CEE bankwatch network
www.bankwatch.org

31 July 2007

CEE Bankwatch Network's response to the Consultation on the review of the Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents

CEE Bankwatch Network is an international non-governmental organisation (NGO) with member organisations currently from 12 countries across the central and eastern European region. The aim of the network is to monitor the investments supported by the international financial institutions as well as by the European Union funds, and to propose constructive alternatives to their policies and projects in the region.

Citizens' right to know – a fundamental human right

The right to access information held by public bodies is a fundamental human right, set out in Article 19 of the United Nations Universal Declaration of Human Rights, which guarantees the right to "seek, receive and impart information and ideas". This right is equally valid for information held by public institutions at the supra-national level, such as EU institutions and bodies, as it is for national bodies.

The right to information plays a crucial role in promoting a range of important social values. Information has been described as the oxygen of democracy. It is a key underpinning of meaningful participation, an important tool in combating corruption and central to democratic accountability. A free two-way flow of information provides a foundation for healthy policy development, decision-making and project delivery.

The key elements of a rights-based approach are a true presumption of disclosure, generous automatic disclosure rules, a clear framework for processing requests for information, limited exceptions and a right to appeal refusals to disclose to an independent body.

We believe these elements should constitute the principles and be a basis for rules on public access to information held by EU institutions and bodies. Therefore, we find the questions posed during the consultations as limited and not fully covering the core of the matter. In our responses we have decided to go beyond the simple remit of the specific questions. Our submission relies heavily on principles spelled out in the Transparency Charter for International Financial Institutions prepared by the Global Transparency Initiative (GTI), of which CEE Bankwatch Network is a founding member. More information on the GTI can be found at: http://www.ifitransparency.org

Q1. Would you qualify the information provided through registers and on the websites of the institutions as (A) comprehensive and easy to access, (B) comprehensive but difficult to find, (C) easy to access but insufficient as regards their coverage, (D) insufficient and difficult to access?

We would like to begin with a broader reference to a need for access to information as well as to documents. We believe that the right of access applies not only to documents but also to information and that any discussion of reform of the rules should be based on this understanding.

While we recognise the progress made by the three EU institutions in making information available electronically on their websites, we still believe the ground principles of transparency are not strong enough. We believe the following rules should be at the heart of the disclosure policy that EU institutions and bodies should be bound to:

The Right of Access

The right to access information is a fundamental human right which should apply to information held by all EU institutions and bodies, regardless of who produced the document and whether the information relates to a public or private actor.

Contact Person: Magda Stoczkiewicz, Policy coordinator
email: magdas at bankwatch.org
tel: +32 2 542 01 88

The right to access information held by public bodies, such as EU intitutions and bodies, is a fundamental and legally-binding human right, grounded in the right to "seek, receive and impart information and ideas", guaranteed under international law. The EU should adopt comprehensive access to information rules giving effect to this right. These rules should create a genuine presumption that access will be given to all information held by the EU institution or body, subject only to limited exceptions (see question 4), known as the principle of maximum disclosure.

The right applies to *all* information *held* by EU institutions or bodies, regardless of who produced it (whether this was the institution/body itself or some other public or private actor), when it was produced, the form in which it is held (a document, electronically and so on) and its official status. The current approach fails to respect this by allowing states who produce information effectively to veto its disclosure.

A serious shortlcoming of the present regime is the fact that, currently, not all EU bodies fall under Regulation 1049/2001. Extending it to all EU institutions and bodies (including financial institutions such as the European Investment Bank) is necessary to ensure full respect for the right to information. Such an extension has been envisagedin Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community. Point 12 of the Regulation reads: 'Regulation (EC) No 1049/2001 applies to the European Parliament, the Council and the Commission, as well as to agencies and similar bodies set up by a Community legal act. It lays down rules for these institutions that comply to a great extent with the rules laid down in the Aarhus Convention. It is necessary to extend the application of Regulation (EC) No 1049/2001 to all other Community institutions and bodies.'

The Right to Request Information

Everyone should have the right to request and to receive information from EU institutions and bodies, subject only to a limited regime of exceptions, and the procedures for processing such requests should be simple, quick and free or low-cost.

The right to request and to receive information is central to the effective functioning of access to information policies. The right should apply to all information held by the EU institutions and bodies, subject only to the regime of exceptions (see question 4). The policy should set out in some detail the manner in which requests for information shall be processed, which should be simple, rapid and free or low-cost. Requesters should be able to submit requests orally or in writing (including via email, fax, regular mail and so on). Assistance should be provided to requesters who are having difficulty formulating their requests and well functioning registers should be available to facilitate requests. Where reasonably possible, information should be provided in the language requested and translation should always be provided where this is in the public interest.

A response to a request should be required to be provided as soon as possible and clear maximum time limits for responding should be imposed (not more than 15 days). Where access to information is refused, notice in writing should be provided, specifying the particular exception upon which the refusal is based, as well as the right of appeal.

This is happening in the current procedure but its application varies from institution to institution, and even within those. We experienced delays (once even for five months) in response and/or not keeping prescribed deadlines without any explanation why; we even experienced no response at all despite several confirmatory requests. We were also advised to request information somewhere else (namely from the government directly for documents clearly in the European Commission's possession, which is a breach of Art. (2) point 3 of the Regulation.) In cases where the request contained several questions, some of them remained unanswered.

Based on the above we believe that currently the comprehensiveness of the information provided varies considerably between and within the institutions and bodies. The information is also often difficult to find. Improving consistency and organising the information in a better way would be crucial in order to allow interested citizens to actually find the information provided online. Therefore, specific rules concerning the duty of EU institutions and bodies to register documents should be developed and applied.

Contact Person: Magda Stoczkiewicz, Policy coordinator
email: magdas at bankwatch.org
tel: +32 2 542 01 88

Q2. Should more emphasis be put on promoting active dissemination of information, possibly focussed on specific areas of particular interest?

Yes

Automatic Disclosure

EU institutions and bodies should automatically disclose and broadly disseminate, for free, a wide range of information about their structures, finances, policies and procedures as well as decision-making processes.

Automatic (routine) disclosure is important both to ensure a minimum flow of information from EU institutions and bodies and to enable the public to participate effectively in decision-making processes.

At a minimum, the following categories of information should be subject to automatic disclosure:

- information about the structure of the EU institutions and bodies (including its basic legal framework and organisational structure, contact information for staff and officials, and its decision-making processes at all levels);
- organisational procedures, rules and directives;
- institutional policies, strategies and guidelines;
- budgetary and financial information;
- evaluations, audits and other information pertaining to effectiveness of the institution or body in meeting its objectives;
- information pertaining to the health, safety, security, environmental and other social implications of institution or body operations, particularly where these operations pose a risk of harm; and
- information that has been released pursuant to a request and where further interest in that information may be expected.

Where certain information in a document subject to automatic disclosure falls within the scope of an exception, the document should still be disclosed but that information may be redacted.

Information should be disseminated widely. The primary mechanisms for dissemination should be through EU insitution or body websites, country offices and member country local communication networks. Documents should be disseminated anew whenever updated. A translation strategy should be in place to ensure dissemination in local languages.

Documents subject to automatic disclosure should be distributed for free.

Access to Decision-Making

EU institutions and bodies should disseminate information which facilitates informed participation in decision-making in a timely fashion, including draft documents, and in a manner that ensures that those affected and interested stakeholders can effectively access and understand it; they should also establish a presumption of public access to key meetings.

One of the objectives of automatic disclosure is to facilitate participation in decision-making. For this aim to be realised, certain conditions must be met. First, EU institutions and bodies should clearly describe their decision-making processes. This should include providing a list of upcoming opportunities to provide public input, releasing consultation and communication plans, and identifying decision benchmarks (for example, dates of key meetings in decision-making process). The public should be able to anticipate when and how they will be able to access decision-making.

Second, information required for participation in decision-making should be disclosed in a timely fashion, sufficiently in advance to enable interested stakeholders and affected parties to provide informed comments before final decisions are taken. Draft documents need to be disclosed and continuous updates need to be provided on activities.

Contact Person: Magda Stoczkiewicz, Policy coordinator
email: magdas at bankwatch.org
tel: +32 2 542 01 88

Third, the information should effectively reach those likely to be affected by decisions. EU insitutions and bodies should utilise dissemination mechanisms that most appropriately deliver the information to the relevant stakeholders.

Meetings – which automatically involve the exchange of information and ideas – fall within the scope of the right to information. All formal meetings with decision-making powers should be open for attendance by members of the public and/or broadcasted online. Notice should be provided in advance indicating the time and place of the meeting, as well as the topics to be discussed. Meetings may be closed to protect legitimate interests but any decision to close a meeting should itself be taken in public and reasons for closure should be provided.

Information about a meeting, even a closed meeting, should be made available after the meeting, for example through press conferences and by circulating summaries, minutes and transcripts as soon as possible. Legitimately confidential information may, carefully and narrowly, be redacted from these documents.

Q3. Would a single set of rules for access to documents, including environmental information, provide more clarity for citizens?

First of all we are calling on the EU institutions and bodies to come up with transparency rules which fully reflect the main principles of maximum disclosure, as described in question 1.

Referring to the current situation it is necessary to remember that the EU is a Party to the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters and therefore the EU is required to implement the Aarhus Convention's provisions fully in its own law. We would support the EU in a move to generalise the Aarhus provisions to all information. Until this is implemented a separate, more transparent set of rules specifically for environmental information that fully implement the principles of the Aarhus Convention must be in place, which is currently not the case with either of the regulations (1049/2001 on access to documents and 1367/2006 on the application of Aarhus).

Q4. How should the exception laid down in Article 4(1) (b) of Regulation 1049/2001 be clarified in order to ensure adequate protection of personal data?

We would like to tackle this question more broadly from the perspective of exceptions to release information.

Limited Exceptions
The regime of exceptions should be based on the principle that access to information may be refused only where the EU institution or body can demonstrate: (i) that disclosure would cause serious harm to one of a set of clearly and narrowly defined, and broadly accepted, interests, which are specifically listed and; (ii) that the harm to this interest outweighs the public interest in disclosure.

It is recognised that the right to information is not absolute. Not all information held by EU insitutions and bodies should be made public; there are some legitimate grounds for confidentiality, such as personal information or where disclosure would genuinely harm the prevention or prosecution of a crime. At the same time, we believe the current regulation contains unduly broad regimes of exceptions which have seriously undermined their usefulness.

Access to information policy should provide a clear and narrow list of public and private interests that may override the right of access. Access to particular information should be refused only where the EU institution or body can prove, on a case-by-case basis at the time of the request, that disclosure would cause serious harm to one of the interests listed. Even where this is the case, the information should still be disclosed unless the harm outweighs the public interest in accessing the information.

Contact Person: Magda Stoczkiewicz, Policy coordinator
email: magdas at bankwatch.org
tel: +32 2 542 01 88

Exceptions should be based on the harm that disclosure would cause, not on who produced or provided the information. Where third parties are involved, they should have the right to make representations as to why a particular piece of information falls within the scope of an exception. But the policy should not allow a third party veto or recognise an originator control principle – currently used by member states for example. The fact that information may be administratively classified should be irrelevant to whether or not it meets the test for non-disclosure. Even classified information should be disclosed where it does not fall within the scope of an exception. Overall time limits on secrecy should be established (historical disclosure), beyond which the need for secrecy must be convincingly demonstrated before access may be refused.

In the current situation the most notable differences between Regulation 1049/2001 and the Aarhus Convention concern the exceptions. This difference significantly extends the scope of application of the exceptions. The Regulation also nowhere states that the exceptions must be interpreted in a restrictive way. The Aarhus Convention requires that exceptions be interpreted in a restrictive way.

The Regulation also includes exceptions not found in the Aarhus Convention. These include:

- The exception for 'the financial, monetary or economic policy of the Community or a Member State';
- The exception for 'commercial interests' and the exception to the right to information on emissions; the Regulation protects 'commercial interests' more broadly than the Convention and makes no exception for information on emissions. The Aarhus Convention requires that information on emissions always be disclosed;
- The exception for 'court proceedings and legal advice', while Aarhus protects 'the course of justice [and] the ability of any person to receive a fair trial.'

When the protection of privacy is concerned we believe it can not mean that all personal data is protected. The implementation of the notion on protection of privacy meant often that names of lobbyists or even officials have not be released (being blanked out from the document or the whole document being withheld). We believe, and as the Green Paper suggests, where persons are acting in an official capacity, the personal data exception should not apply to their names. The question should define what is personal data in the context of persons acting in an official capacity and/or lobbyists operating in the EU sphere; while information such as private address or phone number should not be released, the names of persons, their positions, official contacts and persons' presence and interventions on meetings, gatherings and events should be subject to disclosure.

Q5. How should the exception laid down in Article 4(2), 1st indent of Regulation 1049/2001 be clarified in order to ensure adequate protection of commercial and economic interests of third parties?

We believe much more weight should be given to the interest in disclosure. Please see also our comments in question 1 where we talk about the Right of Access.

Q6. Would it be acceptable to derogate from the normal rules on access, in particular the times frames where access request are clearly excessive or improper?

No.

We believe access to information as a right can not and should not be compromised with the notion of excessiveness or improperness (unless the request is clearly frivolous). The problem of voluminous or excessive requests should be dealt with through communication between the institutions and the applicant.

Q7. With regard to the content of databases, should the concept of 'document' cover sets of information that can be extracted using the existing search tools?

Contact Person: Magda Stoczkiewicz, Policy coordinator
email: magdas at bankwatch.org
tel: +32 2 542 01 88

As mentioned in question 1 above, we believe the regulation should talk about access to information as well as access to documents. In this sense the right applies to *all* information *held* by a European institution or body, regardless of who produced it (whether this was the institution or body itself or some other public or private actor), when it was produced, the form in which it is held (a document, electronically and so on) and its official status. It is implicit in this that information should be extracted from databases using automatic devices such as search tools where this is necessary to respond to a request.

Q8. Should the Regulation indicate events before and after which exceptions would or would not apply?

Yes.

As mentioned in question 4 above on exceptions, we believe that even classified information should be disclosed where it does not fall within the scope of an exception. Overall time limits on secrecy should be established (historical disclosure), beyond which the need for secrecy must be convincingly demonstrated before access may be refused. This is common practice at the national level and there is no reason not to implement it within the EU.

Additional principles that should be followed in the context of access to information:

Appeals

Anyone who believes that an EU institution or body has failed to respect its access to information policy, including through a refusal to provide information in response to a request, has the right to have the matter reviewed by an independent and authoritative body.

Whistleblower Protection

Whistleblowers – individuals who in good faith disclose information revealing a concern about wrongdoing, corruption or other malpractices – should expressly be protected from any sanction, reprisal, or professional or personal detriment, as a result of having made that disclosure.

Promotion of Access of Information

EU institutions and bodies should devote adequate resources and energy to ensuring effective implementation of the EU access to information policy, and to building a culture of openness.

Regular Review

Access to information policy and rules should be subject to regular review to take into account changes in the nature of information held, and to implement best practice disclosure rules and approaches.

Contact Person: Magda Stoczkiewicz, Policy coordinator
email: magdas at bankwatch.org
tel: +32 2 542 01 88