provisions in articles:

- 202 of the TEC([4]) which makes reference notably to legislative delegated powers;

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[1] See : http://www.europarl.europa.eu/document/activities/cont/200807/20080702ATT33265/20080702ATT33265EN.pdf
[2] See : http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20081008&secondRef=ITEM-020&language=EN
[3] Judgment of the Court (Grand Chamber) of 1 July 2008 in joined cases C-39/05 P and C-52/05 P
[4] Article 202 TEC: *'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*

- 207 paragraph 3([1]) TEC which stresses the need for enhanced transparency for the legislative procedures
- 287 TEC which outlines the obligation for "The members of the institutions of the Community, the members of committees, and the officials and other servants of the Community.." to preserve "professional secrecy"
- 296 (1.a) TEC ([2]) 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".

Unfortunately this "constitutional" dimension is currently lacking as the European Commission only clarifies article 1 of the new proposal by adding in the purpose of the Regulation with the reference to *"...grant the public the widest possible access to such documents"*[3].

...Improve transparency consistently with the different nature of legislative or non legislative activity...

5. Consistent with the first objective, the European Parliament asked for a definition of legislative, regulatory and non legislative documents to be inserted into regulation 1049/2001, as each one of these types of documents require, in the member states tradition, different forms of transparency.

6. First of all it has to be decided whether the current definition of legislative act (which should be "binding in and for the Member States") is too wide. This definition, in article 12 of Regulation 1049/01, has been copied from the Council's internal rules. However, since then it has been reinterpreted by the Council itself which, since 2006, has taken the view that Ministerial debates should be publicly retransmitted when they relate to co-decision procedures. By doing so, the Council has partially taken into account the European Courts jurisprudence and the negotiations in the Draft Constitutional Treaty according to which, in a democratic system, legislation should be adopted by an elected assembly.
This second interpretation, if taken as such in the current state of the Treaty, would be too narrow and exclude from transparency more than 50% of the acts that the Council adopt under a Treaty provision.

7. A possible reasonable compromise between these two interpretations could be to consider *legislative documents* to be referring to acts of secondary law with a direct legal basis in the Treaties, notably when the European Parliament is associated in the procedure, not only in co-decision, but also in consultation, or even information. By adopting this interpretation more

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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.'

[1] Art. 207(3) TEC: *' 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.'*

[2] Art. 296(1). *The provisions of this Treaty shall not preclude the application of the following rules:* (a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security

[3] Art. 1 of COM(2008)0229

than 90% of the current legislative acts will be covered, not only in the so called 'first' pillar, but also in the 'third'.

8. According to your Rapporteur, the revised Regulation 1049/01 should also be the legal basis for all initiatives already taken on a voluntary basis by the institutions in the so called "better law making strategy", as the different standards between the institutions when they announce, table and negotiate proposals of the same legislative nature, will be highly questionable.
For instance, during the pre-legislative phase, the impact evaluation and compliance with the subsidiary and proportionality principles should be applicable for a new legislative proposal, regardless of whether the proposal is submitted by the Commission or by Member States as in the third pillar.
By taking stock of the inter-institutional debates launched since November 1992, the revision of Regulation 1049/01 is the right opportunity to overcome the current differences when legislative transparency is at stake by creating a clear reference for the participation of civil society. The experience of the US federal Register, where all new federal proposal's should be announced and all impact assessment's published, could be taken as potential model.

9. When a proposal has been tabled and the procedure is formally launched, all the related documents tabled or received by the institutions should be registered. Additionally, visibility of the number of the procedure to which they are related should also be ensured. Such documents would include the records of European Parliament and Council debates, documents related to the meetings of the institutions' working groups, contributions of the legal services and any contribution from a third party, third country or lobbyist.
In a European Union accused of being a diplomatic/bureaucratic machine, the main aim should be to ensure an ordinary citizen's ability to follow, in a timely manner, a legislative procedure from the beginning to the end (no matter if the texts are debated by the working groups of the Council or by the European Parliament committees). The end stage should be considered to be the publication of the final act in the Official Journal (which should find its legal basis in the revised Regulation 1049/01).

10. The same, highest possible standards of legislative transparency should be granted to the procedures for adopting acts which complete or amend non-essential elements of legislative acts either adopted by the Commission or by the Council: their access should be granted as soon as the draft measure is tabled (or submitted to the Commission committees) so as to allow the citizens control and Parliamentary scrutiny (to have an idea of this kind of quasi-legislative proposal see the current "Omnibus" proposals which realign Comitology acts).

... ***Shaping the principle of good administration for non legislative acts...***

11. Non-legislative procedures also require a strong transparency regime, even if it has to be different to the legislative one.

The "non legislative" category could be considered to be:

a) <u>either binding acts without general scope</u> (like decisions referring to identified legal or physical persons). In this case it would be essential that not only the persons concerned but also the public could verify that the procedure is followed correctly. This does not mean that the administrative activity should be directly transparent and

accessible but that the organisational unit involved in the procedure to be followed should be known as well as the moment when the administration will take its decision. The inspiring principles for this kind of act should be found in art. 41 of the Charter of Fundamental Rights as well in the Ombudsman Recommendations and in the best practices of the Member States in the same domain. *The European Commission believes it has responded to such requests of the European Parliament by modifying "slightly" article 12 and by adding in article 12(4) that "each institution shall define in its rules of procedure which other categories of documents are directly accessible to the public".*

Your Rapporteur does not believe that such an amendment satisfies the request of the European Parliament since without a clear definition of the different types of documents, access to documents by the public remains very ambiguous. We should bear in mind that our goal as institutions is to be open and transparent for the wider public and not only for the specialised users. The recent "transparency" initiative giving access to the names of the beneficiaries of European public funds should be welcomed and extended to all the EU activities. Under the same perspective the initiatives to increase transparency of the relations between the institutions and the lobbyists should also be welcomed, even if they are below the standard of transparency that can be obtained with the revision of Regulation 1049/01

b) political/strategic documents (such as Conclusions, Resolutions, Recommendations…) which even if not immediately binding, simultaneously address the public and the administration. These political documents should be diffused according to the priorities of each institution; therefore the coordination which is slowly taking shape (see the recent inter-institutional declaration on the future priorities of the European communication policy) has to be welcomed.

...Setting inter-institutional principles for confidentiality and exchange of information between the EU, MS and third countries...

12. Regulation 1049/01 deals with the exceptions to transparency:
   a) article 4 outlines principles as required by art. 255 TEC (even some of these principles could and should be updated)
   b) in article 9 which by referring to the so-called "sensitive" documents/information (confidential, secret and top secret) does not define the principles but only some generic description including access by the EP

As it was not possible during the first inter-institutional negotiation to define a coherent set of principles to deal with documents to be treated as "confidential", the European Parliament asked the Commission to propose that the principles be taken as a common inter-institutional framework. Surprisingly the Commission decided not to address this request by underlining that specific rules on classifications and on the handling of classified material should not be laid down in a Regulation on public access.

13. Your Rapporteur considers that the Commission failed to respond to the EP demand as paragraph 2 of art. 255 of the EC Treaty clearly imposes on the legislator the obligation to define specifically the "*limits on grounds of public or private interest governing this right of access to documents...*" as it has already partially done with art. 4 and 9 of Regulation

1049/01. It should be stressed that if in 2001 it was not possible to define a complete set of principles, this should not deter the Institutions from accomplishing this work now or in the immediate future. The activities of the Institutions in these domains are increasing in quantity and quality and it will be democratically unacceptable if work progresses on the sole basis of the internal organisational power of each institution, without any real form of democratic accountability.
Moreover, the situation being as it is now, the European Parliament will continue to be considered a "third party" in the dozens of international agreements concluded by the Council on art. 207 of the Treaty and a third Country could prevent the Council from informing the Parliament!

14. Bearing in mind article 296 TEC, the European Parliament asked for the limitation of the right of Member States to reduce access to their contributions/amendments in the legislative or regulatory procedure, including giving full access to information submitted to the Commission when dealing with the implementation of EC/EU Legislation until any proceeding before the court has begun.
The new proposal by the Commission is lowering the current standards by allowing Member States to instruct EU institutions not to disclose documents originating from them on the basis of reasons referred to in article 4 of the current regulation (EU law) or on "specific provisions in its own legislation preventing disclosure of the documents concerned"[1] *(national law).*
Your Rapporteur, by referring to the Council Legal Service itself, which considers that the position of the national delegation should be accessible, would call for limiting the reasons for withholding the documents by the Member states to the exceptions referred to article 4, only as far as the Council itself endorses such an explicit demand.

...Making user friendly the access to specific documents...

15. The European Parliament has, since 2000, requested a *single point of access* for all documents of the institutions by creating a common interface so that citizens could find the same functionalities in the three registers and a clearer description of the work-flow of the institutions, along with a common set of rules for archiving documents.

The Commission, while being in favour of such an idea, did not believe in the need of inserting any reference to a common portal in the new proposal for revision of Regulation 1049/2001.
Your Rapporteur believes that a regulation focusing on the access to documents by the public should aim, above all in the era of Google and technology, at facilitating the access to documents of the institutions through a common portal. Several Member States as well as Regional and local government have ensured the availability of these kinds of facilities for years, which are the basic level of e-government. Therefore, the Commission should ask all of the EU public administration to implement these facilities.
As is already foreseen for privacy officers, information officers could be appointed and common guidelines should be defined between the institutions so that the citizens could verify the quality of the service that is offered to them. This should be done by grouping the points of access to documents, facilitating a single access within the Union, if necessary through the

[1] Art. 5(2) of COM(2008)0229

creation of a single body to manage this function, in order to put an end to the current trend, which reserves access to specialists only. Moreover, further thoughts should be put in defining a standardised procedure for entering and managing the document in a single register.