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

Part B

Committee on Civil Liberties, Justice and Home Affairs

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III COMPARATIVE ANALYSIS OF 2006 ANNUAL REPORTS OF THE EUROPEAN PARLIAMENT, THE COUNCIL OF THE EUROPEAN UNION AND THE EUROPEAN COMMISSION CONCERNING ACCESS TO DOCUMENTS PURSUANT TO REGULATION (EC) 1049/2001

Article 17 requires each institution to publish an annual report on the application of the Regulation. Additionally, the Commission was obliged to publish a report on the implementation of the principles of the Regulation and make recommendations, which it did at the beginning of 2004. The information contained in these reports, although not as extensive as it could be, provides a useful basis for evaluating how the Regulation has been applied by the institutions[1].

Access to public documents via the registers

At the end of 2006, the register of the European Parliament contained 165139 references (1021599 files), 90% of which were directly accessible (downloadable) on the Internet. The number of research on the website is increasing to 1500 per day[2] (instead 1000 in 2005).

The register of the Council allows access to the full text of documents which, pursuant to the Council's Rule of Procedure (article 11, Annex II), "must be made directly available to the public as soon as they have been circulated. At the end of 2006, the register of the Council listed 849117 documents, 68.7% of which were public, i.e. either available in downloadable format or on request (20816 documents). This represented an increase of 22.8% in the number of documents referred to in the register, and an increase of 38.3% in the number of documents directly available via the register. Moreover, the register contained 14763 documents bearing the code P/A (i.e. partially accessible) including 2133 which were accessible on-line. The total number of visits increased by 61.8%, representing more than 4780 visits per day[3].

At the end of 2006, the register of the Commission recorded 73708 documents and it is important to note that no "sensitive" document[4] was included in the register. The statistic on consultation of the Openness and access to Documents website Europa shows a monthly average of 5937 number of visitors.

The Regulation does not define the categories of documents to be included in the registers and does not oblige the institutions to produce a register covering all their documents. Indeed, registers include documents that are not accessible, whereas many documents that can be requested are not included. This is problematic as it is then difficult for a citizen to find out which documents actually exist in order to request them. Moreover, it is interesting to notice that more than one third of documents of the Council are not accessible on the register.

[1] Should there be a freedom of information act for the EU?, Report on the application of regulation 1049/2001 on access to documents, ECAS September 2006, p.6

[2] EP Draft Annual report 2006 on public access to documents (pursuant to rule 97 (7) of European Parliament's Rules of procedure), p. 5

[3] Council Annual report on access to documents 2006, p.9

[4] "Sensitive document" are defined in article 9 of the Regulation 1049/2001. They which can be recorded in the register only with the consent of the originator, see art.9(3).

As regards the Commission, it is important to point out that the Annual report on access to document for 2005 was made available only in September 2005 and the one of 2006 has been published at the end of 2007[5]. In general terms and by also looking at previous years annual reports of the Commission, it can be noted that the Commission register is the least comprehensive, resulting partly from the vast amount of its documents and decentralised organisation. Most of the preparatory work of the Commission is excluded. The Commission shall now ensure that it has a single register which is complete and up to date, by granting the necessary financial, human and IT resources to it. Furthermore, the tendency leading to the multiplication of registers currently in place cannot be supported as it only creates another obstacle for citizens to access documents. The Commission should also bear in mind that having a proper register and ensuring transparency and openness also reduce the administrative work of the Commission[6].

Analysis of the applications for access

The total number of applications to the European Parliament has increased from 1814 in 2005 to 1917 in 2006, i.e. an increase of 5.5%. The request for access to non-public documents is stable at 15% of the applications: it concerns letters, comitology documents, and documents of the Bureau. There were 5 confirmatory applications received in 2006, and one complaint was introduced to the European Ombudsman[7].

On the other hand, in 2006 the Council received 2224 requests from the public for access to a total of 11353 documents, of which 9606 were disclosed in full or in part[8]. The most requested area of interests are justice and home affairs (24,5%), external relations (CFSP), the environment, agriculture and fisheries, competitiveness and internal market all together accounting for over 60% of applications[9].

As regards the Commission, the number of requests has increased from 3396 in 2005 to 3841 in 2006, i.e. an increase of 13.10%. As regards the area of interest, it is important to note that the number of application in judicial matters nearly doubled and this area together with competition, the environment, the internal market and transport and energy accounted nearly 40% of applications[10].

The number of requests has increased year by year, showing rising interest in access to EU documents. However, it is also clear from the annual reports that the beneficiaries of the access to documents system for the most part belong to very specific groups: researchers, lobbies and lawyers etc[11]. The geographical breakdown of applications shows that most of them came from persons or bodies established in Belgium (around 17-20% of application in

[5] Report from the Commission on the application in 2006 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, COM (2007) 841
[6] Report on the application of regulation 1049/2001 on access to documents, ECAS September 2006, p. 8
[7] EP Draft Annual report 2006 on public access to documents (pursuant to rule 97 (7) of European Parliament's Rules of procedure), p. 6
[8] Council Annual report on access to documents 2006, p. 12
[9] Council Annual report on access to documents 2006, table 12 p. 34
[10] Commission annual report for 2006, p.3 and table p.14
[11] Look at EP Draft Annual report 2006 p. 6 and Council Annual report on access to documents 2006, p.12, Commission annual report for 2006, p. 3 and table 8 p.12.

all the three institutions) and the bulk of the applications came from the most highly populated Member States, i.e. Germany, France, Italy, the United Kingdom, the Netherlands and Spain, all together accounting for over half of the applications[12]. The EU is a complex construction and for this reason documents are often inherently specialised. Hence most requests are made by experts, which benefits the general public only indirectly, when for instance civil society organisations try to influence the decision-making. The right to access documents is a right for every citizen, and in order to make the public more aware of their right, there should be an information campaign[13].

Percentages of positive answers to requests

In 2006, 283 requests concerned documents of the European Parliament that had not been published before. The percentage of positive answers reached 87% compared to 80% of the previous year[14].

In the Council, 11353 documents were requested in 2006, with an access percentage of 76.8% or 87.7% if documents approved for partial access were taken into account[15]. Whereas the number of requests has been increasing, the disclosure rates for both the European Parliament and the Council have remained approximately the same.

As regards the Commission, it is interesting to note that the disclosure rate has been decreasing since the Regulation came in force. Under the old rules and codes of conduct before the regulation was introduced, the disclosure rate was 80-90%. The disclosure rate for the Commission is now running at about 70% or two-thirds. In particular for 2006, 73.83% of cases the document were disclosed in full determining an increase compare to the 64.43% of 2005 while partial access to document decreased from 3.65% in 2005 to 2.94% in 2006[16].

Grounds for refusal

In general terms, the ground for refusal most frequently invoked is the protection of the decision-making process, which accounts for 43.2% in the Council and for 39% in the European Parliament (as more and more documents concerning the comitology decisions are requested before there are communicable to the public) and 33, 36% in the Commission. As next grounds most frequently invoked for the European Parliament come the protection of private life and the integrity of the individual (24%) and the protection of judicial proceedings and legal opinions (24%)[17]. In the Council, the protection of public interest as regards public security comes in second position (17.1%) before international relations (12.3%) and defence and military matters (4.5%)[18]. The Commission Annual report of 2006 states that the two main reasons for refusing an initial application are: a) protecting the purpose of inspections, investigations and audits (30.72% of refusals against 41.80% of 2005; b) protecting the

[12] Commission annual report for 2006, p. 3 and table p. 13, EP Draft Annual report 2006 table 6 p. C, Council Annual report on access to documents 2006, p. 33
[13] Report on the application of regulation 1049/2001 on access to documents, ECAS September 2006, p. 6
[14] EP Draft Annual report 2006 p. 7
[15] Council Annual report on access to documents 2006, p. 14
[16] Commission annual report for 2006, p. 4 and table 3 p. 10
[17] EP Draft Annual report 2006 p. 8
[18] Council Annual report on access to documents 2006, p. 15

Commission's decision-making process (19.6% for cases concerning opinions for internal use and 14.30% for cases where the decision had still to be taken, for a total of 33.36% of refusals[19]. It is also important to note that till very recently, the main reason for the Commission refusing documents has continuously been the exception relating to inspections, investigations and audits, amounting to around a third of refusals. This is because of the large number of requests relating to infringement procedures and competition cases[20].

The use of different exceptions by the institutions as such does not lead to any conclusions but merely reflects their different roles. It is important that the institutions should not use any exceptions to refuse documents systematically, which would run contrary to the main goal of the Regulation, i.e. not only "the widest possible access to document" but also to create the ground for a genuine freedom of information.

IV SUMMARY OF PROPOSALS ON HOW TO IMPROVE THE CURRENT EU LEGISLATION IN ORDER TO MAKE THE EU MORE TRANSPARENT TO THE PUBLIC

Already in 2004 Michael Cashman[21] identified in his report some shortcomings of the openness regime in the EU. By acknowledging that progress has been made as regards the number of accessible documents, he considers that the Regulation should be amended as follows:
- By redefining the notion of a 'legislative document' i.e. reserving it only for secondary law with a clear legal basis in the Treaties;
- Access should be granted to all preparatory documents, Parliament and Council debates and related documents, identities of authors of initiatives and formal amendments, complementary documents related to meetings of working bodies, as well as contributions submitted by secretariats;
- Institutional procedures relating to dealing with non-legislative documents should be made public;
- Regulatory documents should be made accessible on the same grounds as legislative documents;
- The right of Member States to limit access to their contributions/amendments in legislative/regulatory procedures should be limited;
- To ensure that documents are not classified as confidential as a matter of routine by defining more clearly the basis on which documents may be classified as confidential or limited in their distribution;
- To reorganise registers so that citizens can find the same functionalities in all three of them.

Conclusions of the report of European Citizen Action Service (ECAS) September 2006

- The need to improve registers and classification systems so as to make them more useable for ordinary citizen;
- More resources should be allocated to informing the public of their rights to access to EU

[19] Commission Annual Report for 2006, p. 4 and table 6 p. 11-12.
[20] Report on the application of regulation 1049/2001 on access to documents, ECAS September 2006, p.7
[21] Cashman Initiative report with recommendation to the commission on access to institutions' text (2004/2125 INI)

documents;
- The documents produced by special bodies or high level groups of experts should be included;
- Dividing lines should be created between legislative, non-legislative and regulatory documents along with more clarity as regards grounds for classification of "confidential", "limited" and "sensitive" documents;
- Each Commission DG should have a register. Registers of the three institutions could contain references to related documents of other institutions from different stages of decision-making, hence making it easier for citizens to follow the process;
- There should also be more inter-institutional cooperation as regards statistical information and reporting;
- The rules relating to documents originating from Member States and third parties need clarification;
- The 'overriding public interest', as well as the circumstances in which applicants using it have a chance of succeeding, needs to be clarified;
- Administrative burden is not an exception contained in the Regulation, nor should it be, and therefore cannot be used to deny access. In cases like these, the institutions should take more advantage of Article 6 and try to find a 'fair solution' with the applicant, instead of not granting access to accessible documents.

Response of the European Ombudsman to the Commission's Green paper[22]

- To specify in Regulation 1049/2001 that adequate resources are needed "to put the principle of openness into practice" and ensure the "efficiency, effectiveness and transparency" of the Union's institutions and bodies.

- To make the interactions between the different levels in the Union more transparent for the citizen (particularly between national and European level concerning the "right of veto" of the member States to public access)

- To specify that the Member State have to state the reasons for non-disclosure and that the institutions have to communicate them to the applicant.

- To create an independent working party on access to EU-related documents and information in the Member States, with an advisory status, "that could be composed of representatives of information commissioners or similar bodies in the Member States and of the European Ombudsman as an analogous body at the Union level".

- To extend the time limit given to reply to the requests to 30 working days (Article 8 of the Regulation).

- To precise the concept of "legislative documents" that should be defined more precisely in the future Treaty, bearing in mind that "citizen also have a legitimate interest in being able to

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[22] Response of the European Ombudsman, P. Nikiforos Diamandouros, to the Commission's green paper "Public Access to Documents held by institutions of the European Community: a review"
http://www.ombudsman.europa.eu/letters/en/20070711-1.htm

monitor the exercise of the administrative and regulatory powers that are vested in public authorities".

- To specify in the Regulation "principles as to what kind of documents must be registered and to require each institution to adopt and publish more specific internal rules to implement those principles".

- To promote a more active dissemination of documents, and to do so "it would be useful for each institution and body to adopt and publish a publication scheme, setting out its policy as regards electronic and conventional publication of material, including the language of the publication" (so that the business rules of the registers are better known and defined).

- To mention in Regulation 1049/2001 the Aarhus Convention (concerning access to information in environmental matters) without integrating it.

- To clarify in a new recital of the Regulation the interaction with the protection of personal data in such a way: "privacy and commercial confidentiality are legitimate interests that limit public access. However, the very person whose privacy and commercial interests are concerned should not be denied access on that ground".

- To precise that a balancing exercises should be carried out when commercial and economic interests of a third-party are concerned.

- The need of transparency should be taken into account in the design and operation of databases. However: "to limit the right of access to information that can be extracted using existing search tools would risk undermining the usefulness of the right of access".

- To exclude the possibility of a temporal application of the exceptions.