



## Statewatch

### Proposed Commission changes to Regulation on access to documents fail to meet Lisbon Treaty commitments

- The public and civil society have a right to know what is being discussed during the EU legislative process
- Abolish the "space to think": Article 4.3 is used to deny access to documents concerning measures "under discussion" because it could "seriously undermine the decision-making process". On the contrary Article 4.3 "*seriously undermines*" democracy because the public and civil society have no right to know what is being discussed until after a measure is adopted (and sometimes not even then)
- the Commission used Article 4.3 to refuse access to documents in over 25% of initial applications and for the Council the figure was 39.2% (plus an undefined proportion of the 28.2% refused for multiple reasons) [2009 Annual Reports]

---

On Monday (21 March) the European Commission adopted a proposal to amend Regulation 1049/2001 on public access to EU documents to meet the commitments stemming from the Lisbon Treaty

The first amendment updates Article 1.a to acknowledge that "*Article 15(3) of the Treaty on the Functioning of the European Union in such a way as to grant the public the widest possible access to documents*" is the new basis of the Regulation. The second says that the Court of Justice of the European Union, the European Central Bank and the European Investment Bank are now subject to the Regulation "*only when they exercise their administrative tasks.*" And the third amendment extend the scope of the Regulation to cover "*institutions, bodies, offices and agencies of the European Union, including the European External Action Service*" where they have not already done so.

The Commission's new proposal leaves its 1 April 2008 proposals on the table because "*the Council and the European Parliament have shown strongly diverging views about amending the Regulation*".

Therefore the Commission proposal says that these new amendments should be adopted "*without further delay*".

Does Article 15.3 of the TFEU in the Lisbon Treaty, referred to in the amendments, have wider implications than simply proposing to extend the scope of the Regulation to "*all institutions, bodies, offices and agencies of the European Union*"?

---

The simple answer is Yes.

One of the fundamental principle of a democracy is that its legislatures should carry out their proceedings in public. Meetings must be open and access to all the documents under discussion should be available to the public and civil society as they are produced. It is this principle that sets democracies apart from dictatorships and totalitarianism.

The Council of the European Union has a number of roles and one of them is as a **legislature** - with the European Parliament it acts as a co-legislature. Its role as a **legislature** includes the deliberations of a multitude of Working Parties and meetings of the Councils of Ministers. All of the documents concerning the Council's **legislative** role should be available as soon as they are produced. In the EU "legislative" measures include both "*legislative*" and "*non-legislative*" measures.

It is quite unacceptable for a legislature to meet in secret, and it is equally unacceptable in a democracy for its two legislatures to meet together in secret. 84% of legislative measures concerning civil liberties/justice and home affairs adopted between 2004-2009 were agreed in secret 1st readings deals between the Council and the European Parliament and the practice has continued unabated since. The only record of the progress of these discussions appear in "Outcomes" prepared by the Council - which are not made publicly available and to which access, on application, is routinely refused under Article 4.3 on the grounds that disclosure would "*seriously undermine the decision-making process*".

Just imagine if this practice was pursued at national level. The government would publish a Bill then in the parliament (legislature), at the detailed Committee stage, meetings would be held in secret and then the full parliament presented with a *fait accompli* with no amendments allowed. There would rightly be uproar.

The Council refers to meetings with the European Parliament to discuss 1st reading deals (called "trilogues") as "negotiations" which ensures Council Member States can speak their mind in private - but these are **joint meetings of two legislatures**. The concept of "negotiations" conjures up images of 19th century international diplomacy (or perhaps the era of justice and home affairs inter-governmental cooperation prior to the Maastricht Treaty).

Giving evidence to the UK House of Lords Select Committee in 2009, Mr Hubert Legal, from the Council's Legal Service, said:

*"During ongoing legislative procedures there is not a general right for the public to access documents if the fact of giving access would undermine the institutional decision-making process. That is the protection of ongoing procedures, which means that once the procedure is completed the document is no longer limited in access."* (House of Lords Select Committee report: Codecision and national parliamentary scrutiny)

Thus Mr Legal's position is that the public and civil society have no right to know what is being discussed until after "the procedure is completed" - documents can be obtained only after the decision has been made.

But the public and civil society do have a right to know what documents and issues are under discussion in EU legislatures. Only then can they discuss and debate what is being proposed and intervene if they wish to.

## The Commission's new proposal

The Commission's planned proposal only covers Article 15.3 sub-para 3 of the TFEU which would extend the scope of the Regulation to cover all institutions, bodies, offices and agencies of the EU.

However, Article 15.3 also states in sub-para 5 that when "considering" draft legislation (Article 15.2):

*"The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures."* (emphasis added)

Note it refers to "legislative procedures" in the plural - EU "legislative" measures include both "*legislative*" and "*non-legislative*" measures - the latter category refers to measures amending existing *binding* law.

This Treaty commitment reflects Article 15.1 which requires all "institutions, bodies, offices and agencies" of the EU to "conduct their work as openly as possible", "in order to promote good governance and ensure the participation of civil society" - this is a more specific application of the general rule set out in Article 1 of the TEU.

Taken together these elements of Article 15 means that Article 4.3 of Regulation 1049/2001 should be deleted. Article 4.3 states that:

*"Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."*

*Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."* [NB: access has never been granted in the "public interest"]

This "exception" is used to refuse access to documents because "*disclosure of the document would seriously undermine the institution's decision-making process*". The Council routinely uses this power to deny access to documents "under discussion", and in some cases even after a measure has been adopted, which are part of the **legislative** process. It is unthinkable at the national level that documents and records of legislative discussions would be kept secret from the public - yet this is how the Council has operated for years under Article 4.3.

## What is the origin of Article 4.3 - the "space to think"?

Under the "Code of Access to EU documents (in force between 1993-2001) the list of exceptions (similar to those on Articles 4.1 and 4.2 of the current Regulation) were the **only** grounds for refusing access to documents it did **not** contain the concept of the "space to think", whereby documents under discussion in the *legislature* could be kept secret, hidden from public view.

The first body to put forward this idea was the Commission in April 1999 as part of the consultation on implementing the commitment in the Amsterdam Treaty which said:

*"This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen."*

In a paper produced for the consultation the Commission said that access "would not extend to working documents in the form of a contribution to internal proceeding" and access should be delayed:

*"to certain documents to avoid interference in the decision-making process and to prevent premature publication of a document from giving rise to "misunderstandings" or jeopardising the interest of the institution (eg: granting access to preparatory documents only after the formal adoption of the decision)."*

When the formal discussions on the new Regulation got underway the Commission argued for a new "exception" to allow institutions to refuse documents which would undermine *"the effective functioning of the institutions"*) and the Council also decide that it wanted the power to refuse access where no decision on a document has been made where it *"could seriously undermine the institution's decision-making process"*. Thus was Article 4.3 conceived.

Civil society argued vigorously against the inclusion of this new exception arguing that it ran totally contrary to the intent of the Amsterdam Treaty. In 2000, during the discussion on the Regulation, "Essays for an Open Europe", said:

*"the Commission wants to create the so-called "space to think" for officials (public servants) and deny access to innumerable documents, some permanently. The "space to think" for officials is apparently more important than the peoples' right to know."*

The Annual Reports of the Commission and the Council for 2009 show that the Commission used Article 4.3 to refuse access to documents in over 25% of initial applications and for the Council the figure was 39.2% (plus an undefined proportion of the 28.2% refused for multiple reasons). The high figure for the Council is not surprising. The contents of 78.5% of the documents on its register are publicly accessible but nearly all the documents "under current discussion" are not - that is, the documents of most interest to civil society and citizens.

Article 4.3 seriously undermines the democratic process.

#### **Commitments under Article 11 of the TEU - an informed civil society**

If was not reason enough there are other commitments in the Lisbon Treaty which cannot be met unless Article 4.3 is repealed.

Title II of the TEU in Article 11.1 requires EU institutions to give:

*"citizens and representative associations the opportunity to make known and publicly exchange views" in "all areas of EU action"*

and Article 11.2 expressly requires:

*"open, transparent and regular dialogue with representative associations and civil society".*

How can these Treaty obligations be met if civil society are denied access to the records of on-going legislative discussions?

## The Hautala Working Document

The legitimacy of Article 4.3 of the Regulation is further questioned in a **Working Document No 1** prepared by Heidi Hautala MEP who is the Rapporteur on the Annual Report on public access to documents. The Working Document says that the exception "*disclosure of the document would seriously undermine the institution's decision-making process*" was inserted into Regulation 1049/2001 to:

*"mirror the spirit of a specific former [Amsterdam] Treaty provision (Article 207(3) TEC) which required transparency of Council legislative preparatory works, "while at the same time preserving the effectiveness of its decision-making process."* (Working document No 1, p4)

But there is:

*"no reference to the concept of protection of the decision-making process in the new Treaties, and the current "survival" of this concept is based only on Article 4(3) of Regulation (EC) 1049/2001."*

The repeal of Article 4.3 was also proposed by the European Parliament in the Resolutions of 11 March 2009 and 12 May 2010 (Amendment 41).

### Conclusions

- The public and civil society have a right to know what is being discussed during the EU legislative process
- Article 4.3, the "space to think" in secret, must be repealed
- It would be a travesty if the advances in openness, through access to documents, built into Article 15.3 of the Lisbon Treaty are not transposed into the Regulation

Tony Bunyan

---

For background documentation and developments see:  
Observatory: the Regulation on access to EU documents: 2008 - 2011:

<http://www.statewatch.org/foi/observatory-access-reg-2008-2009.htm>

For the full history and documentation on Access to documents in the EU see Statewatch's Observatory: FOI in the EU: Reporting on openness and secrecy in the EU since 1992:

<http://www.statewatch.org/foi/foi.htm>

---