

EUROPEAN PARLIAMENT

2004



2009

Committee on Civil Liberties, Justice and Home Affairs

22.8.2007

WORKING DOCUMENT N°1

on 2006 annual report on access to EU documents (art 17 of Regulation (EC)
No 1049/2001 and art. 97 p. 7 of the EP rules)

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Marco Cappato

Democracy, transparency, openness and access to documents

In democratic states, citizens have a right to know the laws that they are called to respect and States are bound to make them public so to ensure that they are accessible and knowledgeable. Secondly, citizens participate in elections to select their representatives, and they can do it properly and effectively only if they have the possibility to follow the activities of their representatives. Thirdly, the decision making process leading to the setting of norms binding on citizens is open and public, so that it is possible for individuals or for interest organisations to let legislators and public authorities know their opinion on a certain proposal before it comes into force. All these elements are fundamental in democracies, and are commonly described as *transparency, openness and access to documents*.

The European Union has incorporated in its legal order these principles, which were first introduced in the EU legal order through the Maastricht Treaty in 1991, which led the Council and the Commission to adopt a Code of Conduct on public access to documents. In 1996 this right of access was enshrined in article 255 of the Treaty establishing the European Community as amended by the Amsterdam Treaty, and Regulation (EC) 1049/2001 of 30 May 2001 regarding public access to documents¹ was adopted to ensure the concrete application of this right.

Since the entry into effect of the Regulation, the number of requests for access to documents has constantly increased, as demonstrated by the annual reports issued by the EP, the Council and the Commission, as required by article 17 (1) of the Regulation, which demonstrates that the Regulation met a concrete interest of the citizens. At the same time, the application of the Regulation led to disagreements on certain issues: a number of cases have been brought by individuals, organizations and Member States to the Court of First Instance and the Court of Justice, the European Ombudsman has issued special reports and a series of opinions on complaints he received, while the European Parliament in its reports has underlined a series of problems to be addressed and proposed solutions, notably by proposing to amend the Regulation².

While the Commission had judged in January 2004 that the Regulation did not need to be amended at that time, it issued on 18 April 2007 a Green Paper on Access to Documents which contained a questionnaire on a series of issues which are according to the Commission particularly relevant and that could be reviewed. A public consultation followed (closed on 31 July) and a report on the outcome of the consultation will be published in September. In October 2007 the Commission will issue its proposals for amending the Regulation, which will open a legislative procedure of co-decision with the EP and the Council.

The review of the Regulation: EP requests and the Commission questionnaire

Your draftsman notes first of all that the Green Paper of the Commission does not address most of the issues the EP has repeatedly raised in its reports, and notably in its latest report and accompanying detailed recommendation (Cashman report). The respective issues and positions are summed up in the table below:

¹ The text of the Regulation, the “Green Paper on Public Access to Documents held by the institutions of the European Community – a review, COM(2007) 185 final”, as well as the public contributions, are available at: http://ec.europa.eu/transparency/revision/index_en.htm

² See the latest report of the EP on access to documents drafted by Michael Cashman, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0122+0+DOC+XML+V0/EN&language=EN>

| Issues raised by the EP in the Cashman report | Response of the Commission and issues raised in the Green Paper |
|---|---|
| Clarify that article 255 EC and the Regulation shall be applied by EU institutions in their legislating and implementing activities of the legislation (Recommendation 1) | - |
| - Re-define in the Regulation “legislative documents” and ensure access to them, including preparatory documents, documents discussed, amendments, identity of the authors, legal service opinions, etc.; this applies also to comitology regulatory documents - define “non-legislative documents”, of administrative nature, implementing legislative acts - establish rules for drafting, publication, consolidation, implementing multilingualism (Recommendation 2) | - see Question 8 of the Green Paper on the passing of time |
| Establish further rules in the Regulation to ensure that confidentiality of documents does not nullify public and parliamentary control and it is not decided on a routine basis (Recommendation 3) | - |
| Amend the Regulation to ensure that MSs contributions/amendments and identity are accessible in the legislative/regulatory procedures; and ensure access to all documents submitted to the Commission on implementation of legislation (Recommendation 4) | - |
| Create an inter-institutional common interface for access to documents, provide explanations on procedures, set rules for archiving (Recommendation 5) | Is the quantity and accessibility of the information provided through registers and websites of the institutions satisfactory? (Question 1) |
| | Active dissemination of focussed information shall also be promoted? (Question 2) |
| | Should a single set of rules for access to documents in general and environmental information be created? (Question 3) |
| | Access to documents and protection of personal data: should it be revised? (Question 4) |
| | Access to documents and commercial or economic interest: should it be revised? (Question 5) |
| | Good administration and handling of excessive and improper requests: should it be revised? (Question 6) |
| | Definition of document to cover also information from databases? (Question 7) |
| | Access to documents shall take into consideration the passing of time? (Question 8) |

As it can be seen, the EP and the Commission start from a completely different perspective. While the EP asked for important changes in the Regulation, the Commission appears to have focussed on secondary and technical issues. Your draftsman hopes that the questions raised by the Commission are not an indication of the *only* amendments the Commission intends to put forward, and appeals to the Commission to properly take into consideration the EP positions and come forward with the amendments it requested.

Publicity of the EU legislative works

The EP clearly supports a view by which democracy entails that all the documents related to the legislative decision-making process shall be public and accessible. While this is generally true for the European Parliament – although more transparency should be ensured on occasion of first reading co-decision agreements, an issue which the draftsman wants to analyse in the future – the Council keeps on defending a view by which it is entitled to keep secret some documents or parts of it and notably the identity of the Member States' delegations in the Council and in its working groups as well as their proposals, votes and declarations. Although the Council now holds parts of its discussions and votes in public, which is an extremely positive development, this still constitute a marginal part of the legislative decision-making procedure. The draftsman believes that the Council should hold public meetings and make accessible all the documents in their entirety also at working group level when a legislative procedure is followed.

The opinions of the Legal Services of the institutions, when drafted in the framework of the legislative decision-making process, should not escape the democratic principle of publicity. The debate on the correct legal basis of an act in preparation is part of the democratic debate on legislation. Such a debate takes place in public in EP Committees without jeopardizing the EU legal order and it seems logical to foresee an amendment to the Regulation to clarify this point¹.

Notably in a moment of scepticism of the people towards the EU and its representatives in the EU bodies, it would be necessary to ensure not only access to documents, but to actively promote the publicity of the legislative works. Live broadcasting on the Internet of all EP sessions and of parts the Council sessions are positive means to reach this objective and allow citizens to follow legislative works. Further steps in this direction, including creating possibilities to simply retrieve these documents, could be done either through amendments to the Regulation and/or through practical reforms.

Access to documents in the field of non-legislative works

Access to documents shall also be guaranteed in the field of non-legislative works. It shall be made clear that all documents of an administrative nature or concerning the implementation of EU and EC policies in the Member States should be made public, with the aim of ensuring public scrutiny of Member States' compliance with EU laws and policies in their implementation.

A major problem concerns the interpretation of art. 4 (5) of the Regulation and the possibility given to a Member States to ask an institution not to disclose a document originating from it without its prior agreement. While the Commission applies it in a way that grants in practice a power of veto to Member States on the disclosure of the document, a different view has been put forward considering that the institution holding the document is called by the Regulation to make its own judgment, taking into consideration the request of the Member State. The same applies for art. 4 (4) of the Regulation concerning the power of veto granted to third parties on the documents they produced. The relevance of this issue emerges clearly in the contributions submitted to the Commission in the framework of the consultation, notably by the Ombudsman.

¹ Notably if the judgment in the *Sweden and Turco vs Council* case shall not provide any progress in this regard.

Preliminary comments on the issues raised by the Commission in its Green Paper

Your draftsman would also like to make some comments on some of the questions put forward in the Green Paper (that should anyway be understood as preliminary, notably since the Commission has not proposed a specific text for amendments):

- The ***quantity, quality and accessibility of the information provided through registers and on the websites of the institutions needs a serious improvement*** (ref. to Question 1, see table above): many documents are not on the registers (see for instance the complaint by Statewatch to the Ombudsman against the Commission¹); information is not fully available or accessible; information and documents are difficult to find (search tools are not efficient); different registers and databases co-exist (by institution, by stage in the procedure, by DG, etc); information on the procedures is not provided (for instance, it is almost impossible to follow the decision-making process in the Council working groups and having a document does not help to understand what will be the next steps); information is not updated; old documents are not uploaded and accessible; translations in all languages are not available. It seems extremely urgent to ensure that all documents are uploaded on the registers and explore technical ways to create a common gateway for access to documents and improve search tools so that the right of access to documents is not nullified by “technical” problems.

- ***Active dissemination of focussed information can be promoted, but this is a matter of communication strategy and not of access to documents, publicity, transparency and openness*** (ref. to Question 2). As explained above, more emphasis should be given on publicity of legislative works through complete access to documents, live broadcasting on the internet and creation of a database with retrievable audio-video files.

- ***A revision of the Regulation text concerning the handling of requests for access to documents does not seem appropriate*** (ref. to Question 6), as art. 6 already provides for possibilities for the institutions to enter into discussion with the applicant to find an agreement on the handling of the request; furthermore, improvements in the management of the registers and databases will help the institutions to better deal with large numbers of documents.

The draftsman would like to propose to colleagues to gather more information from the Commission, the Ombudsman, the EDPS, NGOs, stakeholders and experts concerning the remaining questions on the occasion of public hearings in committee, to ensure that the EP makes the best choices. He will also keep on following the consultation process, and notably the report of the Commission and the proposal for amendments to the Regulation, keeping colleagues informed with further Working Documents if needed.

¹ See <http://www.statewatch.org/foi/foi.htm>