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*Committee on Civil Liberties, Justice and Home Affairs*

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## DRAFT REPORT

with recommendations to the Commission on access to the institutions' texts  
(2004/2125(INI))

Committee on Civil Liberties, Justice and Home Affairs

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(Initiative – Rule 39 of the Rules of Procedure)

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## MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

**with recommendations to the Commission on access to the institutions' texts  
(2004/2125(INI))**

*The European Parliament,*

- having regard to Article 192, second paragraph of the EC Treaty,
  - having regard to Rules 39 and 45 of its Rules of Procedure,
  - having regard to the Institutions' reports on the implementation of Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents and, particularly, to the Commission's first triennial report, on implementation, as provided for in (Article 17(2) on the same regulation).
  - having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs (A6-0000/2005),
- A. whereas since ratification of the Amsterdam Treaty and the entry into force of Article 255 of the Treaty establishing the European Community (TEC), transparency has become a fundamental principle of the European Union, the aim of which is to strengthen the democratic nature of the European institutions, to enable citizens to participate more closely in the decision-making process, to ensure that public administrations enjoy greater legitimacy by being more effective and more accountable to the citizens, and, finally, to allow problems or errors to be detected in a more timely manner,
- B. whereas Regulation (EC) No 1049/2001 only partially implements Article 255 TEC, in as much as:
- its implicit definition of legislative activity (Article 12) is too general and could create confusion with activities of an administrative nature. Moreover, the Regulation does not state that legislation should be debated and adopted in public by the Council and the Parliament, or that in addition to legislative initiatives, amendments submitted by the Member States should also be immediately accessible. By the same token, all preparatory documents should also be accessible (irrespective of whether they are drawn up by the legal services of the institutions) so that decisions can be taken in full knowledge of the domain to be regulated. Furthermore, there is no clarification of the requirements regarding publication of legislative texts in the Official Journal or the organisation of that Journal (for instance, as far as the electronic edition is concerned),
  - there are no clear rules on access to documents of an administrative nature; on the so-called “space to think”; on better drafting; on informing citizens of the procedure to be followed by each institution involved in the process; on common rules for archiving documents, or on privileged access by persons with specific access rights,
  - there is a clear need to define how specific documents can be totally or partially classified as confidential and for rules imposing a regular review of such classifications. Furthermore, it is contrary to the democratic principle on which the Union is founded that the European Parliament does not have a clear legal basis for

accessing classified EU information, notably in cases where such access is also forbidden to or limited for national parliaments. In this context, provision must also be made to prevent third countries or international organisations from prohibiting the Council or the Commission from giving Parliament access to classified information,

- the administrative machinery (Institutions' registers, databases and other IT applications) is still in a pilot phase and there is no common approach by the three institutions, even where interinstitutional procedures are concerned there is still no common understanding among the Institutions on the way to manage, share, and store the different types of documents. Although some improvement has been made, there is still a clear lack of coordination between the institutions, notably in respect of documents linked to interinstitutional procedures, so that it is not only ordinary citizens who are lost but also professionals, researchers, and national parliaments.
- C. whereas, even though Regulation (EC) No 1049/2001 itself made provision for its revision after three years, and despite the fact that Parliament has several times asked the Commission to improve and strengthen the EU legislation on transparency, no proposal within the meaning of Rule 39(2) of Parliament's Rules of Procedure is in preparation,
1. Requests the Commission to submit to Parliament by 1 March 2006, on the basis of Article 255 TEC, a legislative proposal on "the right of access to European Parliament, Council and Commission documents, and general principles and limits on grounds of public or private interest governing this right of access", following the detailed recommendations set out below;
  2. Confirms that the recommendations respect the principle of subsidiarity and the fundamental rights of citizens;
  3. Considers that the financial implications of the requested proposal must be covered by \*\*\*;
  4. Instructs its President to forward this resolution and the accompanying detailed recommendations to the Commission and Council, and to the governments and parliaments of the Member States and accession and candidate countries.

**Recommendation 1 (on Article 255 TEC and Regulation (EC) No 1049/2001 from a constitutional perspective)**

The Commission must improve the clarity of the citations and recitals in Regulation (EC) No 1049/2001 in order to make it quite clear that Article 255 TEC<sup>1</sup>, which is the legal basis for the Regulation itself :

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<sup>1</sup> Article 255. TEC. 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.

- is the main legal basis in the Treaties for implementing the founding principles of the Union, outlined in Article 1 of the Treaty on the European Union (TEU), according to which "*.. decisions are taken as openly as possible and as closely as possible to the citizen*", and in Article 6 TEU, according to which "the Union is founded on the principles of ... democracy ... and the rule of law";
- is the pivotal legal basis, as far as transparency and confidentiality are concerned, for all the activities of the Council, the Commission and Parliament (the "legislative triangle") when acting under the TEC and the TEU;
- must be loyally and full implemented in the internal rules of the European Parliament<sup>1</sup>, the Commission<sup>2</sup> and of the Council<sup>3</sup>;
- must be applied in a coherent way when the Institutions act in a legislative capacity (as outlined in Article 207 TEC) or implement EU and EC legislation (Article 202 TEC)<sup>4</sup>, irrespective of which institution delegates the power or implements the EU/EC rules.

### **Recommendation 2 (on the notion of legislative and non legislative documents)**

The Commission, complying with principles outlined with Recommendation 1, should amend Regulation (EC) No 1049/2001 by defining:

- (a) **the notion of "legislative documents"**, which are currently defined in Article 12(2) of that Regulation as documents "*...drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States*", by adding a reference to the fact that the notion of (legislative) act should be reserved only for secondary law (with a direct legal basis in the Treaties), notably when adopted by way of the codecision procedure in accordance with the procedure established by Article 251 TEC.

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<sup>1</sup> Article 199 TEC *The European Parliament shall adopt its Rules of Procedure, acting by a majority of its Members.*

<sup>2</sup> Art. 218.2 TEC *"The Commission shall adopt its Rules of Procedure so as to ensure that both it and its departments operate in accordance with the provisions of this Treaty. It shall ensure that these Rules are published."*

<sup>3</sup> Art. 207 TEC. 3. *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.*

<sup>4</sup> 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 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."*

The Regulation should be amended in a way which obliges access to be granted:

- to all preparatory documents linked to an identified decisional procedure; access should be granted as of the moment when those documents are formally submitted by each institution taking part in the decision;
- to the Parliament or Council debate where these institutions are acting in a legislative capacity, and to the documents debated (if not classified, see Recommendation 3 below);
- to the identity of the author of each initiative or formal amendment;
- to complementary pertinent information or documents related to the meetings of the working bodies in the institutions, and to the contributions submitted by the secretariats of the institutions (including the legal services) where such documents are not simply administrative in nature.

The Regulation should also be the legal basis for establishing rules, good practices and interinstitutional agreements ensuring the better drafting of legislative texts and accessibility to the final legislative texts, such as the rules to be followed for

- drafting legislative acts,
- publishing them in electronic form in the Official Journal, and
- consolidating basic texts with their amending acts.
- Therefore, the Regulation should determine the format of the Official Journal, the rules to be followed for multilingualism, and the mission of the OPOCE.

- (b) **the notion of "non legislative documents"**, as documents linked to procedures for implementing or delegated acts (whichever institutions are involved) and, in any case, documents linked to acts which are not binding. In such cases, it should be possible to apply less stringent rules of transparency, given their administrative nature.

Each of the Institutions should make public the procedure to be followed when dealing with such non-legislative documents and make clear the times when and the conditions in which interested parties may take part in the procedure concerned and the public may have access to the documents.

The Institutions should also clearly indicate the organisational units involved in administrative procedures, the way in which documents are stored, both temporarily and permanently, and how they can be accessed.

- (c) **the notion of "regulatory documents"** as documents linked to regulatory measures completing and implementing primary and secondary legislation (whether adopted by the Council or delegated to the Commission); these documents should be accessible *mutatis mutandis* on the same conditions as those applicable to legislative documents

(e.g., in Comitology procedures access should be granted from the moment when a draft measure is formally submitted to a committee). Similarly, access should also be granted to the relevant complementary documents (e.g. the agendas, minutes and result of votes of the committee).

### **Recommendation 3 (on documents to be treated as confidential)**

As Regulation (EC) No 1049/2001 does not currently clearly define the "*.. limits on grounds of public or private interest*" which could delay or prevent access to the pertinent documents or parts of them (Article 255 TEC) the Commission should amend, in particular, Articles 4 and 9 of the Regulation by defining more clearly on which basis or objective elements specific documents may be classified as confidential or limited in their distribution, in order to protect the essential interests of the EU. Taking into account best practice in the Member States, Regulation (EC) No 1049/2001 should also contain precise rules for:

- ensuring that documents are not abusively classified as confidential, and
- ensuring adequate control by the European Parliament (democratic parliamentary scrutiny).

It should also be clearly stated that the bilateral agreements with third states or international organisations may not prohibit the Council or the Commission from sharing confidential information with the European Parliament (in particular, in cases where the pertinent documents are not accessible to national parliaments, since they are EU documents).

### **Recommendation 4 (on the relationship between the EU and Member States as regards sharing information/documents)**

Taking into account the principle outlined in Article 296 TEC 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*", Regulation (EC) No 1049/2001 should

- limit the right of Member States to limit access to their contributions / amendments in legislative/regulatory procedures;
- give full access to information submitted to the Commission when dealing with the implementation of the EC/EU legislation until such time as a judicial procedure before a Court has commenced.

### **Recommendation 5 (on the practicalities for giving access to citizens)**

Taking into account the experience of the first four-year period of Regulation (EC) No 1049/2001, the Commission should amend the Regulation by making a coherent proposal for:

- ensuring a single point of access in a clear and structured way to all preparatory documents dealing with a legislative or regulatory procedure (see Recommendation 2);

- reorganising the Institutions' registers by adding a common interface so that the citizen/user is able to find the same functionalities in the three registers;
- defining common rules for archiving documents, avoiding duplication and ensuring the authenticity of the different versions;
- presenting in a clear and comprehensible way the work-flow of the institutions and, where relevant, the point of access to the documents;