Exchange of views on access to EU documents. European Ombudsman's address to LIBE committee

Speech - **City** Brussels - **Country** Belgium - **Date** 21/04/2022

Good afternoon and thank you very much for inviting me today.

Let me start by paying tribute to the people of Ukraine at this time and recognise the unimaginable suffering they are experiencing. Neither the young nor the old, the healthy or the sick, have been spared the savagery of the Russian assault and daily we witness scenes we thought we had long consigned to history.

I am pleased that the Ukrainian Commissioner for Human Rights, Ms. Lyudmyla Denisova, has accepted my invitation to speak at the annual conference of the European Network of Ombudsmen that will take place in Strasbourg next week.

Today, I am here to discuss an issue that is linked to the upholding of European democratic ideals and therefore to the upholding of the EU's credibility and legitimacy in the eyes of its citizens: transparency and, in particular, public access to EU documents. Access alone is not a panacea for the challenges we currently face but it is recognised in the EU Treaties as the means by which citizens can exercise their right to take part in the democratic life of the Union. At a time when so many people around the world are denied that very right, we can therefore see its importance in the architecture of that EU democratic life.

The first treaty that mentioned the public right to access to documents was the Maastricht Treaty in 1992. The same Treaty also established EU citizenship and the office of the European Ombudsman

In 2001, the co-legislators adopted **Access Regulation 1049** , which allows citizens who have not succeeded in accessing documents to complain to the Ombudsman.

Every year, about one quarter of my Offices' inquiries relate to EU transparency and access to documents.

The complaints tend to fall into one of the following categories:

1. The question of whether something is a document,

2. exceptions to access to documents, and

3. procedural issues, in particular delayed access.

First, the definition of a document.

Two decades after 1049 came into force the way in which we communicate both personally and increasingly professionally has undergone radical change. When we think about documents today, we rarely think of sheets of paper and binders.

New communications channels are now used in the process of policy making and of implementation, including instant messaging and social media.

My inquiries show that the institutions are grappling with how to apply their obligations to record and disclose documents to new technologies. During the negotiations on COVID-19 vaccine procurement, it was reported that exchanges took place between the Commission President and pharmaceutical companies through instant messaging services. My Office is examining a complaint on this matter after a journalist was told that no records existed because such messages are “short-lived” by definition.

The Regulation however considers that “any content, whatever its medium” is a document, as long as it concerns the institutions’ work. This definition allows for new forms of communication and is agnostic to technology changes.

While this sounds very clear, practical questions often arise. The regulation applies to documents “held” by the institution but what if the documents are held on a cloud-based data server belonging to a private multinational company?

What does it mean when institutions refer to something being “short-lived”?

How do institutions record and retain new forms of communication?

How can they provide access to them without huge administrative costs?

The EU administration has to develop legal and technical solutions to keep up with these developments.

I have recently asked EU institutions to inform me what measures they have in place for documenting work-related text and instant messages. The aim is to draw up a list of good practices to help guide the EU administration on the issue.

Second, let me talk about **exceptions to public access** .

The right to access to documents has limits: institutions can refuse access to certain documents to protect important public interests, personal data, business interests, ongoing investigations

and the decision-making process.

The Court of Justice has produced an extensive body of **case law** to interpret these exceptions which has to be taken into account to understand their scope.

We must also take into account the fact that access to EU documents is a right, the default option, and therefore refusing access should remain a rare event.

When there is a strong public interest in accessing certain documents, such as during the legislative process, these exceptions should apply in an even more limited manner.

I have examined this issue in a number of my inquiries. One outcome is that Parliament, Council and Commission have pledged to establish a public " **joint legislative database** " that will in particular contain documents exchanged during the trilogue process.

Third, **time limits and delays.**

The Access Regulation requires institutions to reply to requests for access to documents within 15 working days.

This deadline reflects the fact that many requests for access to documents are time sensitive. Journalists for example cannot wait for months or years until they receive access to a document, they need prompt access. Similarly researchers working in important public interest areas. **Access delayed is effectively access denied** .

Recognising this need for speed, my Office instituted a Fast Track procedure under which we try to resolve access complaints with the EU administration within 40 working days, and I am pleased that the institutions have been co-operative.

Following a number of complaints, I recently launched an own-initiative inquiry into the extent of delays by the Commission in replying to initial access requests.

All institutions need to try harder to prevent these delays. Processes need to be streamlined and adequate resources given to the handling of requests. In reflecting on the EU response to the Covid crisis I took note of how fast things can be done and how many bureaucratic barriers can be got rid of where there is a will to do so and that I believe is key when it comes to access to documents.

It appears that in recent times the institutions are increasing their acceptance of my recommendations. In a series of public access cases, EU institutions and agencies have now granted wider public access to documents following my recommendations, despite initially refusing to do so. For example, the **European Commission** gave out more documents as regards the procurement of facemasks at the start of the COVID-19 crisis, the voting records at the **European Banking Authority** are now being published and authoritative guidance on the GDPR issued by the **European Data Protection Board** was published.

Finally, what is the **future of the Access Regulation** ?

Attempts have now been made to reform the Regulation for almost 15 years. In 2008, the Commission submitted its first reform proposal. At a conference that I hosted at end of last year, Commission Vice-President Jourova stated that she is ready to do her part and launch a new revision process. The Commission, as you know, proposed to withdraw the two files which make up the old attempt at a revision, but Parliament objected to this withdrawal. Therefore it would appear that Parliament holds the key to what happens next while of course what ultimately happens also depends on the Council.

There may be a window of opportunity given the upcoming Presidencies of the Council. But that is a decision for you as legislators.

In a world of disinformation, fake news and the increasing manipulation of democratic institutions through the use of communication tools not even invented when 1049 was established, the failure to modernise the EU's transparency regime seems out of step with the march of history.

The scope of the Regulation, I would respectfully suggest, should be broad, exceptions to public access should be limited and the law should reflect the modern reality of how we communicate.

If the legislators do not wish to revise the Regulation at this time, then perhaps the Commission could consider issuing a Communication on the topic to allow the Parliament and Council to debate the issue and take some general position ahead of a possible future revision.

I look forward to hearing your ideas, and my Office is always available to provide technical input on the topic, should you need it.

Thank you.