

Proposal for a Council Regulation amending Regulation (EEC, Euratom) No 354/83 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community

(2002/C 331 E/30)

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(Submitted by the Commission on 19 August 2002)

EXPLANATORY MEMORANDUM

1. Background

On 30 May 2001 the European Parliament and the Council adopted Regulation (EC) No 1049/2001 laying down the general framework for public access to European Parliament, Council and Commission documents.

Article 18 of the Regulation states that the Commission will examine the conformity of Regulation No 354/83 concerning the opening to the public of the historical archives of the EEC and the EAEC with the principles and limits laid down by the new Regulation on public access to documents.

Article 4(7) of the Regulation (EC) No 1049/2001 states that exceptions to the right of access referred to in paragraphs 1 to 3 of that Article apply only for a maximum of thirty years. However, exceptions relating to protection of privacy (Article 4(1)(b)) or of commercial interests (first indent of Article 4(2)) and the specific provisions relating to sensitive documents (Article 9) may, if necessary, be applied after that period.

2. Institutions covered (Article 1)

Now that the Court of Auditors is an institution, pursuant to Article 7 of the EC Treaty ⁽¹⁾, it is no longer necessary for Article 1 to specify that it be treated in the same way as an institution. For the purposes of the new Regulation, the Economic and Social Committee and the Committee of the Regions will be treated in the same way as the institutions referred to in Article 7(1) of the Treaty.

3. Exceptions applicable after thirty years

- Protection of privacy: Regulation (EEC, Euratom) No 354/83 does not apply to the files of staff of the European Communities or to documents containing information on the private or professional life of an individual; there is no right of access to these documents. Excluding a category of documents in this way is not compatible with the general principle of Regulation (EC) No 1049/2001, which grants access to all documents unless disclosure of its contents is liable to harm one of the interests specifically protected by the Regulation.

Protection of privacy constitutes an exception to right of access and it can last beyond the thirty-year deadline laid down by Regulation (EC) No 45/2001 ⁽²⁾.

- Protection of commercial interests: before deciding, on expiry of the thirty-year period, to give the public access to documents and records which could affect commercial interests if disclosed, the institution will inform the firms or other interested parties, in accordance with rules to be defined by each institution, of its intention to make the documents accessible to the public.

⁽¹⁾ OJ C 340, 10.11.1997, p. 173.

⁽²⁾ OJ L 8, 12.1.2001, p. 1.

- Protection of sensitive documents: Regulation No 1049/2001 defines sensitive documents as documents classified as 'confidential' or higher in order to protect the public interest, notably public security, defence and military matters, international relations and financial, monetary and economic policy of the Community or a Member State.

At the end of the thirty-year period, the Institution decides whether sensitive documents should be declassified. Documents not declassified are not given public access and will be re-examined periodically under Article 5(1) of Regulation (EEC, Euratom) No 354/83.

4. Abolition of category exemptions (Article 3)

Article 3(1)(b), (c) and (2) of Regulation (EEC, Euratom) No 354/83 excludes certain categories of documents from the right to public access: contracts concluded by the Euratom Supply Agency, documents and records of cases submitted for judgment to the Court of Justice of the European Communities and documents classified as 'confidential' or higher.

In Regulation (EC) No 1049/2001, these documents are covered by the right of access and their disclosure may be refused only on the basis of the exceptions in Article 4 and the special provisions of Article 9. It is therefore necessary to abolish the category exceptions in Regulation (EEC, Euratom) No 354/83 and, if necessary, protect documents on the basis of one of the exceptions to right of access, the application of which may be extended under Regulation (EC) No 1049/2001.

It is, however, necessary to maintain the exception to public access provided for in Article 3(1)(a) of Regulation (EEC, Euratom) No 354/83, which concerns documents classified in accordance with Regulation No 3 of 1958 implementing Article 24 of the Euratom Treaty. The Court of Justice has ruled (Judgment of 15 December 1987 in *Deutsche Babcock*, Case 328/85, [1987] ECR 5119) that the provisions of the EC Treaty and those adopted under the Treaty are applicable to matters covered by the Euratom Treaty only by default. The classifications in question are therefore not covered by the access rules of Regulation (EC) No 1049/2001 and Regulation (EEC, Euratom) No 354/83. On the other hand, as there are no Euratom provisions requiring that supply contracts be excluded, Article 3(1)(b) cannot be retained. However, the protection of supply contracts is ensured through the exception relating to commercial interests.

THE COUNCIL OF THE EUROPEAN UNION,

European Parliament and Council Regulation (EC) No 1049/2001 ⁽¹⁾.

Having regard to the Treaty establishing the European Community, and in particular Article 308 thereof,

- (2) The exceptions to public right of access provided for in Regulation (EC) No 1049/2001 are applicable for a maximum period of thirty years. The exceptions relating to protection of privacy or commercial interests and the specific provisions on sensitive documents may, however, apply beyond that period if necessary.

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 203 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

- (3) Council Regulation (EEC, Euratom) No 354/83 ⁽²⁾ provides that the public will not be given access to certain categories of documents thirty years after the documents were created. It is necessary to bring these exceptions into line with the exceptions to right of access provided for in Regulation (EC) No 1049/2001.

Whereas:

- (1) The general principles and the limits governing the public's right of access to documents of the European Parliament, the Council and the Commission were laid down in

⁽¹⁾ OJ L 145, 31.5.2001, p. 43.

⁽²⁾ OJ L 43, 15.2.1983, p. 1.

(4) For the purposes of Regulation (EEC, Euratom) No 345/83, the Economic and Social Committee and the Committee of the Regions should henceforth be treated in the same way as the institutions referred to in Article 7(1) of the Treaty establishing the European Community.

(5) Regulation No 354/83 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EEC, Euratom) No 354/83 is amended as follows:

1. Paragraph 1 of Article 1 is replaced by the following:

'1. The institutions of the European Community and of the European Atomic Energy Community (hereinafter referred to as "the institutions") shall establish historical archives and open them to the public on the terms provided for by this Regulation after the expiry of a period of thirty years starting from the date of the creation of the document. For the purposes of this Regulation the Economic and Social Committee and the Committee of the Regions shall be treated in the same way as the institutions referred to in Article 7(1) of the Treaty establishing the European Community.'

2. Articles 2 and 3 are replaced by the following:

'Article 2

1. In the case of documents covered by the exceptions relating to privacy and the integrity of the individual and the business interests of an individual or firm, including intellectual property, the exceptions may continue to apply after this period if the relevant conditions for their application are satisfied.

2. Documents containing information on the private or professional life of individual persons, including files of staff of the European Communities, shall be disclosed in accordance with Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies, and in particular Articles 4 and 5 thereof.

3. Before deciding to make available to the public documents which, if disclosed, could harm the commercial interests of a firm or individual, including those relating to

intellectual property, the institution shall inform the firm or the person concerned, in accordance with the rules to be defined by each institution, of its intention to make the documents in question accessible to the public. The documents shall not be released if, taking account of the observations of the third parties, the institution considers that their disclosure could jeopardise such commercial interests, unless there is an overriding public interest in disclosure.

4. Sensitive documents within the meaning of Article 9 of Regulation (EC) No 1049/2001 shall be accessible within the limits laid down in that Article.

Article 3

The public shall not have access to documents and records that have been classified in accordance with Article 10 of Council Regulation No 3 of 31 July 1958 implementing Article 24 of the Treaty establishing the European Atomic Energy Community⁽¹⁾, and have not been declassified.

⁽¹⁾ OJ 17, 6.10.1958, p. 406.'

3. Article 4 is deleted.

4. Article 6 is replaced by the following:

'Article 6

Where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document must or must not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation.

The Member State may instead refer the request to the institution.'

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.