

CIRC 0014
26-May-00

Comments by ECAS
on the Commission's Draft Regulation
(Com(2000)30 final)
on Public Access to Documents

In this memorandum, we comment on the Commission's draft regulation (Com(2000)30 final) on public access to documents under article 255 of the Amsterdam Treaty, which provides that:

- " 1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.*
- 2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.*
- 3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents."*

As background to the comments and amendments proposed here, ECAS has already published in February 2000 a special 20 page edition of its newsflash. A first draft of this text was sent in December 1999 to all Commissioners and to the Secretary General who distributed it widely. ECAS also organised a press conference with the European association of journalists before the Commission finalised its draft.

The accompanying publication can be summarised as follows:

1) The case for freedom of information

ECAS aims to bring about a better balance between public interest and commercial lobbies and in this way to contribute to a citizen's Europe. As an advice service for NGOs and individuals, ECAS has always defended steps towards freedom of information and transparency. Such reforms can help the imbalance, when it comes to EU affairs, between privileged insiders, who have access to early confidential information and outsiders who do not. There can be no true European citizenship without a sense of a public space for debate round the EU Institutions, in which individuals and associations can participate.

In its publication, ECAS has come to the conclusion that, what is good for the citizen is also good for public authorities. If policy can be prepared and decided in such a way that it is communicable to the public, not only is the accountability of public administrations increased, but also their efficiency. According to the European ombudsman, Mr. Soderman, "transparency means that the process through which public authorities make decisions should be understandable and open; the decisions themselves should be reasoned: as far as possible, the information on which decisions are based should be available to the public". A climate of mutual trust and confidence is created, in which citizens are able to participate in a well informed and therefore responsible way in public debate.

ECAS also argues that the case for freedom of information is particularly strong at EU level. Although, the EU Institutions are in practice rather more open than most of their national counterparts, the public perception, because of their remoteness and the complex decision-making process, is generally the opposite. Attempts to preserve secrecy can, as a result, be particularly disastrous in the European context. For example, attempts by national governments in the 1990's to keep food safety risks secret resulted when they became public in the sudden collapse of consumer confidence and markets across Europe. The report also points out that because it is impossible for the EU to have a perfect consultative systems reaching legitimate interests across 15 Member States and covering a vast array of issues, a well publicised register and access to documents system is particularly necessary to give those not formally consulted an opportunity to express their views.

The ECAS report suggest that the balance sheet of current practice with the codes of conduct in the EU Institutions is largely positive. It is difficult, on the basis of existing practice, to understand why the EU Institutions are handling the negotiations of the draft regulation with such difficulty. There is no evidence that the current codes which allow access to all documents, subject to certain exemptions, have caused any problems to the decision-making process or the formulation of policy. On the contrary, the codes have been managed in a way that has made openness the rule and secrecy the exception, since 80% to 90% of requests have been accepted. From ECAS' point of view, the weakness of the codes is that they have been underused, and most requests come from already well-established interests. The internal and external appeals systems have operated fairly.

It is above all the European Court of Justice decisions which have brought about a *modus vivendi* by requiring the Institutions to balance the interest of citizens in gaining access to documents against their own interest in maintaining the confidentiality of their proceedings. This case by case examination appears to have worked to the benefit of the individual. Furthermore, the ombudsman, on his own initiative and in response to complaints, has helped to widen the scope of application of the regime, in particular to the “third pillar” of the Council of Ministers on home affairs and justice. The ombudsman has also encouraged not only all institutions of the Union to have access to document codes, but also agencies.

The report also makes the point that access to documents is one aspect of a policy of transparency. The report summarises the progress made over the last decade in terms of transparency in general, consultation mechanisms, relations with interest groups (lobbying rules and codes) and the consolidation and simplification of legislation. There is progress, but by no means even, across and within all Institutions. The Council still legislates in secret, and whilst consultation mechanisms are more widespread, they are still lacking in some areas and for some issues (including, ironically, this issue). ECAS intends to develop its analysis in response to the discussion paper “The Commission and non-governmental organisations: building a stronger partnership” (Com (2000) 11) of 18 January).

2) Generals comments on the draft regulation

As will be apparent from our proposed amendments under point 3, ECAS regards the Commission draft regulation as a whole, as failing to come down decisively in favour of transparency, and is to an extent self-contradictory. The proposed legislation reflects a paradox:

On the one hand, one would have thought that the arguments in favour of an EU freedom of information act were won. Failures by the last Commission to communicate sensitive information about anti-fraud investigations to the budget control committee of the European Parliament except slowly and selectively contributed to its downfall. Decisions by the new Commission to allow access to minutes of its meetings and by President Romano Prodi to publish his correspondence on the Europa site, and above all the climate of reform and modernisation of the administration: all these are signs that there will be a regime of more openness and accountability.

On the other hand, for any organisation, freedom of information is sensitive, because it creates a contract with the citizen to move documents from the sphere of confidentiality to the public domain. The crisis in the Commission has both strengthened the argument for more transparency, and created a backlash. This was apparent from the difficult passage of the preliminary draft regulation through the Commission. Earlier drafts on which ECAS commented in its press release of 10 January “Commission needs to rethink radically its approach to access to documents” – were improved – but as we make clear here – not nearly enough.

In retrospect, ECAS should have insisted more on prior consultation by the Commission. In our report, we refer to a document of 21 April 1999, but which does not represent official Commission policy. The resignation of the last Commission and the appointment of a new one left a vacuum in which its services decided apparently that they had no time and no mandate to consult. In this of all areas the absence of consultation is not acceptable. At no point has there been an opportunity for different user groups to meet together and with Commission officials to discuss the interpretation of different articles. The consequences of this have been a largely negative press reaction and heated exchanges which have not helped to clarify ambiguities in the drafting of the legislation. The European Parliament should make up for this absence of consultation by organising a hearing for all interested parties. Far from being a burden and causing further delays, consultation can often help to speed up the decision-making process.

3) Analysis of the draft regulation and proposed amendments

Before examining the draft regulation article by article, ECAS would like to stress at the outset where the major problems lie:

- Exceptions for preparatory drafts. In its defence of limiting access to certain preparatory documents (see article 3), the Commission has made much of the second report of the Committee of independent experts created by the European Parliament, which states that “like all political institutions, the Commission needs the “space to think” to formulate policy before it enters the public domain, on the grounds that policy made in the glare of publicity and therefore “on the hoof” is often poor policy”. The second report goes on however to say that “openness and transparency do not therefore imply routine and invasive public access to the inner counsels of the Commission in the course of its work”. This is a misinterpretation of the aim of users of access to documents regimes: to obtain information at a particular time and corresponding to their own needs: in general they have no particular wish to penetrate the inner working of Institutions as an end itself and in a routine way. There is no evidence from the use of the existing codes that officials in the Institutions have been denied, ever, “a space to think” in this way. It would be interesting to see evidence that policy making is more reactive and crisis ridden in countries which operate freedom of information laws than in those that do not. The Commission has used the report of the Committee of experts selectively. In reality, the report is not only an endorsement of the codes of conduct and the work of the ombudsman on transparency, but goes further by stating that “these mechanisms cannot in themselves bring about a change in mentality. In the first instance, it falls to the new Commission and above all its President, to give an example by their own behaviour of a move away from the present mentality of secretiveness into one of openness”. If there is a problem about a “space to think”, it is the exception – openness for the Committee of experts is the rule.

- The mandatory exceptions (article 4). The improvements, which could be brought about in the regulation, could be totally undermined if the long list of exceptions were applied to the letter. All commentators so far want to replace the institutions “shall” refuse by “may” refuse, to give officials the necessary degree of discretion to establish whether or not disclosure could cause substantial harm. Furthermore, whilst the Commission claims in the explanatory memorandum that “compared with the rules laid down in the present Council and Commission code of conduct, the wording of the exceptions has been spelled out more clearly”, this is not apparent in the text to any outside observer. The ombudsman, Mr. Söderman, has pointed out that “the list of exceptions in article 4 is more restrictive than the existing Code of conduct. It is also drafted in unnecessarily broad terms as for example, in the case of the new exception “relations between and / or with the Member States or community and non-community Institutions.””

Similarly, in its press release of 27 January, ECAS objected to a mandatory exception for the catch-all provision “the effective functioning of the Institutions”, up-grading the current discretionary exception whereby the Institutions can protect the confidentiality of their deliberations, but are obliged on a case by case basis to balance what interest against that of the citizen in disclosure. In their own detailed comments the EEB (European Environmental Bureau) come to the conclusion that “this catalogue of exceptions, undeservedly masquerading under the collective notion of the “public interest”; establishes a set of loopholes large enough to allow the Community decision-making process to disappear from sight”. We support the EEB’s analysis but do not think given the current success with access under codes of conduct that article 4 would be applied with sufficient rigour to have much a serious consequence. However, there can be no guarantee, and it is essential to rethink the whole approach in article 4 to bring it more in line with current practice.

In its report, ECAS argues for a “no turning back clause”: “we urge that the EU Institutions should use the opportunity of the Amsterdam Treaty to build on what the codes have achieved, extend their scope, whilst encouraging more use of the right to access, through creating registers of documents. Article 255 must be seen in the context of the Union’s commitment to transparency at Amsterdam: “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 A TEU). In no case therefore should the legislation be a step backward by comparison with the practices and case law of the Court of Justice developed since the Maastricht Treaty. In terms of article A, any retrograde measure could be open to challenge in the Courts.”

4) Comments article by article

Article 1 – General principles and beneficiaries

This article establishes a right of access to documents in terms of article 255, and is welcome. It does not however attempt to put right a retrograde step in article 255 which limits access to citizens of the Union and residents. A step forward might be taken if amendments tabled on the convention on fundamental rights are accepted.

This article should be amended to begin with the word “Everyone”. Under the current codes, requests for access to Commission documents from countries outside Europe only represent a small proportion: 2.7 %. Why exclude European citizens from candidate countries? If a European citizen can apply under the US freedom of information act for documents, why cannot an American citizen apply for an EU document?

Article 2: Scope

In terms of the proposal, the draft regulation “shall apply to all documents held by the Institutions, that is to say, documents drawn up by them or received from third parties and in their possession”.

This is an improvement, since under the current codes documents which are held by but not produced by the Institution concerned, are not accessible. The Commission sent a questionnaire to Member States and from the replies it nearly emerges that nearly all governments operate systems which also cover in-coming documents. This improvement brings the EU closer in line with national practice. ECAS, in its report, underlines the importance of this reform: to understand decisions, citizens need access also to documents produced by lobbies and in turn the lobbying process needs to become more transparent.

There are some problems with the second sentence of this article “This regulation shall not apply to documents already published or accessible to the public by other means”. The second part of this sentence should be deleted, and for documents already published, the citizen should be told where they can be found. Finally in article 2 it is specified that the regulation “shall not apply where specific rules on access to documents exist”. It is necessary for the regulation to specify what these rules are (presumably tendering procedures, etc).

Article 3 – Definition

There are two different issues covered by this article:

- Definitions excluding preparatory document
Should “only administrative documents be covered”? This is defined as “i.e. documents concerning a matter relating to the policies, activities and decisions falling within the Institution’s sphere of responsibility, excluding texts for internal use such as discussion documents, opinions of departments and informal messages”. It is precisely matters which may not clearly come within the competence of the Institutions and which are not yet official policy which are often of great public interest, particularly to NGOs attempting to launch new initiatives. Our main objection is to exclude “discussion documents”, often the very official basis on which policy and legislation is developed as well as “Email” messages, some of which may be considered to be documents, others not. The strong point of the existing system is that it covers all documents, including preparatory ones.

The regulation should also, and simply limit the definition to clarifying that a document is a document regardless of its means of communication. The citizen should have access to decision-making from its beginnings, and be aware of the arguments put forward by different services, just as the Brussels lobby system already does.

- Excluding a right of access to documents of European agencies

The European Federation of Journalists stresses that “the term “Institutions” must apply to all and shall also include all other European bodies with which the European Union Institutions have direct relations, such as the European central bank, etc”. Article 255 refers only to documents of the Institutions. However, all European agencies either depend directly on the Institutions, or are set up under the Treaties. One of the past successes has been the ombudsman’s encouragement for agencies to develop codes – even though these may be of varying degrees of openness, and unharmonised. What will happen to agency codes? Should the citizen have a right of access to a Commission document, whilst agencies could continue to supply the same document without being subject to such an obligation towards the citizen, on a discretionary basis? It is a step forward that the Commission defines “Institutions” as including committees which they have set up. ECAS would however like to see the further step taken so that “Everyone has a right of access to the documents of the Institutions of the European Union and of subsidiarity bodies and agencies established by the institutions and by the Treaty on European Union”.

Article 4 – Exceptions

In the list of 10 exceptions to protect the “public interest”, under point (a) we would propose that the following should be struck out, unless they can be justified and far more precisely and narrowly defined:

- Relations between and/or with the Member States or Community or non-community institutions (see remarks above)
- Financial or economic interests (far too general: covered by point (c) commercial and industrial secrecy)
- The stability of the Community’s legal order (does what some would regard as the essence of the Union depend on secrecy? Is there a more specific concern here, such as independent legal advice given in confidence?)
- Infringement proceedings, including the preparatory stages thereof (particularly the second phrase should be eliminated)
- The effective functioning of the Institutions (see remark above that this upgrades a discretionary to a mandatory exception).

This article will be at the centre of the legislative debate. It should begin: “The Institutions may refuse access to documents where disclosure would undermine the protection of the public interest.”

In our report, we develop at some length the thesis that the EU, by comparison with national or local authorities, only has an indirect impact on the citizen. It is not the subject matter under discussion – whether defence, security or international relations – which is the decisive factor in deciding whether disclosure would cause substantial harm, but the content, on a case by case basis. For example, is the discussion about defence policy, or is it about a planned military operation? We would like to see this concern about the level and actual impact of the decision-making process reflected in article 4.

Furthermore, as is clear in more advanced national legislation and the Aarhus convention for example, the public interest has to be assessed from different, often contradictory perspectives. For example, there is a public interest in secrecy where the success of inspections, investigations and audits could be jeopardised by disclosure. On the other hand, where an inspection establishes at an early stage that there are risks to safety, health or the environment, there is an equally strong public interest in disclosure. The regulation should make clear that such considerations should always take precedence and that partial disclosure is possible. The same should apply to abuses of human rights and fundamental freedoms. Finally, the regulation should make it clear that the Institutions will not simply follow requests for “confidentiality as requested by the third party having supplied the document or information”, but will also balance such requests against the public interest in disclosure.

Article 5 - 11

These articles relate to implementation mechanisms – processing applications, appeals, registers of documents. It is an improvement on the system of the current codes that failure to reply within the time limit when the applicant submits a confirmatory application is considered “equivalent to a positive decision” thus putting more onus on the administration to justify a refusal on time. ECAS is however looking for further improvements to improve on the present system.

- Time limits
The current access to documents system is underused because not only journalists but also interest groups need information immediately. For requests for identifiable documents which do not relate to any of the exceptions, a standard response time should be 48 hours. Certainly, one month is too long, and the possibility that this could be extended to two months, excessive.
- Restrictions
Some restrictions are suggested for certain types of requests. Applications relating to very large documents should be handled by posting them to a website.
- Use of documents obtained
The Commission wants to ensure that the system is not exploited i.e. by companies selling freely available information. Article 8 is however too widely drafted, covering exploitation “for any other economic purposes.”

- Registers

The proposition in article 8 that each institution “shall provide access to a register” should be developed. It should be made clear that the register should contain confidential and non-confidential documents and provide guidance to applicants as to their context, origin and the next stage in the decision-making process. The current system of access to documents is underused because people do not know what to ask for.

Finally, rights about which people are not informed are rights only on paper, or at best reach those who are least deprived of them. The EU budgetary authorities must make funds available to make sure that the future rules are known and work.
