Openness and Transparency in the European Union

Research Paper 94/107

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This Paper considers moves towards openness and transparency in the institutions of the European Union, with particular emphasis on access to the records of Council business and to Commission and Council documentation. It also refers to two actions concerned with public access to EU business that have been taken to the European Court of Justice.

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I Introduction

During the Maastricht Treaty negotiations, the need for more openness in the work of the Council and Commission and the improvement of public access to their documents were discussed and a Declaration was included in the Treaty which states:

> The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.[1]

In accordance with this principle, ways of opening up the business of the Community to the public were discussed at the Edinburgh European Council summit in December 1992 and the Presidency concluded that access to the Council's work and more public information on Council decisions needed to be addressed.[2]

At the European Council in Corfu on 24-25 June 1994, the presidency was self-critical of progress so far in implementing the Edinburgh pledges, noting:

> The European Council ... stresses that openness and subsidiarity are essential components which require further elaboration. The Union must be built with the support of its citizens.[3]

This Paper will consider some of the steps taken since Edinburgh to improve openness in the EU institutions, particularly in Council business, including public access to Council voting records. Most of the texts of documents cited can be found in the Annexes to this Paper.

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[1] Cm 1934, p.128
[2] European Council in Edinburgh, *Conclusions of the Presidency*, 11-12 December 1992, see Annex I
[3] European Council in Corfu, *Conclusions of the Presidency*, 24-25 June 1994

II Action since Edinburgh

A. The Council

An *Inter-institutional Declaration on Democracy, Transparency and Subsidiarity* adopted at the inter-institutional conference of the European Parliament, the Council and Commission on 25 October 1993 stated that the Council had agreed "to take steps to"

- open some of its debates to the public;
- publish records and explanations of its voting;
- publish the common positions which it adopts under the procedures laid down in Articles 189b and 189c, and the statement of reasons accompanying them;
- improve information for the press and the public on its work and decisions;
- improve general information on its role and activities;
- simplify and consolidate Community legislation in cooperation with the other institutions;
- provide access to its archives.

In accordance with this policy, in October 1993 the Council began to publish details of Council votes and common positions in its press releases on Council meetings. Where no vote was taken, which is often the case, this was also recorded.

On 6 December 1993, the Council adopted new Rules of Procedure[4] which provided for greater publicity for Council proceedings as envisaged in the Edinburgh Conclusions, except in the case of decisions taken under the two inter-governmental pillars which operates outside the Treaty of Rome. The basic rules of privacy for Council deliberations remained but with some significant exceptions, summarised as follows:

1) Policy debates on the Presidency's work programme are to be televised and the Council may decide by unanimity on a case-by-case basis to televise other debates (Article 6)

[4] Council Decision 93/662/EC, OJL 304, 10 December 1993

2) When the Council adopts binding legislative acts, the voting record is to be made public unless the Council decides against this by a simple majority. This also applies when the Council is adopting a common position under the co-operation procedure and the new co-decision procedure, as well as to votes in the latter's Conciliation Committee. Votes taken under the Common Foreign and Security Policy and Justice and Home Affairs pillars will only be published if the Council decides to do so by unanimity at the request of a member of the Council (Article 7(5)).

3) When the record of a vote is published, the explanations made at the time of the vote are also to be published if the member state concerned so requests (Article 5).

4) The common position adopted by the Council under the co-operation and co-decision procedures are to be published in the Official Journal, with the reasons for the position (Article 15).

5) The Council is to adopt detailed arrangements for public access to Council documents, the disclosure of which would be without serious or prejudicial consequences (Article 22).

B. The Commission

The Commission has also contributed to the openness debate[5] and the *Inter-institutional Declaration* of October 1993 also listed the measures that the Commission had already taken or was in the process of taking:

- wider consultations before presenting proposals, in particular publication of Green or White Papers on the topics listed in the 1993 legislative programme;

- flagging in the legislative programme of upcoming proposals which would appear suitable for wide-ranging preliminary consultations;

- introduction of notification procedure, consisting of the publication in the Official Journal of a brief summary of any measure planned by the Commission, with the setting of a deadline by which interested parties may submit their

[5] see OJC 156, 8 June 1993 and OJC 166, 17 June 1993

comments;

- publication of work programmes and legislative programmes in the Official Journal to publicize action planned by the Commission;

- finalization of the work programme by October with a view to enhancing openness;

- publication in the legislative programme of plans for the consolidation of Community legislation;

- provision of easier public access to documents held by the Commission with effect from 1 January 1994;

- improving knowledge of existing databases and their accessibility, including improving the existing relay network;

- publication each week in the Official Journal of lists of documents on general topics; wider public access to documents on specific topics;

- preparation of an interinstitutional yearbook giving details of each institution's organization chart;

- faster publication of Commission documents in all Community languages;

- adoption of a new information and communication policy occupying a larger place in Commission activities; enhanced coordination of information activities both inside and outside the Commission;

- adoption of additional measures to facilitate the general public's understanding of Commission business, in particular by making available the necessary resources and equipment to provide a suitable response to requests from the media;

- improvement in the treatment of telephone, mail and personal contacts between citizens and the Commission;

- promotion of the establishment of self-regulation by special interest groups by asking them to draft a code of conduct and a directory;

- creation by the Commission of a database on special interest groups as an instrument for use by the general public and by Community officials.

There are already several examples of Commission undertakings which have been fulfilled or the application of which has been improved. The Commission's Legislative Programme, which is the nearest thing the Community has to the Queen's Speech, has replaced the Commission Programme. The new programme gives more detailed information on proposals and is also published in the Official Journal of the European Union. Annex I of the 1994 legislative programme[6] listed subjects on which green or white papers were likely to be produced. Recent Green Papers include those on education, consumer disputes and mobile and personal communications, while White Papers have been produced on social policy, the use of the Ecu and growth, competitiveness and employment. Annex II of the programme listed fifteen measures which were planned for consolidation, ten of them relating to agriculture.

With a view to easier access to both national and EC legal processes, the Community institutions have also been called upon to explore the technical potential for greater coordination between national legal databanks and databases and Celex, the EC legal database.[7]

Once a week, usually on a Tuesday, lists of Commission documents forwarded by the Commission to the Council are published in the OJC series, so that interested parties can find out about the progress of a particular proposal and obtain the documents if required. Notification of concentrations and complaints to the Commission are also published regularly in the OJC with details of the procedures for submissions and observations.

More recently, in a "communication on improved access to documents"[8] the Commission explains how requests for public access to Commission documents can be made (see Annex IV)

III Views on Openness

A split emerged among member states over the opening up of Council business shortly after the unanimous Edinburgh summit decision, with Denmark and the Netherlands coming out firmly in favour of the widest possible access to Community business (see also ECJ cases,

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[6] Cons Doc 10625/93
[7] Council resolution of 20 June 1994, *OJC 179*, 1 July 1994
[8] OJC 67/5, 4 March 1994

below) and other member states favouring a more cautious approach, fearful that unrestricted openness might be detrimental to the already complex passage of legislation and to the debate on more sensitive Community issues.

A. The Danish Presidency (January - June 1993)

The Danish presidency announced plans to broadcast Council meetings following the initial televising of three ministerial meetings in February 1993, but this was vetoed by the Committee of Permanent Representatives, COREPER, which is made up of the member states' ambassadors to the Union and assisted by national civil servants. Whilst the opening up of Council business has been welcomed in principle, the few televised Council debates so far have tended to be set piece ministerial proceedings rather than controversial discussion. Press commentaries have criticised them for being "long-winded" and "counter-productive". There has been some cynicism as to the real meaning of 'access' to and 'openness' of Council work.

B. The Belgian Presidency (July-December 1993)

During its presidency in the second half of 1993, Belgium announced plans to reverse the openness policy and to revert to more secrecy and less television coverage. On 18 February 1993 *The Independent* noted the views of the Belgian Prime Minister Jean-Luc Dehaene that "the EC could not function properly if the electorate had access to every discussion".

C. The United Kingdom

During the Maastricht debate British ministers had taken a leading part in the campaign for greater openness in Brussels. However, there have been indications since then that the Government is not wholeheartedly in favour of too much openness in the Council of Ministers. The Foreign Secretary has compared Council meetings to Cabinet meetings: both were of necessity confidential. One of the problems in making comparisons between the functions of the Council of Ministers and other legislative bodies is that the Council does not easily compare. It is neither precisely a cabinet nor a legislature, but has some features of both. The Council, which is composed of Ministers from the member states, is the Community's main decision-making body and acts on proposals from the Commission.

The Chairman of the Select Committee on European Legislation wrote to the Foreign Secretary about the Council's decision by seven votes to five "on a procedure that requires that decisions to publish are proposed by a Member State and that a simple majority is

required to block publication".[9] Mr Hurd's reply was circumspect: whilst HMG "would prefer a more open formula" and had in fact been one of the five member states to vote against the proposal, to the question of whether the Government would as a matter of policy always "propose publication, if no other Member State [did] so and vote against a block should that occasion arise", the Foreign Secretary replied:

> I understand why you suggest this approach, and I largely agree with it. I would wish, nevertheless, to retain some small margin of judgement. There may be occasions in the future on which we would frustrate decisions which were clearly in the United Kingdom's interest if we left no room at all for manoeuvre.[10]

The Leader of the Opposition Tony Blair MP is reported to have said recently in Brussels that it was "absolutely scandalous that important decisions are taken behind closed doors in Brussels and barely reported to national parliaments afterwards".[11] British Labour MEP and Leader of the Party of European Socialists Pauline Green has also deplored the fact that even the ministers' debates on openness were cloaked in secrecy and called for ministers to be made accountable for their votes.

D. The European Parliament

The European Parliament supports increased public access to information available to the EU institutions and greater openness as regards documents. Its views on and criticisms of the measures adopted during 1992 and 1993 are set out in a report by the Committee on Institutional Affairs "on openness in the Community".[12]

The EP has demonstrated its support for more openness in its agreements to intervene on behalf of The Netherlands and *The Guardian* in their complaints about EU secrecy at the ECJ (see below). It also saw itself as a victim of Council secrecy when in July 1994 it used its power of veto under the Co-decision procedure (Article 189b of the Treaty) to block a telecommunications liberalisation package. This action dealt a blow to the principle of free competition generally and to US telephone companies in particular which are eager to enter the European telecommunications market. Interestingly, however, this EP flexing of muscles was not in objection to a policy but to the secret Council meetings at which proposals had been amended. In a letter to the *Financial Times*, 26 July 1994, the British Conservative MEP Tom Spencer wrote:

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[9] HC Deb, 19 October 1993, cc 206-7W
[10] *Select Committee on European Legislation, First Report*, HC 48-i, 1993-94
[11] *Financial Times*, 8 July 1994
[12] EP Doc A-30153/94, 21 March 1994

> My colleagues and I were not voting against the opening up of this market, but against the way the Council had sent us a text which left subsequent amending legislation in the hands of technical committees meeting in secret. The Commission can now bring forward a virtually identical proposal which will meet this point of principle, and can be dealt with at speed without compromising the liberalisation timetable.

Labour MEP Mrs Mel Read added that there had been broad agreement between the Council, Commission and Parliament on the substance of the voice telephony package and confirmed that the EP indeed wished to facilitate the liberalisation package, but condemned "the Council of Ministers' refusal to accept the democratic principles of the Maastricht Treaty...".

The voice telephony case has demonstrated that the EP's powers should not be underestimated and that it is prepared to use its power of veto on a point of principle. The consequences are inconvenient rather than disastrous for supporters of the package: the Commission must now come up with a modified proposal which will pave the way for a future compromise between the Council and the EP. The EP is likely to be fully informed of developments this time.

E. The Scandinavian Applicants for EU Membership

The Guardian reported on 17 April 1993 that if Sweden joined the Union there would be "a radical increase in government openness" and that Sweden, which has a long tradition of open government itself, would "want to encourage the EC institutions and the other member states to become more open and less secretive". Sweden, along with Norway and Finland, have attached Declarations to the EU Accession Treaty on their commitment to transparency and open government (Declarations 41,46 and 48), as follows:

[13]

The Union’s response to the Swedish Declaration was to take note of the unilateral Declaration and assume that Sweden "will fully comply with Community law in this respect" (Article 2 of Swedish Declaration).

The question of openness was a referendum issue in Finland, which voted in favour of membership on 16 October 1994, and is likely to be an issue in the Norwegian and Swedish campaigns.

[13] Treaty of Accession to the European Union, Cm 2606, European Communities No. 7 (1994)

IV The "Refusal to Disclose" Article and the Dutch Action

In December 1993, a *Code of Conduct Concerning Public Access to Council and Commission Documents*[14] was implemented under Article 22 of the Council's Rules of Procedure (in accordance with the Council Decision of 20 December 1993 on public access to Council Documents).[15]

Article 4(2) of the Decision states:

> Access to a Council document may be refused in order to protect the confidentiality of the Council's proceedings.

The *Code of Conduct* contains a similar proviso to restrict access to Council documents, stating:

> They [the Institutions] may also refuse access in order to protect the institution's interest in the confidentiality of its proceedings.

A request from Mr Brown-Pappamikail, an official of the European Socialist Group in the European Parliament, for information on the criteria used by the Council to approve or deny requests for access to documents received the reply: "This is a particularly sensitive file and the preparatory documents which it contains are covered by the obligation of professional secrecy".[16] From the implementation of the Code of Conduct until the end of May 1994, only six of the 27 requests had been fully met.

Dutch and Danish Ministers objected strongly to the catch-all clause in the Decision and Code of Conduct, maintaining that Council business would remain as secretive as before. The Netherlands Ministers argued that "a policy to enhance the rights of European citizens cannot be dealt with as an 'internal' matter, and should have required unanimous assent". It was by unanimous agreement that the Edinburgh European Council decided to increase openness in the Community institutions, so it could be argued that unanimity should have been a requirement for a decision on the measures themselves.[17]

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[14] 93/730/EC, OJL 340, 31 December 1993
[15] 93/731/EC, OJL 340, 31 December 1993
[16] *Financial Times*, 13 September 1994
[17] General Affairs Council press release annex, 16/17 May 199

The Netherlands Government's action in the ECJ challenges the validity of the Treaty base Article 151(3)and Article 22 of the Council's Rules of procedure, which, it claims, refer only to the internal organisation of the Council, whereas the public access provisions in the Code of Conduct and the Council Decision have an external effect. Notification of the case (C-58/94) was published in the Official Journal on 26 March 1994:

[18]

The European Parliament's Committee on Legal Affairs decided unanimously on 27 April 1994 that the EP should support the Netherlands' action at the ECJ. Christine Oddy, MEP, the Labour spokeswoman on the Legal Affairs Committee, said: "The endemic secrecy surrounding council business must be ended. ... People have a right to know the circumstances surrounding the momentous decisions that ministers take and which directly affect us all".[19] The same report quotes the Conservative MEP Lord Inglewood: "The Council of Ministers is probably the only legislature in the free world that meets behind closed doors, and that state of affairs should not continue".

In the Council the Dutch and Danish have been opposed by Belgian, German, French and Portuguese Ministers, who have argued that the Council would be inhibited in decision-making if deliberations were made public. The UK position has been more ambivalent. In a

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[18] OJC 90, 26 March 1994, p.11
[19] *Guardian*, 28 April 1994

recent parliamentary reply on the Netherlands challenge, Mr Heathcoat-Amory said:

[20]

V Guardian Case

The confidentiality clause was invoked in April 1994 when Foreign Ministers denied John Carvel (*Guardian* European Affairs Editor) and *The Guardian* newspaper access to certain Council documents. *The Guardian* had made a formal request (under Article 2 of the Decision 93/731/93 and the Code of Conduct) for three sets of documents covering Council meetings of the Social Affairs Councils in October and November 1993 (concerning a directive which would help to prevent the exploitation of child labour), the Justice Council in November 1993 (concerning immigration policy and the terrorist risk) and the Agriculture Council on 24-25 January 1994. Following an exchange of letters, the request for some of the documents was vetoed at a Foreign Affairs Council on 18 April 1994.

At the request of the Danish and Netherlands delegations, the General Affairs Council on 16/17 May discussed the implementation of the Decision of 20 December 1993, noting in the official press release that "The two delegations are opposed to the systematic refusal of requests by private individuals for the release of minutes of Council meetings and have asked for some relaxation of the Council's rules". The Council noted that "the dossier required further technical preparation" and instructed COREPER to prepare for discussion of the subject in June. The Council also confirmed its rejection of the request for information by John Carvel and *The Guardian*, with the Danish and Dutch delegations voting against.[21] An explanation of their votes was published in the press release:

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[20] HC Deb, 19 May 1994, c 554W
[21] see also HC Deb, 25 May 1994, c187W

[22]

The *Guardian* case was submitted to the Court of First Instance on 24 May 1994 and notification appeared in the *Official Journal* C series on 23 July 1994,[23] as follows:

[22] Council Press Release, 6883/94
[23] OJC 202, 23.7.94, Case T-194/94

Under the Court's Rules of procedure, other EU institutions and member states may participate in the proceedings. The European Parliament supports the *Guardian* claim, its Legal Affairs Committee having agreed unanimously on 7 September to intervene formally on the paper's behalf and oppose the Council's practice of secrecy. The Danish Government has also agreed to support the *Guardian* case. In its own defence, the Council has acknowledged that a blanket ban on public access to EU documents would be unlawful, but has denied operating such a ban. *The Guardian*, in its final written submission to the Court, has sought to refute this denial, citing Dutch and Danish Government declarations and a memorandum by the Council's legal service admitting to a policy of automatic refusal. [24] The Council is required to respond in a few weeks but a judgement at the ECJ is not expected until 1995.

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[24] *Guardian*, 6 October 1994

The main difference between the Dutch case and that of the *Guardian* is that the Netherlands is arguing purely on the basis of Treaty base rather than principle. The *Guardian*, on the other hand, is arguing that public access to documentation should be a fundamental principle of EC law, particularly in the legislative procedures.

VI The Financial Times Request

A third request for information hitherto unavailable has come from the *Financial Times* newspaper. The *Financial Times* requested a record of qualified majority voting (QMV) in the Council of Ministers dating back to 1989. There have been until recently no recorded statistics of Council votes except in the minutes of ministerial meetings which are not released. The Council therefore rejected the FT's request for past voting records on the grounds that it did not possess such statistics and that until the end of 1993, voting in the Council had been confidential. Denmark abstained and the Netherlands voted against the decision, noting that in its opinion, the Council should collate past votes and make them available.

However, on 6 July 1994, the Council decided to establish a public record of how national Ministers vote. Its final reply to the FT, which was endorsed by the current German EU Presidency, was that "for the future the Council intends to arrange for statistics on votes made public ... to be compiled and periodically published".[25]

The *Financial Times* remains sceptical, however, reporting on 13 September:

> The Council appears determined to prevent further breaches of its secrecy by arguing before the European Court that decision making could be paralysed by a public right to know details of the negotiating stances of member states. In a submission to the Court, the Council has urged the judges to ignore declarations at EU summits in favour of greater transparency, arguing that such statements had no binding effect.

The publication of voting records is also a sensitive issue. At present, many QMV decisions are taken without any formal vote. This means that Ministers do not have to account for their views and could claim that they were opposed to a measure that was adopted but proved to be unpopular with national parliaments. In order to protect their privacy, Council Ministers might become reluctant to have formal votes, a move which would be a considerable setback in moves towards more openness.

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[25] *Financial Times*, 8 July 1994

Details of voting records in single market measures have not been either unobtainable or secret for British Parliamentarians, however. In August 1994, details of the British voting record in qualified majority votes on Single Market measures were given by the DTI Minister Richard Needham. The list sets out QMV votes in the Foreign Affairs and Internal Market Councils from January 1989 to December 1993. The list reveals that although the vast majority of measures were adopted unanimously, 91 out of 233 single market decisions were adopted against the wishes of one or more member states. The UK voted in favour in contested votes on 66 occasions, abstained 17 times (which is tantamount to a vote against) and voted against a measure (ie was outvoted) 8 times.

VII Conclusions

The full implications of the Guardian and the Netherlands cases at the ECJ remain to be seen. They are at any event a test of the Maastricht Declaration which states that "transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration" and of subsequent pledges from the Institutions in support of open government.

The exemptions listed in the Council's Code of Conduct would probably be acceptable in any modern democracy where some restrictions are considered necessary, in the interests of public security or monetary stability, for example. However, the catch-all clause to which the Dutch have objected and which has now been invoked to prevent access to documents by *The Guardian* is in the view of the latter an exemption "worthy of a totalitarian state". [26]

A number of governments are wary about making potentially sensitive documents available to the public. Controversies which arose as a result of interested parties gaining access to documents which have hitherto not gone beyond the Council and COREPER might have repercussions for national scrutiny procedures and subsequent lobbying of Ministers might delay or even halt the already complicated and lengthy decision-making processes.

However, there are already some indications that the EU institutions are yielding to national pressures to release certain documents labelled confidential. The challenge to national governments to support the principle of access to 'sensitive' documents has been taken up recently in France. Under Article 104c of the Treaty a procedure is set out for the monitoring of deficits in the member states and the Commission is required to produce a report. The anti-Maastricht RPR politician and President of the National Assembly, Philippe Séguin, asked the Prime Minister Edouard Balladur to obtain a copy of the Finance Council's 'confidential'

[26] *Guardian*, 19 April 1994

report on the excessive deficit in France in time for the National Assembly's budget debate on 11 October. Mr Balladur had said in July that he would try to remedy the weakness in links between the French Parliament and European Union procedures. He put the request to the German Presidency and the report was forthcoming.

The Commission's Opinion and decision on Britain's excessive deficit and the Council's recommendations have not been made subject to a parliamentary scrutiny reserve in spite of being designated 'confidential'. It appears that the Presidency has left it to the Government of each member state to decide whether or not to make the 'confidential' reports available to their parliaments. Whether or not this heralds a more widespread liberal policy on the release of such documents remains to be seen.

VM/JML

Annex I

Edinburgh European Council Conclusions on Transparency

Annex II

Code of Conduct Concerning Public Access to Council and Commission Documents (93/730/EC)

(OJL 340, 31 December 1993)

Annex III

Council Decision of 20 December 1993 on Public Access to Council Documents (93/731/EC)

(OJL 340, 31 December 1993)

Annex IV

Commission Communication on Improved Access to Documents (94/C 67/03)

(OJC 67, 4 March 1994)