

# Essays for an Open Europe

**Tony Bunyan  
Deirdre Curtin  
Aidan White**

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# Introduction

A new code on the citizens' right of access to documents in the European Union is currently being discussed by the European Commission, the Council of the European Union and the European Parliament. The three EU institutions have to agree a new code by May 2001 to meet the commitment in Article 255 of the Amsterdam Treaty to "enshrine" the right of access to documents.

In the "corridors of power" in Brussels the positions of these institutions indicate that they are heading for more secrecy and less openness. Indeed they seem more concerned with establishing rights for themselves (through so-called interinstitutional "deals") than for the citizen.

These essays have therefore been written to encourage a much wider debate throughout the whole of civil society so that its voice can be heard in a way that cannot be ignored. Access to documents in the EU is not a "gift" from on high to be packaged, sanitised and manipulated, it is a "right" which is fundamental in a democracy.

The reproduction of these essays is positively encouraged.

*Tony Bunyan, Deirdre Curtin and Aidan White*

# Contacts

Tony Bunyan,  
Statewatch, PO Box 1516, London N16 0EW, Uk  
tel: 00 44 208 802 1882 fax: 00 44 208 880 1727  
office@statewatch.org

Deirdre Curtin,  
Faculty of Law, University of Utrecht, Achter Sint Pieter 200, 3512 HT Utrecht,  
Netherlands  
tel: 00 31 30 253 7065  
dcurtin@worldonline.nl

Aidan White, General Secretary,  
European Federation of Journalists (EFJ), rue Royale 266, B-1210 Brussels, Belgium  
tel: 00 32 2 223 2265 mobile: 00 478 258 669  
aidan.white@ifj.org

For full and updated documentation on the new code of access see:

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

For the latest news on the code see: <http://www.statewatch.org/news>

For information from the European Federation of Journalists see: <http://www.ifj.org>

# Access to documents “could fuel public discussion”

By Tony Bunyan, Editor Statewatch

When Statewatch applied for a document setting out far-reaching changes to the 1993 code of public access to EU documents in July (the "Solana Decision") the Council said its release "could fuel public discussion on the subject". It is hard to think of a more undemocratic argument. Access documents is fundamental to a healthy, critical and thriving democracy, it enables civil society to understand, analyse and participate in discussion. Access to documents does indeed "fuel public discussion" and so it should.

Civil society should be able to get access to all documents, including those from non-EU governments and international organisations (including ad-hoc, and often secret, intergovernmental meetings of officials and officers), subject only to narrow and specific exceptions. People have a right to know all the views considered and rejected, all the influences brought to bear, on policymaking. They have a right to see these documents as they are produced or received - not after a new policy is adopted, but before.

Similarly there has to be access to all documents concerning the implementation of the policies adopted - reports, mission reports, surveys and their results, and studies - which flow from decision-making (again as they are produced).

This kind of access would allow EU citizens and those outside the EU who are affected by its policies and practices - refugees, asylum-seekers and third world countries - to take part in decision-making and to monitor ongoing practices.

Without documents and debate democracy is devalued and diminished and finally it withers away leaving democracy without content, without meaning.

## **“Space to think also means space to act**

The EU Council (governments), the European Commission and the European Parliament are currently discussing a new code of public access to EU documents. This is meant to "enshrine" the commitment in the Amsterdam Treaty (Article 255) to ensure openness is truly put into practice, but will it?

In its proposed new code of access to EU documents the Commission wants to create the so-called "space to think" for officials (public servants) and permanently deny access to innumerable documents. The "space to think" for officials is apparently more important than the peoples' right to know.

But there is another problem with the "space to think" for officials, it would also give them the "space to act". Many of the documents hidden by this rule would concern the implementation of measures - the practice that flows from the policies. Officials would be unaccountable for their actions. Democracy is not just about information and participation in policymaking, it is crucially about the ways policies are put into practice. For example, police powers over the citizen are judged not just by formal laws but by how they treat people on the streets and in detention. In policing terminology the "space to act" is called "self-regulation" where officers are given so much discretion that they are "free" from direct lines of accountability for their actions, often with disastrous results.

We are seeing an increasing number of "gaps" in EU accountability even at the formal level. Since 1994 there have been annual reports on the work of the Europol Drugs Unit but now that Europol is a fully-fledged operational agency there is a "public" glossy version heavy on "spin" and low on content. Since 1995 there have been annual reports on the implementation of the Schengen Convention (up to 1998). Now we are being told that because the Amsterdam Treaty split Schengen between the "first" (TEC) and "third" (TEU) pillars there are to be no annual reports in future. Who made this decision, officials or governments?

Thus we will no longer know how many checks have been carried out on the Schengen Information System (SIS) database to exclude people from entering the EU or how many cross-border surveillance operations have been requested. And all this happens when the Council is discussing major extensions in the data to be held on the SIS.

The huge gap in knowledge which would result from the "space to think/act" is compounded by the proposal that non-EU states, agencies and international organisations, like the USA or NATO, would have the right to veto access to documents for EU citizens. At a time when ad-hoc, secret, international working parties abound in the field of "law enforcement" and globalisation marches on unfettered the idea that whole areas of policymaking and practice should be removed from public view should be abhorrent to any democrat.

The demand for the "space to think" and the "space to act" must not be allowed to contaminate the code of access to documents. It is only legislatures which have the right to ask for the space to think, not the executive and its officials. The people have "freedoms" and "rights", government and officials have "responsibilities" and "duties".

It is simple, democracy needs a culture of accountability.

## **Undermining the principle of access to all documents**

The principle of freedom of information (access to documents) is in the first Article of the current code of access. Citizens have the right to request any document subject only to very specific and narrow exceptions.

At the end of July when Brussels was empty for the holiday season the Council adopted (by 12 votes to 3) the "Solana Decision" to satisfy NATO. The Decision permanently excludes from public access whole categories of documents covering foreign policy, military and "non-military crisis management" - and any other document whether classified or not which refers to these issues (the Commission is in negotiations with NATO to reach a similar agreement). Nor does it make any distinction between policy-making (which should be in the public domain) and operational details. It is not possible to equate this Decision by the Council to change the 1993 Decision taken without consulting anyone, certainly not parliaments or people-with any conceivable understanding of democratic decision-making. It was arrogant and contemptuous of democratic standards.

When Statewatch was told that access to a document "could fuel public discussion" we were also told that access could offend "the Council's partners". We cannot have a situation where non-EU states (eg: USA) or international organisations (eg: NATO) have a veto over the EU citizen's right of access to documents. What is the meaning of a defence and security policy, what is it defending and securing if it requires the denial of citizens' rights and is adopted in a way that a totalitarian state would be proud of?

There is a public register but none of the documents excluded under the "solana Decision" will be included, nor will the thousands of documents produced every year which are called "SN" (sans numero) documents (even though they are numbered).

On top of all this the Council and Commission want to have wide powers of discretion over what can be released. If a diligent researcher asks for too many documents they can be refused or sent only some of them. If they ask for documents on their special interest/expertise (environment, policing, immigration, trade and aid) on a regular basis they can also be refused access.

Will the new code be better than the existing code and practice? Will the new code, as intended by the Amsterdam Treaty commitment, "enshrine" the citizens' right of access to documents? The answer from the Commission and Council is a clear no. Public knowledge is to be sanitised and controlled.

EU governments do not seem to have learnt the lessons of just a short time ago, that freedom of information is the best defence against corruption, fraud and the abuse of power. While the Netherlands, Sweden, Denmark and Finland are trying to ensure the commitment in the Amsterdam Treaty is met, France and Germany are pushing strongly for changes which will mean even less access to documents than at present.

## **Is there a future for democracy in the EU?**

As long as I can remember there has been a "democratic deficit" in the EU and there still is even as the EU prepares for enlargement.

The "democratic deficit" is not just about the powers of parliaments - national or European - it is much deeper than that. It is about changing the democratic culture into a culture of openness, of an informed public and responsible and accountable institutions.

When the Commission put out the draft for the new code of access many suspected the "dinosaurs" would come out of hiding, that officials and entrenched interests would try and use the commitment in Article 255 of the Amsterdam Treaty not to "enshrine" the right of public access but to limit and shackle it - to end up not with a code of access for citizens but "*A Regulation for the Protection of the Efficient Workings of the Institutions*".

The resolution of this issue will be a defining moment for democracy in the EU. The argument is really very simple:

**In a democratic system, it should be quite easy to understand - citizens have a right to know how and why decisions are made and implemented. Without freedom of information, access to documents, there is no accountability and without accountability there is no democracy.**

# Authoritarian temptation seduces EU decision-makers

*By Deirdre Curtin, Professor of the Law of International Organizations, University of Utrecht and member of the Standing Committee of Experts on International Immigration, Asylum and Criminal Law, Utrecht.*

Listening to the speeches of Europe's political leaders in recent months it is difficult to suppress the sentiment that they are not being quite serious. Many "grand" visions of the future of Europe have been launched (Joshua Fischer, German Foreign Minister, Jacques Chirac, French President, Guy Verhofstadt, the Prime Minister of Belgium and Tony Blair, the British Prime Minister). The rather pedestrian preoccupation of the current IGC process to ensure that the European institutions operate in an efficient manner after the next rounds of enlargement ( a new Europe of 25 to 30 members) is for many European political leaders too meagre a diet. A European Union with very imperfect democratic legitimacy and ill functioning cannot be the end station of what they have in mind, no matter how many new members it acquires. The politicians horizons have these past months shifted not so subtly away from the size of the EU to the ultimate goal of the European unification process.

How must a European Union with so many members be conceptualised, in which areas must a common European policy be pursued together and what should the renewed EU's role in the world be? Progress in each of these regards is said to be possible only if the ultimate goal to be achieved is formulated first. According to the Belgian prime minister: *"any process comes to a standstill when we lose sight of the objective. That is how it works. It is the dynamics caused by the debate about the ultimate goal that is the strength of the European integration. If these dynamics are no longer there, the European unification is threatened by stagnation. Actually, the European Union may be compared to a bicycle. It must move forward, otherwise it falls."*

But the fundamental question is surely in what kind of Europe do we want to live? The Belgium Prime Minister claims that "we all would like to live in a Europe that is built on European values of democracy, respect for human rights, rule of law and the cultural and political diversity which is our richness. In short, a Europe that attaches great importance to the values,

## **An informed citizenry**

which result from the French revolution. A Europe that knows how to ensure these values without giving up its diversity and its future." Few will disagree with this, Euro sceptics included. The problem is that it sounds marvellous phrased in these terms but the operationalisation in practice is severely lacking.

A Europe that attaches great importance to the value of democracy is not what we are currently living in. Transparency in decision-making and freedom of information are key elements in the democratisation process of the EU. Without an informed citizenry no real accountability is possible. Yet what is presently happening is that the Member States acting together in Council as well as the Commission (and even in certain respects the European Parliament) seem almost to be conspiring together to ensure that the gradual and hotly contested steps towards achieving more openness in decision-making processes at the EU level are stopped in their tracks and in some respects reversed.

Over the course of the past five or so years, many EU institutions and organs have themselves adopted on a voluntary basis self-regulatory measures granting citizens access to their documents. Moreover the Court of Justice in Luxembourg has laid down some general principles in case law. However it was the Treaty of Amsterdam which explicitly gave the citizens' right to access to documents a fundamental treaty status. It also required that secondary legislation (Euro-Freedom of Information Act, FOIA) had to be adopted by May 2001.

## **Draft Freedom of Information Act**

The current EU rules give access to all categories of documents produced by the institutions in question, subject to a limited number of exemptions. The Commission drew up a draft Euro-FOIA earlier this year which excluded a very substantial category of documents from its scope on the ground that the institutions need a (unlimited) space to think. Excluded are "texts for internal use such as discussion documents, opinions of departments and

## **The Solana decision**

informal messages". Such excessive defensiveness has been the subject of quite extensive criticism. Also it is quite extraordinary that the Commission in its new draft directive on public access to environmental information includes such internal documents within the scope of access of the directive only enabling Member States to refuse access where they can show that a specific exemption applies, subject to an overall public interest test. This much more restrictive and narrowly tailored approach to Member States environmental information stands in sharp contrast to the Commissions approach to its own internal documents.

The Commission's draft Euro-FOIA is now being considered both by the European Parliament and the Council . In the meantime, the Council this summer explicitly challenged the Parliament's role in the EU legislative process by unilaterally amending its own decision on access to its documents. This can be described as an act of bad faith by the Council given that the Euro-FOIA will replace this internal decision as soon as it is adopted. Moreover, it can be argued that the provisions of the Treaty of Amsterdam create a standstill obligation for the Community institutions as regards access to documents. In other words the institutions must not act in a manner which makes access to documents more difficult than before the entry into force of the Treaty of Amsterdam. Instead what is now happening is that both the Commission and the Council are attacking what has already been achieved.

The Council decision in question was adopted on 14 August while the European Parliament, its legislative partner, was in recess. National parliaments and civil society were also not informed. Some of the press dubbed this incident "Solana's military coup". Mr. Solana, ex-Secretary General of NATO, is Secretary-General of the European Union and High Representative for Common Foreign and Security Policy. As well as that he is Secretary-General of the Western European Union (WEU). The amendment he prepared severely restricted public access to "all documents classified as

top secret, secret and confidential in the fields of foreign policy, military and non-military crisis management". It did so by excluding such documents from the scope of access entirely.

Sensitive security information is protected by every administration. There is nothing extraordinary or undesirable about that. That aim could have been achieved by the exemptions included in the existing rules on access. What is undesirable and is explicitly contrary to the existing case law of the Court of Justice is to exempt broad categories of documents without subjecting individual documents to explicit scrutiny as to the applicability or otherwise of one of the grounds of exception (protecting justified interests such as privacy, defence, etc). Moreover the case law requires institutions to grant partial access to documents where non confidential information is included and to respect general principles such as the principle of proportionality. This was ignored.

There are a few other aspects to the Solana decision which are worrisome. First, the phrase "non-military crisis management" refers to civilian aspects of crisis management, such as police and judicial co-operation. This would exclude, for example, access to all documents relating to the new EU rapid-reaction paramilitary police force, even with regard to policy-making matters. Second, the Solana decision allows international organisations such as NATO and third countries such as the US to veto a citizens access to documents if the documents have been drawn up by or in conjunction with them. For all the rhetoric of the EU on the need for greater transparency only the Netherlands, Sweden, and Finland voted against adoption of the Council's Solana decision.

The Dutch decision to challenge the legality of the Council's Solana decision before the Court of Justice in Luxembourg has been greeted with surprise by some of the other Member States. But the Netherlands has also strong allies on the matter. Sweden and Finland have announced that they will support

## **The future of EU open government**

the Netherlands in its case and the European Parliament has too. Though this firm stance in favour of more openness is very welcome it must be recalled that it will raise the rather technical legal question of the validity of the legal basis employed in the light of the changed legal context of the Treaty of Amsterdam. Moreover by the time the Court delivers its judgment the outcome will be of largely historic interest.

The more immediate issue for the future of open government in the EU is the question of the relationship of the Solana decision to the draft Euro-FOIA now going through co-decision. The Commission has issued a statement, promising to adjust its own rules to bring them into line with the Solana decision. This is explained by the fact that the Commission is itself negotiating security arrangements with NATO at present. Moreover the Commission has stated that it might also have to amend the draft Euro-FOIA to incorporate the Solana provisions. If the Commission does this then the Netherlands may again be overruled in the co-decision procedure which is governed by majority voting. The UK government has informed the House of Lords that it is likely that the Solana decision "will form the basis for the Council's common position on the Regulation".

The battle lines are in any event clearly drawn and the outcome uncertain. At the end of the day it might only be an outright veto by the European Parliament which could stop an unsatisfactory Euro-FOIA being adopted. In these circumstances all three institutions in the legislative procedure would fail to comply with their treaty obligation to adopt a Euro-FOIA by May 2001. It is in this troubled perspective that Europe's leaders need to ensure that their grandiose plans on Europe's future turn out not to have feet of clay. Their own credibility vis a vis the citizens of the EU are at stake. They need to first take the issue of more transparency and openness seriously. This means ensuring that the European Freedom of Information Act which is in the process of being finalised does not constitute a step backwards compared to the status quo. In other words it should build on what has

already been achieved both at the EU level itself as well as at the national constitutional level. The aim of formulating such rules at the EU level can never be to deprive Europe's citizens of rights which they have already acquired either at the European level or at the national level.

The forces for secrecy cannot be allowed to argue that the EU institutions need a virtually unlimited space to think : these institutions do not operate as islands where fortifications need to be firmly secured around them. Rather these institutions and organs operate within a democratic culture and are subject to its restraints. Moreover at the very time when the EU is planning to adopt an EU Charter of Fundamental Rights enshrining both the right to information, to access to documents and to good administration it must be ensured by all the various actors that the fundamental status of such rights is taken seriously in practice, in deeds as well as words. Only when this is assured should the debate on Europe's future and the means of increasing its democratic legitimacy pursue its course.

# How Journalists Have Spiked NATO's Secrecy Guns

*By Aidan White, General Secretary of  
the European Federation of  
Journalists*

Next year European Union leaders face a deadline set by the Treaty of Amsterdam in 1997 to put in place a procedure and policy to guarantee citizens' rights of access to documents of the European Parliament, the Council of Ministers and the Commission. But the co-decision process to agree a new code strengthening peoples' right to know is in chaos.

There have been allegations of skullduggery, court actions and a range of proposals now before the Parliament reflect a failure to reach any sensible consensus on how to break the culture of secrecy that still rules in Brussels.

The security chiefs of Europe (and NATO) have, belatedly, plunged into the transparency debate with an uncompromising approach that threatens to halt the march towards open government and may even signal a retreat from an openness policy first agreed seven years ago. But NATO's attempts to shut the door on the peoples' right to know are likely to fail.

The security establishment began their campaign with a "summertime coup" on 14 August, while parliaments and journalists were on holiday, when the Council of Ministers unilaterally amended its own rules of procedure to deny access to certain documents under a new system of classification. For good measure they also excluded access to any category of other documents that might allow someone to deduce the fact a classified document exists.

This approach not only torpedoed the freedom of information traditions of a number of Member States, it undermines the core principles of transparency and makes a mockery of efforts to agree a new procedure, by May 2001, which is meant to "enshrine" the citizen's right of access to documents under Article 255 of the Amsterdam Treaty.

The arrogance of the Council, led by Foreign Policy Chief and former NATO Secretary

## **Why national standards counter Brussels secrecy?**

General Javier Solana, is touched with farce given the response to a request by the magazine Statewatch who asked for the papers upon which the decision was taken. They were refused and, as Tony Bunyan explains in his essay, were told that access to a document "could fuel public discussion". Another request for documents, by the European Citizens Advice Service, received a blanket refusal, even though the papers concerned were already in the public domain.

But the reality is that NATO's actions are likely to founder following the action taken by journalists in Sweden a few years ago who demonstrated that national laws guaranteeing access to documents take precedence over privileged access to information by political insiders in Brussels.

The Journalists Union of Sweden in May 1995 challenged the Council of Ministers over access to Council documents relating to Europol activities. At that time the Swedish Union asked for 20 documents from the Council and, under Swedish Law, requested the same documents from the Swedish Government.

The Council handed over just two documents, but in Sweden some 18 documents were released in line with the country's long-standing legal commitment to make access the rule of government rather than the exception. The Swedish Union mounted a legal challenge to the Council's action and won their case at the Court of First Instance in Luxembourg.

In its judgement on June 17th 1998 the Court set out the important principles:

First, that according to the 1993 European Union code, access to documents must be the rule;

Second, any restrictions on access must be narrowly interpreted;

Third, every document should be tried or examined on its own when deciding if it should be released;

Fourth, if a document is refused there should be real harm to the interests concerned.

All of these principles are, under NATO's guiding hand, being challenged by the European Union Council of Ministers.

Meanwhile, in the United States security chiefs put before the Senate a proposal to enact an "official secrets act" that make it a criminal offence to leak classified information to the press. Although Congress has struck down such proposals in the past as unconstitutional, the latest effort, like the action by the Council of Ministers, has taken place without any public debate or review of the proposal.

At the beginning of November President Clinton bowed to widespread protests by US civil liberty and journalists' groups and said he would not support this move. But the fact that it slipped on to the legislative agenda in the first place raises concerns about future attempts to undermine freedom of information policy.

The issue at stake, both in Europe and the United States, is one that concerns the fundamental rights of all citizens and is not just in the interests of working journalists indeed, if the truth we know well that the press corps in Brussels and Strasbourg can generally get their hands on information through leaks and off-the-record briefings.

## **Europe must take the high ground to open government**

Journalists in membership of the European Federation of Journalists and particularly those in Sweden, the Netherlands and Finland have expressed outrage over the actions by the Council of Ministers. They are supporting a legal challenge over the Solana decision by these governments and the European Parliament.

They do so knowing how journalism has benefited greatly from moves towards freedom of information within member states. Any security service worthy of the name knows, therefore, that secrecy rules within the European Union are constantly under threat from ambush at national level.

As the Swedish case proves, national legal traditions can subvert Codes drawn up in Brussels. The benchmark for openness in Europe is not what Brussels can enforce, but the limits of transparency as defined by those countries with the highest levels of access to documents.

The Council of Ministers, and NATO, will have to recognise, sooner or later, that there are different traditions at work here and, in line with the Amsterdam Treaty commitments, it only makes sense to harmonise openness rules up to the levels of access that operate at the highest level nationally.

The alternative will be to attack the current openness rules that apply in a number of national states, such as the Netherlands and the Nordic countries, in particular. That may happen, but if it does, journalists, like those in Sweden, or John Carvel at *The Guardian* or Tony Bunyan at *Statewatch*, who have also challenged secrecy in Europe, will be among the first to take to the barricades.

## EFJ Member Unions

KMFb Sektion Journalisten,  
Oesterreichische Journalisten  
Gewerkschaft  
Bankgasse, 8, 1010 Wien, Austria

Tel. : 43-1-533.14.02  
Fax : 43-1-535.43.55  
Contact : Alexander Baratsits-  
Altempergen, Vice President

AGJPB - Association générale des  
journalistes professionnels de  
Belgique

Quai à la Houille 9B, 1000  
Bruxelles, Belgium

Tel. : 32-2-229.14.60  
Fax : 32-2-223.02.72  
Email : agjpb@belgian-  
journalist.be  
Contact : Mme Martine Simonis  
(martine.simonis@belgian-  
journalist.be)

Independant Union of  
Professional Journalists of the  
Republic of B-H  
Obala Kulina Bana 2/III,  
Sarajevo, Bosnia-Herzegovina  
Tel. : 387-71-67.08.13/67.08.14  
Fax : 387-71-53.44.95  
Contact : Zoran Llie, General  
Secretary

CJA - Croatian Journalists'  
Association  
Perkovceva 2/I, 10000 Zagreb,  
Croatia

Tel. : 385-1-48.28.333  
Fax : 385-1-48.28.333  
Email : hnd@hnd.hr  
Contact : Ms Jagoda Vukusic,  
President  
(jagoda.vukusic@hnd.hr)

Union of Cyprus Journalists  
Kratinou 2, POB 3495, Nicosia,  
Cyprus  
Tel. : 357-2-66.46.80  
Fax : 357-2-66.45.98

Email :  
cyjourun@logosnet.cy.net  
Contact : Ms Elli Kodjamani  
(elli.kotzamani@politis-  
news.com)

Czech Union of Journalists  
Parizska 9, 11630 Praha 1, Czech  
Republic  
Tel. : 420-2-232.51.09 Fax : 420-  
2-232.77.82

Email : syndik.sncr@mbox.vol.cz  
Contact : Ms Irena Valova,  
President  
Dansk Journalistforbund  
Journalisternes Hus, Gammel  
Strand 46, 1202 Copenhagen K,  
Denmark  
Tel. : 45-33-42.80.00  
Fax : 45-33-42.80.03  
Email :

dj@journalistforbundet.dk  
Contact : Mr Soren Wormslev  
(Soren\_Wormslev@online.pol.dk)  
DJV - Deutscher Journalisten-  
Verband  
Bennauerstrasse 60, 53115 Bonn

I, Germany  
Tel. : 49-228-201.720  
Fax : 49-228-201.72.32  
Email : DJV@DJV.DE  
Contact : Mr Michael Klehm  
(kle@djv.de)  
IG Medien  
Postfach 10 24 51 (Friedrichstr.  
15, 70174 S.), 70020 Stuttgart,  
Germany Tel. : 49-711-201.82.38  
Fax : 49-711-201.83.00  
Email : igmedienhvmm@t-  
online.de

Contact : Mr Rudi Munz  
(munz@igmedien.de)  
Journalists' Union of Athens Daily  
Newspapers  
20, Academy Street, 10671  
Athens 134, Greece  
Tel. : 30-1-363.26.01/362.88.03  
Fax : 30-1-363.26.08  
Email : info@esiea.gr  
Contacts : Nikos Kiaos,  
President, Ms Fani Petralia

PFJU - Panhellenic Federation of  
Journalists' Union  
20, Akademias Street, 10671  
Athens, Greece  
Tel. : 30-1-363.98.81  
Fax : 30-1-362.57.69  
Email : press@posy.gr  
Contact : Mr Demetrios Glavas,  
President

Union of Periodical Press  
Journalists  
Valaoritou street 9, 10671  
Athens, Greece Tel. : 30-1-

363.60.39/363.34.27  
Fax : 30-1-364.49.67  
Email : espt@otenet.gr  
Contact : Ms Saia Minassidou,  
General Secretary  
FAPE - Federación de  
Asociaciones de la Prensa  
Española  
Plaza del Callao, 4, 7 C, 28013  
Madrid, Spain  
Tel. : 34-91-522.19.50  
Fax : 34-91-521.15.73  
Email : fape.s@apmadrid.es  
Contact : M. Juan Antonio Prieto  
Rodriguez (japrieto@ctv.es)  
Federación de Comunicación y  
Transporte de CC.OO  
Plaza Cristino Martos 4, 6°  
Planta, 28015 Madrid, Spain  
Tel. : 34-91-540.92.95  
Fax : 34-91-548.16.13  
Contacts : M. Julián Jiménez  
Jiménez, General Secretary; M.  
Romulo Silva Docasar

Federación de Comunicación,  
Papel y Artes Gráficas ELA Igeko  
Barrainkua 13, 48009 Bilbao,  
Spain  
Tel. : 34-94-424.33.00  
Fax : 34-94-424.36.54  
Email : fundm001@sarenet.es  
Contact : M. Koldo San Sebastian  
(koldo.sebastian@hegaztv.com)  
SNJ - Syndicat national des  
journalistes  
33 rue du Louvre, 75002 Paris,  
France  
Tel. : 33-1-42.36.84.23

Fax : 33-1-45.08.80.33  
Email : snj@snj.fr  
Contact : M. Mario Guastoni

Syndicat général des journalistes  
FO  
6, rue Albert Bayet, 75013 Paris,  
France  
Tel. : 33-1-44.24.28.24  
Fax : 33-1-45.86.29.94  
Contact : M. Tristan Malle,  
President

Syndicat national des  
journalistes CGT (SNJ-CGT)  
263, rue de Paris, Case 570,  
93514 Montreuil cédex, France  
Tel. : 33-1-48.18.81.78  
Fax : 33-1-48.51.58.08  
Email : snj@cgt.fr  
Contact : M. Michel Diard,

General Secretary  
Union syndicale des journalistes  
français CFDT  
47-49 avenue Simon Bolivar,  
75019 Paris, France Tel. : 33-1-  
44.52.52.70  
Fax : 33-1-42.02.59.74  
Email :  
journalistes.cfdt@wanadoo.fr  
Contact : M. Alain Goguey,

General Secretary  
NUJ - National Union of  
Journalists  
Acorn House, 314-320 Gray's Inn  
Road, WC1X 8DP London, United  
Kingdom

Tel. : 44-171-278.79.16 Fax : 44-171-837.81.43 Email : Acorn.house@nuj.org.uk Contact : Mr Mark Turnbull	Vittorio Emanuele, 00186 Roma, Italy Tel. : 39-06-683.38.79 Fax : 39-06-687.14.44 Email : infofnsi@tin.it Contact : M. Antonio Velluto	Tel. : 31-20-676.67.71 Fax: 31-20-662.49.01 E-mail: vereniging@nvj.nl Contact: Hans Verploeg, Secretary General Norsk Journalistlag, Boks 8793, Youngstorget, Torggata 5, 4. etasje, 0028 Oslo 1, Norway Tel. : 47-22-05.39.50 Fax : 47-22-41.33.70 Email : njpost@nj.no Contact : Ms Ann-Magrit Austena, Vice President (ama@nj.no)	Contact : Mr Peter Zeman, General Secretary  Slovenian Journalistic Society, Vosnjakova 8, 1000 Ljubljana, Slovenia Tel. : 386-61-132.70.34 Fax : 386-61-132.70.34 Email : d.n.s-slo@siol.net Contact : Branko Maksimovic, President  SJL - Finnish Union of Journalists, Hietalahdenkatu 2 B22, 00180 Helsinki, Finland Tel. : 358-9-612.23.30 Fax : 358-9-64.41.20 Contact : Leena Paukku (leena.paukku@journalistiliitto.fi)	Fax : 41-31-390.66.91 Email : sekretariat@comedia.ch Contact : Thomas Bernhard, General Secretary (bernhard@comedia.ch)  IJAS - Independent Journalists' Association of Serbia, Makedonska Street 5/II, 11000 Belgrade, Yugoslavia Tel. : 381-11-33.43.810 Fax : 381-11-33.43.810 Email : ijas@eunet.yu Contact : Hari Stajner  Independent Association of Professional Journalists of Montenegro, 13th July, 25, 81000 Podgorica, Montenegro, Yugoslavia Tel. : 381-81-24.43.07 Fax : 381-81-24.43.07 Email : upncg@cg.yu Contact : Vesna Pejovic, President
Association of Hungarian Journalists, Andrassy ut 101, 1368 Bp. 246 pf., 1062 Budapest, Hungary Tel. : 36-1-478.90.40 Fax : 36-1-322.18.81 Contact : Mr Istvan Wisinger, President	Latvia Union of Journalists, 2 Marstaju Str., 1050 Riga, Latvia Tel. : 371-721.14.33 Fax : 371--782.02.33 Contacts : Ligita Azovska, President, Leonards Pavils, General Secretary	Sindicato dos Jornalistas, rua dos Duques de Bragança, 7-2 , 1200 Lisboa 2, Portugal Tel. : 351-21-346.43.54 Fax : 351-21-342.25.83 Email : sinjor@mail.telepac.pt Contact: M. Joao Isidro, President	SJF - Swedish Union of Journalists, Box 1116, 11181 Stockholm, Sweden Tel. : 46-8-613.75.00 Fax : 46-8-21.26.80 Email : kansliet@sjf.se Contact : Mr Magnus Lindstrom (Magnus.Lindstrom@sjf.se)	
Community of Hungarian Journalists, Kanizsai u. 6, 1114 Budapest, Hungary Tel. : 36-1-209.34.94 Fax : 36-1-371.08.69 Contact : Ms T,rezia Katona- Endrody	Lithuanian Union of Journalists, Vilnius Street 35, 232600 Vilnius, Lithuania Tel. : 370-2-61.17.90 Fax : 370-2-22.15.71 Email : lzs@takas.lt Contact : Vilius Kavaliauskas (kavaliauskas@aiva.lt)	SZDR - Societatea Ziaristilor din Romania, Piata Presei Libere 1, Oficial Postal 33, Cod. 71341 Bucuresti, Romania Tel. : 40-1-222.83.51 Fax : 40-1-222.42.66 Contact : Ms Valeria Filimon	Federation suisse des journalistes, Grand' Places 14A, Case postale 316, 1701 Fribourg, Switzerland Tel. : 41-26-347.15.00 Fax : 41-26-347.15.09 CoMedia, Monbijoustrasse 33, Postfach 6336, 3001 Bern, Switzerland Tel. : 41-31-390.66.11	
National Union of Journalists, Liberty Hall, Dublin 1, Ireland Tel. : 353-1-805.32.58 Fax : 353-1-874.92.50 Email : liberty.hall@nuj.ie Contacts : Eoin Ronayne, President, Seamus Dooley	ALJ - Association luxembourgeoise des journalistes, BP 1732, 1027 Luxembourg, Luxembourg Tel. : 352-51.82.36 Fax : 352-39.51.04 Email : secr@alj.lu Contact : M. Jean-Claude Wolff, President (jcwolff@100komma7.lu)	Slovensky Syndikat Novinarov, Zupn, n m 7, 81568 Bratislava, Slovakia Tel. : 421-7- 4.43.50.71/54.41.22.06 Fax : 421-7-54.43.45.34 Email : ssn@internet.sk		
Union of Icelandic Journalists, Sidumula 23, 108 Reykjavik, Iceland Tel. : 354-55-391.55 Fax : 354-55-391.77 Email : bi@press.is Contact : Ms Frida Bjornsdottir	NVJ - Nederlandse Vereniging van Journalisten, Joh. Vermeerstr. 22, Postbus 75997, 1070 AZ Amsterdam, The Netherlands			
FNSI - Federazione Nazionale della Stampa Italiana, 349 Corso				