



Statewatch analysis

Proposals for greater openness, transparency and democracy in the EU

Professor Steve Peers
University of Essex
October 2008

Introduction

The European Union's titanic treaties keep hitting the icebergs of public opinion. Despite some undoubted improvements in ensuring openness and transparency in the EU since 1991, there is still a widespread and justified perception that:

- the EU's activities are too secretive and convoluted,
- the EU does not listen enough to the general public or organised civil society; and
- there is too little control of the activities of the EU by the public, and in particular there is insufficient control of EU actions by directly elected parliaments.

It seems clear that these concerns played a significant role in the rejection of the proposed Treaty of Lisbon by the Irish electorate. Moreover, these concerns are widely shared by both critics and supporters of EU integration.

A separate analysis on the possible ratification or implementation of the Treaty of Lisbon examines what steps *could* be taken regarding ratification of the Treaty following the Irish referendum vote - without prejudging the question of whether the Treaty *should* still be ratified.¹ The steps toward further openness, transparency and democracy in the European Union outlined in this analysis could largely be taken separately from any initiative relating to ratification of the Treaty

¹ Can the Treaty of Lisbon be ratified or implemented?: A legal analysis:
<http://www.statewatch.org/news/2008/jun/analysis-lisbon-june-sp-2008.pdf>

of Lisbon. So these measures could go ahead even if Member States decide to stop ratification of the Treaty, or if further attempts at ratification prove to be impossible.

Alternatively, these measures could form part of a 'package' deal which is aimed to convince Irish voters to approve the Treaty. It is worth recalling, as pointed out in the separate analysis, that back in 1992, when an EU Treaty was first rejected in a national referendum (the Danish rejection of the Maastricht Treaty), a 'package' deal including the first EU measures concerning openness and transparency convinced Danish voters to approve the Treaty after all. However, the measures proposed in this analysis could largely still be adopted regardless of whether or not Irish voters do agree to ratify the Treaty of Lisbon.

This analysis first of all summarises particular improvements that could be made as regards openness, transparency and democracy in the EU, most of which have been supported by Statewatch in the past. The analysis then presents draft texts which could implement these principles. Such measures could be approved by the EU institutions later this year - if the EU institutions and Member States are prepared to recognise the current deficiencies regarding the level of openness, transparency and democracy in the European Union and to muster sufficient political will to address these issues. .

Overview of the proposals

Annex I includes a draft European Council declaration that addresses a number of urgent issues regarding openness and transparency in the EU, on the one hand, and democracy on the other. Annex II contains a proposed Inter-Institutional Agreement on the particular issue of enhancing the transparency of agreeing 'first-reading' deals between the Council and the European Parliament (EP) in the 'co-decision' process.

As regards openness and transparency, points 1 and 5 of the proposed declaration concern the two EU bodies which have **not** in practice adopted rules on access to documents: the European Council (the formal name for the summits of Member States' heads of state and government) and the Court of Justice. The Treaty of Lisbon would provide, if it is ratified, for the application of the EU general rules on access to documents to these bodies. However, there is no need to wait for the ratification of the Treaty of Lisbon - if it is ever ratified - in order for these bodies to adopt access to documents. In fact, over two dozen other EU bodies have adopted rules on access to documents without waiting for the Treaty of Lisbon. It is inexcusable that the European Council and the Court of Justice have not followed suit long ago.

Point 5 distinguishes between the administrative acts of the Court of Justice, where it should adopt access to documents rules immediately, and its judicial function. The Treaty of Lisbon would only apply the general access to documents rules to the Court's administrative tasks. However, the Treaty would not *prevent* the Court from adopting internal rules governing access to judicial documents. In order to address the concern that public access to judicial documents might impair the effective functioning of the Court, the proposed declaration calls for an objective assessment of this issue based on national law and practice, to see whether or not these concerns are justified.

Point 2 concerns openness in the Council. Since 2006, the Council has normally held public meetings when discussing acts pursuant to the 'co-decision' procedure. The Treaty of Lisbon would oblige the Council to hold public meetings as regards all legislative acts, regardless of the applicable procedure. There is no need or justification for the Council to wait for the Treaty of Lisbon to enter into force - if it ever does - to extend the openness of its proceedings, since it can regulate this issue in its rules of procedure. Moreover, the Council should hold more public meetings in a non-legislative context.

In order to ensure that open Council meetings are practically accessible to the public, it is necessary to amend the rules on access to documents accordingly (point 2(d)) and to draw up transcripts of ministers' comments during open meetings (point 2(b)) - which would be equivalent to the published records of the proceedings of national parliaments. The principle of 'confidentiality' (ie secrecy) of the Council's proceedings is already limited in practice by the rules on access to documents and open meetings, but the basic requirement of Council secrecy in its rules of procedure is so deeply emblematic of the level of secrecy of EU institutions which so profoundly alienates the EU from the public it aims to serve. This beast needs to be slain for symbolic reasons (point 2(c)).

Point 3 deals with the Commission. Points 3(a) and (b) concern draft implementing (comitology) measures, which are currently generally not made publicly available before their adoption by the Commission. This is wholly unjustifiable and gives rise to fully justified public concern about the secrecy of the EU's activities - given that the comitology process cannot even claim to be *indirectly* democratic, since it does not involve the participation of national ministers. This obviously needs to change fundamentally, and national parliaments need access to these drafts in particular - a point addressed in point 14. These points would apply *mutatis mutandis* to the system for the Commission adopting 'delegated' acts, if the Treaty of Lisbon is ratified.

Point 3(c) borrows an established principle from American administrative law, aiming to give more input into draft government measures by those (particularly

private companies) which would be most directly affected by it. The risk of undue influence is addressed by point 3(d), which addresses the concern that the link between the Commission and lobbyists is too murky.

Point 3(e) concerns the issue of freedom of *information*, as distinct from access to *documents*. Often, information on the activities of the EU institutions and bodies has not been set out in the form of a document. But it nevertheless still essential to ensure that the public has access to such information in order to guarantee the full accountability of the institutions. If the Treaty of Lisbon enters into force, there could be legislation on this issue pursuant to a new Treaty provision which would allow for the adoption of legislation setting out administrative procedural rules for all EU bodies, including rules guaranteeing an 'open' EU administration.

Point 4 concerns the current proposal on access to documents - which should be adopted within a reasonable timeframe, should not reduce the level of access to documents, and should take account of the other improvements in openness and transparency which need to be made.

Part II concerns measures to enhance democracy. Points 6 and 7 aim to encourage European political parties to nominate a candidate for Commission president, which the Council should then in principle accept as its nominee for this post following next year's EP elections. This change in practice would help to reconnect the EU to its citizens, by making a direct link between the result of voting in EP elections and the identity of the next Commission President. In the event that the parties do not nominate preferred candidates, point 8 would, as a default, require that the Commission President come from the party which wins the most seats. This principle was already applied implicitly following the 2004 elections. Point 9 provides for the continued application of the same principles if the Treaty of Lisbon is ratified.

Point 10 concerns the 'European citizens' initiative', an innovation of the Treaty of Lisbon. In order to increase public awareness of this concept, and to ensure that it can be applied as soon as possible if the Treaty enters into force, the declaration suggests that the Commission issue a communication on the application of this proposed Treaty article, which could then be swiftly applied if the Treaty of Lisbon is in fact ratified. Point 11 makes clear that citizens could use the initiative to curtail the EU's activities as well as (more obviously) to increase them. Point 12 aims to ensure that the Commission will take account of valid citizens' initiatives as far as legally possible.

Finally, points 13 and 14 concern national parliaments. The enhanced rights for national parliaments in the Treaty of Lisbon should be applied in advance or in the

absence of that Treaty's entry into force (point 13) - although of course the Treaty would have to be ratified for those rules to become *legally binding*.

Point 14 aims to encourage the EU institutions to confer much greater rights in practice on national parliaments than the Treaty of Lisbon provides for - as regards non-legislative EU measures, a broader range of objections by national parliaments, possible requests for an extension of the time limits in the relevant protocols, joint legislative initiatives by national parliaments, and joint requests to amend the Treaty by national parliaments. These points should be set out in an Inter-Institutional Agreement to make them legally binding. Alternatively, if the EU Member States decide to make amendments to the Treaty of Lisbon which address issues besides the position of Ireland, or decide to begin a new process of Treaty amendment, these proposals could be included in a revised version of the Protocol on national parliaments. In that case, the proposals could still be set out in an Inter-Institutional Agreement in the meantime.

Annex II sets out a detailed proposal which would dramatically improve the current level of openness, transparency and democracy as regards 'first-reading' co-decision deals. At the moment, the large majority of co-decision measures are agreed in first reading deals, which are totally lacking in the basic rudiments of openness and transparency. It is practically impossible for outsiders, including national parliaments, to work out whether first-reading negotiations are underway, what stage negotiations are at, and what drafts are under discussion. Once an agreement has been reached between the EP and Council, there is often little time for civil society or national parliaments to react before the adoption of the text.

The proposed Inter-Institutional Agreement addresses all of these concerns. It provides for the prior adoption of a negotiating position by the EP and the Council - which must be publicly available - before first-reading negotiations start (points 1 to 3). However, to preserve some flexibility, the Council would not be required to establish a negotiating position. The requirement for the responsible EP committee to adopt a negotiating position avoids any risk that the EP's rapporteur will go off on a 'frolic of his (or her) own', by implicitly enhancing the rapporteur's accountability to the committee.

Detailed information on all aspects of the negotiations must be available to the public (point 4). The final provisional text of any deal must in particular be public (point 5), and be widely publicised (in practice by means of press releases and updates on the dedicated website), in particular to national parliaments. There must then be at least eight weeks for national parliaments and civil society to scrutinise the final deal before any vote - although national parliaments could ask for an extension of this period (point 6).

For all this information to be accessible, there would be a single specialised website (point 7). At the moment, the separate co-decision' sites of the Commission, EP and Council are hard to find, contain much less information, and are infrequently updated. This site should be a broader forum for discussion of the proposals - including comments by civil society and interventions by national parliaments. There should be provision for interactivity, if, for instance, national ministers or MEPs want to respond to comments or to explain the latest developments.

Finally, since proposals to codify EU legislation do not make any substantive amendments to that legislation, there is no need to apply the rules to those proposals (point 10).

It is not proposed to apply any new rules to second and third reading co-decision agreements, since the institutions' positions are in that case made public anyway, and the deadlines set out in the Treaty for second and third readings would not permit a two-month 'cooling-off' period as proposed here.

It should be recalled that if the rules on access to documents are amended as proposed in Annex I, there would be full access to documents at any stage of the co-decision procedure. But Annex II would still be useful in the event that the proposals in Annex I were not adopted. Even if the Annex I proposals were adopted, the Annex II proposals would be useful because they would shed much more light on the process of reaching first-reading deals (in particular because they would require at least the EP to adopt a formal negotiating position), and because they would provide for greater participation by national parliaments and civil society, due to the cooling-off period.

Annex I

Declaration of the European Council on enhancing the openness, transparency and democracy of the activities of the European Union

I Measures to enhance openness and transparency

- 1) The European Council will adopt, at its next meeting, a Code of Conduct on access to its documents, taking account of the principles and limits set out in Regulation 1049/2001;
- 2) The Council is invited to amend its rules of procedure within three months, in order to provide for:
 - a) holding all meetings involving the discussion of draft legislative acts in public, and extending the obligation to hold public meetings in other cases;
 - b) drawing up a transcript of its public meetings, to be made available online to the public;
 - c) abolishing the rule that Council meetings are in principle confidential, with confidentiality limited instead to specific duly justified cases, which cannot include legislative activities; and
 - d) amending the rules concerning access to Council documents to take account of points (a) to (c);
- 3) The Commission is invited:
 - a) to make publicly available, within three months, the text of all draft implementing measures on its register of comitology documents;
 - b) to forward such draft measures to national parliaments immediately;
 - c) to establish, within one year, a 'notice and comment' system as regards Community acts;
 - d) to establish a register fully detailing all contacts between the Commission and lobbyists; and
 - e) to report, within one year, on specific measures which may be taken to ensure freedom of information as regards EU institutions, bodies, offices and agencies, including, if the Treaty of Lisbon has entered into force, a proposal pursuant to Article 298 of the Treaty on the Functioning of European Union addressing this issue.
- 4) The Council and the European Parliament are invited to adopt the proposed Regulation on the right of public access to documents by the end of 2009,

taking full account of the other provisions of this Declaration, and ensuring that the Regulation does not reduce the current level of protection of this right;

- 5) The Court of Justice is invited:
 - a) to propose, within three months, amendments to its rules of procedure which elaborate specific provisions concerning access to its documents as regards administrative tasks, taking account of Regulation 1049/2001; and
 - b) to carry out within one year an assessment of Member States' laws and practices regarding public access to judicial documents, taking into account Article 6 of the European Convention on Human Rights, and to report in light of that assessment on the feasibility of adopting rules concerning public access to judicial documents of the Court;

II. Measures to enhance democracy

- 6) European political parties are encouraged to establish a process to nominate a preferred candidate for President of the European Commission, in advance of the June 2009 elections to the European Parliament;
- 7) The Council, meeting in the composition of the Heads of State and Government, is invited to consider nominating, as the person it intends to appoint as the President of the Commission, the candidate preferred by the European political party which obtains the largest number of seats in the June 2009 elections;
- 8) In the event that the political party which obtains the largest numbers of seats in the June 2009 elections has not nominated a preferred candidate for President of the Commission, the Council, meeting in the composition of the Heads of State and Government, is invited to consider nominating, as the person it intends to appoint as the President of the Commission, a person with the same political background as that European political party;
- 9) If the Treaty of Lisbon is ratified, the European Council shall, when proposing a candidate to the European Parliament for election as President of the Commission, take account of the results of the elections to the European Parliament, in accordance with the Treaty on European Union, by proposing the candidate preferred by the European political party which obtained the largest number of seats in the previous elections to the European Parliament; if that party has not nominated a preferred candidate for President of the Commission, the European Council shall propose a

candidate for election as President of the Commission who has the same political background as that European political party;

- 10) The Commission is invited to propose, within three months, a communication concerning options for a draft regulation providing for a European citizens' initiative, to begin public discussion on this issue; if the Treaty of Lisbon is ratified, the Commission is invited to propose a regulation on this issue within three months of the Treaty's entry into force, taking account of the views of national parliaments and civil society on its communication, and the Council and the European Parliament are invited to adopt this proposed regulation within one year;
- 11) The communication and, if the Treaty of Lisbon is ratified, the proposal to establish a European citizens' initiative should make clear that a citizens' initiative can call for the repeal of an EU act, or the amendment of an EU act in order to reduce the level of regulation of an issue by the Union;
- 12) The Commission is invited to confirm, in its communication concerning options for a European citizens' initiative, that it will very seriously consider proposing a measure pursuant to a duly submitted citizens' initiative, and that it will give detailed reasons if it decides not to submit a proposal following such an initiative;
- 13) The Commission, the Council and the European Parliament are invited, as far as possible, to apply the principles in the revised versions of the Protocols on national parliaments and subsidiarity and proportionality, as set out in the Treaty of Lisbon, in advance of or in the absence of the entry into force of that Treaty;
- 14) Moreover, the Commission, the Council and the European Parliament are invited to strengthen in practice the application of the principles set out in the revised versions of the Protocols on national parliaments and subsidiarity and proportionality, whether or not the Treaty of Lisbon enters into force, by adopting an Inter-Institutional Agreement providing for:
 - a) applying the principles set out in the revised versions of the Protocols to all EU measures, not just non-legislative acts;
 - b) considering objections by national parliaments to draft EU measures made on any grounds, not just grounds of subsidiarity, and in particular the grounds that a proposed act breaches the principles of proportionality or exceeds the powers conferred upon the Union by the Member States;
 - c) the possibility for national parliaments to request an extension of the time periods set out in the Protocols, in particular cases;

- d) establishing a process by which at least one-third of national parliaments can submit a joint initiative to invite the Commission to make a proposal for an EU act, which could entail the repeal of an EU act, or the amendment of an EU act in order to reduce the level of regulation of an issue by the Union;
- e) establishing a process by which at least one-third of national parliaments could informally suggest the convening of an Inter-governmental conference to amend the Treaties, which could serve either to increase or reduce the level of EU competences.
- f) agreement that if 60% of national parliaments object to a draft EU measure on any grounds, that proposal should in principle be withdrawn.

Annex II

Inter-Institutional Agreement

On enhancing public access to documents
and citizens' participation in decision-making
as regards the co-decision procedure

- 1) The negotiating position of the European Parliament as regards a first-reading agreement shall be set out in a report adopted by the relevant committee of the European Parliament in accordance with the Parliament's Rules of Procedure; this committee report shall be publicly available;
- 2) The negotiating position of the Council as regards a first-reading agreement shall be set out in a document adopted by the Council, or agreed within Coreper or the relevant Council working group(s) or committee(s) on behalf of the Council; this document shall be publicly available;
- 3) The European Parliament and the Council shall not begin negotiations for a first reading agreement unless a negotiating position of the European Parliament, in accordance with point 1, has been adopted;
- 4) When Members of the European Parliament and representatives of the Council hold any meetings to discuss a possible first-reading agreement, full information shall be publicly available as regards the meeting dates, the names and roles of participants at the meetings, the meeting agendas, all documents submitted to or considered at such meetings and the minutes of such meetings;
- 5) The text of any provisional first-reading agreement reached between the negotiators shall be made publicly available and shall be widely publicised

by the Council and the European Parliament; in particular, the Council and the European Parliament will draw national parliaments' attention to these agreements;

- 6) Except for duly justified cases of urgency, a period of at least eight weeks shall elapse between the public availability of a first-reading agreement and any vote on that agreement by the Council or European Parliament; the relevant provisions of the Protocols on national parliaments and on subsidiarity and proportionality shall apply during this period; a national parliament may request an extension of this time period;
- 7) The documents referred to above shall be made available to the public in a dedicated single website to be set up by the institutions, which shall be designed to ensure ease of use by the public; this website shall also include the original proposal and any related impact assessments or communications, any relevant documents forwarded by national parliaments (or regional parliaments), the Economic and Social Committee, the Committee of the Regions, and civil society, and full information about and documentation concerning any public hearing held by EU institutions or lobbying of EU institutions related to the proposal;
- 8) The EU institutions shall amend their rules of procedure and any prior agreements or declarations as necessary to ensure compatibility with this Agreement;
- 9) If the Treaty of Lisbon is ratified, the reference to the 'co-decision' procedure in this agreement shall be understood as a reference to the 'ordinary legislative procedure', and the references to the Protocols on national parliaments and on subsidiarity and proportionality shall be understood as a reference to the new versions of those Protocols;
- 10) This Agreement shall not apply to measures to codify Community or Union legislation.

Background

1. FOI in the EU: <http://www.statewatch.org/foi/foi.htm>
2. Statewatch: Observatory on access to EU documents: 2008-2009:
<http://www.statewatch.org/foi/observatory-access-reg-2008-2009.htm>

© Statewatch ISSN 1756-851X. Personal usage as private individuals/"fair dealing" is allowed. We also welcome links to material on our site. Usage by those working for organisations is allowed only if the organisation holds an appropriate licence from the relevant reprographic rights organisation (eg: Copyright Licensing Agency in the UK) with such usage being subject to the terms and conditions of that licence and to local copyright law.