PUBLIC ACCESS TO DOCUMENTS

Position on the Green paper on public access to documents held by institutions of the European Community

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Summary

The current regulation on access to documents has brought some progress but much more needs to be done. Far too many documents remain restricted and access falls very far short of best practice at national level. The process of searching for and getting access to documents is cumbersome and difficult to follow. The institutions should be more pro-active and systematic in providing access to documents generally.

Special rules are needed for access to documents in competition cases, particularly for consumers who have suffered from illegal anti-competitive practices and who wish to seek redress.

All submissions on matters of public policy made to the Commission and other institutions should be published (electronically) as a matter of course, subject to a few limited and well-defined exceptions. The Commission should take the lead in doing this immediately – it requires only a decision and an announcement by the Commission itself.

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I. INTRODUCTION

Although we acknowledge that the institutions and in particular the Council, have progressed in relation to providing access to documents, there is still a long way to go to achieve the necessary transparency. We urge the institutions to continue efforts to this end.
The main elements of our response concern the following issues:
1) The general rules on access to internal documents
2) Full and immediate publication of all third party policy submissions
3) Competition cases
In order to follow the Green paper's questionnaire, we have responded to those questions which are most closely connected to these issues.

Before addressing the Commission's questions, we would like to highlight two specific issues:

A) Public access to documents in relation to competition cases.
B) Access to all policy submissions from third parties.

A) Competition cases
One of the most important court cases about the regulation was a case brought forward by a consumer organisation (the Austrian consumer organisation VKI, member of BEUC) against the Commission regarding access to the file related to a competition case (Judgment of the Court of First Instance of 13 April 2005, case T-2/03, Verein für Konsumenteninformation v Commission – see a summary of the judgment attached as an annex to this position paper). This case touches upon several issues which are raised by the Commission in the Green paper, such as procedural issues of good administration (partial access to documents and handling of voluminous requests). We think that the court's findings in this case should be incorporated into a revised text of the regulation.

But other issues, on which the court in the Lombard-case did not rule, require urgent clarification, such as the balancing of the interests recognised by the exceptions of the regulation– in particular in relation to business secrets and the overriding public interest in disclosure. Beyond retribution of consumers in case of infringement of competition rules, these issues are relevant to a number of competition cases BEUC has been involved in[1].

Experience shows that the regulation has been useful in general terms for increasing access and transparency of the EU institutions, yet in relation to one of the most important fields in which it could be useful to citizens /consumers, namely **in competition cases, the regulation has proved to be toothless as it leaves much too much leeway to the Commission to make use of the exceptions provided for.**

In particular, in relation to cartel cases, the Commission seems to give overwhelming priority to co-operation with cartel members over the retribution of consumers for damages whilst promoting private enforcement in

[1] See BEUC's position on the Commission's communication on access to file in competition cases (BEUC/X/036/2004)

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competition cases is only possible if sufficient access to information/evidence is granted[2].

Therefore we expect the Commission to come forward with specific rules for access to documents/evidence in competition cases, through the forthcoming initiative on Damage Actions in competition cases. However, there is also a need to amend the general regulation (see our proposal for wording on page 5 in the answer to questions 4 and 5).

B) Access to all Policy Submissions from Third Parties

Subject to a few very limited exceptions (see our response to questions 4 and 5 below) the Commission should publish all submissions that it receives on matter of public policy. The failure to publish such submissions means that some interest groups have the possibility to exercise secret influence on the Commission. It may mean also that the Commission is concealing arguments that were influential in the eventual policy decisions of the Commission. Non-disclosure of policy submissions also helps to inspire distrust and even paranoia as to the "real" reasons for a Commission decision.

Data protection is sometimes cited as a reason for the Commission's policy of secrecy in relation to many third party submissions. We do not believe that this line of reasoning is valid. Even if it were valid, the matter could be resolved by a decision and statement by the Commission to the effect that all future policy submissions would be published (subject to the prescribed and limited exceptions).

The same principles of transparency should of course apply to the other institutions, which are much less transparent on this point than the Commission.

II. BEUC'S RESPONSES TO THE QUESTIONS OF THE GREEN PAPER

1- How would you qualify the information provided through registers and on the websites of the institutions?

In relation to the Commission and the Parliament, the information provided by the Council remains the most problematic one when looking at accessibility.

In its experience in researching information on the Council's on-line register, BEUC has found that the information contained in it is both insufficient and difficult to access. The register is structured in 2 main categories; "latest document references" and "latest public documents", both of which direct the user to an unstructured list of items. This makes finding a particular document difficult. In addition, most documents under the "latest document references" are not public.

[2] For more details on this, see 'BEUC position on the Green Paper on Damage Actions for breach of EC anti-trust rules', BEUC/X/026/2006 of 4th May 2006

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Documents in the register should be classified in a more user-friendly way, under certain topics and according to a comprehensive, but easily understandable structure.
The obligation that the reply to a request for access to a Council document has to be provided within the 15 days period as stipulated in the regulation is not sufficient to meet urgent requests. More documents need to be made public immediately after circulation to the delegations.

Regarding the specific provisions on public access to Council documents in Annex II to the Council's Rules of Procedure (as adopted by Decision on 15th September 2006), we consider that the Council should be obliged (and not only be allowed to, as it is worded now) to make much more documents public.

Particularly in relation to point 4, lit b) of Annex II, improvements are necessary. Member States apparently do not want to make their individual positions public during negotiations. Therefore according to the current text of the annex, the Council secretariat may only make those documents public (during – and after? - negotiations), which do not reflect individual delegations' positions. Yet, the most important council documents when following the decision making process from the "outside" are those which summarise discussions etc. (e.g. presidency documents). They normally contain Member States' positions and therefore, are never made public after circulation. We consider that these documents are of vital interest to the public. Their importance is comparable to the Parliament's draft reports and the amendments tabled to it, which are public at the time of their discussion in the Parliament.
We think that the Council should be obliged to make an "anonymised" version of these documents public (without individual delegations positions – e.g. the so-called "bibles", but without footnotes which include the Member States positions) immediately after circulation to the delegations.

On a more practical side, we would suggest that the institutions' websites make more use – whenever possible – of the so-called RSS system (Really Simple Syndication), which could help to find rapidly the latest documents which have been posted; In the EUR-lex website for example, RSS syndication would be very appreciated to monitor more easily the new COM documents (http://eur-lex.europa.eu/COMIndex.do?ihmlang=en) and the new issues of the Official Journal (http://eur-lex.europa.eu/JOIndex.do?).

2- Should more emphasis be put on promoting active dissemination of information, possibly focused on specific areas of particular interest?

The system set up by the Arhus Convention regarding active dissemination of information provides that the institutions and bodies of the Community must actively and systematically disseminate information concerning environmental issues. We consider that this should become the overriding rule for all information held by EU institutions (at least the Commission, the Council and the Parliament).

Active dissemination (in contrast to passive, e.g. on request) should become the norm for the management of information by the EU institutions. The institutions should be obliged to actively and systematically disseminate the information they hold to the public.
In this context an idea would be develop further what many presidencies have provided in recent years: they made a kind of "newsletter" and even a kind of "document provision service" available through the presidency website:

Everybody can subscribe to a newsletter or information to be selected for all or only certain EU policy areas. Sometimes this service included the sending of COREPER agendas etc; this is a very welcome development and should be turned into a general service of the Council for the distribution of documents through electronic means. The existing council classification of documents could be used as the base to select the policy fields of interest for such a "subscription" service. As said in our response to question 1, the public register of the Council is for the time being not easily accessible for finding recent information a certain topics.

Moreover we believe that in applying this system, a rule should be set as to the time frame in which the information is disseminated. The Arhus Convention does not address the time factor which can be crucial. As it is for the moment, BEUC finds that, too often, documents which are made public after a request are done so after an unreasonable period of time which is detrimental to the user as regard the usefulness of the information.

3- Would a single set of rules for access to documents, including environmental information provide more clarity for citizens?
A single set of rules would provide more clarity as to what information is public and what isn't. In this sense we believe that all the rules should be harmonized to match the spirit of the Arhus Convention Regulation. In addition to this, more efforts should be provided as to the structure and the interface of the research tools provided to the public.

4- How would the exception laid in Article 4(1)(b) of Regulation (EC) No 1049/2001 be clarified in order to ensure adequate protection of personal data?
5- How should the exception laid in Article 4(2), 1st indent of Regulation (EC) No 1049/2001 be clarified in order to ensure adequate protection of commercial and economic interest of third parties?

We would like to link our response to questions 4 and 5 together:

<u>Publication of policy submissions</u>
Firstly, in our comments to the Commission's consultation on the EU Transparency initiative in 2006 (BEUC/X/052/2006), we have already underlined the importance of more transparency in relation to submissions made by third parties received by the institutions on matters of public policy:

In brief we proposed that the Commission should take a Decision to publish (electronically) all submissions made to the Commission on matters of public policy, subject to a few, well defined and strictly limited exceptions. The point is that the Commission (and also the other institutions covered by the regulation 1049/2001) should move to a policy of active publication of submissions they receive – only restricted by some narrow exceptions.
These exceptions could include (genuine) matters of personal privacy (question 4 of this consultation) and matters of (genuine) commercial confidentiality (question 5 of this consultation). *To this purpose the exceptions in Art. 4 point 1 b) and point 2 should be further specified.*

The Commission publishes some, but rarely all, submissions and communications on public policy issues. In effect, they follow a "private" consultation process whereby the Commission sees all views submitted but the stakeholders and general public do not. As a result, certain views may go unchallenged. There is no way of seeing the balance of views which forms the basis for the Commission's subsequent decisions or actions. The Commission retains to itself the privilege of seeing the "full picture" while denying the same possibility to everyone else.

In certain cases at present, authors of submissions know in advance that their submissions will be published, but these occasions are relatively rare and even in such cases publication can be easily avoided. In other cases the Commission seeks permission to publish – a time-consuming and often wasteful procedure.

At times, representatives of the Commission have tried to justify the current practice by citing the constraints of data protection rules. This is nonsense. Already the Commission can announce in advance that they are going to publish some submissions, e.g. during an open consultation. The Commission should simply make a similar announcement in relation to all future policy submissions (subject to a few limited exceptions, as mentioned above).

Above all, the publication of all submissions would be a great step forward towards the transparency to which we all aspire.

Clearly we would like to see the European Parliament and the Council also adopting the practice of publishing all policy submissions: on this issue those two institutions are very much less transparent than the Commission.

(Moreover, if the Commission were correct in its understanding of the effects of the data protection directives it should logically take action against those Member States that are more transparent in their publication of third party policy submissions. Presumably, the data protection directives apply equally to Member States as to the Commission?)

Furthermore, the Commission should provide feedback and the reasons why certain opinions of stakeholders have not been taken on board. In this context we would like to refer to DG SANCO's Peer Review Group's recommendations. In recommendation III: More and Better Feedback, the Peer Review Group stressed the importance of providing feedback to stakeholders' views in order to ensure that they continue to engage in the future. After each consultation, an intermediate report should be prepared which describes the views expressed by stakeholders and provides reasons why certain stakeholders' views were or were not taken on board. DG SANCO committed itself to provide, after each consultation, a synthesis report to be circulated to each consultees. These reports should state the main outcome of the consultation and the reasons why the stakeholder's views were considered or not.

Need to make consumers' participation effective - Exception on commercial interests

Referring to the **exception on commercial interests** (Art. 4 point 2, first indent), we feel that the principle of protection of economic and commercial interest as set out in the current Regulation is not satisfactory, particularly in competition matters.

BEUC in its response to the Commission's public consultation on access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 on the 21st October 2004 (BEUC/X/36/2004) has already raised this issue.

Particularly in relation to competition matters, e.g antitrust cases, consumer organisations have experienced fundamental problems of getting access to data and the application of the exceptions of Art 4 in regulation 1049/2001 has sometimes been used by the Commission to reject consumer organisations' requests for access to files.
In 2002, the Verein für Konsumenteninformation ('the VKI') applied to the Commission for access to the administrative file relating to the 'Lombard Club' decision (see the introductory remark on page 1). When the Commission rejected that request in its entirety, the VKI brought an action for annulment of that rejection before the Court of First Instance of the European Communities.

Access was essential to get compensation for Austrian consumers who had been victims of this cartel. As Austria's consumer advocacy organisation recognised in national law, VKI had brought legal action on behalf of a group of 180 customers claiming compensation for losses suffered. As a result of the refusal, efforts to bring damages claims against Austrian banks have been thwarted.

The ability of consumer organisations to gather evidence and gain access to (market) information has a direct impact on their ability and willingness to engage into private enforcement cases. Their access under the current rules is limited. In our view, in the Lombard case, access to edited evidence would have been possible.

The same applies for access to the file itself in competition cases, when consumer organisations are acknowledged as interested parties and gain access to the Statement of Objections. Depending on the competition case considered, (recent) market data might be included in the edited version of the Statement of Objections or not (such as in the notorious COMP/M.3333 Sony-BMG case), although market data, available freely or for a fee can hardly be regarded as business secret/commercial interest for the parties to the case.

The provision of a mere summary of the Statement of Objections (as in the COMP/38606 Groupement Cartes Bancaires case) is not the right way forward either, as it restricts the ability of consumer organisations to make meaningful comments on the aspects raised.

BEUC believes that the current wording in Art 4 point 2, namely that the exception is granted "unless there is an overriding public interest in disclosure" should be amended so as to contain the following; "an overriding public interest in disclosure shall be deemed to exist where the information requested relates to data which is necessary to secure damages for consumers, who suffered from illegal business practices."

This approach would be in line with the EC regulation for the application of the Aarhus convention 1367/2006, which in its Article 6 provides for a similar **limitation to the exceptions of Article 4, point 2 of the access to documents regulation**, first and third indent, in cases of information on emissions into the environment.

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A remark on Article 4, point 2, second indent:

Exception for legal advice

It is not comprehensible, why the opinions of the Legal Service of the Council and of the other institutions are by principle not accessible.

There is certainly a case for granting an exception in cases were legal advice refers to advice given during a court procedure, however, **opinions of the legal services of the institutions in relation to specific questions of legislative proposals** and administrative practice , including transparency and (non)disclosure policy, are of general interest. It is difficult to understand the reasoning of an institution for following this or that approach, justified by an opinion of the legal service, without having access to this opinion.

For example, while practice disclosure varies across the Commission the argument has been made that non-disclosure of third party submissions is based on advice from the legal service – but this advice has not been published. In arguments about minimum and maximum harmonisation, also, and the interpretation of Article 153, for example, reference is frequently made to legal advice that has never been disclosed. Too often, a mere reference to the "Legal Service" is used (or abused) to stifle further public discussion.

6- In the light of experiences made so far, is there a case for specific provisions for handling requests, which are clearly excessive or improper, in particular with regard to time frame?

BEUC believes such a case does exist, but it should be clearly defined and apply to a very limited number of cases. In the evaluation of what constitutes an excessive request, the rules should provide for satisfactory criteria, ensuring that requests are not deemed excessive only because of their volume, thus excluding requests arising from complex issues. A rule of proportionality with the stakes at hand which motivate the request should be considered. In particular the example of the Lombard case shows that the regulation should be amended to provide for a fair examination of the interests at stake: (see above in the introductory remark and in the response to question) The Commission refused access to documents because the individual examination of the files in question to establish whether an exception would apply or not would have involved a disproportionate effort.
END

ANNEX I

Summary of the judgment of the court of first instance of 13th April 2005, case T-2/03 - Verein für Konsumenteninformation v Commission

By decision of 11 June 2002, the Commission found that eight Austrian banks had participated, over a number of years, in a cartel known as the 'Lombard Club' covering almost the whole of Austria ('the Lombard Club decision'). In the Commission's view, the banks referred to had, within that cartel, inter alia, jointly fixed the interest rates for certain investments and loans. The Commission therefore imposed fines totalling 124.26 million euros on those banks, which included in particular the Bank für Arbeit und Wirtschaft AG ('BAWAG').

The Verein für Konsumenteninformation ('the VKI') has conducted several sets of proceedings against BAWAG before the Austrian courts. In that context, the VKI applied to the Commission for access to the administrative file relating to the 'Lombard Club' decision. When the Commission rejected that request in its entirety, the VKI brought an action for annulment of that rejection before the Court of First Instance of the European Communities.

The VKI submitted inter alia **that it is incompatible with the right of access to documents** and, in particular, with the Regulation regarding public access to European Parliament, Council and Commission documents to refuse access to the whole of an administrative file without having first actually examined each of the documents contained in the file. In its view, the Commission should, at the very least, have granted it partial access to the file. The Court of First Instance observed, first of all, that the institution to which a request for access to documents is made under the regulation concerning access to documents is obliged to examine and reply to that request and, in particular, to determine whether any of the exceptions referred to in that regulation is applicable to the documents in question.

The Court then held that **where an institution receives such a request it is required, in principle, to carry out a concrete, individual assessment of the content of the documents referred to in the request**. However, that approach, to be adopted in principle, does not mean that such an examination is required in all circumstances. Since the purpose of the concrete, individual examination which the institution must in principle undertake in response to a request for access is to enable the institution in question to assess, on the one hand, the extent to which an exception to the right of access is applicable and, on the other, the possibility of partial access, such an examination may not be necessary where, due to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted.

In this case, the Court found that the exceptions relied on by the Commission do not necessarily apply to the whole of the Lombard Club file and that, even in the case of the documents to which they may apply, they may concern only certain passages in those documents.

Consequently, **the Commission was bound, in principle, to carry out a concrete, individual examination of each of the documents referred to in the request in order to determine whether any exceptions applied or whether partial access was possible**. The Court added that it is only in exceptional cases and only where the

administrative burden entailed by a concrete, individual examination of the documents proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required, that derogation from that obligation to examine the documents may be permissible.

Without ruling definitively on whether the examination required of the Commission in this case was unreasonable, the Court found that it is not apparent from the reasons for the contested decision that the Commission considered specifically and exhaustively the various options available to it in order to take steps which would not impose an unreasonable amount of work on it but would, on the other hand, increase the chances that the applicant might receive, at least in respect of part of its request, access to the documents concerned.

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