



Statewatch Analysis

EU: Deepening the democratic deficit: the failure to “enshrine” the public’s right of access to documents

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In April 2008 the Commission opened up the process to amend the 2001 Regulation on access to EU documents nearly three years on nothing has happened - all that has been agreed is a new set of “comitology” rules that will restrict access

The struggle for openness - access to documents - in the EU has been a long and protracted one that has yet to be resolved. When Maastricht Treaty came into force the Council of the European Union (the EU governments) and the European Commission adopted the “Code on access to E U documents” in December 1993 . The Amsterdam Treaty, adopted in 1997 , came into force in 1999 and Article 255 promised to “enshrine” the right of access to E U documents.

During 1999 and 2000 the Council and the European Parliament engaged in lengthy “trilogues” which resulted in the current Regulation on access to EU documents (1049/2001). See: Statewatch’s Observatory [1].

In April 2008, the Commission finally put forward proposals to amend the Regulation. This was highly contentious as the Commission sought to change the definition of a “document” which would exclude most documents thus removing the requirement to list them in its register of documents and the public right of access to them.

Nor did the Commission’s proposals address any of the long-standing criticisms from civil society:

- the power of the Council and the Commission to deny access to documents under discussion - they can refuse access, as they consistently have, to documents on deciding legislation until a measure is adopted (and even then they can be refused);

- the power of EU member states (governments) to deny access to documents they have submitted as part of the legislative and administrative processes to the Council. People have a right to know what is being done in their name.

- the failure to accept that the public interest in disclosure was greater than the institution’s need for secrecy

- the right of “third states” (like the USA) to veto access to EU documents

- the failure to amend Article 6 of the Regulation to also allow for freedom of information requests (FOI) - whereby the applicant can make a general request without having to ask for specific documents.

- the failure of the Commission to provide a complete register of all documents produced and received[2]

At the time *Statewatch* commented on the Commission's failure to address the concerns of civil society and those of the the European Parliament:

Most crucial is the public's right to know what is being discussed in the Council before it is adopted in Brussels - a practice that would never be tolerated at national level.

The Amsterdam Treaty was agreed in 1997 and was meant to herald a new era of openness and transparency - we got half the loaf and are still waiting for the other half."

Now, nearly three years later, there is an institutional "impasse" as the Council refuses to recognise the right of the parliament to make additional substantial amendments to those put forward by the Commission, and the Commission refuses to consider any amendments to its proposals until the parliament adopts its 1st reading position.[3] The Council, for its part, shows no enthusiasm to change the *status quo*.

The Lisbon Treaty

While this process of inactivity continued the Lisbon Treaty (comprised of the Treaty on the Functioning of the EU, TFEU and the Treaty on the EU, TEU) came into effect in December 2009 and should have given a fresh impetus for meaningful change.

Article 1 of the TEU states:

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.

Article 15 of the TFEU, replaces Article 255 of the Amsterdam Treaty, and spells out in more detail the issue of openness. Article 15.1 says:

In order to promote good governance and ensure the participation of civil society, the institutions, bodies, offices and agencies of the Union shall conduct their work as openly as possible.

And Article 15.2 says, within agreed limits, that:

Any citizen of the Union, and any natural person or legal person residing or having its registered office in a Member State, shall have the right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium..."

These statements are unequivocal and spell out that these principles also extend to EU bodies, office and agencies for the first time.

New comitology "deal" denies citizens access

On 16 December the Commission announced that a new Regulation had been agreed with the European Parliament on comitology. [4] "Comitology" refers to the procedure under which Member States and the Commission reach agreement on the implementation of legislation (hundreds of implementing measures are adopted each year). [5]. In fact agreement on this Regulation was reached as a result of yet another 1st reading secret "deal" between the Council and the European Parliament. [6]

The Commission declared in a press release that the new powers will be "simpler, more efficient, more transparent and in full compliance with the Treaty" [7]. The Legal Affairs Committee rapporteur in the parliament also declared "transparency and parliamentary control will be much better after this regulation is adopted" and the parliament enthusiastically adopted the measures by 567 votes to 4. The MEPs were convinced that "parliamentary control" would be "better" but this will only happen if MEPs have the time and resources to carry out their role, which is a big "if". But "transparent" the process is not. The MEPs were primarily concerned with their own powers and failed utterly to protect the right of citizens to get access to the documents being discussed.

The previous rules on comitology were set out in the Council Decision of June 1999. Article 7 says that "the principles and conditions on public access to documents applicable to the Commission shall apply to the committees". Under the 1999 Decision the European Parliament received copies of the agenda, a summary record of meetings together with the voting list and those attending. "References" to these documents (under Art 7.5) were to be listed in "a register" to be set up by the Commission in 2001. The public register set up by the Commission rarely contains these references and the separate "Comitology register" is patchy with summary records (often a few very general paragraphs and certainly not Minutes) listed in some cases and not in others.

Since 2001 the Commission rules on public access to documents came under the Regulation on access to documents (not the old Code of Access agreed in 1993) and following the further commitments to openness and transparency in the Lisbon Treaty it might have been expected that the new Regulation on comitology would reflect these principles - and that the European Parliament would stand up for the right of citizens to get access to these documents subject to the exceptions in Article 4.1 of the Regulation. But no.

In the new Regulation Article 9 repeats 1999 Decision's commitment that the rules on public access to documents shall be those applicable to the Commission - which are those set out in Regulation 1049/2001. But then totally undermines this commitment in Article 10.

Here Article 10 (paras: a-g) says that a "register of committee proceedings" shall be set up which contains: the agendas, summary records, draft measures, the voting results, the final draft measure, information on the final adoption by the Commission and statistical data on the workings of the committees.

The Council (the EU governments) will get access to the content (called euphemistically "information") of all of these documents. But the public will only get access to the "references" of these documents, not the content, on the "register of committee proceedings" (the "Comitology register"). The only document that will be made public is the statistical data on the work of the committees.

When the new Regulation comes into force in March 2011 the Commission will be obliged to provide even less public information than it does at present.

Footnotes

1. <http://www.statewatch.org/secret/observatory.htm>
2. <http://www.statewatch.org/analyses/no-82-eu-commission-register.pdf>
3. <http://www.statewatch.org/foi/observatory-access-reg-2008-2009.htm>
4. <http://www.statewatch.org/news/2011/feb/eu-new-comitology-procedure.pdf>
5. See: EU doc no: 15942/10 and Statewatch Guide to decision-making after the Lisbon Treaty: <http://www.statewatch.org/analyses/no-115-lisbon-treaty-decision-making.pdf>
6. <http://www.statewatch.org/analyses/no-84-ep-first-reading-deals.pdf>
7. European Commission press release, 16.12.10.

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