

Public Access to Documents after the entry into force of the Amsterdam Treaty: Much Ado About Nothing?

Ulf Öberg

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Abstract

There is a trend towards recognising a general principle of public access to documents held by public authorities, both in national and in Community law. Once such a fundamental principle of Community law is established, the exceptions to public access to documents laid down in the internal rules of the institutions must not be construed or interpreted in a manner which will render it impossible to attain the objective of openness. To this effect, and in the light of the increasing – but still marginal – judicial review of the institutions refusals of access to documents, the European Ombudsman's inquires into public access to documents and his decisions on individual complaints of maladministration have provided an efficient and cost-effective recourse for European citizens. However, the entry into force of the Amsterdam Treaty and the subsequent adoption of secondary legislation is unlikely to resolve all the inadequacies of the current public access regime in Community law. This calls for a uniform interpretation of the law on public access to documents in the Community legal order.

Kurzfassung

Ein Trend zur Anerkennung des allgemeinen Prinzips des öffentlichen Zugangs zu Dokumenten von öffentlichen Einrichtungen ist sowohl auf nationaler als auch auf Gemeinschaftsebene festzustellen. Sobald dieses Grundprinzip des Gemeinschaftsrechts feststeht, dürfen Ausnahmen vom öffentlichen Zugang, die in den internen Regeln der Institutionen festgelegt werden, nicht in einer Weise gestaltet bzw. interpretiert werden, die die Erreichung des Ziels der Offenheit vereitelt. In Hinblick darauf und im Lichte der, wenngleich marginalen, Erweiterung der gerichtlichen Überprüfung der Verweigerungsakte der Institutionen, Zugang zu Dokumenten zu gewähren, haben sich die Untersuchungen der europäischen Ombudsperson sowie deren Entscheidungen über Individualbeschwerden wegen schlechter Verwaltungsführung als effizienter und kostengünstiger Rekurs für europäische Bürger erwiesen. Das Inkrafttreten des Amsterdamer Vertrages und die nachfolgende Verabschiedung von entsprechendem Sekundärrecht wird jedoch kaum alle Mißstände des aktuellen Regimes im Gemeinschaftsrecht beseitigen. Daher wird eine einheitliche Interpretation des Rechts auf Zugang zu Dokumenten in der Gemeinschaftsrechtsordnung gefordert.

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I. Introduction

In the last twenty years, most Member States of the European Union have adopted rules at constitutional or legislative level which confer on citizens a general right of access to documents held by public authorities. Constitutional provisions on public access have been introduced in Sweden (since 1766),(1) Spain (1978),(2) the Netherlands (1983),(3) Austria (1987),(4) Portugal (1989),(5) Belgium (1994).(6) and Finland (1995).(7) Legislative provisions exist in France (1978)(8), the Netherlands (1978)(9) Denmark (1985),(10) Austria (1987-1990),(11) Portugal (1993)(12) and Ireland (1997),(13) as well as, to a more limited degree, Greece (1986)(14) and Italy (1990).(15)

Germany, the United Kingdom and Luxembourg remain the only Member States where such a right does not yet exist. However, in Germany an Akteneinsichts- und Informationszugangsgesetz(16) has been adopted at the regional level in the Land of Brandenburg. Moreover, the UK Government has made a pledge to legislate for freedom of information, in order to bring about more open Government. A White paper, entitled "Your Right to Know"(17) was published in 1997 and submitted to the public as part of a wide consultation process. A draft bill is expected to be published in early 1999. Furthermore, access to official information have gained new momentum within the Council of Europe.(18) Among the candidates for accession to the European Union, the Senate of the Czech Republic has recently debated the passage of a freedom of information law, modelled closely on the United States' Freedom of Information Act (FOIA).(19).

In contrast to the development of such public access legislation in the Member States, the principle of secrecy has hitherto prevailed within the institutions of the European Union. The process of European integration is increasingly problematic in this respect. When certain government competencies – subject to democratic scrutiny and accountability within the constitutional orders of the Member States – are transferred to supra-national decision-making bodies, European citizens are

deprived of their "right to know" as regards the acts of their decision-makers⁽²⁰⁾ and a fundamental element of national and Community democracy is undermined.⁽²¹⁾

This dilemma was clearly illustrated in a judgment of the *Raad van State* (Netherlands Council of State) delivered on 7 July 1995 in the *Metten Case*.⁽²²⁾ In a decision of 2 October 1992, the Dutch Minister of Finance rejected a request, based on the provisions of the Dutch Act on Open Government, to provide access to the minutes of meetings of the Council of the European Communities (Economic and financial affairs) held by the Dutch Government. The latter, which normally champions transparency and public access to documents within the Community, took the view that the national Act on Open Government did not apply to such documents since the meetings of the Council of the European Communities were subject to secrecy under Article 18 of the Council's internal Rules of Procedure. In its judgment, the *Raad van State* interpreted the case-law of the Court of Justice of the European Communities (ECJ)⁽²³⁾ without referring the question to the Court for a preliminary ruling. It took the rather surprising view that the doctrine of primacy of Community law applied to the internal Rules of Procedure of Community institutions, even though they have no direct effect. Thus, access to the requested documents was denied since the secrecy clause in Article 18 of the Council's internal Rules of Procedure was considered to take precedence over the access provisions in national legislation and in the Dutch Constitution.⁽²⁴⁾

However, contrary to the assumption of the *Raad van State*, it is no longer true that all documents held by Community institutions are hidden by a veil of secrecy, unless they have expressly been rendered public. The Community legal order is subject to a progressive recognition of a general principle of access to documents held by public authorities (I). In the light of the increasing – but still marginal – judicial review of the institutions' refusals of access to documents, the European Ombudsman's own inquiry into public access to documents and his decisions on individual complaints of maladministration have provided an efficient and cost-effective recourse for European citizens (II). If, or when, a fundamental principle of Community law is established, providing citizens with a right of access to documents held by the European administration, any exceptions to that right laid down in the internal rules of the institutions must be construed or interpreted in a manner which will render it possible to attain the objective of openness (III). However, the entry into force of the Amsterdam Treaty and the subsequent adoption of secondary legislation is unlikely to resolve all of the inadequacies of the current public access regime in Community law. This calls for a uniform interpretation of the law on public access to documents in Community legal order (IV).

II. The progressive recognition of a general principle of access to documents in the Community legal order

Within the European Union, the importance of the right of access to documents was stressed, for the first time, in the Maastricht declaration on the right of access to information which links that right with the democratic nature of the institutions. Annexed to the Final Act of the Treaty on European Union, signed in Maastricht on 7 February 1992,⁽²⁵⁾ the Maastricht declaration provides: "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 the information available to the institutions."

With the purpose of bringing the Community closer to its citizens, the European Council called on the Council and the Commission to implement such a right on several occasions. In response to the

Maastricht Declaration and to those calls, the Commission undertook a comparative survey on public access to documents in the Member States and in some non-member countries. The results of this survey were summarised in a communication entitled "Public access to the institutions' documents" and were sent to the Council, the Parliament and the Economic and Social Committee.⁽²⁶⁾ In Annex II to a second Communication entitled "Openness in the Community",⁽²⁷⁾ the Commission formulated some basic principles and requirements which should govern access to documents, with a view subsequently to discussing them with the other institutions. It invited the other institutions to cooperate in this process and proposed that the policy of access to documents might take the form of an inter-institutional agreement.

At the meeting held in Copenhagen on 22 June 1993, the European Council invited the Council and the Commission to pursue their work on the basis of the principle of citizens' having the fullest possible access to information.⁽²⁸⁾ Nevertheless, instead of enacting general rules on public access to documents, the Council and the Commission preferred a more limited approach. On 6 December 1993 they adopted, by common agreement, a Code of Conduct (93/730/EC) concerning public access to Council and Commission documents⁽²⁹⁾ which enumerated the principles governing public access to documents in their possession. Each institution was to implement those principles by means of specific measures before 1 January 1994. By Council Decision 93/731/EC of 20 December 1993 on public access to Council documents,⁽³⁰⁾ the Council adopted provisions for the implementation of the principles set out in the Code of Conduct. Similarly, the Commission adopted, on 8 February 1994, Decision 94/90/ECSC, EC, Euratom on public access to Commission documents.⁽³¹⁾

In the interim, in *Netherlands v Council*,⁽³²⁾ the Dutch Government challenged before the ECJ the legal basis for the adoption of the Council's decision 93/731. It argued that the Council improperly relied on ex Article 151(3) (Article 207)⁽³³⁾ of the EC Treaty and Article 22 of its Rules of Procedure, both of which are concerned solely with the Council's internal organisation. The European Parliament intervened in support of the Dutch Government, arguing that, by basing the contested rules on ex Article 151(3) of the Treaty, the Council exceeded the powers of its internal organisation conferred upon it by that provision. The Parliament submitted that the requirement for openness constitutes a general principle common to the constitutional traditions of the Member States which is enshrined in Community law. Furthermore, it contended that the right to information, of which access to documents constitutes the corollary, is a fundamental human right recognised by various international instruments.

In this context, it should be recalled that it is settled case-law that fundamental rights form an integral part of the general principles of law whose observance the Community judiciary ensures.⁽³⁴⁾ For that purpose, the Court of Justice has on several occasions drawn inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have agreed or to which they have acceded. Furthermore, ex Article F(2) (Article 6(2)) of the Treaty on European Union provides that the Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (hereinafter the "ECHR") and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

It is, therefore, not surprising that Advocate General Tesauro, in his Opinion of 28 November 1995 in *Netherlands v Council*, considered that the basis for the individual's right to information should be sought in the principle of democracy, which constitutes one of the cornerstones of the Community edifice, as enshrined in the Preamble to the Maastricht Treaty and ex Article F of its Common Provisions. In the light of the recent changes which have taken place in the legislation of the Member States, Advocate General Tesauro concluded in that the right of access to official documents now constitutes part of that principle (paragraph 19 of the Opinion).

In its judgment of 30 April 1996, the Court of Justice stressed that 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 (*Netherlands v Council*, cited above, paragraph 34). The Court found that this trend "discloses a progressive affirmation of individuals' right of access to documents held by public authorities" and that accordingly, the Council deemed it necessary to amend the rules governing its internal organisation, which had hitherto been based on the principle of confidentiality (*Netherlands v Council*, paragraph 36). The Court added that, "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, which authorises them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration" (*Netherlands v Council*, paragraph 37).

Consequently, the Court found that, as Community law stood at that time, the Council was empowered "to adopt measures intended to deal with requests for access to documents in its possession" (*Netherlands v Council*, paragraph 39). The Court therefore dismissed the application.

Academic commentators are divided as to whether the Court in effect followed its Advocate General and actually recognised a general principle of access to documents in Community law in *Netherlands v Council*.

In favour of such an interpretation, see Bergeres, who stresses that the importance of the ruling of the Court should not be neglected: "Certes, celle-ci se situe dans une évolution normative et textuelle passablement confuse. Il n'en reste pas moins qu'un principe fondamentalement reconnu par les droits des États membres a été consacrée: celui de la liberté d'accès du public aux documents administratifs."(35)

According to De Smijter "La Cour semble dire que le droit d'accès du public aux documents détenus par les autorités publiques constitue un principe général de droit communautaire."(36)

Armstrong argues that the Court has appeared to recognise a Community law right of access to information (though in terms less express than those employed by the Advocate General), but "such a right does not appear to operate as a substantive standard of transparency with which to test the acts of the institutions."(37)

Chiti notes that optimistically, "the silence of the Court upholds the position of Tesauro on the right of access to documents as part of the democratic principle; but the many cases of judicial activism tell us that the shortcut taken by the Court is, more probably, a genuine lack of interest for the matter."(38)

Some commentators, such as Lafay, take the view that the Court, albeit revealing the essence of a general principle of access to documents in Community law, failed to pursue its reasoning and did not recognise the existence of a general principle.(39)

A minority view, represented by Dyrberg, believe that a general principle of access to documents probably does not exist in the present state of Community law.(40) Sejerstedt argues that the Court did not accept the existence of a general principle and adds that although the Court did not on the other hand explicitly refute its existence, the reference to the "Community legislature" may be interpreted as a cautiously passive attitude of the Court.(41)

If the Court denied the existence of a general right of access to documents in Community law in *Netherlands v Council*, the legal basis for such a right must be sought elsewhere, for example in the internal rules of the institutions. However, according to the case-law relied on by the Court in paragraph 38 of its judgment, the purpose of the Community institutions' internal Rules of Procedure is to organise the internal functioning of its services in the interests of good administration.(42) The essential purpose of such rules, particularly those with regard to the organisation of deliberations and the adoption of decisions, is to ensure the smooth conduct of the decision-making procedure. It follows that natural or legal persons may normally not rely on an alleged breach of such rules, since they are not intended to ensure protection for individuals (*Nakajima v Council*, cited above, paragraph 50). Nevertheless, as compliance with internal Rules of Procedure may constitute an essential procedural requirement, and may in some circumstances have legal effects vis-à-vis third

parties, their breach can give rise to an action for annulment within the meaning of ex Article 173 (Article 230) of the EC Treaty.(43)

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In paragraph 20 of his Opinion, Advocate General Tesauro clearly underlined that the fact that internal rules of the institutions may be invoked by third parties in no way establishes that they are the basis for citizens' right of access to documents held by the Community institutions and other organs: that right existed before the Council's Decision 93/731 was adopted. Accordingly, Advocate General Tesauro considered those acts to be confined to organising the operation of the institution in the light of that right. Moreover, he opined that their scope could not have been otherwise, as the very legal basis selected for their adoption shows that this was the sole objective pursued.(44) The Court seems to have followed this reasoning, since it considered that Decision 93/731 must only be regarded as a "measure intended to deal with requests for access to documents in its possession", adopted in the interests of good administration (*Netherlands v Council*, paragraph 39).

Therefore, Decision 93/731 cannot be regarded as a measure conferring on European citizens a substantive right of access to documents held by the Council.(45) It is not intended to invest in them a formal "right to know" what is going on within the European institutions. If such were the case, the Court would have been compelled, in my view, to strike down the Council's decision since it would manifestly have been adopted on an incorrect legal basis. Thus, in the absence of general rules on the right of public access to documents held by the Community institutions, European citizens' "right to know" must be found elsewhere. It has to be regarded as a general principle of Community law, drawn from the constitutional and legislative traditions common to the Member States. The formal and explicit recognition of such a fundamental principle constitutes the missing link in the reasoning of the Court in *Netherlands v Council*.

The consequence of this reasoning is that when assessing the legality of a decision refusing access to a particular document, the Community judicature will have to determine whether the rights conferred on citizens by virtue of this general principle were effectively guaranteed. In other words, "a decision of refusal of access to documents, albeit adopted in full compliance with [the institution's] self-imposed rules on public access, would have to be regarded as unlawful if it resulted in fact in a negation of the essential substance of the right of information" (Opinion of Advocate General Tesauro in *Netherlands v Council*, paragraph 21).

Nevertheless, the Court of First Instance of the European Communities (CFI) initially seemed to take a diametrically opposed position on the legal nature of the Council's and the Commission's internal rules of access to documents. In *Carvel and Guardian Newspapers v Council*,(46) (47) the CFI stated that Council Decision 93/731 is the only "legislative measure" which deals with public access to documents, which governs citizens' rights of access to documents, and which contains provisions relating to the implementation of the principle of transparency (paragraph 62 of the judgment).

In a subsequent ruling, the CFI relied on the doctrine of estoppel – according to which institutions are bound by their own internal rules – and held that the Commission has, by adopting Decision 94/90, indicated to citizens who wish to gain access to documents which it holds that their requests will be dealt with according to the procedures, conditions and exceptions laid down for that purpose.(48) Although Decision 94/90 is in effect regarded as a series of obligations which the Commission has voluntarily assumed for itself as a measure of internal organisation, it is, in the CFI's view, nevertheless capable of conferring on third parties legal rights which the Commission is obliged to respect (*WWF UK v Commission*, paragraph 55).

In its judgment of 6 February 1998 in *Interporc v Commission*(49), the third chamber, extended composition, of the CFI went a step further. It stated that Decision 94/90 is "a measure conferring on citizens a right of access to documents held by the Commission" (paragraph 46). The CFI held that it is clear, from its overall scheme, that Decision 94/90 is intended to apply generally to requests for access to documents, and that, by virtue of the decision, any person may request access to any unpublished Commission document and is not required to give a reason for the request (*Interporc v Commission*, paragraph 48).

Moreover, the CFI seems to have implicitly recognised the existence of a general principle of access to Commission documents in *Interporc*. The CFI held that the exceptions to the citizens right of access to documents held by the Council and the Commission must be construed and applied strictly, "in order not to defeat the application of the general principle of giving the public 'the widest possible access to documents held by the Commission'".(50)

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Adopting the same reasoning, the CFI held in *Svenska Journalistförbundet v Council*,(51) that Decision 93/731 is a measure which confers on citizens rights of access to documents held by the Council. Although the Court once more avoided the plea of a breach of the fundamental principle of Community law granting citizens of the European Union the widest and fullest possible access to Community institutions' documents, it nevertheless stated that the objective of Decision 93/731 *is to give effect to the principle of the largest possible access for citizens to information* with a view to strengthening the democratic character of the institutions and the trust of the public in the administration. The CFI also recalled that Decision 93/731, like Decision 94/90, does not require that members of the public must put forward reasons for seeking access to requested documents.

However, the uncertainty of the Court of First Instance is revealed in *van der Wal v Commission*,(52) handed down a month after *Interporc*. The fourth chamber of the CFI stated that the exceptions to right of access to documents held by the Commission must be construed and applied strictly, in order not to defeat the application of the general principle *laid down in the decision*. As has been indicated, the internal rules of the institution are not intended to ensure such protection for individuals, and it is highly unlikely whether the institutions can create a general principle of Community law by virtue of their power of internal organisation. The confusion on the legal basis of a right of access to documents and/or the existence of a general principle of Community law is reinforced by the fact that in *van der Wal*, the CFI for the first time addressed a plea that it would be contrary to traditions of public access, to the review of acts of the administration and to the conventional separation of powers if communications from the administration to the judiciary, on the basis of Notice 93/C 39/05 on co-operation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty,(53) were not accessible to the public. The CFI dismissed the last two arguments as being unfounded on the ground that "the applicant has not shown how the principle of the separation of powers and 'review of acts of the administration' (*le 'caractère contrôlable de l'administration'*) would not be respected if the replies provided by the Commission to national courts in the context of the Notice were not made accessible to the public merely on request to the Commission".(54)

Since *van der Wal* is the first public access case to be appealed,(55) the cautious and somewhat hesitant case-law of the CFI calls for a clarification from the Court of Justice on the scope and the legal status of the internal rules of the institutions in the light of the existence – or absence – of a general principle of public access to documents in Community law. If the critics claims of the Court's "genuine lack of interest for the matter" remain unchallenged, the uncertainty of the legal status and interpretation of the internal rules may either generate an increasing number of appeals in order to clarify the law or, on the contrary, lead European citizens to doubt of the effectiveness of

judicial review when challenging secrecy within the institutions.

III. The European Ombudsman's Inquiries into Public Access to Documents

With the view to setting a good example to others, including presumably the Community institutions and organs, the European Ombudsman(56) Jacob Söderman set out in his first Annual Report of 1995(57) to act as openly as possible and has adopted implementing provisions on public access to documents held by the Ombudsman.(58) Documents held by the Ombudsman's office, which do not concern complaints, are public unless the Ombudsman considers that confidentiality is required either by the Treaties, the Statute of the Ombudsman, any other provision of Community law, or, more regrettably, in order to protect the interest in the confidentiality of his proceedings or the running of his office.

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In June 1996, the European Ombudsman launched an own-initiative inquiry into public access to documents held by Community institutions and bodies other than the Council and the Commission. Recalling the case-law of the Court in *Netherlands v Council*, the Ombudsman concluded that it appeared that, in relation to requests for access to documents, Community institutions and bodies have a legal obligation to take appropriate measures to act in conformity with the interests of good administration. The Ombudsman considered that the adoption of such rules promotes transparency and good relations between citizens and the Community institutions and bodies in several ways: the process of adopting rules requires the institution or body to examine, for each class of documents, whether confidentiality is necessary or not. In the context of the Union's commitment to transparency, this process itself encourages a higher degree of openness. Furthermore, the Ombudsman stressed that if rules are adopted and made publicly available, citizens who request documents can know their rights. Finally, the rules themselves can also be subject to public scrutiny and debate, and clear rules can promote good administration, helping officials to deal accurately and promptly with public requests for documents.

Taking into account the case-law of the Court, the Union's commitment to transparency and the existence of a single institutional framework for the Union, the Ombudsman concluded in his Decision in the own initiative inquiry into public access to documents(616/PUBAC/F/IJH)(59) of 20 December 1996 that failure to adopt rules governing public access to documents could constitute an instance of maladministration. He therefore made draft recommendations to the institutions and bodies concerned that they should adopt such rules in respect of all documents not already covered by existing legal provisions allowing access or requiring confidentiality and make them easily available to the public.

The full list of institutions and bodies covered by the inquiry included the European Parliament,(60) the Court of Justice,(61) the Court of Auditors,(62) the European Investment Bank,(63) the Economic and Social Committee,(64) the Committee of the Regions,(65) the European Monetary Institute,(66) the Office for Harmonization in the Internal Market,(67) the European Training Foundation,(68) the European Centre for the Development of Vocational Training (Cedefop),(69) the European Foundation for the Improvement of Living and Working Conditions,(70) the European Environment Agency,(71) the Translation Centre for Bodies of the European Union,(72) the European Monitoring Centre for Drugs and Drug Addiction(73) and the European Agency for the Evaluation of Medicinal Products.(74)

Out of the fourteen other bodies to which the draft recommendations were addressed, (75) thirteen have as of 1 January 1998 adopted rules governing public access to their documents. This is the case with:

- the European Parliament Decision 97/632/EC, ECSC, Euratom of 10 July 1997 on public access to European Parliament documents; (76)
- the Court of Auditors' Decision no. 18/97 of 7 April 1997 laying down internal rules for the treatment of applications for access to documents held by the Court; (77)
- the European Investment Bank's Rules on public access to documents adopted by the Bank's Management Committee on 26 March 1997; (78)
- the Economic and Social Committee Decision on public access to ESC documents; (79)
- the Decision of the Committee of the Regions of 17 September 1997 concerning public access to documents of the Committee of the Regions; (80)
- the Decision n° 9/97 concerning public access to administrative documents of the European Monetary Institute (EMI); (81)
- the Decision of the Governing Board on public access to European Training Foundation documents; (82)
- the European Centre for the Development of Vocational Training (Cedefop), which has adopted the Commission's rules and procedures;
- the European Foundation for the Improvement of Living and Working Conditions;
- the Decision of 21 March 1997 on public access to European Environment Agency documents; (83)
- the Translation Centre for Bodies of the European Union's rules for access to Translation Centre documents, adopted on 17 November 1997; (84)
- the European Monitoring Centre for Drugs and Drug Addiction, which has also adopted the Commission's rules and procedures;
- the Decision on rules on access to documents of the European Agency for the Evaluation of Medicinal Products (EMA). (85)

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So far, the Court of Justice is the only institution that has not adopted internal rules on public access to documents. According to the Ombudsman, the Court of Justice stated in its detailed opinion that it had extreme difficulty in establishing a clear separation between documents which relate to its judicial role and those which do not. The Court also informed the Ombudsman that it had instructed its Committee on the Rules of Procedure to study all questions concerning access to judicial documents and that there was a strong possibility that this could result in proposed amendments of the Rules of Procedure of the Court.

The achievements of the European Ombudsman by his own-initiative inquiry into public access to documents held by Community institutions and bodies other than the Council and the Commission should not be underestimated. One could regret that the Ombudsman did not make any recommendation concerning the substance of the rules to be adopted and only suggested that they consider the adoption of rules on public access to documents similar to those of the Commission and the Council. (86) On the other hand, in a Special Report of 15 December 1997 by the European Ombudsman to the European Parliament following his own initiative inquiry into public access to documents, (87) the Ombudsman concluded that the rules on public access to documents held by Community institutions and bodies are generally quite limited, compared to the provisions governing some national administrations. In particular, most internal rules of the Community administration do not give a right of access to documents held by one body, but originating in another. Nor do they require the establishment of registers of documents which could both facilitate citizens' use of their

right of access and promote good administration.

On 16 July 1998, following the Thors Report,^(87a) the European Parliament adopted a resolution on the special report by the European Ombudsman to the European Parliament following his own-initiative inquiry into public access to documents.^(87b) It regretted the fact that secrecy, confidentiality and discretion are too often the rule in the Commission and the Council, and trusted that the confidential discussions which also form part of the parliamentary process, alongside public legislative decisions, will remain an exception for which special reasons must be given. The Parliament endorsed the view expressed by the European Ombudsman that the Court of Justice and the Court of First Instance should enact rules on access to documents as soon as possible and publish them in the Official Journal. It did not, however, specifically address the substance of the internal rules adopted by the institutions and other organs of the Community, but pointed out that those rules bestow on third persons rights which the institutions are obliged to respect.

Some of the deficiencies in the internal rules of the institutions may be dealt with by the Ombudsman in the context of individual complaints concerning instances of maladministration on the basis of Article 195 (ex Article 138 e) of the EC Treaty. This remedy provides European citizens with a relatively informal, inexpensive and less time-consuming alternative to judicial review when challenging refusals of the institutions to provide access to a requested document.

An example of the Ombudsman's powers of coercion in public access cases is illustrated by one of the six complaints in the Statewatch case. Mr Bunyan, editor of Statewatch bulletin,⁽⁸⁸⁾ uses a systematic technique to obtain access to all Council JHA documents. The technique consists of initially requesting the agendas of all the Council bodies dealing with Justice and Home Affairs (JHA) matters and subsequently requesting all the documents included on those agendas. In four separate requests made on the basis of Decision 93/731, Mr Bunyan asked for the minutes of fourteen meetings of the "K4 Committee", which comes under the Council of Justice and Home Affairs (JHA) ministers. On 3 April 1996, the General Secretariat of the Council replied to the application, stating that the request was "a repeat application which relates as well to a very large number of documents". As a "fair solution" under Article 3(2) of Decision 93/731, the General Secretariat rejected the first three requests *en bloc* and provided five documents related to the fourth request. Mr Bunyan made a confirmatory application for the other nine documents. On 23 May 1996, the Presidency of the Council confirmed the original decision.

According to Article 3(2) of Decision 93/731, "[t]he relevant departments of the General Secretariat shall endeavour to find a fair solution to deal with repeat applications and/or those which relate to very large documents".

In his complaint to the Ombudsman, Mr Bunyan claimed that the Council was not entitled to rely on Article 3(2) of Decision 93/731 as a reason to reject part of the application for documents because:

- (a) he had never applied for the documents in question before whereas the term "repeat applications" refers to a situation in which a person applies for the same document again and again;
- (b) Article 3(2) refers to "very large documents", not "a very large number of documents" as mentioned in the reply from the General Secretariat. Furthermore, in February 1996 the Council introduced a system of charging for documents supplied, whereby the size or number of documents requested had become irrelevant.

According to the Council's opinion to the Ombudsman, "the concept of a "repeat application" refers *inter alia* to cases in which a person regularly and systematically requests over a long period of time access to a large number of documents of the same type, not necessarily identical." The Council also claimed before the Ombudsman that "the volume of documents requested is a separate criterion

which may justify the application of a fair solution, even if the request is not a repeat one". The complainant contested the Council's interpretation of the term "repeat application" and claimed that the General Secretariat's reply to his initial application was wrong when it considered that Article 3(2) also applies to applications for a very large number of documents.

In his decision of 28 June 1998,(89) the Ombudsman recalled the CFI's recent case-law in *Svenska Journalistförbundet*, according to which Decision 93/731 confers upon citizens rights of access to documents held by the Council. He stressed that any person is entitled to ask for access to any Council document without being obliged to put forward reasons for the request and drew the logical conclusion that access to documents cannot therefore legitimately be blocked by the Council because of a possible negative attitude towards the purposes for which a request has been made, or the person who has made it.

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The Ombudsman stated that the term "repeat application" appears naturally to refer to applications for the same document. On this interpretation, the practical effects of Article 3(2) include the possibility of a fair solution to allow the Council services to deal efficiently with cases in which the same person makes repeated applications for the same document, hoping or claiming that the circumstances which motivated previous refusals may have changed. To extend the meaning of "repeat applications" so as to include applications by the same person for different documents could defeat the application of the general rule: Decision 93/731 does not impose any limit on the number of documents for which a citizen may apply as of right. In the absence of such a limit, moreover, the Council's interpretation could infringe the principle of legal certainty. Indeed, it would not be possible to know in advance how many different documents could be requested before the Council would consider the application to be a "repeat application."

Finally, the Ombudsman pointed out that similar arguments applied against an interpretation of Article 3(2) so as to bring all applications for a very large number of documents within its scope, since it leads to the same practical result as interpreting "repeat application" to include applications by the same person for different documents. Recalling that the Court of Justice is the highest authority on the meaning and interpretation of Community law, the Ombudsman concluded that the Council incorrectly interpreted Article 3(2) of Decision 93/731 and that it was not entitled to rely on that Article as a reason to reject part of the complainant's application for documents in this case. The term "repeat applications" in Article 3(2) does not, in the Ombudsman's view, include applications by the same person for different documents, nor is the Article to be interpreted so as to bring all applications for a very large number of documents within its scope. It now only remains to be seen how the Council will comply with the Ombudsman's latest recommendations in the Statewatch complaints.

The European Ombudsman has significantly contributed to promote a culture of openness and an awareness of the importance of public access to documents within the institutions. His interventions raise important legal issues on the scope of the Ombudsman's powers and the relationship between his role and that of the Community Courts. The binding effects of his recommendations are disputed by the institutions, who reluctantly have to reconsider their previous decisions not to grant access to documents. In these respects, is somewhat surprising that the Ombudsman still avoids to express any views as to the existence of a general principle of access to documents in the Community legal order which is independent of the internal rules of the institutions. Indeed, this issue is central when examining the exceptions to public access to documents provided in the those internal rules.

IV. Exceptions to Public Access to Documents under the

current Internal Rules of the Institutions

In general, the case-law of the Court of Justice and the Court of First instance shows that the Community judiciary has not hesitated to undertake a "comprehensive review" of challenged administrative decisions rather than to limit itself to an appreciation of the institution's exercise of discretion.⁽⁹⁰⁾ The facts and considerations on which such decisions are based are examined in considerable detail. In cases where the decision-making authority has had to assess complex economic or technical issues, the Community Courts have opted for a "marginal review", meaning that it will only verify whether the relevant procedural rules have been complied with, whether the statement of reasons is adequate, whether the facts have been accurately stated and whether there has been any manifest errors of appraisal or misuse of powers.⁽⁹¹⁾

However, in access to document cases decided to date, the CFI seems to have opted only for marginal judicial review. It thereby avoids the need to examine in detail the considerations on which a decision of refusal is based and/or to perform *in camera* examinations of requested documents. The CFI has to date concentrated its review on the duty of the institutions to give reasons when denying access to a given document. This quite limited approach is also illustrated by the CFI's interpretation of the exceptions to the right of access provided for in the internal rules of the institutions.

The Code of Conduct and the Council Decision 93/731 lay down, in almost identical terms, interests which may be invoked by the two institutions as grounds of rejection of a request for access to documents. Article 4(1) of Decision 93/731 lists the grounds on which access to a Council document will not be granted, namely "where its disclosure could undermine:

- the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations),
- the protection of the individual and of privacy,
- the protection of commercial and industrial secrecy,
- the protection of the Community's financial interests,
- 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."

In addition, Article 4(2) allows the Council to refuse access to a document in order to protect the confidentiality of its proceedings.

As regards those internal rules, the CFI considers that the Code of Conduct and Decision 93/731 contain two categories of exception to the general principle of citizens' access to Commission and Council documents: five "mandatory exceptions" and the "discretionary exception", constituted by the confidentiality of its proceedings (*WWF UK*, cited above, paragraph 57; *Interporc*, cited above, paragraph 42; *van der Wal v Commission*, cited above, paragraph 50).

According to the wording of the first category, drafted in mandatory terms, the Commission and the Council are, according to the CFI, *obliged* to refuse access to documents falling under any one of the exceptions contained in this category once the relevant circumstances are shown to exist ⁽⁹²⁾. In the *Interporc* and *van der Wal* cases, the CFI added that before deciding on a request for access to documents the Commission must consider, *for each document requested*, whether, in the light of the information in its possession, disclosure is in fact likely to undermine one of the interests protected under the first category of exceptions (*Interporc*, cited above, paragraph 52; *van der Wal*, cited

above, paragraph 43).

By way of contrast, the wording of the "discretionary exception" provides — still according to the CFI — that the Commission and the Council enjoy a *margin of discretion* which enables it, if need be, to refuse a request for access to documents which touch upon its deliberations. The CFI has held that the Council and the Commission must strike a genuine balance between, on the one hand, the interest of the citizen in obtaining access to those documents and, on the other, its own interest in protecting the confidentiality of its deliberations.(93)

The Community Courts have consistently held that the reasoning required by ex Article 190 (Article 253) of the EC Treaty must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure so as to enable the persons concerned to ascertain the reasons for the measure in order to protect their rights, and the Court to exercise its power of review.(94) In *Interporc*, the CFI therefore stressed that in order to comply with those requirements, the statement of the reasons for a decision of refusal of access to documents must contain – at least *for each category of documents* concerned – the specific reasons for which the institutions consider that disclosure of the documents requested is precluded by one of the exceptions provided for in the first category. This is necessary in order to enable the person to whom the decision is addressed to satisfy himself that the institutions do in fact consider the documents in the proper manner and to assess whether the grounds for refusal are justified (*Interporc*, cited above, paragraph 54).

However, if a general principle of access to documents exists in Community law, independently of the internal rules of the institutions, it is doubtful whether the institutions would be entitled to restrict such a fundamental right, linked to the democratic nature of the institutions, by virtue of their power of internal organisation. With the recognition of such a general principle, the CFI's interpretation of the exceptions laid down in the internal measures of the institutions would probably have to be revisited. The basis for the exceptions to public access to documents held by the institutions must instead be sought in the secrecy provisions laid down in the Treaties, in secondary legislation and, if need be, in general principles of law.

From this perspective, Article 2(2) of Council Decision 93/731 and the corresponding provisions in the other internal rules of the institutions are highly questionable. According to Article 2(2) of Decision 93/731, "[w]here the requested document was written by a natural or legal person, a Member State, another Community institution or body, or any other national or international body, the application must not be sent to the Council, but direct to the author". In practice, such provisions defeat the application of the general principle on public access to documents held by the Community administration.

In a decision of 30 June 1998(95) in another of the Statewatch complaints, the Ombudsman stressed that Article 2(2) of Decision 93/731 is not presented in the form of an exception to the general rule of public access. In practice, he noted, it however functions as an exception, since its consequence is that incoming documents are completely excluded from the scope of application of the general rule.

Although the Ombudsman did not take a formal position on the matter of incoming documents in this decision, he stressed that to include documents of which the Council is a joint author within the scope of Article 2(2) would considerably broaden the scope of this de facto exception. He recalled that according to the case-law of the Court of First Instance in public access to document cases decided to date (*Carvel and Guardian Newspapers*, *WWF UK* and *Svenska Journalistförbundet*), where a general principle is established and exceptions to that principle are then laid down, the exceptions should be construed and applied strictly, in a manner which does not defeat the application of the general rule. The European Ombudsman concluded that neither the express wording of Article 2(2) nor the case-law of the CFI supports the Council's position that documents of which it is a joint author fall within the scope of Article 2(2).

As has been correctly pointed out by the Select Committee on European Legislation of the House of Commons, the mere fact that a document has been written by a person outside the Council Secretariat should not of itself be a reason for refusing access to it, if the document was written with a view to influencing the Council when acting in its legislative capacity.⁽⁹⁶⁾ The same could be said of the other institutions, even in cases when they are acting in other capacities. If there are compelling reasons to maintain the confidentiality of a third party document, an exception for the protection of commercial and industrial secrecy or for the protection of the individual and of privacy may be invoked.

Therefore, the right of access to incoming documents held by the Community administration but originating from third parties must be sought in the general principle of Community law of access to documents.⁽⁹⁷⁾ This has been implicitly recognised by the Court in *Netherlands v Council*, since the judgment consistently refers to documents "held by public authorities" and documents "in the possession" of the institutions (paragraphs 36 and 39 of the judgment). Such an interpretation is also supported by the fact that the term "document" is defined in the Code of Conduct as meaning "any written text, whatever its medium, which contains existing data and is held by the Commission or the Council."

Attempts have already been made to widen the scope of the exceptions to public access to documents by amending the internal rules of the institutions. In the 1996 report on the implementation of Council Decision 93/731, the Secretary General of the Council noted that the Council has consequently refused to release documents containing legal positions of the Council Legal Service on the grounds that their content either falls within the scope of Article 4(1), in particular the protection of the public interest (public security, court proceedings), or was part of the Council's proceedings that the Council deemed necessary to protect for reasons of confidentiality (Article 4(2) of Decision 93/731).⁽⁹⁸⁾ In order to regularise this practice, the Secretary General suggested to supplement Article 4(1) of the Council's Decision by adding the words "legal certainty" as a new ground for exemption of public access to documents held by the Council. This would, according to the Secretary General, be justified by the need to ensure the independence of the Legal Service as legal adviser to the Council, a relationship compared to legal privilege existing in lawyer-client relationships. However, the Council resisted this temptation, since it did not see any need to alter the basic features of the Decision.⁽⁹⁹⁾ In this respect, it should also be noted that in *Svenska Journalistförbundet*, cited above, the CFI held that Decision 93/731, in Articles 1(2) and 2(2), expressly provides that it is to apply to all Council documents. Decision 93/731 therefore applies irrespective of the contents of the documents requested (paragraph 81).

Nevertheless, in an Order of 3 March 1998 on an application for a provisional ruling, the President of the Court of First Instance, Judge Saggio, upheld the Council's refusal to provide access to two opinions from the Council Legal Service. According to Judge Saggio, the necessity to ensure "the protection of legal security and of the stability of Community law" as well as the need to safeguard "the Council's possibility to obtain independent legal advice" constitute *prima facie* legitimate reasons to refuse access.⁽¹⁰⁰⁾ The case is now being heard on its merits by the third chamber of the CFI (Judges Tiili (Rapporteur), Briët and Potocki).

On a more positive note, the Council has agreed, in the context of the bi-annual review of Council Decision 93/731/EC on public access to Council documents provided for in Article 9 of that Decision, that access to Council documents should be granted, whenever possible, when the Council acts as legislator. In those cases, Article 4(2) of the Decision (refusal of access in order to protect the confidentiality of the Council's proceedings) will continue to be invoked only as strictly necessary.

V. Towards a Uniform Interpretation of Public Access to Documents in Community law?

During the Intergovernmental Conference that led to the signature of the Amsterdam Treaty, an increasing number of Member States gradually recognised that openness in the operation of the Union and its institutions is essential in order to ensure that the Union is understood and accepted by its citizens.

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The final report from the Chairman of the Reflection Group on the 1996 Intergovernmental Conference, entitled "A Strategy for Europe",⁽¹⁰¹⁾ stated that "citizens are entitled to be better informed about the Union and how it functions. Many of us propose that the right of access to information be recognised in the Treaty as a right of the citizens of the Union. Suggestions have been made on how to improve the public access to Union's documents which should be examined by the Conference."

Proposals were put forward during the IGC by Sweden, Denmark, Finland, the Netherlands as well as by the Italian, Irish and Dutch Presidencies that the principle of public access to documents held by EU institutions and organs be inserted in the Treaty. The right of public access would be ensured as the general rule and precise exceptions would be defined either in secondary legislation which the Council would decide upon or in the internal rules of procedure of each institution. This contrasted sharply with the initial position of the United Kingdom and the view of some other Member States that no change should be made to the present system, whereby documents may be requested but that their release should be subject to the confidentiality of the Council's proceedings.⁽¹⁰²⁾ The general principle would thus remain that the Council would take a decision to grant access.⁽¹⁰³⁾

Once the idea of inserting a public access provision in the Treaty had been accepted, the main points of disagreement in the negotiations related to:

- The scope of such a general principle: should documents under the three pillars and within all institutions and bodies of the Community be covered, and would it include both incoming documents and those established within the institutions?
- The hierarchy of norms: should the list of interests that may limit public access to documents be enumerated in the Treaty, in secondary legislation or under the rules of procedure of each institution?
- The decision-making procedure for secondary legislation: should the conditions for openness and its derogations be adopted by qualified majority or by unanimity in the Council? Should it be adopted by codecision or after simple consultation of the European Parliament?

According to its opening provision, the Amsterdam Treaty signed on 2 October 1997⁽¹⁰⁴⁾ marks a new stage in the process of creating an even closer union between the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen (Article 1 [ex Article A] of the Treaty on European Union). An important step forward has been taken in strengthening the democratic nature of the European Union, without reference to the somewhat misleading notion of *transparency*,⁽¹⁰⁵⁾ but rather by a codification of a *general principle of openness*. This amendment puts an end to the general principle of confidentiality which has until recently prevailed in the internal organisation of the institutions.

It remains however to be seen whether the Amsterdam Treaty will abolish a form of government

which included rules and legitimised practices moulded on those of the international Community, characterised by Judge Mancini of the European Court of Justice as members of the Council of Ministers confining themselves to "rubber-stamping, in most cases behind closed doors, drafts prepared by an ambassadorial college (COREPER) and, at a lower level, by numberless, faceless and unaccountable committees of senior national experts".⁽¹⁰⁶⁾ Indeed, as has been pointed out by Judge Ragnemalm, in the absence of judicially enforceable rules which confer on European citizens a general right of access to documents held by public authorities and which are limited by strict, clear and precise grounds of public or private interest in order to protect justified interests of confidentiality, there is no substance in the promises of increased openness.⁽¹⁰⁷⁾ In other words, the *effet utile* of the principle of openness enshrined in the new Article 1 of the Treaty on European Union may be seriously undermined if the Community legal order does not provide a mechanism to ensure public access to documents.

By amending the EC Treaty's provisions common to several institutions, the Amsterdam Treaty establishes a right of any citizen to have access to European Parliament, Council and Commission documents. Within a period of two years following the entry into force of the Treaty, the Community legislator will determine the general principles and limits governing the right of access to documents in a regulation to be adopted under Article 255 of the EC Treaty (ex Article 191a), which reads:

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"1 Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a 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 264 [ex Article 189b] within two years of the entry into force of the Treaty.

3 Each institution referred to above shall elaborate in its own rules of procedure specific provisions regarding access to its documents."

This provision in the Treaty follows Article 254 (ex-Article 191) which provides the obligation to publish regulations and directives of the Council and of the Commission in the Official Journal. This positioning is symptomatic of the resistance of some Member States to acknowledge the fact that it is no longer true that everything is secret unless expressly stated to be accessible, as underlined by Advocate General Tesauro in his Opinion in *Netherlands v Council* (paragraph 15 of the Opinion). The Netherlands government's initial attempts during the Intergovernmental Conference to include a public access provision in part two of the Treaty on the Citizenship of the Union, on an equal footing with the other rights conferred on the citizens of the European Union, seems to have fallen on deaf ears, including those of Member States with claims of a constitutional heritage of public access to official documents.

The scope of Article 255 *ratione personae* is revealing of the attempts of the Member States, acting as the constituent power of the European Union when amending the Treaties, to limit the scope of the European citizens' fundamental right of access to documents held by Community institutions and other bodies. To single out the institutions of the "legislative branch" of the Union and submit only those institutions to a specific public access principle in the Treaty derives from a misconception that the main purpose of such rules is to allow ordinary citizens to take part in the already complex decision-making process within the European Union. A more modest purpose of such rules – to strengthen the democratic nature of the institutions, public's confidence in the administration and the

principle of good administration in general – would have called for all Community institutions and other bodies to be submitted to a general public access provision in the Treaty. Indeed, public scrutiny and public access to documents held by the European administration are effective means to prevent and discover maladministration and fraud both within the institutions and in the decentralised bodies. It thereby contributes to forming a European awareness as well as expressing the political will of the citizens of the Union. In this respect, public access to documents – together with the forming of political parties at a European level (Article 191, ex Article 138a of the Treaty) – is an important factor for integration within the Union.

Unless the Commission proposes a more horizontal approach covering all institutions and bodies within the Community, the act to be adopted by the Council under Article 255 and in accordance with the codecision procedure referred to in Article 264 (ex Article 189b) of the EC Treaty will thus only cover documents held by the European Parliament, the Council and the Commission. In the light of the case-law of the Court, such a decision or regulation can therefore not be considered as "general rules on the right of public access to documents held by the Community institutions". As long as the Community legislature has not adopted general rules on access and secrecy, the remaining institutions and bodies are therefore bound by the case-law of the Court in *Netherlands v Council* to maintain their internal measures as to the processing of requests of access to documents.

In his Special Report, the European Ombudsman stressed that Article 255 of the Treaty and his own recommendations were complementary in this respect. He pointed out that whereas Article 255 creates a specific right of access to documents held by three Community institutions, other Community institutions and bodies must also have internal rules governing such access, as declared by the Court of Justice in *Netherlands v Council*. In the Ombudsman's view, consistency and equal treatment of citizens require that when the regulation foreseen by Article 255 of the EC Treaty becomes part of Community law, the general principles and limits which it lays down should be applied throughout the Community administration. To support this claim, the Ombudsman pointed out that Article 3 (ex Article C) of the Treaty on European Union provides that "the Union is served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives", which guarantees equal treatment of European citizens as regards public access to documents in Community law and should exclude arbitrary differences in the application of the various measures adopted by the Community administration.

The scope of Article 255 *ratione materiae* covers access to *European Parliament, Council and Commission documents*. The question remains if the provision includes both incoming documents and those established within the institutions. In the Draft versions of the Treaty presented by the Dutch Presidency in May 1997, the proposed Article 255 referred only to documents "originating from" the institutions in question, rather than documents "held by" those institutions.⁽¹⁰⁸⁾ The reasons for the Dutch Presidency not to maintain the previous wording used in drafts from the Irish Presidency (Dublin I: "documents held or issued by the European Parliament, the Council and the Commission"; Dublin II: "European Parliament, Council and Commission documents") remain unclear.

One explanation could be related to the fact that at a very late stage of the negotiations, the European Investment Bank took the quite exceptional step of submitting a letter dated 16 May 1997 to the Presidency of the Conference of the Representatives of the Governments of the Member States.⁽¹⁰⁹⁾ The letter is an unsolicited reaction to a proposal submitted on 6 April 1997 by the Finnish delegation,⁽¹¹⁰⁾ whereby citizens would have a right of access to "European Parliament, Council and Commission documents". In order not to jeopardise the confidentiality requirements of its banking

activity, the EIB suggested that disclosure of third-party documents should be subject to the authorisation of the originator and/or that the protection of banking confidentiality should be mentioned alongside commercial and professional secrecy in a declaration to the Final Act of the Conference. The EIB also submitted an information paper dated 2 May 1997 drawn up on the basis of the Finnish proposals.

Nevertheless, the compromise formula finally adopted in the Amsterdam Treaty – providing access to *European Parliament, Council and Commission documents* – did not accept the proposals to limit public access only to documents "originating from" the three institutions in question. In a concession to the French government, Declaration n° 35 to the Amsterdam Treaty(111) states that "the Conference agreed that the principles and conditions referred to in Article 255 will allow a Member State to request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement." Ironically, this declaration strengthens the view that access to documents applies, as a general rule, not only to documents drawn by a Community institution, but also to all documents held by the institutions irrespective of their author.(112)

Regarding the scope of application of the provision on public access to documents to the second and third pillars, Articles 28 (ex Article J.18, former J11) and 41 (ex Article K.13, former Article K.8) of the Treaty on European Union provide that Article 255 of the EC Treaty applies to the provisions relating to the areas referred to in Titles V and VI of the Treaty.(113) In a declaration n° 41 to the Amsterdam Treaty on the provisions relating to transparency, access to documents and the fight against fraud, the Conference also considered that the European Parliament, the Council and the Commission should draw guidance from the provisions relating to access to documents in force within the framework of the EC Treaty when they act in pursuance of the Coal and Steel and the Euratom Treaties.

In advance of forthcoming round-table discussions with representatives of the Commission, the Swedish government submitted, on 4 June 1998, to the Committee on the Constitution of the Swedish Riksdag a memorandum on five principles to govern a right of access to documents in accordance with Article 255 of the EC Treaty. Although the Commission obviously has the privilege of initiative to submit proposals for secondary legislation on the basis of Article 211 (ex Article 155) of the Treaty, the memorandum is revealing as to both the remaining difficulties to be solved in secondary legislation and the revised ambitions of the Swedish government. It will therefore be referred in some detail.

The first principle in the Swedish memorandum deals with the type of instrument, governing the right of access to documents, to be adopted by the Council within two years of the entry into force of the Treaty. Rather surprisingly, the Swedish government, who previously advocated that all institutions should be covered by the general principle of access to documents, now seem content with the fact that the rules to be elaborated by the Council will only be applicable within the European Parliament, the Council and the Commission. The memorandum explicitly states that the decision should not be directly applicable in any other EU-institution or other body nor in the Member States. Whereas the characteristics of a decision arise from the limitation of the persons to whom it is addressed, a regulation, being essentially of a legislative measure, is directly applicable in the Member States. Therefore, the Swedish government now claims that a decision would be an appropriate instrument for the Council's rules on the right of access to documents. This U-turn can only be explained by the rather bold assurance, given by supporters of accession during the Swedish referendum on the accession the Union, that Community law would not affect the constitutional right of access to documents held by public authorities in Sweden. The goal of the Swedish government during the IGC was to lay down a general principle of access to documents in the Treaty based on the Swedish model. This ambition seems to have been sacrificed on the realisation that the process of cross-fertilisation between national law and Community law may have undesirable effects on the

Swedish Constitution.

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The second principle in the memorandum concerns the general scope of which documents should be covered by the right of access. In the Swedish government's opinion, Article 255 should be interpreted in the light of Article 1 of the Treaty on European Union as covering all documents that are held by an institution, including both incoming documents and those that are drawn up by the institution itself. Although this interpretation is reinforced by the general principle of openness, it is yet unclear what mechanism would allow a Member State to request the Commission or the Council not disclose a document originating from that State without its prior agreement. Such a request will, no doubt, carry considerable political weight. However, it must be underlined that Declaration n° 35 to the Amsterdam Treaty only provides a possibility for the Member State *to request* the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement. It does not establish a *right of confidentiality* in all communications between the Member States and the institutions, nor does it imply that the rules of classification of the Member States would be binding either upon the institutions of the European Union or upon other Member States. Such a request would have to be treated on a case-by-case basis under the respective rules on public access to documents.

Under Article 296(1) of the Treaty (ex Article 223), no Member State is obliged to supply information the disclosure of which it considers contrary to the essential interests of its security. The Court of Justice has never had the occasion to interpret the meaning of the term "essential interests of security". Theoretically, the question could arise if a Member State systematically refuses to submit information to the institutions unless it is guaranteed that the Commission or the Council do not communicate a document originating from that State to third parties without its prior agreement. Indeed, under Article 298 (ex Article 225) of the Treaty, by derogation from the procedure laid down in Articles 226 and 227 (ex Articles 169 and 170), the Commission or any Member State may bring the matter directly to the Court if it considers that another Member State is making improper use of the powers provided for in Article 296. On a more general level, such systematic refusals also raise the underlying issues of European citizens *equal access to documents* and the possibility of scrutiny by individual national parliaments of their own government in relation to the activities of the Union. The latter aspect is, of course, a matter for the particular constitutional organisation and practice of each Member State, as is recalled in the Protocol to the on the Role of National Parliaments in the European Union annexed to the Treaty on European Union, the EC Treaty and the Coal and Steel and Euratom Treaties.

The third principle identified by the Swedish government is related to the general principles and limits to govern the right of access. Based on the Swedish experience, the proposed approach is a two-step analysis, based firstly on the *character* of document and secondly on its *content*. In order to protect the efficiency of the decision-making process, documents of a preliminary nature such as drafts and other working material could *per se* be excluded from public access until they reach a certain degree of finality or have been handed out by the institutions to third parties. In the Swedish government's view, there should not be a blanket exclusion of incoming documents due to their character, thus ensuring that all external attempts to influence the decision-making process are made in the light of the day. Restrictions flowing from the content of a document would be governed by specified exemptions, limiting the right of access on grounds of public or private interest, where due regard would be taken to the fundamental right to privacy and the list of possible exceptions to the freedom of information, laid down in Articles 8 and 10 of the ECHR. In order to ensure the balancing of the right of public access and the protection of legitimate secrecy interests, it is proposed that the system would include harm-tests through detailed rules on secrecy in specified situations and through

more general directives to the institutions for the handling of applications for access.

The fourth principle put forward by the Swedish government deals with the handling of applications. According to the memorandum, in order to realise the right of access, the objective when handling applications for access must be that it should be done as fast as possible, with as few formalities as possible and as cheaply as possible for the applicants, without the institution interfering with the reasons for the requests.

This is probably one of the more essential requirements in order to provide the European Union with a modern public access legislation that could gain the trust of the public and the media. This would imply abandoning the present cumbersome regime, which is characterised by excessive time-limits, internal provisions for revision, wide discretion for the institutions when refusing access to a given document, absence of protection of the anonymity of the applicant and marginal judicial review. Unless those problems are seriously addressed, any public access regime – or Freedom of Information Act, as they are known in the UK and in Ireland – will be undermined from the outset.

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The fifth principle put forward by the Swedish government relates to the duty to register in public registers all documents that falling within the general scope of public access. This would undoubtedly promote the public's right of access as well as enhance efficiency within the institutions. A partial solution to this problem was addressed by the Council during the UK Presidency. At the Justice and Home Affairs meeting on 19 March 1998, the Council, with the purpose of making the policy of access to its documents more effective, decided that a register of *unclassified* Council documents should be made public. The basis of such a public register would be based on the following guidelines:(114)

- In the context of openness and transparency, a register of Council documents will be developed by the Council General Secretariat as a complement to the existing system of electronic storage of Council documents, as soon as possible, preferably during 1998.
- The register will contain titles, dates and document codes of unclassified Council documents. To preserve the Council's right not to communicate a document, the register will not display the content of the documents.
- The register will be made available to the public via the Internet. It will be a multilingual tool offering an adequate range of facilities enabling any citizen to identify Council documents.
- The General Secretariat will take appropriate organisational measures in order to guarantee its reliability and exhaustiveness.
- According to the General Secretariat, the implementation of the register will not require any additional budget provision or additional staff.
- The General Secretariat will take steps to publicise the existence of the register and submit a report on its functioning after six months of operation.

In its resolution of 16 July 1998 on the European Ombudsman's Special Report, the European Parliament took note of the Council's initiative to introduce a public register of its documents, stressing the importance of establishing, in all Community institutions and bodies, public registers for all received and drawn up documents. It therefore called on all Community institutions and bodies to establish such public registers in all the Community languages, making increased and more user-friendly use of the Internet.(115) Finally, the European Parliament called upon the Commission to include such a measure as a requirement in the forthcoming proposal to be presented on the basis of Article 255 of the Treaty.

Although the Council's initiative must be welcomed as a positive step forward, it must be noted that COREPER II, on its meetings of 22 and 29 November 1995, discreetly adopted a special procedure for the adoption of documents classified SECRET or CONFIDENTIAL by the Council. It decided to exclude these points from the list of normal A-points. Such documents are distributed in a single copy per delegation before the Council meetings, and the A-points are inscribed on a separate classified list, known as the list "A-bis". The document in question is no longer mentioned in the recapitulative telex of approved A-points, but the Permanent Representatives are provided, on a regular basis and in a single copy, of a separate list of SECRET or CONFIDENTIAL A-points approved by the Council.

In the light of the general principles of openness, public access to documents and proportionality, it remains to be seen if the internal rules on classification of documents can be used in this manner to exclude whole categories of documents from public access. Indeed, it seems that a substantial number of documents classified as CONFIDENTIAL have already been released to the public under the current internal rules. Further studies must be pursued in order to assess if there is a general tendency within the institutions to classify documents, whereby those internal rules on classification are used as a last rampart to resist the principle of openness.

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In conclusion, the public access provisions in the Amsterdam Treaty and the subsequent secondary legislation to be adopted give rise to more questions than they provide clear answers. One can only hope for the Commission to draw sufficient inspiration from the legislation in the Member States and put forward a proposal for secondary legislation that matches the challenge of enacting a European Freedom of Information Act for the next century. In this respect, the European Parliament has a unique opportunity, under the codecision procedure, to promote greater openness in an area of vital importance for the European Union's future credibility with its citizens. However, the narrow legal basis provided for in the Amsterdam Treaty is likely to discourage any serious attempts from the Community legislature to adopt general rules both on public access to documents and on strict exceptions of confidentiality within the European Union. Judging from the rather modest Swedish proposals – and having in mind the fierce resistance they will no doubt meet both within the institutions and by some Member States – European citizens should probably not expect much more than a revised and slightly improved version of the existing internal rules of the Council, the Commission and the Parliament. If this were to be the outcome of the secondary legislation, the compromise reached in Amsterdam can only be described as a Pyrrhic victory both for the proponents of greater openness and for those Member States and institutions who voiced legitimate concerns regarding the protection of secrecy within the European Union.

Meanwhile, most of the issues raised by the Swedish memorandum are already pertinent under the current public access regime. They are likely to be submitted, sooner or later, to the European Ombudsman and/or to the Community Courts by European citizens. If this is the case, the discrepancies in and insufficiencies of the institutions' existing internal provisions must be addressed by the Community Courts in the interest of a uniform interpretation of Community law. A necessary step to that effect is to explicitly recognise the existence of a fundamental principle of public access to documents held by the Community administration which is independent of the internal rules of the institutions. Once the general principle is firmly established, the right of access to documents is by no means absolute. In the absence of general secrecy rules adopted by the Community legislature, the Community Courts will therefore have to interpret the provisions on confidentiality laid down in the Treaties and in secondary legislation, limiting that right. They will have to strike a balance on a case-by-case basis between the interest of European citizens in obtaining access to documents and the legitimate grounds for protecting secrecy within the European administration.

Endnotes

(*) Référendaire, Court of Justice of the European Communities, Luxembourg, currently writing a PhD on "L'accès aux documents en droit communautaire" at the Faculty of Law, Stockholm University. All views are expressed in the latter capacity. Earlier versions of this article, entitled "Recent Developments in Public Access to Documents held by European Community Institutions" have been published in the Freedom of Information Review (1998) 74 FoI Review, pp. 22-28 and in the University of Tasmania Law Review, Vol 17, no. 1 1998, pp. 1-18. The author would like to thank William Robinson, Leo Flynn and Kieran Bradley for their helpful comments on earlier drafts of this article.

(1) Freedom of the Press Act, Chapter 2, On the Public Nature of Official Documents, <<http://www.riksdagen.se/arbetar/grundbok%5Fen/FPA02.htm#E11E27>>.

(2) A general right of access to documents held by public authorities seems to arise out of the principle of the publicity of acts of the legislature, executive and judiciary, as enshrined in the third paragraph of Article 9 and Articles 80, 105 and 120 of the Constitution.

(3) Article 110 of the Constitution, in the version resulting from a revision carried out in 1983.

(4) Article 20, paragraph 4, of the Constitution, as amended by a law of 15 May 1987 (B-VG-Nov 1987, BGBI 1987/285).

(5) Article 268 of the Constitution, as amended in 1989.

(6) Article 32 of the consolidated version of the Constitution, dated 17 February 1994. The article was introduced when the Constitution was revised in 1993, and entered into force on 1 January 1995.

(7) Section 10 of the Constitution Act of Finland of 17 July 1919, as amended in 1995, <<http://www.eduskunta.fi/thwfakta/lakikokoelmat/laki3000.html>>.

(8) Loi n° 78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal (Journal officiel du 18 juillet 1978, page 2851), <<http://www.cnil.fr/textes/text051.htm>>.

(9) Wet openbaarheid van bestuur, Stb. 1991, 703.

(10) Lov nr. 572 af 19.12.1985 om offentlighed i forvaltningen.

(11) Bundesgesetz vom 15. Mai 1987 über die Auskunftspflicht der Verwaltung des Bundes und eine Änderung des Bundesministeriumsgesetzes 1986 (BGBI 1987/287, amended by BGBI 1990/357 and 1990/447).

(12) Law 65/93 of the Assembleia da República of 26 August 1993.

(13) Freedom of Information Act, 1997 (Number 13 of 1997), <<http://www.irlgov.ie:80/finance/FREE1.HTM>>.

(14) Law 1599/1986.

(15) Law n° 241 of 1990.

(16) Akteneinsichts- und Informationszugangsgesetz (AIG), GVBl. I/1998, s. 46),
<<http://www.brandenburg.de/land/mi/recht/aig.htm>>.

(17) <http://foi.democracy.org.uk/html/white_paper.html>.

(18) A committee of experts, the Group of Specialists on access to official information (DH-S-AC), has been set up under the authority of the Steering Committee for Human Rights (CDDH). The Group has been given the mission to examine options for preparing a binding legal instrument or other measures embodying basic principles on the right of access to information held by public authorities (see CCDH (97) 41, Appendix VI).

(19) <<http://www.usdoj.gov/oip/foi-act.htm>>.

(20) Ragnemalm, "Démocratie et Transparence: sur le droit général d'accès des citoyens de l'Union européenne aux documents détenus par les institutions communautaires", in *Scritti in onore di Guiseppe Federico Mancini*, Giuffrè editore, 1998, Volume II, pp. 809-830 at 809.

(21) Curtin and Meijers, "The principle of open government in Schengen and the European Union: Democratic retrogression?", *Common Market Law Review*, 1995, pp. 391-442 at 392; from a Swedish perspective, see Strömberg, "Offentlighet, sekretess och meddelarfrihet vid ett svenskt medlemskap i EG", *Förvaltningsrättslig Tidskrift*, 1993, pp. 111-117 at 114.

(22) *Afdeling Bestuursrechspraak, Raad van State*, 7 July 1995, no. R01.93.0067; for an English translation of the judgment, see *Maastricht Journal of European and Comparative Law*, 1996, pp. 179-183.

(23) Case 6/64 *Costa v ENEL* [1964] ECR 1199; Case 14/68 *Walt Wilhelm* [1969] ECR 1; Case 106/77 *Simmenthal* [1978] ECR 629; Case C-68/86 *United Kingdom v Council* [1988] ECR I-855.

(24) On the background of the case, see Metten, "Request to a Member State for Access to European Information: The Metten Case", in *Openness and Transparency in the European Union*, ed. by Deckmyn and Thomson, EIPA, Maastricht 1998, pp. 85-90. For a critical analysis of the Raad van State's ruling on the *Metten* case, see Besselink, "Curing a 'childhood sickness'?: on direct effect, internal effect, primacy and derogation from civil rights: the Netherlands Council of State Judgment in the *Metten* case", *Maastricht Journal of European and Comparative Law*, 1996, pp. 165-178.

(25) OJ 1992 C 191, p. 101 .

(26) OJ 1993 C 156, p. 5.

(27) OJ 1993 C 166, p. 4.

(28) Bulletin of the European Communities, 6-1993, p. 16, point I.22.

(29) OJ 1993 L 340, p. 41, hereinafter the "Code of Conduct",
<http://europa.eu.int/eur-lex/en/lif/dat/en_393X0730.html>.

(30) OJ 1993 L 340, p. 43 <http://europa.eu.int/eur-lex/en/lif/dat/en_393D0731.html>, amended by Council Decision of 6 December 1996 amending Decision 93/731/EC on public access to Council documents (OJ L 325, p. 19), <http://europa.eu.int/eur-lex/en/lif/dat/en_396D0705.html>.

(31) OJ 1994 L 46, p. 58 <http://europa.eu.int/eur-lex/en/lif/dat/en_394D0090.html>, amended by Commission Decision of 19 September 1996 amending Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (96/567/Euratom, ECSC, EC) (OJ L 247, p. 45), <http://europa.eu.int/eur-lex/en/lif/dat/en_396D0567.html>.

(32) Case C-58/94 *Netherlands v Council* [1996] ECR I-2169; Full Court: Judges Rodríguez Iglesias (President), Kakouris, Edward, Puissochet, Hirsch, Mancini, Schockweiler, Moitinho de Almeida (Rapporteur), Kapteyn, Gulmann, Murray, Jann, Ragnemalm, Sevón and Wathelet.

(33) For the purposes of this article, all references to the Treaties will take into account the new numbering and the table of equivalences referred to in Article 12 of the Amsterdam Treaty. In cases where pre-Amsterdam provisions in the Treaties is referred to, the previous numbering (ex Article) will be used.

(34) See Opinion 2/94 of the Court of 28 March 1996 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759, paragraph 33.

(35) in *Recueil Dalloz Sirey*, 1997, Jur. pp. 19-20.

(36) in *Revue du marché unique européen*, 1996, pp. 257-258 at 257.

(37) in "Citizenship of the Union? Lessons from Carvel and the Guardian", *Modern Law Review*, 1996, pp. 582-588 at 585.

(38) in "Further Developments of Access to Community Information: Kingdom of the Netherlands v. Council of the European Union", *European Public Law*, 1996, pp. 563-569 at 569.

(39) in "L'accès aux documents du Conseil de l'Union: contribution à une problématique de la transparence en droit communautaire", *Revue trimestrielle de droit européen*, 1997, pp. 37-68 at 49.

(40) in "El acceso público a los documentos y las autoridades comunitarias", *Revista de Derecho Comunitario Europeo*, 1997, pp. 377-411 at 410.

(41) in *Insynn og Integrasjon*, Universitetsforlaget, Oslo 1997, p. 129.

(42) Case C-69/89 *Nakajima v Council* [1991] ECR I-2069, paragraph 49.

(43) Case C-137/92 P *Commission v BASF and Others* [1994] ECR I-2555, paragraphs 75 and 76.

(44) See also Ragnemalm, cited above note (20), at 823, 830.

(45) See also de Leeuw, "*WWF (UK) v Commission of the European Communities*", *European Public Law*, 1997, pp. 339-350 at 349.

(46) Case T-194/94 *Carvel and Guardian Newspapers v Council* [1995] ECR II-2765; Second chamber, extended composition: Judges Vesterdorf, Barrington (Rapporteur), Saggio, Kirschner and Kalogeropoulos.

(47) For a complete account of the case, see CARVEL, "Request for Documents of the Council: An Account of the Guardian Case", in *Openness and Transparency in the European Union*, cited above note 00, pp. 53-67.

- (48) Case T-105/95 *WWF UK v Commission* [1997] ECR II-313, paragraph 55.
- (49) Case T-124/96 *Interporc v Commission* [1998] ECR II-231, Judges Vesterdorf (Rapporteur), Briët, Lindh, Potocki and Cooke;
<<http://europa.eu.int/jurisp/cgi-bin/gettext.pl?lang=en&num=80019793T19960124&doc=T&ouvert=>'
- (50) *Interporc v Commission*, paragraph 49; compare *WWF UK v Commission*, paragraph 56.
- (51) Case T-174/95 *Svenska Journalistförbundet v Council* [1988] ECR II-0000,
<<http://europa.eu.int/jurisp/cgi-bin/gettext.pl?lang=en&num=80019382T19950174&doc=T&ouvert=>'
- (52) Case T-83/96 *van der Wal v Commission* [1988] ECR II-545, Judges Lenaerts, Lindh and Cooke (Rapporteur);
<<http://europa.eu.int/jurisp/cgi-bin/gettext.pl?lang=en&num=80019680T19960083&doc=T&ouvert=>'
- (53) OJ 1993 C 39, p. 6 hereinafter "the Notice".
- (54) *van der Wal v Commission* , cited above, paragraph 55.
- (55) C-174/98 P and C-189/98 P, OJ C 258 pp. 17-18.
- (56) <<http://www.euro-ombudsman.eu.int>>.
- (57) <<http://www.euro-ombudsman.eu.int/report/en/default.htm>>.
- (58) <<http://www.euro-ombudsman.eu.int/Lbasis/En/provis.htm#Target13>>.
- (59) <<http://www.euro-ombudsman.eu.int/decision/en/317764.htm>>.
- (60) <<http://www.europarl.eu.int>>.
- (61) <<http://www.curia.eu.int/en/index.htm>>.
- (62) <<http://www.eca.eu.int>>.
- (63) <<http://www.eib.org/>>.
- (64) <<http://www.esc.eu.int>>.
- (65) <<http://www.cor.eu.int>>.
- (66) <<http://www.ecb.int>>.
- (67) <<http://oami.eu.int/>>.
- (68) <<http://www.eurofound.eu.int/>>.
- (69) <<http://www.cedefop.gr>>.
- (70) <<http://www.eurofound.eu.int/>>.
- (71) <<http://www.eea.eu.int>>.

(72) <<http://europa.eu.int/en/agencies.html#tceu>>.

(73) <<http://www.emcdda.org>>.

(74) <<http://www.eudra.org/emea.html>>.

(75) On the basis of the information supplied to the Ombudsman, it seems that the Office for Harmonization in the Internal Market had already adopted such rules; those rules have not yet been rendered public.

(76) OJ 1997 L 263, p. 27, <http://europa.eu.int/eur-lex/en/lif/dat/en_397D0632.html>; implemented by Decision 98/306/EC, ECSC, Euratom of the Bureau of the European Parliament of 17 April 1998 implementing, as regards the provisions concerning the fee to be paid for the delivery of very large documents, Decision 97/632/ECSC, EC, Euratom of the European Parliament, and in particular Article 3(1) thereof (OJ 1998 L 135, p. 46)
<http://europa.eu.int/eur-lex/en/lif/dat/en_398D0306.html>.

(77) OJ 1998 C 295, p. 1, <http://europa.eu.int/eur-lex/en/lif/dat/en_398D0923_01.html>.

(78) OJ 1997 C 243, p. 13, <http://europa.eu.int/eur-lex/en/lif/dat/en_397Y0809_01.html>.

(79) OJ 1997 L 339, p. 18, <http://europa.eu.int/eur-lex/en/lif/dat/en_397D1210_01.html>.

(80) OJ 1997 L 351, p. 70, <http://europa.eu.int/eur-lex/en/lif/dat/en_397D0165_01.html>.

(81) OJ 1998 L 90, p. 43, <http://europa.eu.int/eur-lex/en/lif/dat/en_398D0325_01.html>.

(82) OJ 1997 C 369, p. 10, <http://europa.eu.int/eur-lex/en/lif/dat/en_397Y1206_01.html>.

(83) OJ 1997 C 282, p. 5, <http://europa.eu.int/eur-lex/en/lif/dat/en_397Y0918_01.html>.

(84) OJ 1998 C 46, p. 5.

(85) <<http://www.eudra.org/gendocs/PDFs/GENERAL/001297en.pdf>>

(86) For a critical analysis of those rules, see Ragnemalm, cited above note (20), at 823-825.

(87) OJ 1998 C 44, p. 9, <http://www.euro-ombudsman.eu.int/special/en/97_def.htm>.

(87a) (A4-0265/98)

<<http://www2.europarl.eu.int/dg7-bin/seid.pl?APP=RAPPORT+PRG=DOCRAPPORT+FILE=PE-R/1+LISTE=EMPTY+LANGUE=EN+LNGDISP=!PT!FR!ES!SV!IT!EL!DE!DA!NL!FI!EN>>.

(87b)

<<http://www2.europarl.eu.int/dg7-bin/seid.pl?APP=PV2+PRG=DOCPV+FILE=PE-PV-ADOPTES-160798+IDENT=A4-0265/98>>

(88) <<http://www.poptel.org.uk/statewatch/>>.

(89) Decision of the European Ombudsman of 28 July 1998 in complaint 1053/25.11.96/STATEWATCH/UK/IJH against the Council,
<<http://www.euro-ombudsman.eu.int/DECISION/EN/961053.htm>>.

(90) Case 42/84 *Remia v Commission* [1985] ECR 2545, paragraph 34; Joined Cases 142 and 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487, paragraph 62.

(91) Case 255/84 *Nachi Fujikoshi v Council* [1987] ECR 1861, paragraph 21; Case C-156/87 *Gestetner v Council and Commission* [1990] ECR I-781, paragraph 63; Case C-174/87 *Ricoh v Commission* [1992] ECR I-1335, paragraph 68; Joined Cases T-39 and T-40/92 *CB and Europay v Commission* [1994] ECR II-49, paragraph 109. See Lenaerts and Vanhamme, in "Procedural rights of private parties in the Community administrative process", *Common Market Law Review*, 1997, pp. 531-569 at 560.

(92) see, in relation to the provisions of Decision 93/731, *Carvel and Guardian Newspapers*, cited above, paragraph 64, and in relation to the Code of Conduct, *WWF UK*, cited above, paragraph 59.

(93) see, in relation to Decision 93/731, the CFI's judgment in *Carvel and Guardian Newspapers*, paragraphs 64 and 65; in relation to the corresponding provisions of the Code of Conduct, see *WWF UK*, cited above, paragraph 59.

(94) Case C-278/95 P *Siemens v Commission* [1997] ECR I-2507, paragraph 17; *WWF UK*, cited above, paragraph 66 and *Interporc*, cited above, paragraph 53

(95) Decision of the European Ombudsman of 30 June 1998 in complaint 1056/25.11.96/STATEWATCH/UK/IJH against the Council,
<<http://www.euro-ombudsman.eu.int/DECISION/EN/961056.htm>>.

(96) House of Commons, Select Committee on European Legislation, Twenty-eighth Report "The Role of National Parliaments in the European Union", Session 1995-1996, HMSO London 1996, pp. xxxii-xxxiii.

(97) Ragnemalm, cited above note 20, at 830.

(98) Report on the Implementation of Council Decision 93/731/EC on Public Access to Council Documents (July 1996), 8330/96, SN 5015/96 EN, p. 42.

(99) Council Conclusions on the Review of Council Decision 93/731/EC on Public Access to Council Documents, SN 5015/96, p. 61; Council Decision (96/705/Euratom, ECSC, EC) of 6 December 1996 amending Decision 93/731/EC on public access to Council documents (OJ L 325, p. 19).

(100) Order of the President of the Court of First Instance of 3 March 1998, Case T-610/97 R *Hanne Norup Carlsen e.a. v Council* [1998] ECR II-485, paragraph 47.

(101) <<http://www.europa.eu.int/en/agenda/igc-home/eu-doc/reflect/final.html>>.

(102) House of Commons, Select Committee on European Legislation, Twenty-eighth Report cited above note 00, pp. xxxii. Compare the Minutes of Evidence taken before the House of Lords Select Committee on the European Communities, Tuesday 11 November 1997; in Ninth Report, "Evidence by the Minister of State, Foreign and Commonwealth Office, on the Amsterdam Treaty", HMSO, London 1997, p. 13.

(103) In proceedings before the Community Courts, the Council and the Commission as well as the French and the UK governments have consistently rejected assertions that Community law contains a fundamental principle providing for a *general right of public access to the documents* held by the institutions or even that *the public should have the widest possible access to documents* held by the

European administration. Although the positions of the United Kingdom on public access to documents have evolved substantially, I have found no evidence to the effect that such would be the case within the Legal services of the Commission and the Council, nor within the French administration.

(104) OJ 1997 C 340, p. 173.

(105) see Ragnemalm, cited above note 20, at 830.

(106) Mancini, "Europe: The Case for Statehood", in G. F. Mancini and J.H.H. Weiler, "Europe – The Case for Statehood ... and the Case Against, An Exchange"

(107) see Ragnemalm, cited above note 20, at 811.

(108) See Curtin, "Democracy, Transparency and Political Participation", in *Openness and Transparency in the European Union*, cited above note 24, pp.107-120.

(109) CONF/3916/97.

(110) CONF/3865/97.

(111) OJ 1997 C 340, p. 137.

(112) See Blanchet, "Transparence et qualité de la législation", *Revue trimestrielle de droit européen*, 1997, pp. 915-928 at 925 and Curtin, cited above note 108, at 113-114.

(113) It should be noted that in *Svenska Journalistförbundet*, cited above, the CFI has already held that in the absence of any provision to the contrary in Decision 93/731 itself, its provisions apply to documents relating to Title VI of the EU Treaty (paragraph 84 of the judgment).

(114) 2075th Council meeting JUSTICE AND HOME AFFAIRS Brussels, 19 March 1998, Press Release 1998-03-26 6889/98 (Presse 73).

(115) It must be stressed that the European Parliament and the Court of Auditors are the only institutions within the Community administration that still do not accept requests for access to documents sent by e-mail. The basis for such refusals is that requests should be made "in written" according to the internal rules and therefore, in the view of those institutions, must be signed by the requester. However, in the preparatory works to European Parliament Decision 97/632/EC, ECSC, Euratom of 10 July 1997 on public access to European Parliament documents, the Committee on Petitions clearly indicated that a signature should not be required when citizens make electronic requests (Letter from the President of the Commission to the President of the European Parliament, Bruxelles 23 June 1997, see PE 223.536). It could even be argued that the requirement that requests must be made in a written form defeats the application of the general principle of access to documents, since European citizens are entitled to ask for access to any document without being obliged to put forward reasons for the request. If access to documents cannot legitimately be blocked by the institutions because of a possible negative attitude towards the purposes for which a request has been made, or the person who has made it, it follows that European citizens should have a right to anonymity when making such requests.