Why Europe Needs a Harmonised Access to Information Act

Neus Vidal Marti & Viktoria Kraetzig

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May the 3rd marks press freedom day around the world. Today, many articles and editorials will be published across Europe, highlighting the need to put an end to threats faced by journalists in Member States such as reporters being attacked by protestors while covering demonstrations or media outlets being sued by powerful individuals to prevent them from investigating them. While all these pan-European threats certainly need to be tackled – in fact the European Commission has recently addressed them via the Recommendation on the Safety of Journalists and the Anti-SLAPP Directive – one fundamental pan-European crisis faced by journalists across the continent remains widely ignored: the difficulties to access information held by public authorities and the disparities among Member States when requesting data.

This article aims to review the current situation of the right to request information from public bodies in EU Member States and offers a proposal that opens the door to discussing the possibility of harmonising such a right through the internal market competence. This is now more important than ever in the digital society we live in since, despite many benefits, the rise of digitisation can also bring dangers to democratic processes in Europe. External interference by foreign powers can easily be done through targeted content on social media and online, with rising fake content serving antidemocratic interests being disseminated to European citizens on a daily basis. Arguably, that makes the need to harmonise and strengthen access to verified information held by public authorities even more important, since reliable official information can act as a counterbalance to dubious and one-sided fake information.

The right to request information in Europe

The right to request information in possession of public bodies in Europe was first recognised by Nordic countries, and has been eventually followed by the majority of states in the continent. More recently, Austria has passed a new law on Access to Information (hereafter "ATI") while Germany still has to wait for its new federal transparency law, which was promised by the coalition government but has not been presented yet. ATI laws give all journalists and – most importantly – all citizens, a legal tool to know what their governments and representatives are doing and how taxpayer's money is spent. However, while broadly similar, each national law has different characteristics, from different time frames to reply to requests, to different exemptions to deny access or different appeal mechanisms. Even more important, the implementation of the law and how the law works in practice is not necessarily linked to the strength of the legal text, since political culture and a pro-transparency independent judiciary play an important role when predicting the outcome of requests for information. Strikingly, there is no database that systematically tracks the implementation of ATI Laws across the Union, but there is plenty of evidence that clearly indicates that disparities in the application of the law are creating inequality amongst European citizens: some information that can be requested from public authorities in one Member State can easily be denied when requested in a neighboring country.

In Spain, the Medicines Agency took the media outlet Maldita to Court over a resolution by the Transparency Council that stated that the agency had to release information requested by the outlet regarding agreements between the Spanish Government and

other countries to resell or donate Covid-19 vaccines (the Court eventually ruled in favour of the outlet). In Greece, the government refused to grant a request by NGO Vouliwatch to access information about a media advertising campaign by the executive and the distribution of public funds, which was clearly in the public interest. In Malta, the Shift News requested information about contracts and payments between public entities and Malta Today co-owner Saviour Balzan. The Information and Data Protection Commissioner ordered the disclosure of documents, but 30 public entities refused to oblige and challenged the decision at the Appeals Tribunal, forcing the media outlet to embark in a hugely time and resource-consuming process. In Germany, the Berlin-Brandenburg Higher Administrative Court ruled against Tagesspiegel and held that the chancellery didn't have to disclose off-the-record conversations between Angela Merkel and journalists on topics such as the refugee crisis or how to work with the far-right AfD party. The court did so after 5 years on the grounds that the government had changed since the case had been filed. And, to be fair, the European Union itself does not necessarily fair better in this regard as Päivi Leino-Sandberg's well-documented quest for background information on the EU's big Covid-relief measure shows (see here, here, only upon involvement of the Ombudsman and the General Courtsome material was eventually released, see here).

Now or never: Momentum for Harmonisation

As the aforementioned cases have shown, citizens face enormous challenges when attempting to access information held by public authorities in the European Union. This is extremely worrying in an age of disinformation, misinformation and AI-created content which threatens to affect democratic processes, including the important EU elections that will take place in June. How are public authorities spending taxpayer's money? Who have members of the government met before drafting a new law? ATI laws in Europe should be useful tools to answer all these questions and allow citizens to hold authorities accountable. It is clear that the current fragmentation of legislation is not working properly to defend the right to seek information by European citizens. Accessing information is essential to contribute to the public discourse and to take part in decision-making processes and elections, and therefore should be one of the most protected democratic European values. Hence, harmonisation of the right to access information in the European Union should be on the table – now more than ever before.

European institutions have already stated that some rights and freedoms such as media freedom must be protected and the best way to enshrine them is to establish common standards via harmonisation – as done with the European Media Freedom Act (EMFA). Arguably, the right to access information from public authorities across Europe could be defined as an even more important right to protect and to be harmonised, since it affects every aspect of what the Union stands for, from democratic values to fair competition.

This is even more relevant taking into account the role that digital information plays in democratic processes. States are now recording a huge amount of information that can be easily tracked digitally, greatly reducing the time and resources that would have been spent locating documents just 10 years ago. Additionally, most communications between public representatives are now automatically recorded, since they take place in written form via email or text message.

On that note, it is important to flag one of the biggest ATI conundrums of the last years since, while electronic communications are easy to track, they are also easy to delete. There can be no doubt that electronic communications between democratically elected representatives and interested actors (such as lobbyists and private companies) must fall under the scope of ATI Laws, but this is actually not recognised by all legal texts or public authorities. One of the most notorious recent cases dealing with this topic is the one involving the text messages between European Commission President Ursula von der Leyen and Pfizer's CEO Albert Bourla regarding the purchase of Covid vaccines. In 2023, the New York Times took the European Commission to the European Court of Justice for their refusal to publish the aforementioned

texts. The petition, initially sent by journalist Alex Fanta, was supported by the European Ombudsman.

These new circumstances in the digital age not only call for a reform of ATI laws in Member States, but also for an important step at the EU level: a European Acces to Information Act, since it is clear that no democracy will be able to endure in the digital age without transparency and accurate information.

Disparities in ATI law as an obstacle to the internal market

Reasons for the need to establish a harmonised ATI Law have already been laid out, and the following paragraphs will develop a first proposal on how to do it. If the European Media Freedom Act (EMFA) can be based on the internal market competence of Art. 114 TFEU (critical see Kraetzig), an EU harmonisation of ATI Law can as well. With the EMFA, the Commission tackled issues hindering the provision of media services in the internal media market on the basis of Art. 114 TFEU. The fragmentation of Access to Information law in the EU (EUI, Media Pluralism Monitor 2023, page 29 et seq.) is an obstacle for the internal media market. Why has it not been harmonised yet with the EMFA? What should have been done in the past must now be dealt with – we need harmonisation of ATI Law in the EU (on this see Alemanno).

To start with, the internal media market is hindered when journalists are not able to access government information in all Member States due to divergent legal regimes. If journalists in some domestic jurisdictions cannot access information while others can, such unequal access may create inequalities within the Community as regards conditions of competition – regarding public access to environmental information, Directive 2003/4/EC addresses such disparities in national laws (see its Recital 7). Moreover, cross-border investigations are made considerably more difficult or even impossible. Member States have their own rules on ATI with divergent exception provisions. Implementation and enforcement of the law also differs greatly. In Germany, for example, copyright has been a welcome defense against ATI (on the grounds of Section 6 Freedom of Information Act). It can be because the threshold for copyright protection is set so low that copyrights bars even reports written by civil servants based on templates from external access (German Federal Court of Justice, I ZR 139/15 – Afghanistan Papiere; on copyright as rule of law challenge, see Kraetzig). Unfortunately, not every applicant for information is a copyright expert and can oppose such practice (luckily, Frag den Staat could!) nor will they have the financial resources to go to court. In Hungary, in some cases lawyers do not even know the concrete legal basis when the state denies ATI – in court, they have to fight for ATI litigation-blind. However, harmonised rules on ATI would also benefit the internal market beyond the media market: administrative transparency does foster the free movement of capital in the internal market as the CJEU has repeatedly pointed out (Alemanno). Taking into account the principles of subsidiarity and proportionality, probably a directive with minimum standards for ATI law with the adoption of the lowest common denominator would be the appropriate measure. As the lines between directives and regulations are becoming more and more blurred anyway, it could also become a regulation.

Setting standards for a European Access to Information Act

Now is the time to identify which specific ATI instruments are suitable to set minimal standards at the EU level. One of the most relevant attempts at unifying criteria in Europe is the Council of Europe Convention on Access to Official Documents – known as the Tromsø Convention 2009 – which has only been ratified by 7 EU Member States. While the Convention is a useful tool, the current digital age needs to establish further requirements. Therefore, a European Access to Information Act should follow international standards and address the following points:

- Establishing a common definition of public authorities that allows all European citizens to have an equal right to access information regardless of the Member State they reside in.
- For the right of access to also cover digital communication, a broad definition of “informa-

tion" would have to be used. It is not the means of communication that matters, but the content. If politicians use a mobile phone to make policy, they must disclose the information on their phone.

- Ensuring that applicants can freely request information without disclosing unnecessary personal data and without having to motivate the request. The Act should ensure that accessing information held by public authorities is free of charge and available for all citizens to avoid disparities amongst states that charge and those who do not.
- Requests should always be answered by the competent public authority and no answer should not be considered a rejection of the request.
- Establish an independent body that can review cases such as an Information Commissioner, Ombudsman or Transparency Council.
- Establish clear procedural rules, including harmonising time frames to reply to requests.
- Exceptions to the right to access information should be harmonised, clearly defined and always motivated. They should be subject to a review process or appeal procedure. Exemptions must be designed in such a way that they strike a fair balance between the interests of access to information and the interests of third parties. In particular, the state should no longer be able to refuse access to information on the grounds of copyright if its civil servants have authored the requested documents, as seen in Germany.

This list aims to put forward a first proposal of minimum standards that should be taken into account when discussing the possible harmonisation of ATI in the EU, but by no means intends to be an exhaustive list of all stipulations that could potentially be included in such a text. The need for transparency is now extremely high, and the new European political cycle that will emerge after the June election should ensure that improving the access to information held by public authorities becomes a political priority that will help strengthen European democracy.

ABOUT THE AUTHORS

Neus Vidal Marti
Neus is the Executive Director of Seek Initiative.Neus is the Executive Director of Seek Initiative.
Viktoria Kraetzig
Viktoria Kraetzig is a postdoctoral researcher at Goethe-University, Frankfurt am Main. She is re:constitution Fellow 2022/2023 (CJEU/Univsersity of Cambridge).

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