THE LEGAL FRAMEWORK OF ACCESS TO INFORMATION IN EU INSTITUTIONS

Liga Sondore

University of Latvia

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Abstract

The principle of openness, transparency and accountability are at the heart of democracy and are the very instruments allowing it to function properly. On the one hand, all EU Member states admit that the principle of openness should prevail against secrecy within government. On the other hand, although these principles are increasingly recognized and necessary for any democratic system many disputes have arisen regarding the specific measures of implementation which would in particular be acceptable for the EU legal order.

The main aim of the research is to define the state of the public right to information in the EU grounding it to an adequate legal base. The public right of access to information has been admitted as a necessary measure to ensure the principle of openness in practice.

Promises to promote greater openness within the EU was included in the Maastricht summit as a political goal and resulted in Declaration No.17 with commitments from member Sates to make Union more open and transparent and as close as possible to the citizens in order to promote public confidence in the EU. That was the crucial point for changing the Union legal order from a presumption of secrecy which had prevailed before Maastricht towards a greater openness within EU. Finally since 2001 the public right of access to information has gained a certain status in EU law.

Keywords: access to information, transparency

Author:
Liga Sondore
University of Latvia
E-mail: liga.sondore@inbox.lv

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INTRODUCTION

Since the nineties the discussions on issues related to democratization of the European Union have been included in agenda of decision-makers. The importance of it can be explained by the enlargement of European Union and growing number of decisions taking place at the European level. Especially the last enlargement has played important role.

Often people see the decision making process as too complicated and not accessible process to average people who can not understand the procedure and judicial expressions. EU is trying to reduce this democratic deficit with increasing the level of access to information and transparency in EU institutions and especially regarding the decision making process in the EU level.

The Eurostat survey of 2002-2003 shows that EU citizens see the EU as distant structure which they can influence only little and can not be involved in the process.[1] The European Parliament is often considered as the only institution where EU citizens have some control, however the most part of EU citizens believe that the most important questions are made without the door. This is the aspect of so called democratic deficit.

The issue of democratic deficit includes not only the discussions on the role of European Parliament and its responsibility in front of citizens, but also the work of other institutions and their interdependence. The main emphasis as usually is on European Parliament, Council and European Commission.

On the one hand the stated aim was to make an open government – understandable to its citizens. However on the other hand the measures necessary to achieve this aim were the subject to broad discussions and disputes among many politicians, scholars as well the public concerned.

[1] http://europa.eu.int/comm/eurostat

It is very important to define the state of the public right to information in the EU grounding it to an adequate legal base by analyzing recently adopted instruments to access: whether access to information has been recognized as a general principle and even more whether the public right of access to information is regarded as fundamental one during the law-making procedure and accordingly whether new legislation safeguards this right as fundamental one at EU level.

The research provides for the theoretical and legal background of public access to information discuss both the relevant terms and central problem: public right of access to information to discover the particular content, scope, object and purpose of the later.

In essence, before the Treaty of European Union the European Communities were known as a closed society with very few possibilities of insight. Furthermore as H.Ragnemalm claims: "A general right of access by the public to EC documents has been unknown in Community law."[2] Actually public access to information was not subject to rules but was a matter of wide discretion.

However, since the nineties the situation has developed towards a presumption that information cannot be restricted without a good reason. It was noted in 1995 by Advocate General Tesauro that "It is no longer true that everything is secret except what is expressly stated to be accessible, but precisely the converse."[3]

The increase of access to information is the main tool in all activities connected with transparency and publicity. Any citizen of the EU, also citizens of Latvia after joining EU, have to be informed about possibilities and rights to receive the necessary information in order to protect his or her rights. It is important to mention that it is difficult to define the amount of necessary information, because it is impossible to define the situation when all the necessary information is received.

[2] H.Ragnemalm, „Openness," p.21
[3] Case C-59/94 Netherlands, Opinion of AG, para 5

The EU institutions are working on new legislation, enacting EU policy, administrating EU budget, managing EU external relations on behalf of EU member states. Therefore it is so important to raise the question of access to information as since May 2004 one decision can influence 25 countries and together 453 684,7 million EU citizens (data of Eurostat 2003).[4]

The question of access to information has been included in agenda and the aim of reducing the amount of inaccessible information to minimum has been stated.[5] It is clear that the society should be informed about the accessible information in order to promote that the society is using rights to access the information. Therefore it is very important to establish the legal order of access to information.

[4] http://europa.eu.int/comm/eurostat
[5] Robertson K.G. Secrecy and open Government. Why Governments Want You to Know. London: Macmillan Press Ltd.,1999, p. 9

1. THE EXPLANATION OF MAIN TERMS

There are several names for describing the existing free flow of information. The most often used are “transparency”, “openness”, “access to information”, “rights of access to information”, “public right”, “freedom of information”, but not all of them are used regarding the granting the flow of information.

The term of transparency used in this research means that persons should be informed about the work of EU institutions, but EU institutions should be open and should inform about its work as well as should provide the information on the request. For example, the persons should have right to get the all information regarding the decision-making process in the EU.

In many discussions concerning public rights, we can see that both terms “document” and “information” are recognized as the object. Actually, access to information could be seen as a different term than access to document if we look at the content of both words. So, this means that different objects could be covered thereby. In particular, information could be more and also less than a document. That is information could be included in a section of document (the information is less than the document), but could also consist of a combination of documents and unwritten sources (the information is more than the document).

The term “documents” regarding the access to information involve any kind of information – on paper, electronic, audio, video etc., which is related to the institutions’ policy, activities, decisions.

The Treaty of Establishing European Community precisely defines the access to documents “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"[6]

In the EC Treaty, the explicit public right of access is to a "document". However, it is worth analyzing whether this term covers only a document as such or means rather information held by the EU institutions (which inter alia would include access to information contained in electronic form). One could claim that the EU legislator leaned towards a narrowed approach than that taken in several national legal systems when it has chose the term "document". However, this is matter of interpretation. This is to say, the scope of the term reflected by the word "document" can easily be dealt with as a matter of definition by including a wide definition of "document" in the legal act.

Indeed, usually one requests some document because it contains data which is likely to be of interest, and therefore, it is a case of request for information. It has been argued that to interpret the concept of the right of access to documents as meaning a right of access to the information contained in the documents.

This should be stressed that, although the narrowest term is used in the EU legislation concerning the right of public access, it is also correct to use the term "information". Consequently, in my view, the true object of the public right of access is "information contained in the documents". As to how broad this object can be dependent on the definition used in the legal act of access and interpretation accordingly. Above all, this definition should be wide enough to include all the various ways in which information may be stored to avoid, in practice, impeding the effective exercise of the right of access to information.

[6] Treaty Establishing the European Community (Consolidated version), in B.Ruddeb, D. Wyatt (eds), Basic Community Laws, New York, Oxford University press, 1999

2. THE NECESSITY OF ACCESS TO INFORMATION IN THE EU CONTEXT

The transparency serves as the instrument giving the possibility for citizens to be more involved in the process of the decision-making and ensures the legitimacy and effectiveness of administration in the democratic system as well as defines higher level of responsibility to citizens of EU.

The public right of access as a term is considered as an essential element of openness; however, it is not so easy to highlight precisely the purpose of this right as "the rational of public access rights may vary". At the same time the most important aims have been summarized as follows:

- to further the free interchange of opinions and the enlightenment of the public;
- to secure against abuse of power by means of public control;
- to ensure the availability of information necessary for an informed electorate;
- to improve public debate on matters of general interest;
- to enable more effective participation of the people in the making and administration of laws and policies;
- to further a good and democratic administration.

In short, it may be noted that these aims are necessary to ensure the principles of democracy in a way where the individual is respected. As P.Birkinshaw states, the principle of access to information in whatever form is to keep a democratic safeguard, which increasingly is seen, as necessary to enhance democracy.[7] Furthermore, the creation of a system of public access to information according to Ragnemalm's opinion "meets the standard required by the democratic principle."[8] More specifically, this system should include rules that any member of the public may, at any time, request access to the files that any public authority holds and that this authority may only refuse access on

[7] P.Birkinshaw, „Freedom of Information" at 24-26
[8] H.Ragnemalm, „Openness,"p.20

specific enumerated grounds.[9] In addition, this system guarantees that the citizen can follow and participate in the decision-making process undertaken by political bodies and by the administration. That is to say an open system of government reassures the citizens that their government is working on visible agenda and is thereby generating trust between the governors and the governed.

The next indicator of the public right of access to information is the scope of this right. This can be determined by the type of authorities as well as the object to which this right applies. Although in general the right of access to information will linkage to the freedom of information may be applied more widely to include administrative authorities, legislative bodies within the European Union – mainly those institutions that are concerned with recently introduced legislation within the Union legal order. In particular the public access right to so called "official information" of all EU institutions, except judicial authorities or investigated bodies, will be examined.

The scope of the public right of access to information in connection with the object is an essential issue for considering the level of openness within the respective state, organization or institution. The question could arise, "what objects should this right cover?" Notably, should the principle of "the widest possible access" include only peace of paper in the form of concrete document or something more?

[9] P.Dyrberg, „Current Issues," p.157

3. THE LEGAL FRAMEWORK OF ACCESS TO INFORMATION IN THE EU INSTITUTIONS

3.1. 1951 – 1998

The basic principles of access to information in EU institutions appear in Treaty of Establishing European Community only after Treaty of Amsterdam[10]. It should be mentioned that the questions of access of information in the Treaty of establishing European Coal and Steal Community in 1951 was not even mentioned and was included in the text of the Treaty only in 1999.

It has been recognized by Ian Harden that there are two presumptions regarding information, more precisely, regarding the dealing with public requests for the information. Firstly, a presumption that information is a secret unless a decision is made to publish or release it. Secondly, a presumption that the information should be provided on request unless there is a good reason not to do it.[11] Although these two contradicting presumptions, it is possible to divide the treatment of the requests for information exactly into the same approaches regarding public right of access within the EU: pre and post Maastricht. In fact the freedom of information, particularly accessibility to official information within the EU institutions, has significantly changed since 1993.

Till the Maastricht Treaty the European Union was not paying enough attention to the public right to access the information and the first assumption Harden was clearly recognizable. For instance, the Protocol on the Privileges and Immunities of the European Communities[12] states that the archives of the Community are inviolable (Article 2). The Commission treated the term "archives" in the broadest sense. In practice it meant, "all documents held by the Institutions and their members and officials was "top secret" if the

[10] Treaty Establishing the European Community (Consolidated version), in B.Ruddeb, D. Wyatt (eds), Basic Community Laws, New York, Oxford University press, 1999
[11] I.Harden, „Citizenship," p.175
[12] Annexed to the EC Treaty

documents are more recent than 30 years.[13] Furthermore, both the Commission and the Council codified this interpretation.[14] Thus, for example, the Council regulation allowed public access to documents in historical archives after 30 years. According to these rules, a decision on access was connected to the internal classification of the document as confidential or limited.

This meant the authority had a right to refuse access to documents due to that respective document being classified as "top secret" without any obligation to examine or balance the interests affected by possible disclosure of the document. Subsequently, the presumption "that the information is secret" as well as the wide discretion of authorities was the reality of that time. Moreover, according to Craig and de Burca, the early Communities were fairly undemocratic. Meetings of the Council were secret, and minutes were not published. The Commission was perceived as a distant and remote bureaucracy and the Community processes very complex, peopled by a bewildering number of committees.[15]

However since the nineties the situation has developed towards presumptions that information cannot be restricted without "a good reason".

The crucial point for the development of greater openness within the Union and giving the public right of insight with an aim to promoting confidence of EU citizens was the intergovernmental conference preceding the signing of the Maastricht Treaty.

The situation as it was before Maastricht Treaty could not exist anymore as it become unacceptable for such over national organization as EU with the aim to develop democratic system. Since 1990-ties exists more possibilities to search for documents of EU institutions and the process of making requests have been simplified. But there is still question whether the access to information has changed accordingly?

[13] Curtin and Meijers, "Open Government" p.418
[14] Commission Decision No.359/83/ECSC; Council regulation No.354/83
[15] Craig and de Burca "EU Law" p.368

Concerning general information and the right of public access to it within the union, the first notable event was the recognition of the fact by Member States that the European Union has to be more open and transparent and as close as possible to the citizens to be a counter-balance mechanism to the so called "democratic deficit". Furthermore, it was stated that a means should be found to increase "the public's confidence in the European Community"[16]. This statement is reflected in Declaration No.17. It pronounces that "transparency of the decision making process strengthens the democratic nature of the institutions and the public's confidence in the administration".

The declaration recommends that Commission submit to the Council no later than 1993 a report on measures done regarding the improvement of public access to the information available to the institutions.

There are authors who think that the first steps to the way on access to information were made a little bit before with resolutions of European Parliament and with the initiative of European Commission regarding the access to environmental information. But it was related to competent authorities in the Member states and not to EU institutions. Later on also Commission recognized that the access to information in the field of environment should be ensured also in the EU institutions and especially in the Commission.

The heads of the states confirmed the new approach at the meetings in Birmingham on 16 October and Edinburgh on 12 December 1992. The conclusions stated that the work of EU institutions should become more transparent.

The Birmingham declaration says that "we must make the Community more open, to ensure a better informed public debate on its activities".[17] It was discussed how to open up the work of the Community's institutions including the possibility of some open Council discussions – for example on future work programs. "We welcome the Commission' s offer to consult more widely before proposing legislation which could

[16] EU Commission, „Public Access to the Institutions'Documents'
[17] Birmingham declaration, 16 October 1992 http://europa.eu.int/eur-lex

include consultation with all the Member States and more systematic use of consultation documents (Green papers). We ask the Commission to complete by early next year its work on improving public access to the information available to it and to other Community institutions. We want Community legislation to become simpler and clearer."[18]

At the Edinburgh summit was stated a commitment to open Council debates, improve transparency of decision-making, as well as to simplify and consolidate Union legislation to promote access to it.

Later on the European Council at the Copenhagen summit of June 1993 jointly with the Commission and the Council adopter a Code of Conduct on public access to Commission and Council documents. The code committed the institutions to provide "the widest possible access to documents" and led both institutions to adopt implementing decisions.
So in 1993 the Council adopted Decision 93/731 on public access to documents, but the Commission chose a different approach and implemented in its Decision 90/94 the whole code as part of the decision. However in practice this made no difference.
These implementation rules were adopted on the basis of each institution's power of internal organization and the legal right of public access to information was side-effect.

Moreover, the right to information was not ensured in any of the EU Treaties in the beginning. Therefore, the Court's approach was an important issue for the development of this right within the Union legal order. Firstly, the Court had the opportunity to develop a catalogue of fundamental; rights through its case law in the absence of written one within Union law.[19]

[18] Birmingham declaration, 16 October 1992 http://europa.eu.int/eur-lex
[19] Opinion 2/94 of the Court.

3.2. 1999 – 2004

The first improvements were made during the negotiation over the Maastricht Treaty, but it was in the form of rules and was not legally binding regarding the access to information. There were serious disagreements what kind of legal instruments should be adopted.

The lack of clear status of the access to information in the Treaty did not allow making it as one of the most important issues on the EU legal system. So far it was defined only in the internal documents of the EU institutions. On the other the process of moving from one Harden's assumption to another one was started.

During the negotiations on Amsterdam Treaty member states presented common opinion accepting the importance of openness and the duty to increase its influence. Meanwhile concerning the public right of access they showed rather different position. Some of Member states did not have any concrete proposals at all for improving openness – Germany, United Kingdom, France. But Denmark, Sweden, Finland and the Netherlands presented detailed proposals. Netherlands wanted to include a provision on public access in the text of the treaty; the Denmark wanted to leave this question to the competence of the Ombudsmen.[20] Sweden emphasized that Member States should be protected from the influence which might arise from the access to EU documents".[21]

At the result it was decided to include the question of access to information in the text of the Treaty. The Amsterdam Treaty introduced a new Article 255 which gives citizens a right of access to European Parliament, Council and Commission documents:
"(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 principle and the conditions to be defined in accordance with paragraphs 2 and 3.

[20] Proposals by the Danish Government dated 6 September 1996
[21] Ministry of Justice, Access to documents – Swedish proposal for Treaty Amnedments, Explanatory memorandum, 17 September 1996

(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."

Later on the Regulation on access to information was adopted in 2001 based on this article of the Amsterdam Treaty

In connection with wording of Article 255 several questions arise – the Article grants a right of access to documents – what is the content of the right and what's its relationship with the general principle of access? What about other institutions which were not mentioned in the Article? The Article does not contain any guidance for the legal quality of the measure, which should be adopted accordingly to paragraph two. Should it be a regulation, a decision, or only a recommendation?

Thus one might say that the wording of the Article 255 is very general. This could lead to a situation where the principle of public access to information will be ensured inadequately as it was before the Treaty of Amsterdam or the scope of the right could be diminished.

The regulation which was adoption later on in 2001 No.1049/2001 stated that it applies also to all the documents which fall under activities covered by both previous Treaties.

The each institution has established own internal rules based on the principles settled in the secondary legislation to simplify and clarify the process of processing of incoming requests. The important role is given to the Court of First instance and European Court of Justice in the development of access to information.

4. THE MAIN LEGISLATIVE INSTRUMENTS

4.1. CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

The European Parliament, Council and the Commission adopted The Chapter of Fundamental Rights of the European Union in December 7 of 2000. The Article 42 defines the right of access to information "any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents", the Article 43 lays down the right to refer to the Ombudsman „(..) has right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role", the Article 41 states that "every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union (..) every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language"

Although the Charter is not legally binding, it has been seen as the document summarizing EU fundamental rights and representing the values already approved. In this way it confirms that the access to information should be recognized as fundamental right.

In November of 2004 the EU Member states have signed the European Convention which should be ratified by the Member states in the period of two years. The European Convention includes the whole Chapter of Fundamental rights as part of it. In case of ratification it will be binding documents for all EU Member states. It means that Chapter as such will become binding.

4.2. REGULATION No 1049/2001

Under the Article 255 of the Amsterdam treaty the Council and the European Parliament adopted a new Regulation on public access to European Parliament, Council and Commission documents.

The purpose of the Regulation No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding the public access to European Parliament, Council and Commission documents is "(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission documents provided for in Article 255 of the EC Treaty in such ways as to ensure the widest possible access to documents; (b) to establish rules ensuring the easiest possible exercise of this right; (c) to promote good administrative practice on access to documents."[22]

The main improvements to the public access provided by the regulation are:

- a regulation as secondary legislation is an adequate legal base in contrast with the previous one where this right was regulated by the internal rules of the institutions;
- the regulation abolishes the authorship rule; Access is guaranteed to both documents drawn up and received by an institution;
- the regulation provides the obligation for the institutions to maintain a public register of documents. This should help to realize the right of access to information for an individual and to systemize the work of the administration. In reality the register can be useful if it lists all documents existing;
- exceptions have been determined on the grounds of public and private interests regarding the public right of access to information as a fundamental right.

[22] Regulation No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public Access to European Parliament, Council and Commission documents, OJ 2001 L 145, p.43

The definition of a "document" is a broad one and no category of document is excluded a priori form the right of access, including classified documents. Refusal to grant access must be based on one of the exceptions provided for in the regulation and must be justified on the grounds that disclosure of the document would be harmful.

Irrespective of that Regulation concerns only three main EU institutions – European Parliament, Council and the European Commission other institutions can not ignore the rules laid down in this regulation.

The European Parliament, the Council and the Commission called on the remaining institutions to adopt internal rules on public access to documents according to the principles and limits included in the Regulation. Additionally, the authorities of all institutions have to take into account the recommendations of the European Ombudsman and be in line with broadly recognized principles of good administrative behavior embodied in the European Code of Good Administrative Behavior. In this regard the Code states that "Official shall deal with request for access to documents in accordance with the rules adopted by the Institution and in accordance with the general principles and limits laid down in Regulation No 1049/2001". Other institutions had to elaborate their procedural rules also due to possibility of an individual to challenge the refusal of requested information as the Regulation provides.

5. INTERINSTITUIONAL CO-OPERATION

The important questions are on how the institutions co-operate with each other to simplify and make more effective the work with incoming requests and preparing answers. One of the starting points was establishing the Interinstitutional Committee in 2002, following the Article 15 of the Regulation No 1049/2001 which says "the institutions shall establish an interinstitutional committee to examine best practice address possible conflicts and discuss future developments on public access to documents".

The second important step was signing The memorandum of understanding between the services of the European Parliament, the Council and the Commission regarding public access to documents. It was signed on 9 July 2002. The aim of the memorandum was to facilitate the prompt work with requests regarding the documents which have been received from another institution. It established the mechanism that one institution consults with another which is the author of the document asking to send the necessary documents in 5 days.

The next step was signing of the Interinstitutional agreement between European Parliament and Council on access to secret documents in security and defensive policy.

The forth step was publishing the brochure "The public access to European Parliament, Council and Commission documents. Instructions" in order to facilitate the access to information in these institutions.

6. CONLUSIONS AND PROPOSALS

1. On the one hand, an agreement has been reached concerning the necessity to guarantee the public right of access to information at the European Union level. Nowadays access to information has become a treaty-based principle of European Union Law.

2. In order to ensure the access to information in EU institutions it is necessary:

– to inform society about the information which EU institutions are holding and the way how it is possible to get it;
– to establish common practice in EU institutions regarding the providing information to simplify the process of it;
– to ensure the possibility of the right to institute court proceedings and to make complaint to the European Ombudsman.

3. During the last years two new instruments were adopted to guarantee the public right of access to information in EU – Charter of Fundamental Rights (December 2000) and the Regulation No 1049/2001 on the public right of access to information (December 2001). The ratification of the European convention will make the Charter binding to EU member states.

4. It is necessary to remark the restricted amount of addressees of the Regulation 1049/2001 – European Parliament, Council and the Commission as the weak point. This restriction limits the access to documents of other institutions through the public administration.

5. It has been considered that the level of transparency should be increased. There are several steps to be done in order to increase the participation of society in the decision making process and to increase the input of interest groups. It might be done by increasing the level of knowledge about EU with:

- ensuring passive transparency – publishing documents, brochures etc.;
- ensuring active transparency – formulating the clear division of competences between EU institutions and governments of EU Member States

6. The EU institutions have showed initiative to increase the level of access to information; otherwise they would lose the confidence and support of society. The EU has made purpose to make EU as close and open as possible to citizens, but the problem is to define what does it mean "as close as possible".

7. The access to information is not the aim itself, but very important instrument in reducing democratic deficit and increasing confidence in EU institutions.

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