Access to documents of the European Institutions

Introduction

Eyebrows were raised in the corridors of power of the European Union earlier this year as a result of what to some Brussels mandarins was a rather unseemly public row between the President of the European Commission, Mr Prodi and the European Ombudsman, Mr Söderman. That the disagreement was played out in public in the *Wall Street Journal*, added to the sense of outrage in Brussels. The source of the tension between these top level officials was the contents of the proposed Regulation on public access to documents of the institutions of the European Union[1] (the proposed Regulation) which was adopted by the European Commission in January 2000. Mr Söderman, who has long been a champion of access to information of the institutions of the European Union, published an article in which he vigorously attacked the proposal. He described it as having been 'secretly drafted' and went on to criticise its substance referring to the list of exemptions from the right of access as being 'without precedent in the modern world'. He suggested that should the proposal be adopted 'there probably won't be a document in the EU's possession that couldn't legally be withheld from public scrutiny'. To the surprise of many, Mr Prodi chose to defend the proposed Regulation in the same newspaper. He refuted the allegation that the proposals had been secretly drafted and argued that the Regulation, if adopted, will give 'the EU a regime on access to documents that compares favourably to some of the most progressive in the world'. Mr Prodi also wrote to the President of the European Parliament which has responsibility for the appointment of the Ombudsman, complaining of the publication by Mr Söderman of his criticisms of the proposal in the press and describing his article as 'polemic and extreme'.[2]

The aim of this paper is to briefly analyse the main provisions of the proposed Regulation to see whether, as Mr Söderman suggests, it amounts to 'token measures of transparency'.

Background

The Regulation is being introduced on foot of Article 255 of the Treaty of Amsterdam which for the first time provided explicit legal recognition of a right of access to documents of the European institutions. It provides as follows:

> 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 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 189b within two years of the entry into force of the Treaty.
>
> 3. Each institution referred to above shall elaborate in its own rules of procedure specific provisions regarding access to its documents.

Article 255 requires the adoption of implementing legislation within two years of the Amsterdam Treaty coming into force (ie by 1 May 2001). The process of adoption is that of co-decision which requires that the implementing legislation be adopted by the European Parliament and Council as well as the Commission.

Prior to Amsterdam, the legal basis of the right of access to documents of the institutions had been somewhat uncertain. Following the inclusion in the Maastricht Treaty of a declaration on the right of access to information which linked that right with the democratic nature of the institutions and the public's confidence in the administration, the Council and the Commission had adopted a common Code of Conduct concerning public access to Council and Commission documents.[3] Each of these institutions then implemented the Code of Conduct through a decision, Council Decision 93/731 of December 20, 1993 (the Council Decision) and Commission Decision 94/40 of February 8, 1994, (the Commission Decision).[4] In 1997, the European Parliament also adopted a Decision on public access to its documents.[5]

The status and scope of the Council and Commission Decisions have been examined by the Community Courts on a number of occasions.[6] In general, the approach of the Courts has been to characterise the pre-Amsterdam measures on access as being concerned with the internal functioning of the institutions rather than being imbued with the status of a general principle of Community law.[7] The focus of interpretation of the right of access, in the earlier case law in particular, has been on procedural issues such as whether reasons were given for a denial of access.[8] Substantive issues concerning the interpretation of the exceptions to the right of access have received less attention.[9]

With the inclusion of Article 255 in the Amsterdam treaty, the right of access to information of the institutions has taken on an enhanced status. A bolder approach on the part of the Courts to the interpretation of the right of access is therefore to be expected in the future. Much depends, however, on the terms in which the right of access are fleshed out in the implementing legislation.

The proposed Regulation

Principle of access

Article 1 of the Regulation sets out the general principle underpinning the access right. It is expressed as 'the right to the widest possible access to the documents of the institutions'. This declaration on the scope of the access right is supported by paragraph 4 of the recitals which states that the purpose of the Regulation is to 'widen access to documents as far as possible, in line with the principle of openness'. The formulation of the principle of access in such strong terms will doubtless assist the Courts in their deliberations on the extent of the access right.

Publication of information

One aspect of the proposed Regulation which distinguishes it from its counterparts in the common law world is that it does little in terms of imposing obligations on the institutions to actively disseminate information about their activities. Article 9 merely requires the institutions to inform the public of the rights they enjoy as a result of the Regulation and to provide access to a register of documents. These requirements fall far short of the common law requirements which generally require publication of two types of information by public authorities.[10] In the first place, information concerning the functions of the body concerned, the types of records it holds and arrangements

for obtaining access to such documents must be made available. The second type of information, publication of which is mandated, is sometimes referred to as the 'internal law' of the body concerned. It consists of the rules relied on by the body concerned in exercising its decision-making functions. The omission of similar obligations from the text of the proposed Regulation is surprising.

Scope

The practical impact of Article 255 is limited by the fact that it confers a right of access only in respect of documents of three of the institutions of the European Community, namely the Parliament, the Council and the Commission. Other institutions such as the Courts, the Committee of the Regions, the Economic and Social Committee, the Court of Auditors and a whole range of agencies such as EUROPOL, Eurostat, the Trade Mark Agency are excluded.[11]

The proposed Regulation introduces an important change to the scope of the access right in terms of its application to documents supplied to the institutions by third parties. There had been serious doubts as to the applicability of the pre-Amsterdam measures to third party documents. The Parliament Decision was clearly limited to documents drawn up by that institution[12] while the recitals to the Council Decision stated that documents written by a person body or institution outside the Council are excluded from its scope. In all three Decisions, there was a provision to the effect that where the requested document is written by a third party, including a natural or legal person, a Member State, a Community institution or an international body, the application for access must be sent to the author and not to the institution.[13] The application of this 'authorship rule' was considered by the Court of First Instance (the CFI) in *Interporc Im und Export GmbH (Interporc II).*[14] The Court upheld the Commission's reliance on the authorship rule to justify its decision to refuse access to documents of which the Member States were authors.[15] Thus it appeared that the disclosure of documents sent by Member States to Community institutions could not be required under the pre-Amsterdam access provisions.

This important restriction on the scope of the access right is set to be removed by the adoption of the proposed Regulation which provides a right of access 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'.[16] Third party is defined as 'any natural or legal person or any entity outside the institution including the Member States, other Community and non-Community institutions and bodies and non-member countries'.[17] Thus any record which has been received by the European Parliament, the Council or the Commission from a Member State will be subject to the Community access regime. The right of access to documents from third parties will, however, be limited to those sent to institutions after the date of entry into force of the Regulation.[18] Another important limitation on the right of access to third part documents is set out in Declaration 35 to the Amsterdam Treaty. It allows Member States to request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement. While this Declaration does not have the status of a Treaty provision or of a protocol, the Court of Justice would give due consideration to it in any relevant case coming before the Court.

Definition of documents

The right of access conferred by the Regulation applies to 'documents' as opposed to information. Document is defined as 'any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording). The pre-Amsterdam provisions also conferred a right of access to documents rather than information. This fact had formed the basis of arguments adduced on behalf of the Council that it was not obliged to grant partial access to documents. These were rejected by the CFI which held that the right of access imposes on the institution concerned an obligation to consider whether partial access may be granted to information not covered by the exceptions. The basis of these decisions was the principles of the right to information and of proportionality.[19]

The definition of document contains one of the most significant limitations on the scope of the Regulation. Only 'administrative documents' are to be included. These are defined as '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'.[20] The Explanatory Memorandum to the Regulations sheds further light on the types of document to be excluded under this provision. It lists as excluded 'documents expressing individual opinions or reflecting free and frank discussions or provision of advice as part of internal consultations and deliberations as well as informal messages such as e-mail messages which can be considered as the equivalent of telephone conversations'. This limitation on the type of documents covered by the Regulation marks an important departure from pre-Amsterdam access rights which applied to all documents produced by the institutions. This approach is also at odds with FoI legislation in common law jurisdictions where internal documents are protected by way of exemption provisions which may, or may not, be applicable depending on the circumstances. The applicability of such exemptions depends on issues such as whether the document concerns deliberative processes, whether it relates to a decision already taken or to be taken in the future, and whether its disclosure would be in the public interest.[21] The removal from the scope of the right of access of this entire class of documents weakens the impact of the Regulation significantly.

Exceptions

The exceptions to the right of access are set out in Article 4. Each is a mandatory, harm-based, exception requiring requests for access to be refused where disclosure could significantly undermine any one of four major interests namely: the public interest; privacy; commercial and economic interests; and confidentiality. Article 4 provides as follows:

> The institutions shall refuse access to documents where disclosure could significantly undermine the protection of:
>
> (a) the public interest and in particular:
>
> - public security
> - defence and international relations
>
> relations between and/or with the Member States or Community or non-
>
> Community institutions,
>
> financial or economic interests,
>
> - monetary stability,

relevant case coming before the Court.

the stability of the Community's legal order,

court proceedings,

inspections, investigations and audits,

infringement proceedings, including the preparatory stages thereof,

the effective functioning of the institutions;

(b) privacy and the individual, and in particular:

personal files,

information, opinions and assessments given in confidence with a view to recruitments or appointments,

an individual's personal details or document containing information such as medical secrets which, if disclosed, might constitute an infringement of privacy or facilitate such an infringement;

(c) commercial and industrial secrecy or the economic interests of a specific natural or legal person and in particular:

business and commercial secrets,

intellectual and industrial property,

industrial, financial, banking and commercial information, including information relating to business relations or contracts,

information on costs and tenders in connection with award procedures;

(d) confidentiality as requested by the third party that supplied the document or the information, or as required by the legislation of the member State.

While space does not allow for a detailed analysis of each of these exceptions, some general points can be made concerning the changes they introduce to the pre-Amsterdam exceptions and more generally on their formulation.

While the four main exceptions to the right of access allowed under the proposed Regulation also appeared in the pre-Amsterdam provisions, the list of specific interests mentioned under these exceptions has been considerably expanded upon. For example, the public interest exception in the proposed Regulation includes a number of grounds for refusing access which were not listed in the pre-Amsterdam measures such as: defence, relations between and/or with the Members States or Community or non-Community institutions, financial or economic interests, the stability of the Community legal order, audits, infringement proceedings and the effective functioning of the institutions. Thus the scope of the exceptions in the proposed Regulation would appear to be much broader than that of the exceptions provided for under the pre-Amsterdam measures.

It could be argued however that the scope of the exceptions in the pre-Amsterdam measures were already potentially as broad as those in the Regulation. This is because the formulation of the public interest exception in the pre-Amsterdam provisions has been interpreted by the CFI as not being limited to the list of interests specifically mentioned in its text.[22] The wording which introduces the list of specific interests protected by the Regulation differs only slightly from that employed in the pre-Amsterdam provisions.[23] However it is arguable that the former could not be interpreted as being open-ended on the grounds that paragraph 2 of Article 255 requires that any limits on the right of access be explicitly set out in the implementing legislation. Thus it would appear that the list of exceptions contained in the proposed Regulation can only be interpreted as being exhaustive.

The application of all of the exceptions is mandatory. This marks another change from the pre-Amsterdam provisions on access. The Commission and Council Decisions contained two distinct types of exception, mandatory and discretionary. The only discretionary exception was that concerned with protection of the confidentiality of the institutions proceedings. This is the only exception contained in the pre-Amsterdam measures which has been omitted from the proposed Regulation.[24] In applying this exception, the CFI had imported into it a type of public interest test reminiscent of those found in most common law FoI Acts. The CFI held that in applying the discretionary exemption, the institution in question was obliged to 'genuinely balance the interest of citizens in gaining access its documents against any interest of its own in maintaining the confidentiality of its own deliberations.'[25] No such balancing of interests is required in the case of any of the exceptions set out in the proposed Regulation since the application of each of them is mandatory. It appears from the case law that all that is required in the case of the application of the mandatory exceptions is that the institutions refer to the particular exception being relied on and state the reasons why it is applicable.[26]

While the exclusion from the list of exceptions in the proposed Regulation of the exception concerning confidentiality of the institutions' proceedings is to be welcomed, the fact that all exceptions are now mandatory is a retrograde step. It is ironic and perhaps somewhat telling that the only reference to the public interest in the proposed Regulation is in the context of its use as a justification to withhold documents from disclosure.

One element of the proposed Regulation which compares favourably with the exceptions in the pre-Amsterdam measures is the fact that the harm test is expressed in terms of a requirement that disclosure *significantly undermine* the specified interest. The earlier provisions merely required that the interest in question be *undermined.* The significantly undermine standard is also relatively high when compared with the standards employed in harm tests in the common law jurisdictions.

The standard of proof required in establishing the necessary degree of harm is that disclosure 'could' significantly undermine a particular interest. In cases concerning the application of the pre-Amsterdam measures 'could undermine' standard, the CFI has held that this requires the institution in question to consider whether disclosure 'is in fact likely to undermine one of the facets of public interest protected ...'[27]

A final notable feature of the proposed Regulation is Article 8 which prohibits the reproduction for commercial purposes of documents acquired under the Regulation. It also prohibits the exploitation of such documents for any other economic purpose without the prior authorisation of the right-holder. This restrictive approach to the use of documents obtained under the Regulation is in sharp contrast to the tone of the recently published Commission Green Paper on Public Sector Information in the Information Society[28] which extols the benefits of commercialisation of public sector information. The Green Paper refers to the role of public sector information in stimulating economic growth and development and points to the example of the US of which it is said that 'a very active policy of both access to and commercial exploitation of public sector information ... has greatly stimulated the development of the US information industry'.[29] While the Green Paper is referred to in the Explanatory Memorandum to the proposed Regulation as one of the documents to which the Commission has given special consideration

in drawing up the proposal, no effort is made to reconcile the contradictory elements of the two documents.

Conclusion

Article 255 of the Amsterdam Treaty forms the basis of a fully-fledged right of access to documents of the European institutions. The instrument of its implementation falls short of expectations however. The restricted scope of the proposed Regulation is evident in a number of its features. These include: the omission of active obligations requiring publication of information concerning the institutions; the exclusion from the scope of the Regulation of internal documents; the extensive list of exceptions; the fact that all the exceptions are mandatory in nature; and the absence of any express public interest override provisions. The potential impact of one of the redeeming features of the proposed Regulation namely the extension of the scope of the access right to documents emanating from third parties is lessened by the limitation imposed by Declaration 35 on access to documents of Member States.

The proposed Regulation on public access to documents of the European institutions is, as Mr Söderman suggests, a very disappointing document. Its development echoes that of UK access provisions in that legislation which had been eagerly anticipated has fallen short of expectations even to the extent of being weaker in a number of respects than measures of inferior legal status already in place. It is hoped that at least the most objectionable aspects of the proposed Regulation will be remedied before it becomes law.

MAEVE McDONAGH
Maeve McDonagh is a Lecturer in Law, University College, Cork, Ireland.

Ref rences

1. Proposal for a Regulation of the European Parliament, and of the Council regarding public access to European Parliament, Council and Commission documents, COM(2000) 30 final/2.
2. See Statewatch website (http://www.statewatch.org/) on which the newspaper articles and correspondence referred to are published.
3. 93/730/EC, [1993] OJ L340/41.
4. Respectively [1993] OJ L340/43 and [1994] OJ L46/58.
5. Parliament Decision on public access to Documents 10 July 1997, [1997] OJ L263/27.
6. Case C-58/94 *Netherlands v Council* [1996] ECR I-2169; Case T-105/95 *WWF v Commission* [1997] ECR II-313; *Carvel and Guardian Newspapers v Council* [1995] ECR 11-2765; *Interporc Im- und Export v Commission* [1998] ECR II-231 (Interporc I); Case T-174/95 *Svenska Journalistförbundet v Council* [1988] ECR II-2289; Case T-14/*98 Hautala v Council*, unreported, judgment of 19 July 1999; Case T-83/96 *Van der Wal v Commission* [1998] ECR II-545; Case T-610/97 *Carlsen and others v Council* [1998] ECR II-485; Case T-188/97 *Rothmans International v Commission*, unreported, judgment of the 19 July 1999; Case T-309/97 *Bavarian Lager Com Ltd v Commission*, unreported, judgment of 14 October 1999; Case T-106/99 *Meyer v Commission*, unreported, order of 27 October 1999; Case T-92/98 *Interporc Im- und Export v Commission*, unreported, judgment of 7 December 1999 (Interproc II); Case C-174/98 P and C-189/98 P *Netherlands and Van der Wal v Commission*, unreported, judgment of 11 January 200; Case T-199/98 *Kuijer v Council*, unreported, judgment of 6 April 2000.
7. *Netherlands v Council, ibid., Van der Wal, ibid.*
8. *WWF v Commission, op. cit.*, above, ref.6; *Interporc Im- und Export v Commission (Interporc I), op. cit.*, above, ref.6; *Hautala v Council, op. cit.*, above, ref.6.
9. See Curtin, D., 'Citizens' Fundamental Right of Access to EU Information: An Evolving Digital Passepartout?' 37 *Common Market Law Review* (2000), 7; Öberg, U., 'Recent Developments in Public Access to Documents held by European Community Institutions', (1998) 74 *FoI Review* 22.
10. See for example: Ireland: Freedom of Information Act 1997, ss.15 & 16; Australia: Freedom of Information Act 1982 (Cth), Part II; Canada: Access to Information Act RSC, 1985, s.5; New Zealand: Official Information Act, 1982, Part III, US: Freedom of Information Act, 1966, s.552(a)(1).
11. Curtin argues, however, that since Article 1 of the Treaty of the European Union refers to open decision making as being one of the objects and purposes of the Treaty, all institutions, organs and other bodies operating within the framework of activity of the European Union are subject to this principle. This, she suggests, implies that the internal access rules of such bodies should be interpreted in the light of the new Treaty-based emphasis on open decision making: Curtin, *op. cit.*, above, ref.9, pp.28-29.
12. Parliament Decision, Article 1(2).
13. Council Decision, Article 2(2), Commission Decision, Article 1, Parliament Decision Article 2(3).
14. *op. cit.*, above, ref.6.
15. *ibid.*, para.74.
16. Article 2(1).
17. Article 3(f).
18. Article 2(1).
19. *Hautala v Council, op. cit.*, above, ref.6; *Kuijer v Council , op. cit.*, above, ref.6. This judgment has been appealed by the Council to the European Court of Justice: see Case C-353/99 P, pending.
20. Article 3(a).
21. See for example: Ireland: Freedom of Information Act 1997, s.20; Australia: Freedom of Information Act 1982 (Cth), s.36; Canada: Access to Information Act R.S.C., 1985, s.21; New Zealand: Official Information Act, 1982, s.9(2)(f) and (g), US: Freedom of Information Act, 1966, Exemption 5.
22. *Carlsen v Commission, op. cit.*, above, ref.6.
23. The exception in the pre-Amsterdam provisions was set out as follows: 'the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations)'.
24. *ibid,* Article 4(2).
25. *Carvel v E.U. Council, op. cit.,* above, ref.6, at para.65.
26. *WWF v Commission, op. cit.*, above, n.6; *Interporc Im- und Export v Commission (Interporc I), op. cit.*, above, ref.6.
27. *Svenska Journalistförbundet v Counci, op. cit.*, above, ref.6; *Hautala v Council, op. cit.*, above, ref.6.
28. COM (1998) 585.
29. *ibid.*, p.1, n.3.

A Charter to Withhold Information

The South Australian Freedom of Information Act

The *Freedom of Information Act 1991* (SA) was enacted nine years after the Commonwealth and Victoria, and one year after NSW had enacted similar legislation. It was claimed at the time that South Australia had 'drawn on the experience of the operation and administration of the legislation in these other jurisdictions' to produce legislation which 'strikes a balance between rights of access to information on the one hand and the exemption of particular documents *in the public interest* on the other'.[1]

This claim appears to have largely succeeded, when viewed from the perspective of a person seeking access to documents concerning their own personal affairs. But in contrast, access to information about broader policy and administrative matters is not balanced 'in the public interest'. In particular, the protection of 'business affairs' (both those of the State government and of private interests) is not subject to any evaluation of the 'public interest' (discussed under 'Other Information' below). Contrary to the Act itself (s.54(3)(a)), full statistics are not collected.[2] From those that are collected it is apparent that many hundreds of FoI applications are refused or granted only partially each year, in reliance on