

NATIONAL SECURITY AND OPEN GOVERNMENT:

STRIKING THE RIGHT BALANCE



Campbell Public Affairs Institute
The Maxwell School of Syracuse University

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DIGITAL GOVERNMENT IN THE EUROPEAN UNION:

FREEDOM OF INFORMATION TRUMPED BY “INTERNAL SECURITY”

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Globalization is an ambiguous process but one that cannot be rolled back...[W]e need to combine economic integration with cosmopolitan politics...Globalisation must become accountable and its fruits must be distributed more fairly.... The danger is however that exactly the opposite will happen. There is a risk that trans-national cooperation will become a means of creating fortresses, states in which both the freedom of democracy and the freedom of markets are sacrificed on the altar of private security.

Ulrich Beck, “Globalization’s Chernobyl,”
Financial Times, November 6, 2001

INTRODUCTION

Counter-terrorism strategies pursued after September 11, 2001 have at times undermined efforts to enhance respect for human rights. Not only have measures been taken in several parts of the world that suppress or restrict individual rights, but as highlighted by then UN High Commissioner on Human Rights, Mary Robinson, there “is increasing evidence that particular groups such as human rights defenders, migrants, asylum-seekers and refugees, religious and ethnic minorities,

political activists and the media are being specifically targeted.”¹ This is true also in the context of the European Union (EU), and the effects may be exacerbated by measures taken by the EU Council of Ministers behind closed doors. The focus of this paper is limited to attacks on freedom of information in the aftermath of September 11, and in particular the effects of the counter-terrorism strategy followed by the European Union in that regard. This specific issue should however be placed and understood in its broader context of the effects of the counter-terrorism efforts on human rights in general and on certain groups in particular.

The US government, followed by other governments around the world, has striven to increase “internal security” by *inter alia* embarking on a path of secrecy unprecedented in recent years. In particular, freedom of information laws have come under attack and have been reduced or even suspended in the quest for more control over the sources of knowledge. In Canada for example, the Anti-Terrorism Act contains a (much-criticised) clause enabling the Minister of Justice to suspend the effect of Access to Information provisions.² In the UK, despite 25 years of campaigning for a Freedom of Information Act, Prime Minister Tony Blair suspended its enactment for a period of four years.³

In the United States, Attorney General John Ashcroft issued a directive to the heads of agencies to encourage those agencies to deny access more often to public records if a claim of invasion of privacy or a claim of breach of national security could be alleged.⁴ The release of presidential records was moreover halted indefinitely by the assertion of executive privilege.⁵ US State legislatures on the whole followed suit attacking open records and meetings laws.⁶ Secrecy is in demand: it gives those in government exclusive control over certain areas of knowledge and thereby increases their power, making it more difficult for even a free press to check that power. The culture of secrecy is sometimes referred to as a virus, spreading from one part of government to another, and also transnationally, invading concerns where national internal security plays no role at all. The stakes are high: freedom of information as a fundamental (constitutional) value of democracy is sacrificed on the altar of internal security, as opportunistically interpreted.

At the level of international organizations, the Member State governments of the European Union have *inter alia* used the tragic events of September 11, as a means of adopting legislation in a highly secretive fashion which gives far-reaching powers to law enforcement agencies in the various Member States: and at the European Union level, to issue a European Arrest Warrant, freeze assets, include demonstrators in databases designed for terrorists,⁷ and most recently to exchange information on individuals with the United States.⁸

At the same time the newly adopted access to information law in the EU⁹ is being implemented in a restrictive fashion with wide derogations that are used to give priority to internal security concerns. It can be noted that prior to September 11, 2001 the EU, as a result of its fledgling Common Foreign and Security Policy, was already responding in a restrictive manner to the issue of classified information in this area and in particular sought to prune back the possible remit of the new (draft) freedom of information legislation as it applied to EU institutions and the public’s right of access in that regard. The direct cause of this new “security” consciousness of the Council, of the EU in particular, was its evolving close relationship with NATO and the demands imposed by the latter with regard to providing the EU with access to NATO classified information. As a result, the EU limited the scope of its own access to information legislation.¹⁰

Further problems emerged as a result of the speed and the content of the EU’s reaction to the terrorist offensive post September 11. These problems relate both to *process* (the secretive manner in which highly sensitive and far-reaching decisions are taken) and to *substance* (in particular the encroachment on civil liberties such as the freedom of expression, the freedom of movement, the freedom of assembly and the right to privacy).

Should a sophisticated international organization such as the EU, which is replacing (by means of supranational law) constitutional and legislative provisions on all kinds of fundamental issues at the national level (from constitutional rights of access to information to the laws on extradition between Member states to the laws on terrorism et cetera), adopt the lowest common denominator or a high standard of protection, given the more difficult legitimacy crisis faced by the EU than by any Member Nation State? Moreover, given the fact that the

Europeanization of a very wide range of policy areas takes place at a distance to individual citizens, and that these citizens have difficulty in understanding the incredibly complex decision-making processes and structures at the EU level, does that not make it even more necessary that information is made accessible by digital means in a very timely, user friendly and exhaustive fashion? The answers to these questions has everything to do with our vision of the nature of the democracy that we wish to construct at the European level and how it will interact with the national level.

THE DIGITAL DIMENSION OF EU GOVERNANCE: THE EVOLUTION OF A CITIZENS' RIGHT TO ACCESS EU INFORMATION

The first question is whether in the context of EU activity, citizens enjoy in terms of civil and political rights a right of access to information, including the right to receive that information digitally. The background to the question is the way in which access to information has taken shape within the EU over the course of the past eight years or so. The aftermath of the Danish “no” to the Maastricht Treaty prompted the first serious attempts to institutionalize a system of public access to EU documents which was made operational by the three main decision-making institutions in a joint Code of Conduct on the matter.¹¹ The institutions then made this non-binding Code operational in principle in their own specific institutional context by adopting decisions respectively based on their own internal Rules of Procedure.

At the time, this approach was said to highlight the commitment of the three institutions to transparency. The issue of public access to their documents was something that they had voluntarily assumed in their internal rules but that they were under no legal obligation to do so in the absence of any explicit Treaty rules on the subject. In due course, other institutions and bodies - among them the European Parliament and the European Central Bank - have adopted similar rules to those of the three political institutions, mostly pursuant to recommendations issued by the Ombudsman in the context of inquiries into the existence of rules on public access to documents.¹² Despite a number of important limitations, the most critical ones being the exclusion of documents drawn up

by third parties and a number of widely drawn exceptions,¹³ the Code of Conduct seemed to work quite well in practice.¹⁴ In the event a request for access had been refused, citizens could either bring a case to the Court of Justice or complain to the European Ombudsman.

The role that the European Court of Justice has played, teasing out the implications of the rules adopted by the various institutions and laying down the broad parameters of their action, has been a significant one. It can very generally be said that whereas the Court adopted a role of fairly marginal scrutiny of the actions of the institutions in practice it nevertheless, in a whole series of cases tested the exact limits, successfully kept pressure on the institutions to make incremental steps in changing their culture of secrecy. Some of these pressures include a requirement to balance interests; scrutinize the documents on a case by case basis; and grant access to parts of documents. The court also applied the internal rules broadly, applying them to the Commissions “comitology” committees, and also to decision-making in the two supposedly inter-governmental fields, Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (CJHA).¹⁵

It was only with the Treaty of Amsterdam in 1999 that access to documents was given treaty status and a provision made that the three institutions would adopt a legal instrument by co-decision (that is, jointly by The European Council and the European Parliament). This instrument set out the limits and exceptions to the principle by May 1, 2001. With minor delay and through a highly problematic and secretive procedure, a draft regulation was indeed adopted. It entered into force on December 3, 2001. To some extent it reflected the status quo and in certain respects it is more restrictive.¹⁶ In particular, this is the case with regard to the issue of internal preparatory documents, sensitive/classified documents and the fact that it basically overrides more liberal national laws on the subject.¹⁷

THE EVOLVING DIGITAL PRACTICE OF THE EU INSTITUTIONS

The reaction of the institutions to the case-law of the Court in particular and to advances in information and computing technologies (ICT)

has been to introduce a more structured and pro-active approach to access to their information than was their initial inclination or practice. Part of the reaction was to establish a hyper-link (the Europa server) and to make a host of information available through the medium of the internet. As time went on, the approach of various institutions and bodies became more sophisticated in this new digital context. Thus, the Council in 1999 set up a digital register of its documents in a relatively accessible and user-friendly fashion. This has gradually been expanded and refined.

Both the Council and the Commission now include information on the new policy making fields of CFSP and CJHA on their internet sites and in the Register of Council documents. Article 11 of the new Regulation on Public Access to Documents states that each institution shall provide a public register, in which “references to documents shall be recorded without delay.” The registers must be operational by June 3, 2002.

However, the Commission’s Rules of Procedure are very half-hearted in their approach and if followed will almost certainly breach the obligation imposed by Article 11 of the new Regulation. It states that:

the coverage of the register provided for by Article 11 of Regulation (EC) No 1049/2001 shall be extended gradually.

The European Parliament’s formally adopted “Register of references” make no such limitations. However, its internal discussions indicate that there are at least four categories of documents which will never be made accessible to the public.¹⁸

One of the main ways that the Access to Documents Regulation adopted by the EU is surprising however is precisely the fact that it contains few explicit digital provisions other than to provide that access to the registers which will be set up by the Commission and the European Parliament (the Council already has one) will be provided electronically (Article 11, paragraph 1). In the United States, the Freedom of Information Act (FOIA) originally adopted in 1946 was adapted a few years ago to the new digital reality in an e-FOIA that is quite far-reaching in the scope of obligations placed on the public administration in terms of making their information available digitally and providing access in that way.¹⁹ In particular it introduced an “electronic reading

room” facility.

The issue of the digital information provision is also at the leading edge in countries such as the Netherlands that has known an Act to Promote Open Government (WOB) since 1978 (amended in 1993). This legislation deals with public access to information about the administration laid down in documents. An e-WOB is currently before the Dutch Parliament with the purpose of providing greater access to information on-line.

Of course, the concerns are very different and much more basic in a sense in Member States at the other end of the spectrum. The UK has just announced a four year delay on the implementation of its FOI Act, which was the subject of a twenty year campaign to get it on the statute books, and Germany which still has no federal law on access to information, although a draft is currently being debated.²⁰

REFINING THE DIGITAL PRACTICE: THE ISSUE OF ACCESS TO CLASSIFIED INFORMATION RAISES THE STAKES

The Council and EP Regulation on Access to Documents in Article 9 makes special provision for a whole category of so-called “sensitive documents” which basically constitute classified documents (top secret, secret and confidential) originating from the institutions or the agencies established by them, from Member States, third countries or international organizations. The scope of the documents covered by these special rules includes public security documents, and documents relating to justice and home affairs. It even appears that documents within the scope of the “financial, monetary or economic policy” exception could conceivably be considered “sensitive documents” under the new rules. The effect of a classification as a “sensitive document” is that only certain persons can process the application for access to those documents and that reference to them can only be recorded in the register or released with the consent of the originator. This gives tremendous power to the originator of a document, who controls downgrading, and it also assumes that even the document number of a document included in a register will somehow threaten public security!

Given that originators have full control over classification, registration and release, there is no access whatsoever to such documents when authored by the Council or by third parties. This is a real problem in practice, with countries such as the United States, international organizations such as NATO, and even the Member States themselves effectively being given a veto over access to information in the EU context.²¹ However, if the recent Court of Justice's judgment in the *Hautala* case is applied to the category of sensitive documents then the originator of a sensitive document could only veto access to the truly sensitive parts of the document. Access under the general EU access rules would have to be granted to the non-"sensitive" parts of a document.²²

According to the new legislative system, the three institutions concerned (Council, Commission and European Parliament) had to adopt detailed internal rules on security rules and classifications (in their rules of procedure) which they did before Christmas 2001.²³ The most elaborate is that of the Commission which in effect clearly indicates an agenda of setting up a EU wide network of freely exchangeable "classified information" among the institutions, bodies, offices and agencies of the EU via intranet or other digital means. Moreover third states, international organizations and other bodies may also be included in this digital network and download such information provided that they operate equivalent security rules themselves. The only glint of light from the outside is the fact that references to classified information "may" be included in the digital register of its documents.

The EU has also adopted new IT information security (IT-INFOSEC) rules that entered into force on December 3, 2001. Their aim is to:

safeguard EU information handled in communications and information systems and networks against threats to its confidentiality, integrity and availability.

This seems to be an important statement of purpose as far as digital governance by the European Commission is concerned. The rules apply to "all communications and information systems and networks" handling information classified as EU "confidential." This gives the rules broad scope the Commission has defined EU classified information as:

any information and materials, the unauthorised disclosure of

which could cause varying degrees of prejudice to EU interests, or to one or more of its Member States, irrespective of its origin.

THE ADOPTION OF SECRET LEGISLATION AND ACCESS TO INFORMATION: A CASE STUDY AFTER SEPTEMBER 11

The example of the Framework Decision on the European Arrest Warrants is a good illustration in terms of substance of just how far the Europeanization process has gone within the context of the EU. It amounts to a rewriting of national laws on extradition and removes some of the safeguards (procedural and substantive) that have traditionally applied in various national contexts. It leaves little to no discretion to Member States once adopted, although it will formally have to be implemented into national law. But this can involve virtually no parliamentary input even at that stage. According to the provisions of the Anti-Terrorism, Crime and Security Act²⁴ adopted by the UK Parliament, it can be implemented by Ministerial order and would not, even at the stage of national implementation, necessarily have to go before national parliament. The situation may of course be different in other Member States. Be that as it may, the provisions of the Framework Directive once adopted may well be relied upon by the law enforcement arms of the respective Member States in due course.²⁵

The only legal quality the provisions of the Framework Decision will in any event not enjoy is "direct effect," and the only reason is that the framers of the Treaty of Amsterdam specifically stated this in the relevant legal article (Article 34(2)(b) of the Treaty on European Union). In other words, citizens in the various Member States will not be able to rely directly on its provisions and to enforce them in precedence to other national rules before a national court. The Court of Justice will have jurisdiction to entertain preliminary questions from national courts on questions of interpretation and validity of its provisions (Article 35(1) of the Treaty on European Union).

My focus is on the process of its adoption and the information available via internet and other sources at the time of its adoption by the Council (early December 2001). I traced through the information available via

internet on the Europa server²⁶ (Council²⁷ and Commission²⁸ home pages) on the draft Framework Decision on European Arrest Warrants²⁹ just prior to its adoption by the Council (that is September to November 2001). I then compared the information put before the two parliaments I was in a position to study: the Dutch parliament and the UK parliament. Finally I looked at the documents available on the Internet site of an organization of civil society, Statewatch.³⁰

On September 19, 2001, the Commission put forward a draft proposal that can be found on internet via a link with Eurolex³¹ under “legislation in preparation.”³² To find it one needs to know more or less the number one is looking for. A more accessible source is to be found under the link on its home page “justice and home affairs” and then onto the newly established site “Terrorism – the EU on the move”³³ where under the heading “documents” one will find the Commission’s draft (COM (2001) 521).³⁴

As an introduction to its new “terrorism” section, the European Commission explained that it had put forward “proposals aimed at eliminating legal loopholes in the EU that may help radicals suspected of violence escape justice.” These proposals were examined by the EU Council of Ministers of Justice and Home Affairs on September 20, 2001³⁵ and the extraordinary European Council meeting on September 21, 2001.³⁶ The special Article 36 Committee of senior officials subsequently continued examination of the draft and came up with various reworked drafts during the course of the ensuing months. No reference to Council negotiations or even a link with the web page of the Council is provided under this specially constructed terrorism site of the Commission.

If one then went to the Council’s web page, one found access to certain earlier drafts on the European Arrest Warrant. For example, under the activities headed “justice and home affairs,”³⁷ one could not track anything down, as it fell neither under the heading “future proposals for action” nor “lists of decisions adopted under JHA”. One, in fact, had to know that one must go separately to the topic of “transparency” and then to the heading “access to documents / register”³⁸ in order to try and literally track down possible Council texts. A search in the register with the words “European Arrest Warrant” produced (at that time) a list of eight entries. This contained the Commission proposal, a Council document transferring the

Commission proposal to all delegations and six sets of draft Council texts / amendments (dating in time from September 24- October 10, October 31- November 14, and November 19 - December 4). Only the text from the Article 36 Committee to COREPER / Council of October 10, 2001 could be downloaded via the internet and it was a very initial text asking for some political guidance on some very specific issues of principle. The four substantive Council texts indicating where the Council’s consideration of the Commissions proposal are indicated as “not available” on the Internet.

I then turned to the heading “agendas and timetables to meetings,”³⁹ exploring whether further substantive information could be gleaned as to the content of the Council’s work on this particular subject. From the “timetables of meetings,” it could be learned that a meeting of JHA Council was planned on December 6 and 7. Under “agendas” of meetings of the Council, on December 6, the day the scheduled meeting on JHA is to commence, the latest agenda for meetings refers to those that took place a week or more previously!

As a next step, one may turn to the heading “Article 36 Committee” to see if anything could be reconstructed from what is available there, after all this is the preparatory instance of the Council’s draft decision. But the latest agendas for this important committee date back to the meeting it held on November 12 and 13, some several weeks previously . Out of curiosity one looks to see whether one might at least find the draft Council decision of October 31, but discovers only the provisional agenda and a document number, which on re-checking the Council register turns out to be the draft of October 31. So on November 12 and 13, the Article 36 committee was discussing the draft of October 31, and since then three further draft texts have been produced and distributed.

The amount of information that was available in two Member States was also limited. One discovered that on November 12, the Select Committee on the EU of the House of Lords made a Report *inter alia* on the European Arrest Warrant proposal in order to inform an early debate in the House on some of the proposed EU legislation concerned with terrorism.⁴⁰ During the course of drawing up the report, they took evidence from the relevant Government Minister and published it as is customary with evidence. The report itself and the debate in the House of Lords, reproduced in Hansard, are available on the internet.⁴¹ The state of the negotiations are those reflected in the Belgian presidency

document of October 31, the only document available at the time that evidence was taken, and furthermore, it was provided only in French.

The Dutch Parliament is consulted as a matter of national constitutional law. On November 19, it received from the government what is known as an annotated agenda of the meeting to take place in Brussels on December 6 and 7. That agenda is also published on the Internet as an official document of the Dutch Parliament (in Dutch).⁴² It included the draft arrest warrant, but referred to the version of October 31, which was supplied in Dutch and to the two later texts, one available in English and the most recent version only in French. The explicit rider was added to the annotated agenda, to the effect that in any event “it was the subject of on-going negotiations, and that the government would provide further information when it became available”.

On December 5, only one day before the start of the relevant Council meeting, the Dutch Minister of Justice appeared before the relevant scrutiny committee of the Dutch parliament. At that meeting, parliament was given oral information as to the state of play in negotiations, but was not given the latest draft (December 4), as it was stated that it was not available at that time. The Dutch Parliament asked to agree to the substance of a text that was not made available to it. This despite the text of the Dutch constitutional provisions stating that it would receive such documents fifteen days in advance. In the event the Dutch parliament, along with the UK and Sweden, imposed parliamentary scrutiny reserves on the text as agreed in Council. Such reserves cannot alter the content of the Decision agreed upon in Council but must be lifted before it can enter into force.

By contrast, information was more readily available from a non-governmental organization, Statewatch. Statewatch maintained a very extensive and very easily accessible web site plus a special Observatory on the anti-terrorism measures under discussion after September 11.⁴³ Statewatch describes itself as “a non-profit making voluntary group founded in 1991 and comprised of lawyers, academics, journalists, researchers and community activists. Its European network of contributors is drawn from twelve countries. Statewatch encourages the publication of investigative journalism and critical research in the fields of the state, civil liberties and openness.”⁴⁴ It proved easy to retrieve a text of the Proposed Framework Decision on the European Arrest Warrant,⁴⁵

background material, and detailed commentary on the provisions of the available draft .

REFLECTIONS ON EU INFORMATION AND COMMUNICATIONS POLICY

It is not uncommon to come across statements to the effect that the technology behind ICT has occasioned a very fundamental shift in the role of government and governance.⁴⁶ ICT is responsible for a vast increase in the amount of information that is available, both in a quantitative sense and in the manner in which it renders information accessible. ICT, in principle, increases the transparency of processes and structures by generating information about the underlying productive and administrative processes through which public administration accomplishes its tasks. The Commission, in its *White Paper on Governance*, is content to adopt a congratulatory and superficial approach to its information policy (including the controversial new regulation on public access to documents) and some meagre thoughts in a separate communication on developing its communications policy.⁴⁷

Indeed, further examination of the Report of the Working Group 2a (internal) - *Consultation and Participation of Civil Society* - as well as that of Working Group 1a *Broadening and Enriching the Public Debate on European Matters* - reveals that the general attitude displayed within the Commission to the significance of ICT is a highly ambivalent one, confined largely to viewing it in purely instrumental terms. In other words, it tends to focus on the introduction of more on-line information (for example, databases providing information on civil society organizations that are active at European level or listing all consultative bodies involved in EU policy-making) rather than on reflecting on the institutional potential and dynamics of the technology in a broader (citizenship) framework.⁴⁸

The obligation on institutions to make information available to the general public on request at the same time entails, the obligation to make known the information they have in their possession. Interested citizens must be able to know what public information the institutions possess and where and how it can be found. It is the task of the institutional actors, in the formal political process, to proactively make this informa-

tion available and in principle freely available.⁴⁹ This includes the establishment of a public register where, as a rule, documents that have been received and drawn up by a public authority (including all its preparatory instances) must be registered.

This would include documents that the public authority in question estimates initially to be “secret” or “classified” (i.e. not falling within the rules on access to documents but under one of the specific exceptions to the general rule of openness). Only in this way can public activities be opened up to the citizens (and their representatives) in such a way that they can choose the information they wish to obtain, without having to rely on public information services (the information that public authorities choose to give about their work). In June 2002, the Commission, the Council, and the European Parliament had separately instituted such registers as part of their obligations under the newly adopted regulation on access to their documents, which in large part they have done, although those of the Commission and the European Parliament have been subject to some criticism.⁵⁰

Electronic media makes it possible to make such information widely available.⁵¹ More and more it is considered an obligation on the part of all executive, administrative, legislative, and even judicial authorities within the EU to put on the internet extensive information about their tasks, their organization structure, their activities, the agendas for their meetings, as well as, information on the most important documents under discussion in that context.⁵² If the documents are not directly made accessible via internet, then information should be included as to where those documents can be obtained. Initially, it could be said that the information placed on the web pages of the various institutions relating to documents, could already be considered as within the public domain.

THE ROLE OF THE NON-GOVERNMENTAL SECTOR

The decision by the Commission not to deal with the key issues of access to information and the linked question of the communication policies of the institutions is a major defect in the *White Paper on Governance*.⁵³ The decision pre-determined a fairly marginal role for “active” civil society representatives in its development of the gover-

nance agenda in the EU. But it is a rather futile exercise to attempt to pigeonhole as part of an exclusively vertical pyramid of accountability the role of the citizen and their civil society representatives in the manner that the Commission attempts to do in its *White Paper on Governance*. Rather, a re-imagined role for the civil society sector could invigorate considerably not only the institutions of representative democracy but also offset to some extent at least the reality of excessive bureaucratic domination. What is crucial however, to this perspective of introducing more spaces for deliberative democracy is that access to the debate is open and transparent and that there is no (or reduced) monopolization of influence behind closed doors. Information is often not sought by interested citizens because they are unaware of its existence.

Providing a greatly improved system of information is only to be considered a first step of a much larger project. It would serve as the basis for a system that allows widespread participation in policy-making processes through the mechanisms of interactive dialogue between the Union institutions and interested private actors. It would allow individuals to access the deliberative process as active participants rather than as mere passive receivers of messages. Moreover, it might well prove to be a unique opportunity for deliberations of citizens and interest groups beyond the traditional frontiers of the nation-state, without the burden of high entry costs for either individual citizens or public interest groups.⁵⁴ The danger of resulting information “overload” is clearly present. Already today citizens, groups, and national parliaments all experience difficulty in sifting through the information they receive and evaluating it to know what is and what is not important, and when precisely action and at what level, is required.

In this context, the role for the more specialized issue-oriented NGOs emerges as a kind of well informed “early-warning” mechanism helping to stimulate and focus public deliberations on related areas. Such “active” citizens can also have a pivotal role to play in ensuring the more widespread dissemination and filtering of information with the aim of assuring more concrete possibilities for political participation in the deliberative process itself.⁵⁵

What could in 1996 still be termed the “quiet revolution” of NGO participation in international organizations took a different turn after Seattle in 1999. Since then, the European Council summits have rou-

tinely been accompanied by demonstrations and protests. Over time, it has become a clearer focus for anti-globalization protests, the EU being perceived as a *globalisierungsverstärker* and the links between anti-EU protests and anti-globalization protests have strengthened.⁵⁶ Such spectacular demonstrations and protests led not only to dismissive comment by a segment of the political elite (such as the statement by Tony Blair after Gothenburg, condemning “the travelling circus of anarchists”), but also amongst others. This led to greater realization of the need to take on board the sentiments of dissatisfaction being expressed bottom-up (also evidenced in referenda, such as the Irish vote on Nice) in the further construction of the EU.

Nevertheless, the temptation is to react in an overly authoritarian manner to certain post-national threats from “uncivil” society with the risk of unnecessarily radicalizing “civil” society. Thus, the normative response at the EU level to September 11, has been to equate protestors at summit meetings with terrorists, rather than ensuring that a “voice” is also given to those who seek change from the political process. What is interesting about this latter example is that it was civil society organizations themselves that successfully made an issue for debate in the (European) public sphere of the attempt to introduce a new and sweeping definition of terrorism.

The combination of immediate digital access to the relevant documents (provided by civil society itself and not by the responsible decision-makers) coupled with sophisticated analysis and an engagement with the formal political actors at the national level (national parliaments in particular) and at the European level (the Council and the European Parliament in particular; the European Economic and Social Committee (ESC) played no role at all) was a formula that resulted in real change to the normative provisions in question.⁵⁷

As a result of engaged, albeit non-traditional political activity, citizens not only have much greater motivation to seek out information as to the performance of public administrators and formal decision-makers (either by themselves or through an association or interest group to which they belong): they are also better placed than ever to scrutinise the manner in which public administration tasks are carried out. Moreover, it follows that citizens no longer need or wish to have passive relations with the public authorities, but instead wish to play a vig-

orous part in defining these contacts as they see fit.⁵⁸ In other words, citizens are themselves developing their role, using the opportunities offered to them by ICT both in terms of acquiring information and maintaining virtual and horizontal relations with no traditional time and space constraints,⁵⁹ and are more willing to engage actively in issues now than in times where a more heroic view of politics prevailed.⁶⁰

NOTES

¹ Statement by Mary Robinson, United Nations High Commissioner for Human Rights, Commission on Human Rights, 58th session, March 20, 2002.

² See, A. Roberts, “The Department of Secrets: The Chretien cabinet is using fears of terrorism to further restrict public access to information,” *Ottawa Citizen*, October 18, 2001, page A 19.

³ For details see the UK Campaign for Freedom of Information: <http://www.foi.org.uk/doubleblow131101pr.html>. The FOI Act itself was passed on 30 November 2000 and must be fully implemented by November 2005. An implementation timetable was announced by the Lord Chancellor in the House of Lords on 13 November, and is set out in the Government’s First Annual Report on implementation published on 30 November. The timetable confirms that the right of access will not come into force until January 2005. However a provision requiring authorities to produce publication schemes describing information they publish proactively will be phased in earlier, starting with central government departments in November 2002.

⁴ The text of the Ashcroft October 12 Memorandum is available at: <http://www.usdoj.gov/oip/foiapist/2001foiapist19.htm>.

⁵ Lucy A. Dalglish, Gregg P. Leslie., and Phillip Taylor, eds. *Homefront Confidential: How the War on Terrorism Affects Access to Information and the Public’s Right to Know*. Committee for Freedom of the Press, 2002.

⁶ See, Dalglish, Leslie and Taylor (2002).

⁷ See, in particular, Council Framework Decision of June 13, 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision Official Journal L 190 , 18/07/2002 P. 0001 - 0020 2001) See also, EP Report on that proposal, A5-0003/2002, 9 January 2002. See also, Framework Decision on the execution in the European Union of orders freezing assets or evidence, Council 12636/01, 10 October 2001. See, Council Framework Decision of 13 June 2002 on combating terrorism

Official Journal L 164 , 22/06/2002 P. 0003 - 0007 which defines “terrorism” in such a way that many fear could still embrace protestors: see Statewatch at www.statewatch.org.

⁸ See the agreement negotiated by the Director of Europol with the United States on the exchange of personal information, 15231/02 5 December 2002, www.statewatch.org

⁹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145/43 (31 May 2001) that entered into force on 3 December 2001.

¹⁰ See further on this development, T. Bunyan, *Secrecy and Openness in the European Union: The Ongoing Struggle for Freedom of Information*, Chapter 6, <http://www.freedominfo.org/case.htm>

¹¹ Code of Conduct of 6 December 1993 concerning public access to Council and Commission documents, Council Decision (93/730/EC), [1993] O.J. L340/41; Council Decision (93/731/EC) of 20 December 1993, [1993] O.J. L340/43; Commission Decision (94/90/ECSC, EC, Euratom) of 8 February 1994, [1994] O.J. L46/58.

¹² See, *ibid.*

¹³ In particular, the exception concerning the protection of the interest in the confidentiality of the institution’s deliberations has been problematic.

¹⁴ In 2001 the Council received 1,234 applications for a total of 7,950 documents. The statistics of the Council over 2001 show further a high percentage of disclosure, in respect of the Council 88% of the documents have been released for the procedure as a whole.

¹⁵ See further, D. Curtin “Citizens’ Fundamental Rights of Access to EU Information: An Evolving Digital Passepartout?,” *Common Market Law Review* (2000) pp. 7-41.

¹⁶ See, in general on the pre-Regulation status quo, Curtin (2000) , note 15.

¹⁷ For critical commentary see Statewatch <http://www.statewatch.org/news>.

¹⁸ See, in particular, www.statewatch.org.

¹⁹ The e-FOIA amendments were subject to a staged implementation deadline: the last of the provisions were to be phased into US agency operations by the end of 1999.

²⁰ See the web-site of the Federal Ministry of Home Affairs, <http://www.bmi.bund.de>.

²¹ See further, Statewatch home page: www.statewatch.org.

²² See, “Council of the European Union disagrees on giving access to the public of positions taken by EU governments”:www.statewatch.org/news

²³ See, specific provisions regarding access to documents in Annex III to the Council’s Rules of Procedure, as amended by Council Decision of 29 November 2001, 2001/840/EC, O.J. L 313/40, 30.11.2001. The detailed rules on access to documents are laid down in an Annex to the Commission’s Rules of Procedure, as amended by Commission Decision of 5 December 2001, 2001/973/EC, ECSC, Euratom, O.J. L 345/94, 29.12.2001. See EP Decision adapting its Rules of Procedure to the provisions of European Parliament and Council Regulation (EC) No 1049/2001 on public access to Parliament, Council and Commission documents, 13 November 2001 (Rule 172 and Annex VII) and EP Bureau Decision of 28 November 2001 on public access to European Parliament documents, O.J. C 374/1, 29.12.2001.

²⁴ <http://www.statewatch.org>.

²⁵ See further on this point D. Curtin and Dekker, “The Constitutional Structure of the European Union: Some Reflections on Vertical Unity-in-Diversity,” in: P. Beaumont , C. Lyons and N. Walker (eds.), *Convergence and Divergence in European Public Law*, (Hart , 2002).

²⁶ <http://europa.eu.int>.

²⁷ <http://ue.eu.int/en/summ.htm>.

²⁸ http://europa.eu.int/comm/index_en.htm.

²⁹ http://europa.eu.int/eur-lex/en/com/pdf/2001/en_501PC0522.pdf.

³⁰ <http://www.statewatch.org>.

³¹ <http://europa.eu.int/eur-lex/en/index.html>.

³² http://europa.eu.int/eur-lex/en/search/search_lip.html.

³³ http://europa.eu.int/comm/justice_home/news/terrorism/index_en.htm.

³⁴ http://europa.eu.int/comm/justice_home/unit/terrorism/terrorism_sg_en.pdf.

³⁵ http://europa.eu.int/comm/justice_home/news/terrorism/documents/concl_council_20sep_en.pdf.

³⁶ http://europa.eu.int/comm/justice_home/news/terrorism/documents/concl_council_21sep_en.pdf.

³⁷ <http://ue.eu.int/jai/default.asp?lang=en>.

³⁸ <http://register.consilium.eu.int/utfregister/frames/introshfsEN.htm>.

³⁹ <http://ue.eu.int/cal/en/index.htm>.

⁴⁰ <http://www.parliament.the-stationery-office.co.uk/pa/ld200102/ldselect/ldcom/34/3402.htm>.

⁴¹ <http://www.parliament.the-stationery-office.co.uk/pa/ld/ldhansrd.htm>.

⁴² <http://www.parlement.nl>.

⁴³ <http://www.statewatch.org/observatory2.htm>.

⁴⁴ <http://www.statewatch.org/about.htm>.

⁴⁵ <http://www.statewatch.org/news/2001/sep/earrest2.pdf>

⁴⁶ ICT and Government Committee, *Citizen and Government in the Information Society. The Need for Institutional Innovation*. (Den Haag, September 2001), <http://www.minbzk.nl/international/documents/pub3092.htm>.

⁴⁷ European Commission: Communication on a New Framework for Co-operation on the Information and Communication Policy of the European Union, COM (2001) 354, 27 June 2001.

⁴⁸ Bovens (2001).

⁴⁹ The role of commercial publishers in this regard must clearly also be considered but here it is a matter more of a supplemental role where such publishers charge commercial rates for information to which some clear added value in terms of information provision is present.

⁵⁰ See further, www.statewatch.org

⁵¹ Of course the assumption cannot be made that individual citizens interested in participating in this fashion all necessarily have access to the requisite hardware in order to have voice in this fashion. Clearly the provision of easy access to the computer hardware in public areas such as libraries, community halls and even public kiosks (Portugal and the Netherlands) need to be stimulated at national and local level, possibly with some EC funding.

⁵² See the practice of the Europa server in that regard: <http://www.europa.eu.int>.

⁵³ see, http://www.europa.eu.int/comm/governance/white_paper/index_en.htm

⁵⁴ See too, Weiler et al. (1996).

⁵⁵ See further, D. Curtin, "Non-Governmental Representation v. Civil Society Deliberation: A Contemporary Governance Dilemma", paper presented to ARENA Annual Conference, Oslo, 2-3 March 2002.

⁵⁶ See too, Wolf (2001) 113.

⁵⁷ See for details the Observatory on Terrorism and the Protection of Civil Liberties on the Statewatch home-page, www.statewatch.org.

⁵⁸ ICT and Government Committee, *Citizen and Government in the Information Society. The Need for Institutional Innovation*. (Den Haag, September 2001) <http://www.minbzk.nl/international/documents/pub3092.htm>.

⁵⁹ See further, Scientific Council for Government Policy, *Governments Losing Ground. An Exploration of Administrative Consequences of ICT* (Den Haag 1998).

⁶⁰ See, on the role of ICT in strengthening the possibilities for civil society organizations to participate in the process, Internet and Public Administration (Internet en Openbaar Bestuur), *De Schaduw Democratie* (2001), <http://www.internetenopenbaarbestuur.nl/>.