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THE RIGHT TO AN OPEN PUBLIC ADMINISTRATION IN EUROPE: EMERGING LEGAL STANDARDS ON ADMINISTRATIVE TRANSPARENCY

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INTRODUCTION

Administrative transparency is on the rise as a policy issue, but is not new. Both the Council of Europe and the OECD have devoted to it a long-standing attention. However, during the last ten years, an impressive number of legislative measures and administrative reforms have been put in place in EU member states. This recent "acceleration" has several roots. Administrative transparency has been recognised by courts, constitutions and treaties as a fundamental right of the individual. It has also been proposed as one of the key instrumental freedoms, essential for economic and social development and for promoting international investment. More crucially, the promotion of the "right to know" of the people is increasingly perceived as an essential component of a democratic society.

In liberal democracies, in fact, the right of access to the information held by public authorities serves three main purposes. First, it enables citizens to more closely participate in public decision-making processes. Second, it strengthens citizens' control over the government, and thus helps preventing corruption and other forms of maladministration. Third, it guarantees the administration to enjoy greater legitimacy, as long as it becomes more transparent and accountable, i.e. closer to an ideal —glass house.

Nonetheless, experience in OECD and EU countries shows that promoting openness in government and administration in practice is a very difficult task. Ensuring the "right to know" of citizens through appropriate access to information stored in public offices remains an elusive policy goal. The need to preserve primary public and private interests (from the confidentiality of international relations to the privacy of individuals) is difficult to reconcile with the quest for transparency in concrete cases. Public officials and politicians, in fact, often tend to emphasise or overestimate the benefits of confidentiality to the public interest. As a consequence, legitimate barriers to public access to information are often overstretched, to include many other issues that, in a healthy democracy, would normally be in the public domain.

Despite such difficulties, many countries, including those in Central and Easter Europe, which have recently instituted democratic political regimes and administrations, have introduced Freedom of Information Acts (FOIA) in recent years. The fact that a FOIA is passed in parliaments does not guarantee *per se* more openness and transparency in governments and administrations, especially when it is not followed by an adequate implementation. Yet, the adoption of a FOIA does constitute a first crucial step on the way to an open government: not only it introduces the idea that citizens have the right to exert a widespread control over the action of public authorities; it also paves a better way for social groups, journalists and individuals to make a judicial case to protect their "right to know" than in countries where a FOIA has not been promulgated.

This short paper illustrates the emergence of common rules, mechanisms and criteria employed in Europe to balance the policy goal and legal obligation of disclosure of information with the requirements of confidentiality. In particular, the paper examines the regulations on access to information where they exist and how transparency policies are implemented in 14 European Union member states. The countries reviewed belong to different European administrative traditions, which allocate disparate weights to the issue of transparency in the handling of public affairs. The countries are Austria, Czech Republic, Estonia, Finland, France, Germany, Italy, Poland, Portugal, Romania, Slovenia, Spain, Sweden and the United Kingdom. Transparency policies and regulations of European Union institutions have also been reviewed.

The aim is to provide useful guidance for policy-makers and practitioners willing to improve the openness and transparency of their administrative systems either through enacting FOIAs or though the amelioration of the information of public interest management. Openness is a basic European principle for public administrations that EU candidate countries are asked to approximate during the accession process. The identification of EU legal standards in this field

may, thus, help prospective member states to converge towards shared democratic political and administrative ways of public governance.

The emerging European standards discussed in the next pages from a practical policy-making perspective. They concern five main aspects that are central to any transparency legal regime:

- How to define the scope of legislation on free access to information, especially with regard to the range of *beneficiaries* of the "right to know" and to the *object* of that right;
- How to circumscribe the *discretion* of the administration in deciding about the *exceptions* to the general principle of free access (legislative techniques– such as the "harm test" and the "balancing test" – are reviewed);
- How to deal with the issue of the "*unreasonable workload*" that the principle of free access may impose upon the administration;
- How to promote the *regular publishing of information* that may be of interest to a relatively large number of individuals or groups without harming relevant public and private interests;
- How to set up an *independent and effective system of review* over decisions refusing access to information by complementing the control exerted by courts with the control exerted by independent administrative bodies such as information commissioners.

In the following pages, the main standards are illustrated, in the form of guidelines for legislators and governments that are willing to adjust their transparency regimes and administrative practice to meet emerging common European standards.

GUIDELINES

In 1981 the Council of Europe (CoE) provided European legislators and policy-makers with eight basic recommendations with regard to the access to documents and information.[1] Twenty years later, in 2002, the same recommendations were revised and developed.[2] Their direct and indirect impacts have been remarkable. The recommendations have been widely applied all over Europe. As mentioned (*supra*, I.1.1), this process of gradual convergence has culminated both in the recognition of access to information as a fundamental right at EU level (Article 42 of the EU Charter of Fundamental Rights) and in the adoption of the Convention on Access to Official Documents on 27 November 2008. This Convention, signed by 12 countries at the moment of writing (30 September 2010),[3] represents the first international binding instrument recognising a general right of access to official documents held by public authorities. Against this background, the comparative analysis carried out in this paper has detected a conspicuous series of European-wide legal standards, which are recapitulated in the following policy recommendations.

Administrative Transparency and Reform

1. The Right of Access as a Fundamental Right. Administrative transparency is increasingly acknowledged as a crucial value in enhancing the democratic quality of a liberal state ruled by law. In today's Europe, free access to information held by public authorities is recognized as a fundamental right. Transparency regimes should be revised to promote the

[1] Council of Europe Recommendation No. R (81) 19 on the Access to Information held by Public Authorities, 25 November 1981 (CoE 1981)

[2] Council of Europe Recommendation No. R (2002) 2 on Access to Official Documents, 21 February 2002 (CoE 2002)

[3] Belgium, Estonia, Finland, Georgia, Hungary, Lithuania, Macedonia, Montenegro, Norway, Serbia, Slovenia and Sweden signed the Convention on 18 June 2009.

widest possible access to public information. In this regard it should be considered as being part of the 1993 Copenhagen criteria for EU membership.

2. Tradition and Reform. The cultural tradition of an administrative system has a crucial impact on the effective degree of openness of that system. National experiences show that culture may change both inside and outside the administration with resolute political willingness. An adequate strategy of implementation is required, however. Legislative reforms should be accompanied by extensive training projects, dissemination of information to the public, the adequate institutionalization by for example setting up of Information Commissioners , and a dedicated website with recommendations from the authority supervising the process.

Beneficiaries

3. Right of Access to Everyone. The right of access to public information is a right of everyone, without discrimination on any ground. "Everyone" means both citizens and non-citizens, being they residents or not. No subjective restriction is consistent with the recognition of access to official documents as a fundamental right.

4. Request for Access. A person requesting access to a document should not be obliged to justify his/her request. Formalities for requests should be kept to a minimum.

Scope

5. Branches of Government. In principle, access regulations concern information held by public authorities in all of the sectors of public action. However, special regimes are often in place for parliamentary, and council of ministers' decision-making and judicial procedures. Accordingly, "member states should examine, in the light of their domestic law and practice, to what extent the principles of this recommendation could be applied to information held by legislative bodies and judicial authorities." (CoE 2002, Rec. II.1).

6. Regional/Territorial Entities. Transparency norms apply to public authorities at national, regional or local level. Sub-national governments are also bound by international treaties such as the TEU, even if the obligated before other member states and EU institutions is the central state. Where a constitution devolves competence to territorial entities, the regulatory autonomy of regional and local authorities should be exercised in due respect of internal, European and national law, thus subject to a "higher standard" condition. This would accommodate the principle of territorial regulatory autonomy with the need to preserve a common minimum level of transparency, as the fundamental nature of the right of access requires.

7. Private Entities Performing Public Functions. In all European systems, the access regime is also applied to private entities (natural and legal persons) performing public functions or exercising administrative authority. Private companies are subject to different transparency requirements, depending on the country where they operate. To redress the difficulties arising from these regulatory asymmetries, member states should examine whether a common standard could be applied to access regulation. Some countries have adopted the EU notion of "body governed by the public law" – which originated in public procurement legislation – as a selective criterion. This option would provide an anchorage to a notion that is well established in all member states and facilitate harmonization.

Object

8. Access to "Document" or to "Information"? The nature of fundamental right requires that access be guaranteed to all the *information* held by a public authority, without restrictions specifically concerning the object. Whenever access regimes make reference to the notion of "document", this notion should be construed broadly. If the purpose of freedom of information acts is to maximize the public's right to know, no limitations can be admitted, other than the exemptions explicitly introduced for the protection of legitimate public and private interests.

Exemptions

9. Grounds. The right of access to information, like other fundamental rights, may suffer derogations. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting legitimate public and private interest.

10. Legislative Constraints on Administrative Discretion. Most FOIAs explicitly qualify the grounds of derogation, distinguishing between absolute (or prejudice prevention oriented) and relative (or discretionary) exemptions. The distinction may provide a framework of evaluation to the public authority and, under certain conditions (specified below), may contribute to ensure that public authorities construe and apply the exceptions restrictively.

a. *Absolute (prejudice prevention oriented) exemptions.* The exemptions serve the purpose to guarantee an enhanced level of protection to certain interests (e.g. defence, international relations, public order) by removing them from the area of administrative discretion. The harm test applies, which requires the public authority to assess whether disclosure would damage the interest protected. In order to ensure a restrictive application of an exception, the harm test needs to be accompanied by further specifications as to the nature and the likelihood of the harm:

i. the public authority must be able to provide some evidence supporting the conclusion that, in the given circumstances, the damage is *reasonably foreseeable and not purely hypothetical*;

ii. a differentiation may be introduced between *straight* and *reverse* harm test: a straight requirement of damage favors the granting of access, whereas a reverse requirement of damage assumes confidentiality to be the main rule.

b. *Relative (discretionary) exemptions*. It is for the administrative body to weight the interest protected by the exemption with the public interest in disclosure. This balancing approach entrusts the administration with proper administrative discretion, in the absence of a predetermined (legislative) order of preference between the competing interests at stake. In order to ensure that the public authority makes an appropriate use of the discretionary power thereby delegated to it, the standard judicial review principles apply (e.g. due process, proportionality).

c. *Absolute and Relative Exemptions: How to Choose.* The harm test, if properly applied, may concede less room to the administration for distortion and arbitrary decisions. Nonetheless, the balancing is the only approach consistent with the status nowadays enjoyed in Europe by the right of access. No public or private interest should be granted a superior level of protection (as it is implied in the harm test) in so far as the right of access is conceived as a fundamental right. In practice, the conferral of discretionary power to the administration does not constitute a problem *per se*, as long as it is always possible – and indeed recommended – for the reviewing bodies to adopt a strict review standard. This conclusion is consistent with the favor accorded to the balancing approach by the Council of Europe, both in its recommendations and in the Convention on access to official documents of 2008.

Processing of Requests

11. Time Limit. A request of access should be processed *promptly* and, in any case, within a reasonable time which has to be specified in advance and should not exceed 30 days.

12. Duty to Give Reasons. A public authority refusing access to an official document wholly or in part should give the reasons for the refusal. In giving the reasons for a total or partial dismissal of a request, the public authority should take into account its obligation to undertake a concrete, individual assessment of the content of the requested documents. A statement of reasons must also include an indication of remedies.

13. Fees. When access involves a complex processing of “information”, a fee may be charged, provided that it is proportional and determined in advance.

14. Administrative Workload. It is not, in principle, appropriate that account should be taken of the amount of work entailed by the exercise of the applicant’s right of access and its interest in order to vary the scope of that right. Nonetheless, access may be refused in exceptional cases, when the request poses a *manifestly unreasonable burden* for the authority. When such is the case, the following rules should apply:

a. the public authority bears the burden of proof of the unreasonable scale of that task;

b. where it has adduced such a proof, the public authority is obliged to consult with the applicant in order to consider whether and how it may adopt a less onerous measure;

c. the public authority may reject the request only after it has genuinely investigated all other conceivable options and explained in detail in its decision the reasons for which those various options also involve an unreasonable amount of work.

Publication

15. Publication as the "Default Rule". Documents should be made accessible by the institutions from the outset, unless an exception to the public right of access clearly applies. All public information that has been requested and disclosed more than three times should be published.

16. Internet Clause. Publication of information on paper in official bulletins or journals does not suffice in terms of the government's duty to facilitate access to public information; publication on the pertinent institutional websites is also necessary.

17. Register of Documents. To ensure the effectiveness of the right of access, each institution should provide public access to a register of documents in electronic form. Each register should include a "guide to information", giving details of

a. the information routinely published and directly accessible through the register;
b. how the remaining information can be accessed on demand;
c. whether or not a fee will be charged for this access.

18. Publication Schemes. Each authority should adopt a publication scheme on the basis of a "model publication scheme". This scheme should be subject to periodical revision. It should indicate the broad classes of information that a public authority is obliged to publish, unless the information is not held, cannot be easily accessed or is subject to a specific exemption.

Review Mechanisms

19. First Instance Administrative Review. An applicant should also have access before an independent administrative body operating as a first instance reviewing authority.

a. Features. Administrative review should be:

i. independent from the government (e.g. appointed by the parliament by qualified majority for no less than a 5-year term and reporting to it)
ii. centralized (i.e. unitary supervision and harmonization of practices)
iii. specialized (expertise is crucial in performing both adjudicatory and standard-setting tasks)
iv. entrusted with enforceable adjudicatory powers*, reviewable by a court.*

b. This mechanism of independent administrative review has various merits:

i. it prevents an increase in the workload of courts (which intervene only in second instance: see below);
ii. it provides specialised supervision and promotes the harmonisation of administrative practices;
iii. it significantly reduces the costs and time-consumption of the review process

20. Second Instance Judicial Review. An applicant whose request for an official document has been refused, whether in part or in full, or dismissed, or has not been dealt with within the time limit, should always have a right of appeal to a court against the decisions of the administrative reviewing authority. An *ad hoc* judicial procedure should also be established in order to speed up the processing of appeals before the courts.