



Fern Briefing Note

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Page 1 of 3

Transparency in the European Union

Calls for the European Union to improve transparency came to a head in 1992 when referenda results in Denmark and France over adoption of the Maastricht Treaty revealed the public's lack of confidence in European Institutions. Such a crisis of public faith in the EU administration could no longer be ignored.

Notably, although the European Community had adopted legislation concerning public access to information held by the Member States' authorities,¹ the European Institutions themselves were under no similar obligation. For environmental NGOs (and others) this discrepancy became an obstacle as even basic information on important decisions was denied to them.

Against this backdrop of general discontent, the European Community took various actions – some internal, others international – in an attempt to remedy the situation. Indeed, a discussion of transparency in the European Union is a moving target, shifting with the push and tug of various political forces elaborating solutions as new crises arise.

What is transparency and who needs it?

Transparency implies that the public is given insight into the functioning of public administrations through access to information held by administrative authorities. Generally, the public must have such access without having to demonstrate a personal interest or otherwise justify its request. Access to documents can only be refused on certain well-defined grounds, some implying an obligatory refusal, others giving the authority discretion to refuse as it sees fit.

Details on the practical functioning of such provisions can be debated – and frequently require judicial intervention to settle. In some form or other, national legal provisions on access to information exist in all the EU Member States.

Openness is also crucial for a variety of other reasons. The public is given the right to oversee the activities of public authorities and view the documents on which official decisions are based. Public participation in policy creation and execution is enhanced where that public is well informed. Moreover, various forms of fraud are discouraged; knowing that their actions cannot remain shrouded in secrecy, the behaviour of public officials is influenced. Of course, these factors in turn bolster the public's confidence in its authorities.

Provisions concerning transparency are not only of benefit in terms of overriding legitimacy and public confidence. In a very concrete manner, transparency and a well-informed public are essential to the monitoring and enforcement of specifically environmental rules, where official resources are over-stretched. The Commission has limited powers to investigate Member States' infringements of Community environmental rules (by contrast with its powers to investigate infringements of Community competition law, where the Commission's powers are extensive). Interested individuals and ecological associations fulfil the critical function of acting as the Commission's eyes on Member State territory. As guardian of the Treaties, the Commission relies on information and complaints it receives from the public alerting it to infringements of Community law. Acknowledging its reliance on public involvement, the Commission has published a standard 'complaint' form², making it easier for the public to bring irregularities to the Commission's attention.

¹ Directive 90/313 on freedom of access to environmental information held by Member State public authorities (OJ 1998 L158/56).

² OJ 1989 C26/6.



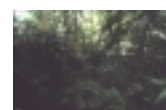
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The Solomon Islands is one of the few places where local land rights are legally recognised.

Nonetheless commercial logging is having a powerful negative impact on society and the environment. Photo: O Tickell.

EU actions to encourage transparency

The EU has taken various steps to regain public confidence since 1992 including the adoption of a Code of Conduct and Implementing Decisions on access to information; the creation of a European ombudsman to investigate allegations of maladministration by European Institutions; and, on an international plane, by signing the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

The Code of Conduct and Implementing Decisions

In late 1993, the Commission and Council adopted a Code of Conduct on Public Access to documents,³ followed by specific Implementing Decisions for the Council⁴ and the Commission⁵ – and later, a resolution by the European Parliament.⁶

Generally, these provide for the “widest possible access to documents held by Commission and Council” and a response on requests within a reasonable time, usually 30 days. Information must be refused where release of documents would undermine public interest; protection of individuals and privacy; commercial and industrial secrecy; the Community’s financial interest, confidentiality of those who supplied the information. Information may, at the institution’s discretion, be refused in order to protect the institution’s interest in the confidentiality of its proceedings.

Importantly, individual rights to access information must be enforceable before the European courts – for very practical reasons.

What the above provisions mean in given situations is not always clear. How the exemptions are invoked in practice has given particular cause for concern. The European Court of First Instance has been called upon to give guidance on what is required of the institutions. In this role the Court has shown itself to be an important ally of the public, requiring, for instance, that any refusal by Community institutions must be adequately reasoned. If invoking the last exemption, the institution in question must genuinely balance the detriment to its interest against the public’s benefit in the disclosure of the information. Finally, if access to the document is refused, information on the possibility of bringing proceedings before the Court of First Instance or on lodging a complaint with the Ombudsman must be provided.

³ Code of Conduct OJ 1993 L340/41.

⁴ Council Decision 93/731 OJ 1993 L340/43, later modified OJ 1996 L325/19.

⁵ Commission Decision 94/40, OJ 1994 L46/58.

⁶ Parliament Resolution, OJ 1998 C292/170.

The European Ombudsman⁷

Ironically, although at the centre of the European crisis of faith, the Maastricht Treaty put a valuable tool in the public’s hands by creating the office of the Ombudsman.⁸ Modelled largely after the Danish ombudsman, the European ombudsman is popularly seen as the defender of the common man. He is empowered to receive, from any citizen or resident of the EC, complaints of alleged contraventions or maladministration in the implementation of Community law, a direct and indirect aide to transparency.

Thus, the Ombudsman’s has an interest in transparency in order to carry out his own role effectively: his task is made easier where the complaints he receives come from well-informed individuals. The Ombudsman also has the power to make an inquiry of his own initiative. He concludes his inquiry with an opinion that, where friendly solutions were not found, will typically include “critical remarks”, “draft recommendations” or “further remarks” that help shape the principles of good administration. Such remarks, though non-binding, carry the weight of his mandate as the people’s defender.

The present Ombudsman, Jacob Soederman, is a strong advocate of transparency, and makes a point of arguing for the citizens right to an “open, accountable and service-minded” administration, notably at a meeting for the Charter of Fundamental Rights for the EU. In one of his first reports, the Ombudsman explained the term ‘maladministration,’ further refining it with a non-exhaustive list of things that may amount to maladministration, including two very important elements of transparency: avoidable delay, and “lack or refusal of information.”⁹

Of particular interest is the Ombudsman’s Special Report¹⁰ concerning an own-initiative inquiry launched in June 1996 into public access to documents held by certain Community institutions and bodies. This concluded that failure to adopt, and to make easily available to the public, rules governing public access to documents could constitute an instance of maladministration. The Decision included draft recommendations to the institutions and bodies concerned.

⁷ Website of the European Ombudsman: <http://www.euro-ombudsman.eu.int/home/en/default.htm>

⁸ Article 138e EC: “The European Parliament shall appoint an Ombudsman empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Just and the Court of First Instance acting in their judicial role.

⁹ See document 398Y1207(01), The European Ombudsman - Annual Report for 1997, OJ 1998 C380/1-162.

¹⁰ OJ 1998 C44/9.

More recently, he has tackled the institutions directly on the issue of transparency (see Commission's proposed regulation, below).

Commission's proposed regulation

Amsterdam Treaty Article 255(3)¹¹ provides among other things that: "Each Institution ... shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents." In its proposed regulation on public access, the Commission seems to have seized the opportunity to take a step backwards. Ombudsman Soederman's reaction was swift. When the Commission released its draft Regulation on access to information published in January 2000, Ombudsman Soederman published a harsh criticism of its provisions in the European edition of the *Wall Street Journal*.¹² His principal objection concerns the vast list of reasons for which access to information could be denied:

"Should the Parliament and Council adopt the Commission's proposal, there probably won't be a document in the EU's possession that couldn't legally be withheld from public scrutiny.... Alas, what the present system seems to do is offer token measures of transparency while making it possible for some of the Commission's most important work – as well as its more venal aspects – to remain cloaked in secrecy."

He argued that such a regulation must cover all documents held by the institutions, without exception; that each institution must establish a register of all documents, and that the list of exemptions must be short, precise and easy to implement.

A more recent proposal elaborated by the Commission¹³ provides that the legislation will cover all documents held by the three institutions, i.e. documents drawn up by them or emanating from third parties and in the possession of the institutions (Article 2); that registers of documents will be set up (Article 9). The list of exemptions (Article 4) is still one of the longest articles in the proposal.

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

Finally, an international instrument has been adopted that concerns not only the Member States of the European Union, but most European states: the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, opened for signature in Aarhus Denmark, 25 June 1998.¹⁴ As the title indicates, the Convention attempts to provide public access not only to information generally, but specifically to allow for public participation in the creation of policy and law, and the possibility to defend these in national courts of law.

The European Union and its Member States signed in 1998; since then, however, Denmark and Italy are the only European Union members to have ratified it. Thus far, the ratification process has been more successful in Eastern Europe and among Newly Independent States.¹⁵ The Convention entered into force on 31 October 2001.

Certainly the provisions of the Convention could be criticised for not being forceful and for being overly deferential to existing national rules. Nonetheless, it provides an ambitious framework on which national rules can be built as well as a structure for co-operation between parties. And task forces have been created on such crucial issues as Pollutant Inventories and Registers, Genetically Modified Organisms, and Compliance Mechanisms.

Although it seems that the Central and Eastern European Countries are taking a more active stance on this instrument, the European Union claims the moral high-ground on these fundamental issues. As far as European NGOs are concerned, the door to the European Court of Justice has been slammed shut.¹⁶ Likewise, the procedure used by the Commission when it elaborated a Communication on the precautionary principle¹⁷, one of the most important principles in *environmental* law, was blatantly closed to environmental organisations.

¹¹ Article 255 "1. Any citizen of the Union, and any natural or legal person residing or having their 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 and private interest governing their right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 189b [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."

¹² Jacob Soederman, 'The EU's Transparent Bid for Opacity' *Wall Street Journal Europe*, 24 February 2000, p.11. See also European Ombudsman press release 3/2000.

¹³ Document 500PC0030: Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents.

¹⁴ For the text of the Convention, see Doc. ECE-CEP-43 <http://www.unece.org/env/pp>

¹⁵ As of end 2001, Azerbaijan, Belarus, Georgia, Macedonia, Moldova, Romania, Turkmenistan, Ukraine had ratified.

¹⁶ Access was refused, not on the merits of the issue brought before the judges, but because they failed to prove that the environmental problem in question concerns their organisations in a manner that differentiates them from any other individuals – an impossibility that, if allowed to stand, will always exclude NGOs from bringing environmental issues to these courts: See T-585/93 *Greenpeace and Others v Commission* [1995] ECR II-2205; and C-321/95P *Greenpeace and Others v Commission*, 2 April 1998.

¹⁷ Repeated requests by environmental organisations to comment on Commission drafts and participate in the elaboration were systematically ignored. By contrast, the European chemical industry association and the American Chamber of Commerce in the EU were pleased that the Commission to their opinion into account. Com (2000)1,2.2.2000. See *EU Forest Watch*, Feb/March 2000.