

TRANSPARENCY AND OPENNESS IN EC DECISION MAKING

Bernard O'Connor

Legitimate and Illegitimate Lobbying in EC law

In 1995 the EC law teachers in the economics faculty of LIUC along with members of the Centre for Law and Economics designed a course on the legitimate and illegitimate lobbying in EC law. The object of the course was to examine the interface between the private sector and the public administration as part of an overall effort to promote openness and avoid the possibility of corruption in public life. The EC aspects included not only the rules on transparency and lobbying but also the co-operation between the police and judiciary within the context of the third pillar of Maastricht, otherwise known as the single judicial space (or market).

Funding for this course was sought from the Community under the Jean Monnet programme. The course was accorded support from the Commission as a Jean Monnet Module. It is taught as part of the EC law course in the 4th year of studies.

This LIUC paper is part of a series of papers which result from the Module and is designed to bring together some of the materials that are relevant to the legitimate lobbying in EC law. The first part of the paper concerns the right of the citizen to information as to what is going on in the institutions of the Community. This is an essential element in the democratic nature of the Community and the key means of avoiding arbitrary or corrupt behaviour. The second part of the paper reviews the administrative rights of the citizen to examine Community practice or policies. This paper is a work in progress as both the legal and economic evaluation of the state of openness in Community decision making is ongoing.

The author wishes to thank the Commission of the European Communities, the economics faculty in LIUC and colleagues and students who have all, in different ways, contributed to the bringing together of the ideas and materials set out in this paper.

PART I

Introduction

When the European Communities were established in the 1950's their supranational and intergovernmental characteristics were more finely balanced than today. It was not clear to many contemporary politicians or lawyers that Community law was superior to national law or that the Treaties gave direct rights and obligations to citizens rather than member States only. Decision making within the institutions of the Communities (which were distinct until the mid-1960s) was deliberately considered to be in the international sphere.

According to the then prevailing (and current) political theory, the only review of government action in the international sphere was the normal domestic parliamentary control over any executive action. International treaties had to be ratified by parliament but the conduct of negotiations were at the discretion of the executive. As the European Communities were considered to be international organisations, decision making within the Community institutions were considered to be intergovernmental. They were not open to institutional or parliamentary review. Governments sitting in the Council or the Commissioners sitting in the College of Commissioners were allowed to deliberate and reach decisions free from direct public or parliamentary review.

The original Communities were provided with parliamentary assemblies but in no sense of the imagination could they have been considered as exercising a control over the actions of the other institutions. The assemblies were not even called parliaments until the 1970s and direct elections to the Parliament were only introduced in the late 1970s. Until 1987 the Parliament only had the right to be consulted on legislative drafts and the Council was entitled to ignore the parliament's conclusions. Even today the Parliament only has limited rights of co-operation and co-decision making.

The only effective control on the Community institutions has been the Court of Justice. But then again, citizens were only given restricted rights to challenge the legality of decisions which directly and individually affected their rights. Member States and the other institutions were given privileged rights of access to the Court.

The phenomenal evolution in the effective competencies of the Communities over the past 40 years, although considered inevitable by some commentators, has not been accompanied by a systematic change in the way decisions are made. In this respect the Community is still

fundamentally intergovernmental. The meetings of the legislature (the Council of Ministers) are closed to Community citizens, decisions of the semi-executive (the Commission) or the Council for that matter, need not necessarily be made available to the public and, except in limited circumstances, citizens do not have the right to participate in decision making which directly affect their rights and obligations. This is an anathema to the parliamentary and transparent nature of the democracies which make up the Communities.

The need for change in the transparency in Community decision making has been recognised by the Community institutions slowly. This paper sets out the different steps taken by EC in the regard, since the beginning of the 1990s.

It is clear that much remains to be done to ensure openness and transparency in EC decision making. In a recent report (616/PUBAC/F/IJH) published on 20 December 1996, the European Ombudsman concludes that:

“On the basis of the above analysis, the Ombudsman concludes that failure to adopt and make easily available to the public rules governing public access to documents constitutes an instance of maladministration.”

In the body of his report the Ombudsman shows that not all Community institutions have adopted rules for public access to documents let alone taken steps to make the public aware of those rules.

The lack of transparency in public decision making can, and most often does, lead to bad decisions which do not take into consideration the needs of all the persons affected. With time closedness leads to corruption. In addition the lack of openness leads to the lack of confidence. The institutions of a state or the Community rely on the confidence of the citizen to retain their legitimacy. If that confidence is lost the institutions crumble. Transparency and openness are therefore essential not only to avoid bad decisions and possible corruption but for the very fabric of the social structure.

This paper will look at the provision in the Treaties of the Communities on the issue of transparency and confidentiality; some of the secondary legislation dealing with access to information and protection of data; the moves towards greater openness in the 1990s; the codes of conduct on access to Council and Commission documents; public access to Council meetings and the case law of the Court of Justice on the issue of confidentiality and transparency.

The Treaties

The Treaties establishing the three European Communities were and have become, with amendments, the constitution of the Communities setting out the rights and obligations of EC citizens and the institutions which represent them. They contain a number of rules relating to administrative transparency. These include rules governing:

- (i) the non-disclosure of information of a kind covered by the duty of professional secrecy (Article 214 EEC);
- (ii) the non-disclosure by Member States of information which is considered to be contrary to its essential security interests (Article 223 EEC);
- (iii) the limited obligation to publish regulations (Article 191 EEC);
- (iv) the obligation to state the reasons upon which such legal acts are based (Article 190 EEC);
- (v) the establishment of rules under which the Commission is obliged to give interested parties the opportunity to express their views on cases falling under Community regulations on competition rules applying to undertakings (Article 85/90 EEC);
- (vi) the obligatory annual publication of a General Report on the activities of the European Communities (Article 18 of the Merger Treaty, which is the Treaty establishing a single Council and a single Commission of the European Community and rule 44 of the Parliament's rules of procedure 95/509/EC);
- (vii) Article 47 of the Treaty establishing the European Coal and Steel Community provides that the Commission must not disclose information of the kind covered by the obligation of professional secrecy.
- (viii) Article 156 EC which set out the Commission obligation to publish annual general reports on its activities.

The constitutional treaties have been amended and consolidated a number of times. The significant amendments in relation to transparency and openness were made in the Maastricht Treaty and in the Amsterdam Treaty. The new provision in the Maastricht Treaty is:

- (i) Article 8D of the Maastricht Treaty sets out the citizens rights to petition the European Parliament under Article 138d of the EC Treaty and the citizens right to apply to the Ombudsman under Article 138e of the EC Treaty;

The new provisions in the Amsterdam Treaty are:

- (i) Amendment to Article 8D to the effect that every citizen would have the right to exercise their rights in one of the official languages of the Community;
- (ii) Amendment to Article 151 EC to the effect that when the Council acts as a legislator the results of the votes and statements in the minutes will be made public. In relation to access to documents the Council is to define rules as to when the public should have access to non legislative information;
- (iii) Introduction of Article 191a of the EC Treaty which provides:
 - “1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have right of access to European Parliament, Council and Commission documents, subject to the principles and the 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 198b within two years of the entry into force of the Treaty of Amsterdam.
 - 3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regards access to its documents.”

The Treaty of Amsterdam has not yet been ratified by all the Member States and has not therefore entered into force. Thus the current rights of citizens are determined by the original Treaties as amended up to and including the Maastricht Treaty.

Provisions in secondary legislation

Secondary legislation refers to that body of EC Regulations and Directives which implement the provisions set out in the Treaties (which used to be known as primary legislation).

Prior to the move towards greater openness in the 1990s there were a number of provisions of secondary legislation of interest in this context. These measures include:

- (i) the Staff Regulations for officials of the European Communities. Article 17 Title II of the Staff Regulations of Officials of the European Communities states:

“An official shall exercise the greatest discretion with regard to all facts and information coming to his knowledge in the course of or in connection with the performance of his duties; he shall not in any manner whatsoever disclose to any unauthorised person any document or information not already made public. He shall continue to be bound by this obligation after leaving the service.

An official shall not, whether alone or together with others, publish or cause to be published without the permission of the appointing authority, any matter dealing with work of the Communities. Permission shall be refused only where the proposed publication is liable to prejudice the interests of the Communities.”

- (ii) Council Regulation No 3 (Euratom) implementing Article 24 of the EEC Treaty establishing the European Atomic Energy Community,
- (iii) Council Regulation of 1 February 1983 concerning the opening to the public of the historical archives of the Community and Euratom which foresees access to the archives after a period of 30 years,
- (iv) Commission Decision of 7 July 1986 on classified documents and the security measures applicable to such documents which, for example, implies that sensitive commercial information made available in the context of competition policy will obtain the appropriate security classification, and also contains rules on classification and declassification of documents and handling of information received from Member States, and
- (v) Council Regulation of 11 June 1990 on data subject to statistical confidentiality addressed to the Statistical Office of the European Communities. This applies to the transmission to the Statistical Office of data which falls within the national statistical institute’s field of competence and is covered by statistical confidentiality,
- (vi) In 1990 the Council of Ministers adopted Directive 90/313/EEC to allow the possibility of access for any legal or natural person throughout the Community to information held by public authorities relating to the environment. In certain specified cases this information may be refused. This Directive came into force on 1 January 1993. The rules apply to environmental information held by the competent authorities of the Member States. It does not apply to environmental information held by the European institutions. However, the Commission indicated, in the explanatory memorandum accompanying the proposed Directive, that it would take initiatives with the object of applying the principle of access to information (with regard to the environment) to the Community bodies. No amendments or changes have been adopted changing this position.

(vii) Directive 95/46/EC on protection of individuals with regard to the processing of personal data and on the free movement of such data was introduced in October 1995. This directive, which seeks to give the individual access to personal data whilst protecting access to that data, applies to Member States. The legislation mentions nothing about its application in regard to Community institutions.

Moves towards greater openness in the 1990s

The Final Act of the Treaty of European Union signed at Maastricht on 7 February 1992 contains a declaration (No.17) on the right of access to information, which states:

“The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to information available to the institutions.”

At the close of the European Council held in Birmingham on 16 October 1992, the Heads of State and of Government issued a declaration entitled “A Community close to its citizens,” in which they stressed the necessity to make the Community more open. That commitment was reaffirmed by the European Council at Edinburgh on 12 December 1992 and the Commission was again invited to continue to work on improving access to information available to Community institutions.

The recognition of the need for greater openness was a result of the difficulties encountered in most Member States, but particularly Denmark and France, in adopting the Maastricht Treaty.

On 5 May 1993, The Commission adopted Communication 93/C 156/05 on public access to institutions’ documents, which set out the results of a survey on public access to documents in different Member States, and concluded that there was a case for developing further the access to documents at Community level.

On 2 June 1993, the Commission adopted Communication 93/C 166/04 on openness in the Community. In it the Commission elaborated the basic principles governing access to documents.

The Code of Conduct on Transparency

On December 31, 1993, within the framework of these preliminary steps towards implementing the principle of transparency, the Council and the Commission approved a Code of Conduct concerning public access to Council and Commission documents (93/730/EC), aimed at establishing the principles to govern access to Council and Commission documents.

The Code of Conduct provides:

“The public will have the widest possible access to documents held by the Commission and the Council.

“Document” means any written text, whatever its medium, which contains existing data and is held by the Council or the Commission.”

The Code of Conduct further provides that the institutions are to refuse access to any document whose disclosure could undermine specified interests, including the protection of the public interest, of the individual and of privacy, and may refuse access to documents in order to protect the institution’s interest in the confidentiality of its proceedings.

Openness in the Council

The Council is the Community legislature and is therefore the key decision making body. It is made up of the representatives (ministers) of the governments of the 15 member States. Formally there is only one Council whereas in practice different ministers will meet in Council to discuss different topics such as, for example, agriculture or transport or social affairs. It is the Council which embodies the intergovernmental nature of Community decision making.

Since the accession of Sweden and Finland to the Community there has been a big increase in transparency in Council decision making. Much information which was previously unobtainable directly from the Community institutions is available indirectly through the freedom on information procedures applicable in those member States.

Public access to Council meetings

On 6 December 1993, the Council amended its Rules of Procedure by Decision 93/662/EC. Article 4 of these Rules provides that meetings of the Council are not to be public except in the cases referred to in Article 6.

Article 6 provides:

- “1. The Council shall hold policy debates on the six-monthly work programme submitted by the Presidency and, if appropriate, on the Commission’s annual work programme. These debates shall be the subject of public retransmission by audio-visual means.

2. The Council may decide unanimously and on a case-by-case basis that some of its other debates are to be the subject of retransmission by audio-visual means, in particular where they concern an important issue affecting the interest of the Union, or an important new legislative proposal. To that end, it shall be for the Presidency, and member of the Council, or the Commission to propose issue or specific subjects for such a debate.”

Article 5 provides:

- “1. Without prejudice to Article 7(5) and other applicable provisions, the deliberations of the Council shall be covered by the obligation of professional secrecy, except in so far as the Council decides otherwise.

2. The Council may authorise the production of a copy or an extract from its minutes for use in legal proceedings.”

Article 9 of the Council’s Rules of Procedure provide that minutes of Council meetings are as a general rule to indicate, in respect of each item on the agenda, the documents submitted to the Council, the decision taken or the conclusion reached by the Council and the statement made by the Council and those whose entry has been requested by a member of the Council or the Commission. Article 22 states: “The detailed arrangements for public access to Council documents disclosure of which is without serious or prejudicial consequences shall be adopted by the Council.”

Decision 93/731/EC on public access to Council documents

On 20 December 1993, the Council adopted Decision 93/731/EC on public access to Council documents, the aim of which was to implement the principles established by the Code of Conduct.

Under Article 1 of that decision:

“The public shall have access to Council documents under the conditions laid down in this Decision. Council document means any written text, whatever its medium, containing existing data and held by the Council, subject to Articles 2(2).”

Article 4(1) of Decision 93/731 provides:

“Access to a Council document shall not be granted where its disclosure could undermine:

- (i) the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations),
- (ii) the protection of the individual and of privacy,
- (iii) the protection of commercial and industrial secrecy,
- (iv) the protection of the Community’s financial interests,
- (v) the protection of confidentiality as requested by the natural or legal person who supplied any of the information contained in the document or as required by the legislation of the Member State which supplied any of that information.”

Under Article 4(2): “Access to a Council document may be refused in order to protect the confidentiality of the Council’s proceedings”

Article 7 provides:

1. The applicant shall be informed in writing within the month by the relevant department of the General Secretariat either that his application has been approved or that the intention is

to reject it. In the latter case, the applicant shall also be informed of the reason for this intention and that he has one month to make a confirmatory application for that position to be considered, failing which he will be deemed to have withdrawn his original application.

2. Failure to reply to an application within a month of submission shall be equivalent to a refusal, except where the applicant makes a confirmatory application, as referred to above, within the following month.
3. Any decision to reject a confirmatory application, shall be taken within a month of submission of such application, shall state the grounds on which it is based. The applicant shall be notified of the decision in writing as soon as possible and at the same time informed of the content of Articles 138e and 173 of the Treaty establishing the European Community, relating respectively to the conditions for referral to the Ombudsman by natural persons and review by the Court of Justice of the legality of Council acts.
4. Failure to reply within one month of submission of the confirmatory application shall be equivalent to refusal.”

Council Decision 96/705/EC of 6 December 1996 amended Decision 93/731/EC providing essentially that the Secretary General of the Council has to report every two years on the functioning of the access provisions and allowing for extension of time limits in certain circumstances.

Access to minutes and statements of the Council acting as legislator

As a further concession towards transparency the Council, by a Presidency proposal on 27 September 1995, introduced this measure to give access to their minutes and statements when acting as legislator.

In February 1996 a fee was introduced relating to Council documents (Decision of the Secretary General of the Council). The fee of ECU 10 plus 0.036 ECU per sheet of paper will be charged for copies of printed documents exceeding 30 pages.

Fees can be charged for the provision of certain documents on the basis of the Decision of the Secretary General of the Council of 27 February 1996.

Openness in The Commission

The Commission is a central body in EC decision making. It has the exclusive right to initiate legislative proposals, it has the right to police the implementation of EC law by the member States and to propose fines on Member States and finally it has been delegated limited legislative power by the Council and has extensive administrative discretion to implement certain policies such as agriculture, competition law and trade defence mechanisms.

The Commission is the administration of the Community and its acts or omissions can and do have a significant impact on the lives of citizens.

Decision 94/90/EC on public access to Commission documents

Article 1 states that the Commission is to adopt the Code of Conduct from 15 February 1994. The Code of Conduct is attached as an annex to the Decision.

Article 2(5) gives a fee to be charged for documents in the same terms as those in the Council Decision of 1996 (see above).

The annex describes the method of applying for information and gives the exceptions when information will be refused. It states:

“The institutions will refuse access to any document where disclosure could undermine:

- (i) the protection of the public interest (public security), international relations, monetary stability, court proceedings, inspections and investigations,
- (ii) the protection of the individual and of privacy,
- (iii) the protection of commercial and industrial secrecy,
- (iv) the protection of the Community’s financial interests,
- (v) the protection of confidentiality as requested by the natural or legal persons that supplied the information or as required by the legislation of the Member State that supplied the information.

They may also refuse access in order to protect the institution’s interest in the confidentiality of its proceedings.”

Commission Decision 96/567 of 19 September 1996 amended Decision 94/90 allowing for the charging of fees for the provision of copies of information in certain circumstances.

Openness in the European Parliament

The Rules of Procedure of the Parliament (95/509/EC) cover public access to Parliamentary documents. Chapter XVI entitled “Public Record of Proceedings” r133(4) states:

“The minutes shall be signed by the Parliament and the Secretary-General and preserved in the record of Parliament. They shall be published within one month in the Official Journal of the European Communities.”

r134(3) covers verbatim reports stating:

“The verbatim report shall be published as an annex to the Official Journal of the European Communities.”

Chapter XVII deals with Committees and r152(2) covers committee meetings and states:

“Unless the committee decides otherwise, only adopted reports and statements prepared on the responsibility of the chairman shall be made public.”

Case law of the EC Courts on access to documents

Stanley Adams v EC Commission (1986).

In this case the court examined Article 214 EEC.

The court felt that although Article 214 primarily refers to information gathered from undertakings it does not restrict it to “information about undertakings, their business relations or their cost components” since that phrase is merely exemplary, being introduced by the typical expression “in particular”. The confidentiality principle in Article 214 is therefore a general one which applies also to information supplied by natural persons (presumably the Court is here referring to persons who are not enterprises; it is established that individuals can be “undertakings” if they engage in business activities), if that information is “of a kind” that is confidential.

“That is particularly so in the case of information supplied on a purely voluntary basis but accompanied by a request for confidentiality in order to protect the informant’s anonymity. An institution which accepts such information is bound to comply with such a condition”.

John Carvel and the Guardian Newspaper Ltd v Council of the European Union (1995).

The court discussed Decision 93/731 and stated:

“The Council is obliged under Article 4(1) to refuse access to documents where certain circumstances exist. Under Article 4(2), however, the Council enjoys a discretion as to whether or not to refuse a request for access to documents relating to its proceedings.

It is clear both from the terms of Article 4 of Decision 93/731 and from the objective pursued by that decision, namely to allow the public wide access to Council documents, that the Council must, when exercising its discretion under Article 4(2), genuinely balance the interest of citizens in gaining access to its documents against any interest of its own in maintaining the confidentiality of its deliberations.

Whenever access to documents is requested, the Council must balance the interests defined above and reach a decision in accordance with the applicable procedure.

The Council also has a margin of discretion under its Rules of Procedure which it should, in a proper case, use to give effect to its decision under Article 4(2) of Decision 93/731. It cannot, simply by not exercising its discretion under Article 5 (1) of its Rules of Procedure, defeat the citizens’ rights under Article 4(2) of Decision 93/731.

The Council did not comply with the obligation of balancing the interests involved, laid down by Article 4(2) of Decision 93/731.”

Kingdom of the Netherlands v Council of the European Union (1996).

This action brought by the Netherlands addressed the issues of the Code of Conduct and Decision 93/731.

Firstly, the applicant felt that the Code of Conduct did not constitute “an act having legal effects on the grounds that it is not an act within the meaning of Article 189 of the EC Treaty but

a text of a political nature setting out political agreements concluded between the Commission and the Council.”

Secondly, the Netherlands argued that the Council wrongly used, as a legal basis of Decision 93/731, Article 151(3) of the treaty and Article 22 of its rules of procedure, both of which are concerned with the Council’s internal organisation.

In his opinion on the issue the Advocate General of the Court stated:

“The domestic legislation of most Member States now enshrines in a general manner the public’s right of access to documents held by public authorities as a constitutional or legislative principle. The importance of this right has been reaffirmed at a Community level in particular in the declaration on the right of access to information annexed to the Final Act of the Treaty of the European Union. The European Council has called on the Council and the Commission to implement that right. In order to conform to this trend the Council deemed it necessary to amend its rules governing its internal organisation.

So long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organisation. Consequently the Council is empowered to adopt measures intended to deal with requests for access to documents in its possession.

Since, as a result, the Council was entitled to adopt Decision 93/731 on the basis of Article 151 (3) of the Treaty, it has not, as the Netherlands Government alleges, circumvented any procedure specially provided for by the Treaty in order to deal with circumstances of this kind and hence is not guilty of any misuse of power.”

The findings of the Advocate General were upheld by the Court.

WWF (UK) v Commission of the European Community

In this case the Court examined the code of conduct and found that there are two categories of exceptions to the general right of citizens right to access to Commission documents. The first exception related to the need to protect both public and private interest. The second exception is the need to protect the confidentiality of the Commission proceedings. The Court stated:

“The Commission must nevertheless exercise this discretion by striking a genuine balance between, on the one hand, the interest of the citizen in obtaining access to those documents and, on the other hand, its own interest in protecting the confidentiality of its deliberations.”

On the facts of the case the Court found that just because the Commission was considering opening infringement proceedings against a Member State under Article 169 EC (which gives the Commission absolute discretion) did not justify a refusal to release any documents in relation to the subject matter of the possible infringement.

Finally reference should be made to a series of problems in relation to access to information on investigations under the Commission’s competence to administer anti-dumping and competition policies. These cases are specific to the specific rights contained in the procedures of those policies.

PART II

The Petition Committee

This committee is responsible for matters relating to petitions, the examination of petitions and actions to be taken having received a petition. It is also responsible for relations with the Ombudsman.

Prior to the amendment of the European Parliament rules in January 1993, petitions were either requests or complaints. This classic distinction was of importance in determining the way in which they were dealt. Complaints were mainly requests for action in respect of the individual petitioner, while requests were petitions calling on Parliament to adopt a position on a general problem, often of a political nature, which did not necessarily affect the petitioner directly.

In 1993 Article 156 of the rules of procedure of the European Parliament were amended so as to remove the distinction between complaints and requests. Article 156 (1) now reads:

“Any citizen of the European Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the European Union’s fields of activity and which affects him, her or it directly.”

The Petition Committee report for 1996/97 has not yet been adopted however it is due for publication in the summer. Attached at annex I is a copy of the 1995/96 report.

Rights of Inquiry

Article 138c of the EC Treaty provides that:

“In the course of its other duties, the European Parliament may, at the request of a quarter of its members, set up a temporary Committee of Inquiry to investigate, without prejudice to the powers conferred by this Treaty on other institutions or bodies, alleged contravention or maladministration in the implementation of Community law, except where the alleged facts are being examined before a court and while the case is still subject to legal proceedings.

The temporary Committee of Enquiry shall cease to exist on the submission of its report.

The detailed provisions governing the exercise of the right of enquiry shall be determined by common accord of the European Parliament, the Council and the Commission.”

On the 19th of April 1995 the European Parliament, the Council and the Commission adopted a decision on the detailed provisions on the right of enquiry. Article 1 of Decision 95/167/EC, Euratom, ECSC states that the right of inquiry is to:

“investigate alleged contravention or maladministration in the implementation of Community law which would appear to be the act of an institution or a body of the European Communities, of a public administrative body of a Member State or of persons empowered by Community law to implement that law.”

The European Parliaments rules of procedure r136 paragraph 10 states:

“After completion of its work a temporary committee of inquiry shall submit to Parliament a report on the results of its work, containing minority opinions if appropriate. The report shall be published.”

However, Article 4 of Decision 95/167/EC states:

“1. The information obtained by the temporary committee of inquiry shall be used solely for the performance of its duties. It may not be made public if it contains material of a secret or confidential nature or names persons.

The European Parliament shall adopt the administrative measures and procedural rules required to protect the secrecy and confidentiality of the proceedings of temporary committees of inquiry.

2. The temporary committee of inquiry’s report shall be submitted to the European Parliament, which may decide to make it public subject to the provisions of paragraph 1.”

Since the establishment of this committee system there have been two temporary committees of inquiry.

Decision 96/C 7/01 (January 1996)

This set up an inquiry to investigate alleged contravention or maladministration under the Community transit system. The committee of inquiry must submit a report within 12 months of the date of publication of the decision setting it up.

Decision 96/C 239/01 (August 1996)

This inquiry investigated alleged contravention or maladministration in the implementation of Community law in relation to bovine spongiform encephalopathy (BSE) attached at annex II.

The positive outcome of the Parliament's inquiry into the BSE crisis is likely to encourage their use in many other situations. At the hearing on the adoption of the report the President of the Commission, Jacques Santer, agreed to reorganise the responsibilities in the Commission for food health and to bring forward proposals for the radical reform of the Common Agricultural Policy. This will be the first big shake up of DG VI (the agricultural directorate) since the foundation of the Community.

The Ombudsman

Article 138e(1) of the EC Treaty provides that:

“The European Parliament shall appoint an Ombudsman empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.”

The Ombudsman can initiate an inquiry on his own initiative or on the basis of complaints or through a request of a Member of Parliament “except where the alleged facts are, or have been, the subject of legal proceedings”.

Article 138e(2) provides:

“Where the Ombudsman establishes an instance of maladministration, he shall refer the matter to the institution concerned, which shall have a period of three months in which to inform

him of its views. The Ombudsman shall then forward a report to the European Parliament and the institution concerned. The person lodging the complaint shall be informed of the outcome of such inquiries.”

The Ombudsman’s duties are further governed by Parliament Decision 94/262/EC.

Article 3 provides:

“The Community institutions and bodies shall be obliged to supply the Ombudsman with any information he has requested of them and give him access to the files concerned. They may refuse only on duly substantial grounds of secrecy.

They shall give access to other documents originating in a Member State and classed as secret by law or regulation only where that Member State has given its prior agreement.

They shall give access to other documents originating in a Member State after having informed the Member State.”

Article 4 provides:

“The Ombudsman and his staff shall be required not to divulge information or documents which they obtain in the course of their inquiries.”

The Ombudsman publishes an annual report, the latest of which is for 1995 (annex III). The 1996 report will appear in the summer of 1997.

An example of the Ombudsman using his own initiative to initiate an inquiry is the report on the access to documents of the institutions and bodies of the European Communities annexed to the first LIUC paper in this series.

The Law Governing Lobbying

93/C 63/02 An open and structured dialogue between the Commission and special interest groups

This document (attached at annex IV) sort to describe the position of the institutions with that of interest groups and to suggest a plan for the regulation of such groups in the future. Its main suggestions were the establishment of a data base of non profit making organisations, self

regulation by interest groups, rules of conduct for interest groups and that the likely driving force behind these suggestions would be the Parliament.

Communication 93/C 166/04 on openness in the Community

Annex I section 3 of the communication (attached annex V) specifically addresses special interest groups. It states that the Commission and Parliament are to work together to create a data base containing information on interest groups. The data base is to be available to the general public as well as the institutions.

The Parliament is the institution most susceptible to the activities of interest groups. It has therefore been at the forefront of any moves to introduce controls concerning special interest groups.

The Ford Report on lobbying in the European Parliament

This report, first introduced in September 1995 and since amended by a second report in June 1996, (attached at annex VI) is a proposed amendment to Parliaments rules of procedure. It seeks to regulate:

“persons who wish to enter parliaments premises frequently with a view to supplying information to Members within the framework of their parliamentary mandate in their own interests or those of third parties.”

In return for access for up to one year the person must respect the code of conduct as annexed to the Rules of Procedure and sign a register. A person is then entitled to a pass with access to areas applicable to all other Union citizens and not to meetings of the Parliament apart from those open to the public.

Presently this remains a proposal for a Decision.

Code of Conduct for Lobbyists

In September 1994 six leading public affairs companies drew up a code of conduct which by November 1995 had 29 signatories. It states the following:

“In their dealings with the EU institutions, public affairs practitioners shall:

- (a) identify themselves by name and by company,
- (b) declare the interest represented,

- (c) neither intentionally misrepresent their status nor the nature of their inquiries to officials of the EU nor create any false impression in relation thereto,
- (d) neither directly nor indirectly misrepresent links with EU institutions,
- (e) honour confidential information given to them,
- (f) not disseminate false or misleading information knowingly or recklessly and shall exercise proper care to avoid doing so inadvertently,
- (g) not sell for profit to third parties copies of documents obtained from EU institutions,
- (h) not obtain information from EU institutions by dishonest means,
- (i) avoid any professional conflicts of interest,
- (j) neither directly nor indirectly offer any financial inducement to any EU official,
- (k) neither propose nor undertake any action which would constitute any improper influence on them,
- (l) only employ EU personnel subject to rules and confidentiality requirements of the EU institutions.”

CONCLUSION

An essential element of any political system is the power of the citizen to influence decisions. This power is generally exercised by the citizen's right to vote and elect the decision makers. Citizens elect members of the European Parliament, however those with the real power in EC decision making, the Commission and the Council are not elected. Therefore other effective forms of accountability must operate to replace this absence of a citizens fundamental rights. The methods of accountability adopted in recent years in the EC go some way to replacing the citizens loss of involvement in the decision making process, however, they are a poor substitute for direct elections and represent a substantial loss of influence by the citizen.