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Interinstitutional Conference
European Parliament Delegation

- The Secretariat -
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TRANSPARENCY AND DEMOCRACY

First draft set of recommendations on "transparency and democracy" submitted by Mr Tsatsos, Mr B. Donnelly and Mr St. Pierre for the attention of the European Parliament's delegation to the Inter-Institutional Conference

BACKGROUND

1. On 25 October 1993 the Parliament, Council and Commission adopted an inter-institutional declaration on democracy, transparency and subsidiarity (OJ C329 of 17/11/93, page 133). At the same time the European Parliament adopted a unilateral declaration in which, inter alia, is expressed its view that legislative transparency should be total, and that the interinstitutional agreement should only be considered as a first step. On 27 September 1994 Mr Tsatsos, Mr Brendan Donnelly and Mr St. Pierre were appointed by the Parliament's delegation to the Inter-Institutional Conference to follow up the implementation of this declaration, and to explore the need for and possible content of a new inter-institutional agreement in these domains.

2. At a meeting on 26 October 1994 the three explorers discussed these issues, and concluded that a new inter-institutional agreement was needed to put flesh on the bones of the existing inter-institutional agreement, and to remedy some of the weaknesses that have emerged as regards its implementation. The explorers further concluded that there did not appear to be any immediate problems requiring a new agreement in the field of subsidiarity, and that any new agreement should concentrate instead on the fields of transparency and democracy. If the delegation agrees the title for a new agreement should thus be renamed "transparency and democracy" (or "transparency as a consequence of the rule of democracy": TSATSOS suggestion).

3. The document that follows is in three parts. The first section emphasises the key legal and political importance of the concept of transparency. The second section looks at some of the practical problems that have arisen in this field, and that need to be more satisfactorily resolved. The final section puts forward some initial draft recommendations. If these are approved by Parliament's delegation they could then be presented at the meeting of the Inter-Institutional Conference on 28 or 29 November 1994.

THE INSTITUTIONAL IMPORTANCE OF TRANSPARENCY

(a) Introductory remarks

1. The talks taking place within the framework of the Interinstitutional Conference presuppose agreement on what is meant by transparency.

2. When a term is used in a specific context it acquires a specific meaning. This is equally true of transparency, a term which is also used in other fields such as physics and ethics. In the language of the institutions transparency comes to have a quite specific meaning. In this sphere, transparency is taken to mean the extent to which a process or the reasons behind a political decision are open to scrutiny.

3. Transparency for whom? For whose benefit is transparency required? Only for Parliament in its role as a supervisory body? Only for the press? Or also for the public and those categories of society who will be most affected by a given decision? For European political parties?

Or perhaps even for the European public? The institutional importance of transparency touches on all these aspects.

4. Transparency in which areas? From this angle too, transparency can be viewed in various ways. After all, the question itself can receive various answers: the principle of transparency must at times give way when other principles are at stake, e.g. protection of the right to privacy or of defence imperatives, the effectiveness of an important external policy measure or of the fight against organized crime, etc.

5. Transparency is both an institutional concept and a conceptual component of the principle of democracy. A democratic process without transparency is unthinkable. The legitimation of any authority, including that of the European Community, requires political events, including the political objectives chosen, to be properly understood. Political scrutiny in particular is impossible without detailed information of the subject matter to be scrutinized. A logical chain of requirements thus arises: democracy - legitimation through participation and scrutiny - transparency. The first presupposes the second and the second presupposes the third.

We believe that our negotiations within the interinstitutional conference must be based on these conceptual foundations.

(b) The legal (institutional) foundations of the transparency principle in the law of the Union

1. Our position is as follows: transparency is not merely something requested by Parliament or European public opinion or by the political groups. Transparency is negotiable only up to a point. We cannot negotiate over transparency as such: the transparency principle is a legal principle arising from Union law.

2. The justification for this position is that the principle of democracy is an expression of existing Union law, since transparency, as was argued above, is a key element or conceptual component of the democracy principle, i.e. transparency partakes of the normative authority of the democracy principle. Any new interinstitutional agreement which seeks to reduce the transparency deficit should not be seen as embodying an understanding attitude on the part of the institutions of the Union but as the fulfilment of an obligation enshrined in the Treaty itself.

In legal terms, the democracy principle forms part of the institutional content of the Union Treaty.

(aa) The third recital of the Preamble to the Union Treaty states: 'Confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law'. This clearly demonstrates that the democracy principle is part of the very substance, one might even say the legal culture, of the Treaty.

(bb) Article F(2) states: 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the

Member States, as general principles of Community law.'. The reference to fundamental rights is a clear enough statement. The history of the state in general, and of the European constitutional state in particular, has shown beyond all doubt that fundamental rights can only exist where democracy and the rule of law prevail. The view that fundamental rights and democracy are divisible is historically outdated, politically dangerous and intellectually unsound.

- (cc) Article 138a of the EC Treaty states: 'Political parties at European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union.'. The functions here assigned by the Treaty to European parties in themselves presuppose the existence of democracy.
- (dd) The introduction of European citizenship has created a new level of political legitimacy for the institutions of the Community. The status of European citizen would be an empty one if it were not tied to the existence of the democracy principle.
- (ee) The reference in the eleventh recital of the Preamble and in Article A to decisions taken as closely as possible to the citizen represents the democracy principle in practical form.

All the above indicates the legally binding character of the democracy principle and hence also of the transparency principle.

Democracy would remain a theory with no practical application if practical consequences were not drawn from the theory. This requires consistency. Without such consistency, the credibility gap currently facing the Community institutions will widen. Transparency is a crucial means for recovering that lost credibility.

PRACTICAL PROBLEMS THAT HAVE ARISEN

The importance of the concept of transparency, both for the European Union's institutions themselves and for European citizens in general, has been emphasized above. The declaration of 25 October 1993 attempted to improve transparency at European level but it is now evident that the Council's decisions of October and December 1993 did not fully respond to the earlier and more ambitious conclusions of the European Councils at Birmingham and Edinburgh, and, moreover, that the declaration of 25 October 1993 has not been satisfactorily implemented. This is particularly the case as regards the central issue of the openness of the Council's proceedings, some of the problems with which have been made clear by the case involving the "Guardian" newspaper, and also by the legal action brought by the Dutch Government in front of the European Court of Justice. (A list of the main recent events in the field of transparency is included as Annex 1.)

INITIAL DRAFT CONCLUSIONS

The need for effective action to follow up existing EU undertakings

1. It is of the highest importance for the credibility of the European Union that its decision making process be as transparent as possible, especially in view of the difficulties of ensuring democratic control of this process, and of its remoteness from European citizens.

2. In addition to the inter-institutional declaration of 25 October 1993, a number of undertakings have been made by the European Union institutions aimed at achieving greater transparency, but their implementation has generally been inadequate.

3. There is a demonstrable need, therefore, not for new EU declarations on the goal of transparency but for effective implementation of existing declarations if the EU is to be serious about transparency. Greater efforts will thus have to be made in this regard by all the EU institutions.

The need for transparency not just at European but also at national level

4. The EU's decision-making system reserves a central role for the individual Member State, insofar as national administrations participate in the EU's legislative process as constituent parts of the Council of Ministers. In consequence, the application of the principle of transparency to the EU's legislative procedure also presupposes transparency both when a Member State is formulating its European policy at national level, and when it is implementing European legislation and policies. Even if this dimension is the sole responsibility of the Member State, within the framework of its institutional autonomy, it nevertheless constitutes an essential element of the transparency and democratization of the current 'sui generis' EU decision-making system.

INITIAL DRAFT RECOMMENDATIONS

I. Council openness

1. New steps need to be taken to strengthen Council openness, most urgently but not exclusively in the context of the Community legislative process.

2. In particular, further measures are required:

- (i) to ensure that the opening to the public of certain Council debates is a real rather than cosmetic exercise;
- (ii) to ensure that more information is provided than at present on Council legislative discussions;
- (iii) to ensure that the principle of public access to Council documents is properly implemented, and that any refusals of access are exceptions rather than the rule.

The openness to the public of certain Council debates

3. This needs to be extended beyond vague orientation debates if it is to have any meaning at all. As a first step the following measures should be considered:

- (i) open debates on Presidency or Commission work programmes should not be restricted to the General Affairs and ECOFIN Councils but should apply to all Councils;
- (ii) major new legislative proposals should, as a general rule, always be the subject of a preliminary open debate in the relevant Council. There should also always be public debates on Commission Green or White papers;
- (iii) the provision in Article 6 of Council's Internal Rules of Procedure that there should be unanimity to open up other debates to the public should be suppressed (or replaced by one calling for a decision by qualified majority/simplified majority);
- (iv) the means of opening up Council debates need to be re-examined, to ensure the re-transmission of Council debates to the European Parliament and to national parliaments as well as to a wider public. Direct public access to the Council meeting room should also be provided on a first-come, first-served basis.

More background information on Council legislative discussions

4. It is unacceptable that the Council's discussions when it is acting as a legislator are still held in secret, and that even subsequent information that is provided on these discussions is still restricted and incomplete. The adoption by public vote of all legislative texts is a "sine qua non" for democracy and transparency, and far more information on background discussions is also required, in the interest of the European Parliament (especially in its role as a co-legislator), of national Parliaments (so that they can better scrutinize the work of their national representatives within the Council) and of Europe's citizens as a whole.

5. In consequence:

- (i) the Council should provide full details on who has voted for what within the Council, and the present system of unjustified exceptions to this principle should be replaced by one where clear explanations are given as to why there should be a specific exception;
- (ii) the European Parliament should be provided with systematic information on Council working group and COREPER decisions, notably in the context of the co-decision procedure. If Parliament representatives are not given observer status at these meetings the Parliament should be provided with the summary reports of these meetings and (on request) with all substantive Council modifications of Commission texts.

Meaningful public access to Council documents

6. The Council's criteria in Council Decision 93/731/EC of 20 December 1993 are too vague and subjective, and are thus too open to possible abuse:

- (i) the current burden of proof should be reversed and Council documents should, in general, be public unless their publication

would cause serious and demonstrable harm to the interests of the European Union or of its citizens;

- (ii) there needs to be a much more precise definition as to what exactly should be covered by the concept of "confidentiality";
- (iii) Article 4-2 of the Council's decision which provides that "access to a Council decision may be refused in order to protect the confidentiality of the Council's proceedings" could justify any exception to the principle of openness, and should thus be deleted;
- (iv) the procedures laid down in the Decision for requesting documents need to be improved by giving a clearer indication of how and where to lodge a request for a document, and of the cost that would be entailed;
- (v) the provision in Articles 7-2 and 7-4 of the Council Decision that failure by the Council to reply within a month to a request for a document is equivalent to a refusal should be deleted, especially since Article 7-4 apparently absolves the Council from the necessity to state the grounds on which a refusal is based that is otherwise provided in Article 7-3.

II. Commission openness

It should be acknowledged that the Commission has gone further than the Council in promoting openness, notably in the transparency package put forward by Mr Pinheiro in February 1994. There are however a number of additional measures that should be taken:

Public access to Commission documents

7. Article 2-4 of the Commission's decision of 8 February 1994, stating that a failure to reply to an application for a Commission document is equivalent to a refusal, contradicts the provision in the Commission and Council Code of Conduct that a reason needs to be given for a refusal, and should thus be suppressed.

Annual legislative programme

8. This is an important instrument in ensuring transparency and democratic control of the EU legislative process. If it is to fulfil this role adequately the Commission needs to make a number of improvements to the annual legislative programme, including giving a proper indication as to the scope of a proposed Commission legislative initiative, whether it is a major or minor matter, and whether it is a new proposal or something carried over from last year.

Committees used in the implementation of Community legislation¹

¹ Other aspects of this subject are being covered in more detail by other Parliament "explorers", but the requirement for greater background information also needs to be raised in this general context of transparency

9. It is essential that there be greater background information than at present about these so-called "commitology" committees, since except for the inadequate information given in the Budget, this has not been provided by the Commission apart from an incomplete document in 1980.

- (i) the Commission should publish regular information on existing commitology committees, their legal base, their composition and the number of meetings that they have held, etc;
- (ii) consideration should be given to publishing in full or otherwise publishing in summary form the opinions given by these committees.

III. Parliament openness

10. The Parliament should itself undertake to look at ways of improving public access to Parliament documents, for example, by creating a Parliament information centre at which interested members of the public could obtain Parliament documents as soon as they were in the public domain.

IV. Measures that should be taken by all three Community institutions

The need for clear and comprehensible EU texts

11. A key factor in ensuring transparency is for EU legislative and other texts to be presented and later publicised in as clear and comprehensible a form as possible.

12. One way of achieving this is through codification of existing Community legislation, but recent attempts to achieve this have not so far been successful, due to disputes as to whether to use this opportunity to modify existing texts, over Commitology questions, etc. The possibility of establishing new guidelines between the institutions should be explored, in order to help resolve these problems.

13. While the establishment of EU guidelines on the form to be taken by EU legislation is a welcome idea it is unacceptable that the Council has recently rejected certain EP legislative amendments in the context of co-decision on the grounds that they were not in conformity with a unilateral Council decision of 8 June 1993 on the drafting quality of EU legislation. Such ground rules should clearly be decided upon by common agreement between the institutions.

Access of interest groups to the EU institutions

14. The institutions should again examine the issues posed by interest groups/lobbies and their access to the EU institutions (self regulation/ code of conduct, data base, etc.) to maintain the principle of maximum openness of access, especially for individual citizens, smaller associations, and those less familiar with EU procedures, while ensuring that any possible abuses are minimized.

General access of EU citizens to Community decisions

15. Further use needs to be made of the new information technologies to increase the transparency of EU decisions and discussions:

- (i) the CELEX data base on Community legislation should be improved;
- (ii) the proposed IDA programme, which should be rapidly adopted, could also play an important role by ensuring the electronic transfer of information between the various Community institutions and national administrations.

Chronology of recent events in the field of transparency

1. Declaration No. 17 annexed to the Final Act of the Treaty on European Union (7 February 1992).
2. Birmingham Declaration of 16 October 1992.
3. Conclusions of the Edinburgh Council on transparency and the implementation of the Birmingham Declaration (12 December 1992).
- 4(i) Commission paper on access of public to documents of institutions (COM (93)(a)fin. of 5 May 1993).
- 4(ii) Commission paper on transparency in the Community (COM (93)258) of 2 June 1993.
5. Council resolution on the quality of drafting of Community legislation (8 June 1993).
6. Commission note on the opening to the public of documents and files from the historical archives of the Commission which are covered by the obligation of professional or business secrecy (OJ C196 of 20.7.93, p.4.).
7. Interinstitutional agreement between the EP, the Commission and the Council of 25 October 1993 on democracy, transparency and subsidiarity (OJ C329 of 6.12.93, page 133).
- 8(i) Council and Commission code of conduct concerning public access to Council and Commission documents (Decision 93/730/EC, OJ L340 of 31/12/93, page 41).
- 8(ii) Council decision on public access to Council documents (Decision 93/731/EEC of 20 December 1993, OJ L340 of 31/12/93, page 43).
- 8(iii) Commission decision of 8 February 1994 on public access to Commission documents (OJ L46 of 18.2.94, page 58).
- 8(iv) Commission communication on improved access to documents (OJ C67 of 4.3.94, page 5).
9. Dutch Government case vs. Council (case C-58/94, inscribed on European Court of Justice register on 10/2/94). Seeks to annul Decisions 93/730/EC and 93/731/EC (see above) as well as Article 22 of Council Decision of 6/12/93 on its own internal rules of procedure (OJ L304 of 10-12-93).
10. "John Carvel and Guardian Newspapers Ltd. vs. the Council of the European Union" (Aff. T 194/94 of 19.5.94) seeks to annul Council's decision refusing access to certain Council documents pursuant to Council Decision 93/73/EC of 20/12/93.
11. EP resolutions of (i) 22 April 1994 on "openness in the Community", and (ii) 6 May 1994 on the "transparency of Community legislation".

Draft
[Joint Declaration/exchange of letters - Interinstitutional Agreement]

The European Parliament,
the Council of the European Union,
the Commission

- A. whereas the principle of democracy is one of the bases of the European Union,
- B. whereas the introduction of citizenship of the Union and the representation of the Union's citizens in the directly-elected European Parliament have created, alongside the democratic legitimation afforded by the Parliaments of the Member States, the new level of democratic legitimation required by ongoing integration,
- C. whereas Article 138a of the EC Treaty assigns political parties at European level both an institutional role and a mandate to establish democratic legitimation,
- D. whereas democratic legitimation by means of the European Parliament and European political parties can only be effectively developed if the process of reaching an informed political opinion is transparent in all the institutions;
- E. whereas the Treaty on Union, particularly the second paragraph of the preamble, Articles E and F, and Articles 138a and 138e of the EC Treaty commit all the institutions to transparency, unless there are overwhelming contrary reasons of public interest,
- F. having regard to the decisions of the European Councils of Birmingham and Edinburgh, the Joint Declaration by Parliament, the Commission and the Council of 25 October 1993, and the measures which the Council and Commission have adopted with a view to their implementation, in the light whereof the following further steps constitute a priority:

Resolve that

- 1.(a) when the Council is acting as a legislative and budgetary authority on the basis of the Community Treaties, its meetings [and those of its working parties] shall be public; this shall apply also to consultations in the run-up to legislative activities (legislative programme, Green Papers, White Papers). Preparatory working documents shall in like wise be made available to all Institutions of the Union involved in the legislative process. Public access to the meetings shall take the form of direct access to the Council meeting room for representatives of the Institutions on a first-come, first-served basis and of live television coverage relayed to a room set aside for the general public and by the publication of the appropriate parts of the minutes of the meetings, which shall in particular show how the individual members of the Council voted;

- (b) in individual cases the Council shall, by a qualified majority, decide on derogations from these fundamental principles, if the publication of certain information would cause serious and demonstrable harm to the interests of the Union or of its citizens. In such cases, the Council shall take all appropriate measures to inform those Members of the European Parliament whose duties mean that they have a legitimate interest in the information in question and have undertaken to respect its confidentiality;
 - (c) In those areas which do not come under (a), the Council shall take a majority decision on whether its meetings are to be held in public and whether the preparatory working documents shall be made available to the public;
 - (d) The Council shall amend its Rules of Procedure accordingly;
2. within the Secretariat of the Council and in the Administrations of the Member States, in the Commission and in the European Parliament contact-offices shall be designated or established, to supply documents from the appropriate Institutions to any citizen interested. An internal procedure shall be established, whereby the refusal of a request for documentation on political grounds can be examined;
 3. the Institutions involved in the legislative process shall endeavour to achieve improved levels of cooperation, in order to guarantee the clarity and clearness of adopted legal instruments. They shall open negotiations on the formulation of joint guidelines in this area;
 4. the Institutions concerned state their intention to improve the Union's legislative programme; in the draft legislative programme the Commission shall, in particular, provide proper indications as to the objective and scope of the proposed legislative initiative.