

**INSTITUTIONAL DYNAMICS AFTER NICE:
VIEWS FROM THE EUROPEAN PARLIAMENT**

***ARE THE EU INSTITUTIONS BECOMING MORE OPEN
AND TRANSPARENT?***

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I. Introduction

In the period after Nice, and in the preparatory period before a new IGC (whose watchwords are likely to include the need for more open decision-making and a clearer structure for the EU), the question of what is meant by openness and transparency at EU level, and the differing interpretations of this within the various EU institutions and bodies, is going to be of fundamental importance.

The need for the EU institutions to become more open and transparent has become ever clearer in recent years, not least to help re-connect the European Union with its citizens. An initial problem, however, relates to what exactly is meant by openness and transparency. For there are many facets of this, most obviously the promotion of public access to EU documents and information, and the introduction of open meetings, but also other aspects, such as the need to draft clearer and more comprehensive EU texts, the provision of adequate and objective information on EU activities, the development of a more open and responsive administrative culture within the EU institutions, and even improvements in the EU's internal structures and functioning, with simpler procedures and a clearer definition of who does what.

In confronting these challenges, however, it is also evident that there are very real differences in approach between the Member States, with some, notably in the Netherlands and the Nordic states, advocating far-reaching systems of public access to documents, and others, especially but not exclusively in the southern Member States, wishing to maintain more closed and even secretive systems of decision-making. Meanwhile, the idea of open meetings, up to now much more widespread in the United States than in Europe, is gradually becoming more accepted within the EU as well.

In spite of these differences in attitude and practice, the last few years have seen considerable progress in extending openness principles within the EU. In particular, codes of access to EU documents have been developed within the various EU institutions and bodies, and the Amsterdam Treaty also introduced an explicit Treaty base for openness.

The situation is still by no means satisfactory, however, and this has become evident in the last year over the issues of European Parliament access to CFSP and enlargement documents and, above all, during the recent difficult negotiations between the institutions over the implementing rules for the new Article 255 of the Treaty.

The present paper seeks to explore these various elements. The first part seeks to put the openness debate in context, by examining the different facets of openness and transparency, the important roles of the European Parliament, the Ombudsman, the European Court of Justice and of citizens' groups in helping to promote greater openness, as well as the differing approaches to openness and transparency within the Member States.

The second part of the paper outlines the progressive extension of openness and transparency within the EU in recent years, including the development of a formal Treaty base and the evolving situation within the various EU institutions and bodies, notably the establishment of new codes of conduct on public access to their documents.

The final section of the paper reviews the present state of openness and transparency within the EU, and the areas where insufficient progress has been made. In particular, it reviews the recent debate on the implementing rules on public access to the documents of the Parliament, Commission and Council, and the various issues that have arisen in the course of this debate.

II. Openness in context

The different facets of openness and transparency

It is not always easy to define what is meant by "openness" and "transparency". In English both words exist (without always a clear distinction between them), whereas in many other European languages only the equivalent for transparency exists. Without getting into a semantic discussion, it is worth briefly reviewing some of the main facets.

The first of these is public access to documents. To what extent are they on a register, or how else can one be made aware of which documents exist, which categories of documents are excluded or restricted, what systems have been established to make documents available, how does one apply, how quick is the response, what are the appeal mechanisms? These are just some of the elements related to public access to documents.

A second main facet of transparency is that of open meetings. Which meetings are open, and to whom and under what conditions? Open meetings are clearly complementary to open access to documents, in that they permit people not merely to judge the outcome of the decision-making process, but to see the decision-makers in action and even to interact directly with them.

An issue, which relates to both these facets of openness, is the extent to which elected politicians, the representatives of the people, should have privileged access to documents and to meetings, and again under what conditions.

In addition to these two more obvious facets of openness, there are a number of wider aspects that were mentioned in the introduction to this paper. One of these is the need for an open and responsive administrative culture, where it is clear who is responsible for what, and which is responsive to the inquiries of those affected by decisions, and indeed of any concerned citizens (the need for courteous and rapid response to letters, telephone calls, etc.). This is also helped by a communication strategy, which provides clear and understandable information, but which, at the same time, is not propaganda. Moreover, documents in general should be comprehensive and not cloaked in jargon. A further issue of particular relevance at EU level is the extent to which citizens should have the right to receive information from, and communicate with, the decision-makers in their own language.

Finally, transparency at EU level can be promoted by improvements in the EU's own internal structure and functioning, by clearer and simpler procedures, by greater democracy and accountability, and by a clearer delimitation of who does what, ideally in the form of a treaty of a more explicitly constitutional nature rather than the present ad hoc and badly structured set of texts. These are all important facets of transparency which deserve greater exploration. This paper will, however, concentrate on the two main aspects of public access to documents and of open meetings.

Why has it become of increasing importance?

The initial administrative culture of the EU institutions tended to be a top-down and elitist one, heavily influenced by the French model, in particular. Moreover, the national traditions of the six founding Member States put little emphasis on openness, with The Netherlands being the only real exception. Denmark then joined them after the first wave of expansion.

Over the years, however, there has been increasing pressure for more open EU decision-making and for a more open administrative culture. In particular, the steady development of NGOs and of civil society, coupled with an increasing lack of trust in politicians and administrations, has led to further demands for wider access to documents and to information. These trends were considerably reinforced during the period after the Maastricht Treaty, with the initial "no" vote in Denmark and the different referenda or parliamentary ratification struggles in other countries, in which the lack of EU openness was an important issue. A further significant push came from the most recent EU expansion to the new Member States of Finland and Sweden with their long traditions of openness and of public access to documents.

Who has been pushing for greater openness?

In addition, however, there have been more specific catalysts, including pressure from within the European Parliament, the activities of the EU Ombudsman, pressures from specific individuals and NGOs, and a number of decisions by the European Court of Justice.

The European Parliament has been a consistent lobbyist for greater openness, partly in reflection of the trend in public opinion, partly because it itself has become increasingly open in its working methods (that is described in more detail below), and has had little to hide, and finally because it too has been seeking greater access to certain categories of documents.

Parliament has thus taken a number of initiatives in this sense. In 1993 it adopted with the Commission and Council an inter-institutional agreement on democracy, transparency and subsidiarity. In the preparatory phase for the Amsterdam IGC its Institutional Affairs Committee appointed three of its members, Mr Donnelly Mr St. Pierre and Mr Tsatsos, as "explorers", in order to negotiate a new and more far-reaching inter-institutional agreement on transparency¹, but there was little response from the Council. Further efforts were made during the IGC by Mr Bonde, a Danish MEP with a particular concern about openness, and who produced a number of working documents on this issue on behalf of the Institutional Affairs Committee. He launched an exceptionally early example of internet consultation on his own draft proposals for the IGC on openness and transparency², and his recommendations were also sent out to the members of national parliaments. Parliament's resolution before the Amsterdam IGC³ all included sections calling for greater openness.

¹ See their working document on "Transparency and Democracy" of November 1994 (PE 210.692/A and B/rev.

² *Open Forum on an Open Europe.*

³ *Martin/Bourlanges, and Maij-Weggen/Dury resolutions.*

After the Amsterdam Treaty introduced new Treaty provisions on openness, a further report was drawn-up by Ms Lööw, a Swedish member of the Institutional Affairs Committee, whose report on "Openness within the European Union" made recommendations as to how best to implement the new Article 255 of the Treaty¹. She suggested a number of guidelines that needed to be considered in drawing-up a new EU code on openness, called for an extension of the practice of open meetings (notably of the Council when meeting in its legislative capacity), for further use of the Internet, and for more open administrative cultures to be developed within the various EU institutions.

Since this report was adopted, a number of members have continued to push hard on the subject, including long-standing MEPs such as Mr Bonde and Ms Maij-Weggen, as well as a group of newly elected members (Ms van der Laan, Ms Malmström, Mr Clegg, Mr Sterckx and Mr Di Pietro), who, in the year 2000, set up a website "www.OpenUpEurope.com", in which they placed a number of unpublished European Parliament documents directly on the Internet (see below). Parliament's efforts to turn the implementing rules on Article 255 into a more far-reaching European Union Freedom of Information Act are described in the last section below.

The EU Ombudsman, Jacob Söderman, has also played a very important role in the struggle for greater EU openness. His first own initiative inquiry after his appointment was into public access to documents, in which he called for all those EU institutions and bodies that did not yet have a code of access to documents to establish such a code. Launched in June 1996 his special report (616/PUBAC/F/IJH) was presented to the European Parliament in December 1997, and was generally very successful in its objectives. Among the Ombudsman's subsequent initiatives have been an inquiry into the existence and public accessibility, in the different Community institutions and bodies, of a code of conduct on good administrative behaviour of officials in their relations with the public.

A further impact on the development of openness within the European Union has stemmed from decisions by the European Court of First Instance and by the European Court of Justice, such as "Netherlands vs. Council" (case C58/94), "Carvel and Guardian Newspapers vs. Council" (case T194/94), "WWF U.K. vs. Commission" (case T105/95), "Interporc vs. Commission" (case T124/96) and the "Svenska Journalistförbund vs. Council" (case T-174/95). The public's right of access to documents has been generally reinforced as a result of these decisions, as well as such important principles that persons requesting documents are not required to give reasons for such requests. These cases have also helped to clarify the ground-rules as regards, for example, restriction of the scope of catch-all exemptions (such as "confidentiality of an institution's proceedings" or "the public interest" and the need to demonstrate that such exemptions have been subject to a balanced examination, on a case-by-case basis, against the criteria of the public's right to information.

Finally, a vital role has also been played by certain pressure groups and concerned citizens. As the above list of court cases shows, some of these have been journalists, such as John Carvel of the "Guardian" and the group of Swedish journalists in case T-174/95. Moreover, the European Federation of Journalists adopted a declaration in April 1996 on

¹ Resolution adopted in plenary of 12 January 1999, based on report A4-0476/98.

the "right to know: access to information in European countries", in which they called forcefully for a European Freedom of Information Act and set out a number of principles to achieve this. While concentrating on access to documents, the declaration also stated that "civil servants must be taught to be open, to have the confidence to disclose information and not to hide it ... in order to break the culture of secrecy and establish a culture of openness".

A number of determined individuals have also done their best to open up access to documents, notably Steve Peers, and above all Tony Bunyan of "Statewatch", who have been responsible for a very high percentage of requests to the Council for access to their documents pursuant to their own internal code (see discussion below). In the 1996-97 period, the Council's report on openness ruefully noted that "two applicants alone accounted for 58% of the documents applied for". In all, they received over 700 documents from the Council, on the basis of 62 and 55 applications and 17 and 20 confirmatory applications.

Different approaches to openness within the Member States

The promotion of greater openness in all its facets is complicated within the European Union by the existence of very different attitudes and traditions in the Member States. On the one hand there is a group of countries such as Sweden (which has had a right of access to documents enshrined in its constitution since 1766), Denmark, Finland and The Netherlands, which have had a tradition of openness, especially as regards access to documents. On the other hand, there is a larger group of EU countries, including most of the larger EU Member States, which have had a more restrictive attitude to openness. It would be tempting to see this as a north/south split, or even a Catholic/Protestant divide (material here for research!), although the dangers of generalisation are shown by the fact that Germany and (until recently at least) the United Kingdom have also not had very open administrative cultures.

Certainly, however, in discussions within the EU, the Nordic countries and The Netherlands have pushed for openness more than the other Member States, and have often taken a distinctive stance, such as in taking a more positive attitude to release certain documents to those requesting them. In the year 2000, out of 24 confirmatory applications for Council documents in which the relevant Council working party was divided as to whether to grant or withhold access, Denmark and Sweden voted to grant access in 88% and 83% of cases, Finland in 58%, The Netherlands in 29%, the U.K. in 20%, and Ireland in 17% of cases. Greece and Germany each voted to grant access in only one case (4%), and Austria, Belgium, Portugal, Luxembourg, France and Spain did not vote to grant access in a single case. (It is also interesting to note that of the seven MEPs who have taken part in recent "trilogue" discussions with the Council and Commission over the implementation of Article 255, two have been Swedes, two have been Finns, and one Dutch: the other two were British, and there were none from central or southern Europe!).

Two further qualifying sets of comments need to be made, however. The first of these is that attitudes to openness are not static, and there is now a greater demand for openness within most Member States. The United Kingdom, for example, is still one of the few EU Member States without some kind of Freedom of Information Act, but attitudes have changed considerably. The United Kingdom has allied itself with the Nordic countries in several recent disputes as to whether to release Council documents, many U.K.

parliamentary committee meetings are open to the public, and some very impressive individual steps have been taken: the new U.K. Food Safety Authority, for example, has adopted a very radical approach as regards openness of its proceedings, both in terms of access to information and of open meetings.

The second set of comments is that comparisons between "open" and "closed" administrative cultures need to be put into perspective. Nordic openness, for example, has its limits. Its emphasis is much more on public access to documents than on open meetings, and the parliamentary committees of the Nordic countries generally meet "in camera". On the other hand, other countries have had seemingly closed systems, but information has been informally available to those who have known how and where to look. This has been the case, for example, of the "Brussels" EU culture, where even working and preparatory documents which might not be made available under Nordic codes have been widely distributed to those in the know in Brussels, such as journalists or trade associations. This is not to minimise the differences between cultures as regards attitudes to openness, but merely to point out that the situation is more complex than first meets the eye.

III. Progressive extension of openness within the EU in recent years

Adoption of a formal Treaty basis for openness

While a public right of access to information could be implied from general principles of European law, for a long time there was no formal Treaty basis for openness. A non-binding Declaration on the Right of Access to Information was introduced in the Maastricht Treaty, and this was subsequently reinforced by European Council conclusions such as those at Birmingham and Edinburgh, and also by an inter-institutional agreement of 25 October 1993 between the European Parliament, Council and Commission on democracy, transparency and subsidiarity.

The Amsterdam treaty, however, explicitly introduced principles of openness into the Treaty. EU decisions now have to be taken "as openly as possible and as closely as possible to the citizen". Moreover, Article 255 TEC now states that "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". "General principles and limits on grounds of public or private interest governing this right of access to documents" would have to be laid down within two years by an act subject to codecision between the Parliament and the Council. It is this that has been the subject of so much controversy in recent months, and the arguments over which are described in the last section of this paper.

Finally, Article 255 also states that the Parliament, Council and Commission shall elaborate in their own rules of procedure specific provisions regarding access to their documents. In fact, codes of conduct on access to Commission and Council documents have now been in existence for around seven years. These have been followed by codes in other EU institutions and decentralised bodies. The introduction of codes on access to documents and other developments concerning openness in specific institutions and bodies are described in the next section of this paper.

The development of openness and transparency within individual EU institutions and bodies

(i) The Council

The Council has long been seen as the villain of the piece as regards openness, especially with regard to its traditional secrecy when meeting in its legislative capacity. This can be explained (but certainly not justified!) by the Council's mix of executive and legislative roles and its involvement in both sensitive and less sensitive questions, as well as its tendency to operate by consensus, so that the more secretive Member States have slowed down or blocked further progress. Nevertheless, in spite of this, there have been a number of measures in recent years towards somewhat greater openness even within the Council.

A first important step was that taken in Council Decision 93/731/EC of 20 December 1993 on public access to Council documents. This established a much more transparent system whereby the Council is normally meant to reply within one month to any request for access to Council documents. If a document is deemed to fall within one of the exceptions, and access to it is refused, the applicant has a further month to submit a confirmatory application. Such applications are then examined by the Information Working Group, a Council working group consisting primarily of the press and information officers at the national permanent representations to the EU. A specific unit within the Council Secretariat administers the system as a whole.

The Council code did, however, have some less satisfactory features. Firstly, failure to reply to an application or a confirmatory application within the normal month was deemed to be equivalent to a refusal. While seen by the Council lawyers as ensuring a measure of certainty for applications, it seems to be quite contrary to what should be normal administrative courtesies. Secondly, the exceptions were couched in much too general terms, especially the catch-all references to "protection of the public interest" and above all to the protection of "the confidentiality of the Council's proceedings". In 1996, in the early years of the system, but after the system had already settled down, 20% of all documents refused were on the former grounds, and no less than 68% on the latter grounds.

In spite of these defects, the number of requests for documents to the Council did grow considerably, and the percentage of those being refused also went down. It became obvious however, that there was a particular problem in the field of Justice and Home Affairs, where traditional secrecy continued to prevail. Moreover, citizens of some EU countries such as the U.K. seemed to be much more attuned to their rights than those in countries like Portugal, Greece, France, Italy and Spain. Finally, it should also be mentioned that the Ombudsman has expressed his dissatisfaction with the Council's failure to respect rules on the right of access to documents in draft recommendations issued in March 2001, including failure to grant access to documents from the "Senior Level Group" and the "EU Task Force" on the grounds that they were not held "by the Council, but only by the General Secretariat".

Moreover, on 14 August 2000, the Council in Decision 2000/527/EC reduced the scope of its earlier Decision 93/731/EC by completely excluding certain confidential documents in the security and defence context from the system. Other European security and defence policy documents (those not classified as "top secret, secret or confidential") could be

made available, but responsibility for examining any confirmatory applications was removed from the Information Working Group and handed over to officials working on security and defence matters¹. Finally, the code was further amended on 19 March 2001 by a Council decision that provided for automatic publication of the full text of certain Council documents, but also introduced a number of new restrictions.

Besides the development of its code on access to documents, the Council has also taken a number of other related measures. Publication of Council votes and of any explanations of votes have been provided for since December 1993 in the Council Rules of Procedure, public access to statements in the Council minutes and to such minutes was permitted by a new Council code of Conduct on 2 October 1995², and a public register of Council documents has also been established after guidelines were adopted by the Council on 19 March 1998. As a result of a later revision in these guidelines, there may now also be a reference in the Council register to the document number and the subject matter of classified documents. The register is also meant to indicate which documents have already been released to the public. Their content is to be made available on the Internet. Since 1 January 2000, lists of items on the provisional agendas of Council meetings (and references to the documents being considered) have also been made accessible to the public. These are all fine as far as they go, but there are still substantial limitations to all these measures.

The results of voting are now systematically published in the case of common positions and for formal legislative acts, but the preparatory legislative discussions are still protected. Moreover, "deliberations leading to the adoption of internal measures, administrative or budgetary acts, acts concerning inter-institutional or international relations or non-binding acts such as conclusions, recommendations or resolutions are not regarded as legislative acts"³. Statements in its minutes can also be prevented from being released to the public at the request of one of the Member States. Again, the main problems in this respect have been in the fields of Justice and Home Affairs, and of Common Foreign and Security Policy.

The Council's Public Register of Documents is also helpful, but is not very easy to use for the non-initiated. In addition, the Council's relevant rules permit no reference to be made to the subject matter of any classified document if they fall within a number of exceptions, including the inevitable "protection of the public interest". The Council decision of 14 August 2000 also provided for the public register to contain no reference at all to security and defence documents classified as top secret, secret or confidential.

A final measure that the Council has taken to improve transparency has been to hold a limited number of open Council meetings. An indicative list of such meetings is approved by the Council at the beginning of each Presidency. Neither journalists nor the public are allowed to enter the actual room where the Council is meeting, but the debate is re-transmitted to the main pressroom in the Council building. Many of these occasions have been bland in the extreme, with only the initial prepared statements by Ministers being

¹ *This issue is discussed in more detail in the last section of this paper.*

² *Unpublished statements had been a particular bone of contention with the European Parliament, which discovered that its legislative role had been undercut in certain cases, such as when it adopted its position on state aids to shipbuilding, and later discovered that Germany had been permitted a derogation for East German shipyards as a result of an unpublished statement.*

³ *Information handbook of the Council of the European Union (May 1998).*

transmitted, and with minimal cut-and-thrust in the debate. There have occasionally been livelier occasions, such as in March 2001 when a number of the Environment Ministers harshly criticised the Commission's proposal for a Sixth Environment Action Programme, provoking a vigorous defence of the Commission's approach by Ms Wallström. Those sceptical of this type of meeting argued that some of the critics were playing to the gallery, and that they would have adopted a more measured approach in the normal "in camera" session.

(ii) The Commission

The Commission has also had a code on public access to its documents, since a decision was taken to this effect on 8 February 1994. Unsurprisingly, since it stemmed from a Commission/Council agreement, its terms were almost identical to those in the Council's code, including the same exceptions and the same concept of failure to reply to an applicant being deemed to be a refusal.

The Commission's "Citizen's Guide to Access to Commission Documents" pointed out that any internal Commission document could be requested, such as "preparatory documents on Commission decisions and policy initiatives such as preliminary drafts, interim reports, draft legislative proposals or decisions" as well as "explanatory documents or other kinds of information such as statistics, memoranda or studies which form the background to Commission decisions and policy measures". This is rather ironic in view of the much more restrictive position later taken by the Commission in its initial proposals for implementing Article 255 of the Treaty.

Demand for Commission documents has been greater than for those of the Council, with 750 requests in 1997 alone. As for the Council code, most of the refusals to provide Commission documents stemmed from the two broadly drawn exceptions of protection of the public interest and protection of the confidentiality of the Commission's proceedings. An interesting subsequent initiative has been that taken recently by European Commission President Prodi, who has established a public correspondence register of all his incoming and outgoing mail. Documents can then be sent to those interested.

A separate but related issue has been the extent to which the Commission should provide privileged access to certain of its confidential documents to members of the European Parliament. The negotiations on this sensitive issue are described below in the final section of this paper.

In addition, the Commission has established a "code of good administrative behaviour" for its staff in their relations with the public, including guidelines as to how they should deal with written, telephone and e-mail enquiries.

(iii) Other EU institutions and decentralised agencies and bodies

An important flaw of Article 255 in the Treaty, and of the draft implementing rules put forward by the Commission, is that they only cover access to documents of the Council, Commission and Parliament, and not other Community institutions and bodies. This problem was, however, tackled in an own-initiative report by the EU Ombudsman in the course of 1996. This inquiry helped to accelerate the adoption of codes of conduct on

access to documents in most of the institutions and bodies concerned. The basic model for most of these was that of the pre-existing Commission and Council codes.

The European Investment Bank, however, came up with its own and much more restrictive rules¹, including the provision that applicants had to identify the purpose for which a request was made. The rules also contained an extremely comprehensive set of criteria for not providing documents, and even included a provision on "illegitimate motives". "Where the Bank has reason to believe that the identity of the applicant or the purpose of the request have been misrepresented, or that the request has been made in pursuit of commercial objectives or other motives which do not accord with the purposes that underline the principle of transparency, the request shall be rejected ..." (op cit, Article 9).

Other distinctive cases were those of the European Court of Justice, which told the Ombudsman (on 21 October 1997) that "it had extreme difficulty in establishing a clear separation between documents which related to its judicial role, and those which do not", and of Europol, which only decided in July 2000, following on from a recommendation of the Ombudsman, to apply the same rules on public access as those of the Council.

(iv) The European Parliament

The European Parliament itself has gradually changed its internal rules and procedures in the sense of greater openness. As it becomes more powerful, however, notably through the co-decision procedure, and becomes more involved in sensitive home affairs and justice, and foreign policy and security matters, it will also face difficult questions as to how to handle issues of transparency and openness in the future.

The most distinctive aspect of openness within the European Parliament has been its far-reaching practice of open meetings. Until recently this was not reflected in Parliament's rules, which used to state that "committee meetings shall not be held in public unless the committee decides otherwise". Parliament's rules even provided for "in camera" sessions of the plenary, if so decided by a majority of two-thirds of the votes cast. In reality, plenary sessions were always held in public, and from the early 1980s onwards Parliament's committees began, one-by-one, to open up their meetings to the public. Practically all of Parliament's committee meetings are now open.

The rules revision of June 1999 finally brought the European Parliament's internal rules in line with the developing practice. The provision for "in camera" sessions of the plenary was abolished, and a special new Chapter XXII on "openness and transparency" was introduced into the rules. This states (Rule 171) that "Parliament shall ensure the utmost transparency of its activities in line with the provisions of Article 1 of the EU Treaty", that "debates in Parliament shall be public" and that "committees shall normally meet in public. Committees may decide, however, at the latest when the agenda of the meeting in question is adopted, to divide the agenda for a particular meeting into items open to the public and items closed to the public". The latter are now rare, with the most common reason for "in camera" sessions being the need to deliberate on a Member State request for the lifting of a member's immunity. Meetings can also be closed at the request of an

¹ *Rules on Public Access to Documents, adopted by the Bank's Management Committee on 26 March 1997.*

outside speaker, and if the committee agrees, but experience has normally shown that little is said on these occasions that could not have been said in public.

There are, of course, still Parliament meetings that are closed¹, including those in the context of codecision conciliation (meetings of Parliament's delegation, "trilogues", and of the full Conciliation Committee). Most members feel that these need to remain "in camera" in order to permit real negotiations with the Council, but a minority has suggested that the final conciliation meeting, at least, might take place in public.

The other main facet of openness within the Parliament, namely public access to its documents, is more complex than it might first seem. Parliament's rules lay down a number of clear rules. Chapter XIX provides for a "public record of proceedings" and states that both the minutes of Parliament's plenaries and the verbatim report of proceedings are to be published in the Official Journal of the European Communities (the former within one month!). Rule 172 (within Chapter XXII on "openness and transparency") covers the issue of "public access to documents" and states (172.2) that "unless a committee decides otherwise, its documents shall be made public". It further calls for their status to be "clearly indicated". This is meant to reduce the risks of confusion as to whether a document is a preliminary draft document not yet considered by a committee, is a draft report already in the public domain (in both cases reflecting the views of one member only), or else has been formally adopted by a committee, and thus reflects its majority view.

The way in which these rules were interpreted, however, was the subject of initial controversy. A distinction was initially made between publication of committee documents on the Intranet and the Internet. Draft reports, opinions and amendments were thus made available for internal Parliament use on its Intranet at least two days before the committee meeting at which they were to be considered, whereas they were to be put on the Internet for general public availability no later than the morning before the start of the committee meeting.

This distinction was challenged by a group of members within the Parliament, who set up a website in March 2000 called "OpenUpEurope.com", in which all documents available internally in the European Parliament were made public each week. The distinction also turned out to be difficult to make in practice, and committee documents are now put on the Internet as soon as they become available from translation. Parliament's implementing provisions still permit draft committee documents not to be put in the public domain if a rapporteur or draftsman and/or the relevant committee chairman, do not want this, but in practice this seldom, if ever, occurs.

After the Ombudsman's inquiry into whether EU institutions and bodies besides the Commission and Council were planning to institute their own codes of access to documents, the Parliament's Bureau adopted a set of rules in July 1997 concerning public access to Parliament's documents. This was practically identical to the Commission and Council codes. Its scope is, however, much less obvious than in the case of the Commission and Council, and very few requests have ever been made pursuant to it to Parliament's administration².

¹ Besides purely internal meetings, such as those of Parliament's Bureau and of its Conference of Presidents
² It is run by the service "Courrier des Citoyens", which responds to general mail sent to the Parliament by the public.

Parliament's rules also now provide (Rule 172.3) for all Parliament documents to be included in a public register. Moreover, the new implementing rules for Article 255 call for (Article 11 of the text agreed between Parliament and Council) each institution to "provide public access to a register of documents", access to which should be provided in electronic form. It is meant to be up and running within a year (by 2002), since most of the documents to be included in such a register will already be in the public domain, apart from a few internal Bureau and Conference of Presidents' documents¹. The main advantage of this register should be to make Parliament's documents more visible.

The issue of visibility and user-friendliness has also been raised in the context of publicity for the register of MEPs financial and other interests that is laid down in Annex 1 of Parliament's Rules of Procedure. Article 3 of this annex states that "the register shall be open to the public for inspection", but for a long time this was interpreted as meaning that members of the public would have to come to a specific office in the Parliament in order to consult it, and were also not allowed to make copies of it. This too proved hard to implement in process, and was challenged in a recent British television programme, whose producers copied bits of the register manually, and then publicised the whole system. In April 2001 the Parliament's Bureau finally took the decision that the register of Members' interests was to be published on the Internet.

An important set of issues related to the transparency of documents treated within the Parliament has concerned the handling of confidential documents. In 1989 the Parliament adopted what is now Annex VII of its Rules of Procedure providing for consideration of confidential documents communicated to the European Parliament, and issues of confidentiality are also raised in the rules in other contexts, such as the work of temporary committees of inquiry (Rule 151 and Annex VIII) and the work of the Ombudsman (Rule 179 and Annex X). As a result of recent controversies in the field of budgetary control, enlargement and common foreign and security policy, in particular, the issue of European Parliament access to a whole set of confidential documents has again come to the fore, and is described below in the last section of this paper.

What has become clear, however, is that Parliament's existing provisions on the handling of confidential documents (and, in particular those of Annex VIII), are too restrictive. Rule 173 now states that "Parliament shall adopt criteria for the definition of confidential information and documents" and the Framework Agreement between the European Parliament and the Commission of March 2000 also requires Parliament to draw up new rules. These are still awaiting final implementation.

The issue of confidential documents does pose, however, the question as to the extent to which members of the European Parliament should be entitled to privileged access to documents and information compared to the public as a whole, and subject to which criteria. A careful balancing act will be required. On the one hand MEPs are surely entitled to greater access to such information in the context of their parliamentary work than is currently the case. On the other hand, they will have to ensure that they are not overly sucked into the existing system of Council secrecy, and that they continue to insist that restrictions on transparency be kept to the absolute minimum.

¹ *Such as the minutes of the Bureau and the Conference of Presidents, that are distributed to all members of the Parliament (unless confidentiality is involved), but not to the public at large. The meeting dates and agendas of these meetings, however, are now in the public domain.*

A related question has been that of access of European parliamentarians to otherwise closed EU meetings, such as informal Council meetings, meetings of the EU coordination at international conferences or meetings of "comitology" committees. While some European Parliament committee chairmen have been invited to attend and speak at informal Council meetings, others have not, and most of the other meetings mentioned above are still closed to parliamentarians. There is a strong case, for example, that Parliament rapporteurs should be authorised to attend certain Council meetings as observers in order to get a direct idea of the range of issues being debated between the Member States.

Also in the name of openness, Parliament has argued, especially recently, that the Council should be prepared to give its point of view at committee meetings, especially in the second reading when a formal Council position has been established. This would help to reduce the current unsatisfactory proliferation of secretive and uncontrolled European Parliament/Council trilogues.

A final issue related to European Parliament transparency in the wider sense has been that of the code of conduct of good administrative behaviour of its officials, following on from the draft recommendation of the Ombudsman on this subject in July 1999. In February 2000 a code of conduct and guide to the obligations of officials and other servants of the European Parliament was published. This includes a section on "relations with citizens" which lays down that "officials and other servants shall behave in a courteous, friendly and helpful way when dealing with the public. The answers that they give must be prompt, factual, polite and clear cut". The subsection on "administrative openness" provides, inter alia, for rapid acknowledgement of receipt of a written request to an administrative department of Parliament, and for a reply to be given within 45 days. There are also further subsections on "access to European Parliament documents", "data gathering and information storage" and "complaints". The latter provides that any member of the public is entitled to complain against any infringement of these provisions, and also provides for designation of a specific Parliament official to be responsible for handling any such complaints.

IV. Recent inter-institutional conflicts on openness

Openness: a battle only half won

The above survey has shown that there has been considerable, if uneven, progress towards greater openness and transparency within the EU institutions. A lot, however, still remains to be done. Many aspects of the Council's proceedings, even when meeting in its legislative capacity, are still closed. There is still a considerable divide within the EU as a whole, and also within each of the EU institutions, as regards attitudes towards openness in general terms and in specific cases. The search for greater openness has thus seen both successes and setbacks.

The last section of this paper shows how difficult it can often be to achieve openness in practice. It looks at two recent sets of negotiations, one between the Commission and Parliament on the groundrules for the Parliament's access to documents held by the Commission, the other between Parliament, Council and Commission on the establishment of the new implementing rules for Article 255 of the Treaty.

Access to Commission held documents by the European Parliament

As mentioned above, Parliament has not only pushed hard for greater public access to EU documents, but has also sought privileged access to all the documents that it requires in the course of its work. However, the other institutions have often been more prepared to provide filtered information on their activities than to provide the actual documents themselves.

A particular catalyst in this request has been the activism of Parliament's Budgetary Control Committee in its investigations of individual cases of possible Commission fraud or mismanagement during the final days of the Santer Commission. The committee was convinced that a number of relevant documents were being withheld from it. The Parliament then decided that it would seek to negotiate an agreement with the Commission on the provision of confidential information. Two of Parliament's members, Ms Theato and Mr De Giovanni, the chairmen respectively of Parliament's Budgetary Control and Institutional Affairs Committees, then began negotiations with the responsible Commissioner for institutional matters, Mr Oreja. An outline agreement was reached between the negotiators, but was not put to the vote to the Parliament before the Santer Commission resigned, after which the draft agreement was put on ice.

The issue returned to the fore during the negotiations for a "Framework Agreement on relations between the European Parliament and the Commission" during the early days of the new Prodi Commission. This framework agreement replaced a pre-existing code of conduct, but was more far-reaching in its scope. The main part of the finally agreed text¹ included a lengthy section on the flow of information. Besides its general provisions, it also contained a specific paragraph (17) on the need for the Commission to forward all information necessary for control over the implementation of the budget to the Budgetary Control Committee. There was also a paragraph (18) to deal with the problem of leaks or privileged access to documents for certain journalists or interest groups. "If an internal Commission document - of which the European Parliament has not been informed pursuant to Article 13² of this agreement - is circulated outside the institutions, the President of the European Parliament may request that the document concerned be forwarded to the European Parliament without delay in order to communicate it to any Members of the European Parliament who may request it".

The main text also contained three annexes, one of which (Annex III) was specifically on the modalities for the forwarding of confidential information to the European Parliament. This was based in considerable measure on the draft agreement negotiated between Ms Theato, Mr De Giovanni and Mr Oreja.

According to the annex, confidential information may be requested by Parliament's President, the chairmen of Parliament's committees, the Bureau or the Conference of Presidents. In the event of doubt about the confidential nature of an item of information, or as to how it should be handled, the committee chairman concerned (and, where necessary, rapporteur) is meant to consult the relevant Commissioner. If the matter is still unresolved it is referred to the Presidents of the Commission and the Parliament. A variety of options for parliamentary handling of the document or information are then laid

¹ Finally voted on by the Parliament on 7 May 2000.

² Dealing with notification of the European Parliament of any Commission legislative initiative, or other significant initiative or decision.

down, ranging from only mildly restrictive measures (such as a ban on copying), round to highly restrictive ones ("in instances justified on absolutely exceptional grounds, information intended for the President of the European Parliament alone"). The Parliament also undertook to put in place a secure archive system for documents classified as confidential, a secure reading room and security provisions governing access to the reading room.

Some of the issues at dispute during the Parliament/Commission discussions on confidential information mirrored those that later emerged during the negotiations on the general implementing rules for Article 255 of the Treaty. One of these issues concerned the treatment of confidential information held by the Commission, but emanating from a third party, where the final version of the Annex lays down that confidential information from a state or an institution or an international organisation shall be forwarded only with their agreement. A second issue related to the general criteria that needed to be respected by the two institutions in judging confidentiality questions. The finally agreed text still refers to the catch-all phrase "protection of the interests of the Union, in particular those relating to public safety, international relations, monetary stability and financial interests".

Besides Annex III on confidential information, the Framework Agreement also contains an Annex II on "Forwarding to the European Parliament information on international agreements and enlargement, and involvement of the European Parliament in this respect". Regular and full information is to be provided to the Parliament in both contexts, and so that it can express its views in sufficient time.

It is still too early to judge the longer-term effectiveness of the Framework Agreement, especially since some of the implementing provisions are not yet fully in place. What is clear, however, is that there are still continuing disputes between the institutions on related matters, and also that filtered "information" on an issue is no substitute for providing the relevant document or documents.

A good illustration of this has come in the field of EU enlargement, where several Parliament committees requested access to the "screening documents" for individual candidate countries. In at least one case these were handed over to the Parliament, but in others they were not, and the final line taken by the Commission was that they were confidential negotiating documents that could not be given to the relevant parliamentary committee. There seems to have been little or no consideration of the possibility set down in Annex III of the Framework Agreement for certain confidential documents to be handed over to the parliamentary committee concerned, but on condition that certain restrictive conditions are applied.

Implementing agreement for Article 255 on public access to documents of the European Parliament, the Council and the Commission

(i) Why it has been so controversial

Article 255 TEC required implementing rules to be laid down within two years on the basis of a proposal by the Commission and by co-decision between the Parliament and the Council. Final agreement was reached in first reading in May 2001 (exactly on time) and a second reading and European Parliament/Council conciliation in third reading was thus avoided. It is in fact rare for there to be such an agreement in first reading on a controversial matter, and this might imply that

there was a large degree of consensus between the institutions on this proposal. In practice, the inter-institutional negotiations on these implementing rules have been anything but easy.

Difficult from the start, they were further complicated by the bitterly-contested Council Decision of 14 August 2000 amending the Council's decisions on access to its documents, in order to exclude "top secret, secret and confidential" documents in the security and defence context. Some of the leading advocates of greater openness, such as ECAS (the European Citizens' Advice Service), the EEB (the European Environmental Bureau), Tony Bunyan's "Statewatch" and the European Federation of Journalists, have been fiercely critical of all the texts being considered, and were urging the European Parliament to reject the finally agreed text right up to the Parliament's vote on 3 May 2001.

Why have these implementing rules proved to be so controversial, even before the Solana decision added a major new problem? In a nutshell, what was at stake was very presciently summarised in Parliament's resolution on "openness within the European Union" of 12 January 1999¹, when it stated that it believed "that the necessity of drawing up a new code constitutes an opportunity to learn from existing experience, and to come up with improved rules for the future"², but went on to warn "against the risk that few such improvements will be made, and even that some new and unjustified restrictions will be introduced"³. The establishment of new implementing rules on access to documents for the new Treaty base had indeed been seen by many as an opportunity to consolidate the undoubted but uneven progress that had already been made by the institutions in extending openness and transparency. Unfortunately others, especially within the Council and those Member States without a tradition of openness, themselves saw it as an opportunity to enact a number of provisions that would make it more rather than less difficult to further extend openness within the institutions. The Commission has tended to err on the side of caution both in drafting its initial proposal, and during the negotiations. The Parliament has been in an extremely difficult position and, while it has succeeded in negotiating a considerable number of improvements, has not got as much as many within the institution would have liked.

- (ii) The Commission's initial proposal - a few positive, but rather more negative features
The Commission's initial proposal (COM(2000)30 final) was put forward on 26 January 2000. It was based to a considerable degree on the existing Commission and Council codes. It did have a few good new features compared to existing codes, notably the fact that it was to apply to all documents held by the institutions (not just to those produced by them, as in the existing system, but also those received from third parties). Other good features were that a failure to reply within the prescribed time-limit to a confirmatory application for a document would be equivalent to a positive decision (rather than being treated as a refusal, as in the existing codes), and the possibility to produce only part of a document if some parts were covered by confidentiality (rather than giving a blanket refusal to access to the whole document).

¹ Based on the Lööw report.

² *Op cit.*, paragraph 2.

³ *Op. cit.*, paragraph 3.

On the other hand, the Commission's proposal also contained a number of more negative features, some of which represented a step backwards from the previous codes. The list of proposed exclusions, for example, was longer than ever before, and there was an explicit exclusion (as there had not been in the initial codes) of "texts for internal use such as discussion documents, opinions of departments and informal messages". Inter alia, there was also an unsatisfactory reference to "repetitive applications" which could be seen as a counter-attack against persistent applicants like Tony Bunyan. Finally, there were a number of other features of the proposal that reproduced some of the negative features of the existing codes, such as the failure to reply within the prescribed time limit to an initial application for a document being deemed to be a negative response.

Once the Parliament had received the text, two committees sought to have the lead role - the Civil Liberties Committee and the Committee on Constitutional Affairs. In the end Michael Cashman (British Labour) was appointed as rapporteur for the Civil Liberties Committee, and Hanja Maij-Weggen (Dutch Christian Democrat) was chosen to work alongside him for the Constitutional Affairs Committee.

(iii) The Solana "summertime coup"

As mentioned before, Parliament's work on its report was complicated in the summer of 2000 by the major modifications that were made to the existing 1993 Council code, in order to provide for a special regime for certain sensitive documents in the context of European security and defence policy (ESDP). The logic of the proposed changes was that the ESDP had developed since 1993, that applications were now being received for operational sensitive ESDP documents, and that the exceptions in the existing code were insufficient to take account of this new situation. A number of options were thus put forward by the Council secretariat and taken straight to COREPER at the end of July 2000. The option that was supported was that documents classified as "top secret", "secret" or "confidential" on matters concerning the security and defence of the Union or of one or more of its Member States or on military or non-military crisis management would be withdrawn from the scope of the existing Council code on access to documents. No application could be made for such documents, which would also not be referred to in the public register of Council documents. Documents classified as "restricted" would remain within the scope of the decision.

A further change that was agreed was that confirmatory applications for any ESDP texts remaining within the scope of the Council code would have to be considered by "persons authorised to take cognisance of the documents concerned" (i.e. ESDP officials rather than by the normal Council information working group).

The final text of the new Council Decision (2000/517/EC) was adopted by written procedure on 14 August 2000, with support by the majority of Member States, but with a minority being opposed.

There was great anger within the Parliament at the new Council Decision. The matter had been handled at great speed, without passing through a Council working group, without any information being given to the European Parliament or national parliaments, and at a time (late July to mid-August) when Parliament was in recess. The Council claimed that it was within its rights to act in this way, since the Council

Decision only applied to Council documents. However, it was immediately clear that this would have a significant impact on the on-going discussions on the Commission's implementing proposals, and that the issue of the handling of sensitive Council documents would now be put directly on the table.

The "Solana affair" was intensively discussed within the Parliament in the early autumn of 2000, and Mr Solana was asked to explain himself before the Conference of Presidents on 5 October. Parliament subsequently decided to join up with the Dutch, Finns and Swedes in seeking to annul the offending Council decision. The French Presidency also sought to placate the Parliament by offering privileged access to classified documents to the President of Parliament and to other selected MEPs (including the Chairman of Parliament's Foreign Affairs Committee). These conditions were not acceptable to Parliament's leadership, but a draft agreement concerning access by the European Parliament to classified information of the Council in the field of security and defence policy was subsequently prepared. Special restricted arrangements would have applied to any "top secret" and "secret" documents that were requested by the Parliament, with only the President, Chairman of the Foreign Affairs Committee and four other members designated by the Conference of Presidents authorised to have sight of the documents. Classified documents with a lower security rating would be handled by other means. Discussions on an agreement of this type were still taking place between the Parliament and the Council at the moment of writing this paper.

(iv) Public access to environmental information - a contrast in terms of transparency

There was another development in the summer of 2000 which was much less publicised, but also had an interesting bearing on the discussion on implementing rules. On 29 June 2000 the Commission put forward its proposal for a directive on public access to environmental information (COM(2000)402 fin.), which was meant to improve an existing directive on this subject¹, and also to help prepare the way for European Community ratification of the Aarhus Convention².

The striking feature of this proposal, which covered requests for environmental information held by public authorities, was that, in a number of respects, it went well beyond the Commission's proposals for access to general Commission, Council and Parliament documents. For example, exceptions to access were to be on a discretionary rather than mandatory basis (Member States "may" provide for refusal rather than "shall", as in the Article 255 proposed implementing rules). Moreover, the text stated, in each case when an exception was being invoked, that "the public interest served by the disclosure shall be weighed against the interest served by the refusal. Access to the requested information shall be granted if the public interest outweighs the latter interest"³.

A further area where the text compared very favourably to the Article 255 implementing text is that there was no reference to a failure to reply being equivalent to a negative response. The text stated, instead, that "the reasons for a

¹ Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment.

² UN/EC Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters.

³ Article 4.2 of the proposal.

refusal to make information available, in full or in part, in the form or format requested shall be provided to the applicant within the time limit referred to ..."¹

The Parliament voted in first reading on 14 March 2001 to further reinforce this proposal, on the basis of a report by Ms Korhola of its Environment Committee. A common position is currently awaited from the Council. Whatever happens, however, in second reading, the final directive is likely to contain more far-reaching provisions on openness than the general regulation on access to documents.

(v) The negotiations leading up to the final agreement on a regulation on public access to documents

In spite of the distraction caused by the Solana affair, Parliament continued its work on the draft regulation, and on 16 November 2000 it voted in plenary on the Cashman report. Once the Parliament had voted upon its amendments to the text, and the Commission had not been able to give the necessary assurances that it could support these amendments, Parliament then postponed its final vote on the accompanying draft legislative resolution. This meant that Parliament had given an initial indication of its detailed position, but had not completed its first reading on the proposal.

Discussions then began with the Commission and with the French Presidency, which produced a text which did not move significantly on the key points in dispute. A letter was then sent on 14 December by President Fontaine to the Commission (with a copy to the French Presidency) expressing the Parliament's concerns about the deadlock. It also set down four sets of principles to which the Parliament was particularly attached, full transparency of the entire legislative process, more tightly defined exceptions, proper democratic accountability for the system of openness and conversion of the proposed regulation into a true "Freedom of Information Act" for the EU institutions. President Prodi's reply to this letter can best be described as cautious!

A series of trilogues were later held between the Parliament's representatives (Mr Cashman the rapporteur and Mr Watson, Chairman of the Civil Liberties Committee, Ms Maij-Weggen of the Constitutional Affairs Committee, Ms Cederschiöld the EPP shadow rapporteur in the Civil Liberties Committee, and Ms Hautala, Ms Thors and Ms Malmström, draftsmen of opinions on the proposal), the Swedish Presidency and the Commission. As a result of these talks a compromise agreement was finally reached at the end of April. This was put to the vote in the plenary session of 3 May 2001 and was adopted by 388 in favour to 87 against and 12 abstentions. The European People's Party and the Socialist group were overwhelmingly in favour, as were the Liberals and the Union of Europe of Nations. The GUE (left socialists and communists), the Green group and a substantial majority of the EDD group were opposed to the agreement. This was also adopted by the Council, and there has thus been an agreement in first reading.

(vi) Evaluation of the final agreement

The finally agreed text contains substantial improvements when compared to the original text, but still falls short of what the Parliament has argued for in the past.

¹ *Op. cit.*, Article 3.4.

This can best be seen by looking at some of the key issues that have been at stake during the whole debate over improving access to EU documents.

- *To which institutions and bodies should the Regulation apply?*

The Löw resolution of 12 January 1999 on openness within the European Union had called "for any new code to apply not only to Commission, Council and European Parliament documents, but to those of all other EU institutions and bodies" (paragraph 2). While the Regulation only directly covers European Parliament, Commission and Council documents, there is a new recital (8) that states "in order to ensure the full application of this Regulation to all activities of the Union, all agencies established by the institutions should apply the principles laid down in this Regulation". The three institutions have also agreed on a joint statement to be published in the Official Journal to help ensure that the objectives of this recital are actually met.

- *To which documents will the Regulation apply?*

It has been confirmed that the new Regulation, unlike the existing codes, will apply "not only to documents drawn up by the institutions, but also to documents received by them (recital 10). It will also apply "in all areas of activity of the European Union" (2.3). This is clearly a welcome change. Less satisfactory, however, is that "a Member State may request the institution not to disclose a document originating from the Member State without its prior agreement" (Article 4.5), thus giving potentially far-reaching blocking powers to Member States, even if it does not amount to a formal veto right. The text as regards other third party documents is somewhat more satisfactory, in that no absolute veto right is given, and a decision in unclear cases will be taken in consultation between the institution and the third party. A lot will depend in practice on the attitude towards openness to be taken by that third party, and how the institutions will then respond.

- *Will special rules be established for legislative documents?*

A new recital (6) has been added to state that "wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers", although the text goes on to add the potentially wide loophole of "... while at the same time preserving the effectiveness of their decision-making process". How is "effectiveness" defined?

A related set of provisions is that documents drawn up or received in the course of a legislative procedure are to be made "directly accessible", either in electronic form or through a register (Article 2.4 and Article 22).

- *How extensive is the list of exceptions?*

This remains one of the key questions in evaluating the new regulation. Considerable improvements have been made to the original text. The list of exceptions has been reduced significantly, the list is now exhaustive, and some of the broadest and most unsatisfactory exceptions have been deleted, such as "relations between and/or with the Member States or Community and non-Community institutions", "the stability of the Community legal order" (as well as the phrase in the existing codes referring to "protection of confidentiality of an institution's proceedings"). For certain, but not all, categories of exceptions

(those in Article 4.2) they can even be put aside if "there is an overriding public interest in the disclosure".

A number of important caveats have to be made, however. The most important of these is that, unlike the draft directive on access to environmental information, the exceptions in Article 4 are meant to apply in a mandatory ("shall") rather than discretionary ("may") form. What makes this even more tricky is that institutions shall refuse access to a document where disclosure "would undermine the protection of the public interest ...".

The original text referred to "seriously undermine", but this has now been removed (allegedly because the lawyers consider that "undermine" is strong enough), and the question of what is meant by "undermining" is left unclear. Unlike the directive on access to environmental information, no explicit test is laid down of balancing the public interest served by the disclosure against the interest served by the refusal.

Finally, while some of the vaguest exceptions have been deleted, there are still some remaining with very general scope, such as the "public interest", "public security" and "international relations". Again, this would be less of a problem if the exceptions were discretionary rather than mandatory.

- *What has happened to the protection of the institutions' "space to think"?*

This has been a controversial issue through the negotiations since it was not covered in the Commission and Council's existing codes, and internal and preparatory documents could thus be requested and handed out without any form of explicit restriction.

The initial text of the Commission explicitly excluded "texts for internal use such as discussion documents, opinions of departments and informal messages". The new text no longer provides for a blanket exclusion, but is still potentially significant in that recital 11 states that "the institutions should be entitled to protect internal consultations and deliberations where necessary, to safeguard their ability to carry out their tasks".

The most specific rules in this respect are then laid down in Article 4.3: "access to a document drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if its disclosure would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure". Access to a "document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned" may even be refused after the decision has been taken. These rules could prove hard to interpret.

- *How are "sensitive" documents to be treated?*

This has also become one of the key issues at stake, in the light of the protests at the Solana decision of summer 2000. The final text does explicitly provide for the right of access to apply "to documents relating to the common foreign and security policy and to police and judicial cooperation in criminal matters" (recital

7), but goes on to say that "on account of their highly sensitive content, certain documents should be given special treatment. The new rules are then laid out in more detail in Article 9.

The definition of such documents is clearly of central importance. These are "top secret", "secret" or "confidential" documents "originating from the institutions or their agencies, Member States, non-Member States or international organisations ...", which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4.1(a), notably public security, defence and military matters. The Solana decision is confirmed in that applications for these documents are to be handled not by the people normally responsible for public access to documents but only "by persons who have a right to acquaint themselves with those documents". The same people are to assess which references to sensitive documents could be made in the public register.

One positive feature of this system is that there is not to be a blanket exclusion of sensitive documents. There are, however, several worrying features. Firstly, "sensitive documents" are not just restricted to public security, defence and military matters, but could also include wider issues of international relations, or the financial, monetary or economic policy of the Community or a Member State. Secondly, sensitive documents are to be "registered or released only with the consent of the originators", thus giving them a formal veto right. Thirdly, the classification of documents is not to be the subject of common agreement but is to be "in accordance with the rules of the institution concerned", so that they could, in practice, vary considerably.

In this context, the Lööw resolution had suggested (point 4 (iv)) that "consideration should be given to simplifying the system of classifying confidential documents, and there should be clearer guidance as to which document falls into which category". This is now more important than ever.

A final comment on this issue relates to Article 9.7 of the new agreement, which states that "the Commission and the Council shall inform the European Parliament regarding sensitive documents in accordance with arrangements agreed between the institutions". A reference to the need for an inter-institutional agreement on this matter is also made in recital 9. This should be implemented as a matter of urgency, building on and improving the annexes to the framework agreement between the Parliament and the Commission. Parliament's rules and procedures on confidential information will also have to be updated as mentioned earlier on in this paper. There are indeed two references to the security rules of the institutions in recitals 7 and 14 of the new agreement.

- *What is the relationship of the new regulation to existing national rules?*

One issue of considerable concern has been how the new rules would fit in with existing national rules, in particular the more general rules on access prevailing in certain Nordic countries. This issue is addressed in recital 14, which states that "it is neither the object nor the effect of this Regulation to amend national legislation on access to documents". In this latter recital, however, Member States are then asked to "take care not to hamper the proper application of this Regulation and respect the security rules of the institutions". There is also a

specific Article 5 on "documents in the Member States" which covers the issue of access to documents in a Member State that originate from an EU institution. If there is doubt about its status the Member State is asked to "consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of the Regulation". An alternative for the Member State will be to refer the request to the institution. It will be interesting to see some test case applications of this article!

- *Do non-Union citizens have access to the documents covered in this Regulation?*
Besides citizens of the Union, "any natural or legal person residing or having its registered office in a Member State" has an automatic right of access to the documents of the institutions. Access is, however, discretionary as regards requests from other non-citizens of the Union. "The institutions may ... grant access to documents to any natural or legal person not residing or not having its registered office in a Member State" (Article 2.2).
- *Are there any other new or distinctive features of the applications regime?*
A few improvements have been made in the new Regulation as compared to the existing system. For example, the institutions are meant to respond within 15 working days rather than a month to any initial or confirmatory applications. European Court of Justice case law that applicants are not obliged to state reasons for their applications has been confirmed. The institutions are meant to help applicants in clarifying their requests where they are not sufficiently precise, and shall also provide information and assistance to citizens on how and where applications for access to documents can be made.

One potential issue of concern has also at least been partially allayed. The original text used emotive language referring to "repetitive applications" which clearly represented frustration in the institutions at continuing applications from a handful of individuals. The wording has been changed to refer to "applications relating to very long documents or a very large number of documents" (Article 6.3), although it is not very clear what is meant by informed talks with the applicant, "with a view to finding a fair solution".

Another matter that remains unsatisfactory is that there is still no automatic requirement to reply to an applicant. The one difference is that the provocative wording that a failure to reply can be deemed to be a refusal has been removed. It has been merely replaced, however, with a more diplomatic formulation of the same concept, namely that failure to reply within the prescribed time-limit shall entitle an applicant to make a confirmatory application or later to refer the matter to the Ombudsman and/or to the Court of Justice. This is unfortunately a step backwards from the first draft of the Regulation, and goes against Parliament's recommendation in paragraph 4 (vii) of the Löw resolution.

- *What other innovations are being proposed?*
An area where the new text has responded to a proposal in the Löw resolution relates to the establishment of public registers in all the institutions. These are meant to be operational within one year, and access to such registers is to be provided in electronic form. Where possible they should also permit direct

access to the documents concerned. As mentioned before, direct access now becomes mandatory for legislative documents.

Transparency is also reinforced in other ways with, for example, a list of documents that must be, or as far as possible, published in the Official Journal. There are also provisions that each institution take the necessary steps to inform the public of their rights under the Regulation.

Another new objective of the Regulation is to promote good administrative practice on access to documents. The institutions are asked to develop this, and are to establish an inter-institutional committee "to examine best practice, address possible conflicts and discuss future developments in public access to documents" (Article 15.2).

- *What are the implementation and review clauses?*

The Regulation is to enter into force within three days of its publication in the Official Journal. The three institutions are meant to adopt their internal implementing rules within six months of adoption of the Regulation, at which date the Regulation will become applicable. Finally, within six months of the entry into force of the Regulation, the Commission is to "examine the conformity of the existing rules on access to documents with this Regulation" (Article 18.3).

An important provision is that (Article 17.1) "each institution shall publish annually a report for the preceding year with the number of cases in which the institution refused to grant access to documents and the reasons for such refusals and the number of sensitive documents not recorded in the register". Moreover (Article 17.2), "at the latest by 31 January 2006 the Commission shall publish a report on the implementation of the principles of this Regulation and shall make recommendations, including, if appropriate, proposals for the revision of this Regulation and an action programme of measures to be taken by the institutions".

V. Concluding remarks

This paper has sought to demonstrate that openness and transparency have several aspects, that they are not always easy to define, and that there remain very real differences in approach between the Member States. In spite of these differences, however, considerable progress has been made in extending openness within the European Union institutions on a variety of fronts. Finally, while it falls short of what many would have liked, there is now an agreed regulation to implement the Amsterdam Treaty provisions on openness.

The attempts to extend openness and transparency will now enter a new and difficult phase. Will the new regulation be properly implemented? Will the Member States without a tradition of openness change their administrative cultures, or will these remain secretive in nature? What will be the impact of EU enlargement on openness, bringing in countries with little or no background of openness, but whose recent change of political system and introduction of democracy has given them a chance to make a fresh start?

There will also be important questions about the limits of openness. To what extent should EU discussions take place in the full public glare? If not, should European Parliament or national parliamentarians be given privileged access, and to what extent?

One of the most familiar arguments against a great extension of open meetings is that the real negotiations will be driven into the corridors. If the Council is to meet in public when acting in its legislative capacity, should this apply to Council working groups and COREPER meetings or only to the final Council meetings? If the "corridor" argument has any validity, would not systematic opening up of Council meetings or final conciliation meetings be of more symbolic than real value? All these issues will have to be carefully examined in the coming period.

The immediate challenge, however, will be to ensure the best possible implementation of the new regulation. The European Parliament, Commission and Council will have to adopt their own internal rules, and in a way that reinforces rather than further undermines the new regulation. The scope of the regulation will also have to be extended to the other EU institutions and bodies as soon as possible.

Perhaps most importantly of all the annual reports on openness should lead to a careful evaluation of the functioning of the new rules, in particular, as regards such difficult areas as the interpretation of the over-general exceptions to openness, the treatment of internal documents and above all the definition and treatment of so-called "sensitive" documents. If serious weaknesses are demonstrated, the 2004 review of the regulation will then provide a good opportunity to eliminate or reduce them¹. The recent history of openness has consisted of steps forward and steps backwards. In the first few years of the new regulation it will be essential to ensure that the steps forward are much greater than the steps backwards, and that there is constant vigilance on the part of the advocates of greater openness.

¹ *One encouraging precedent being that successive reviews of the U.S. Freedom of Information Act have led to the progressive extension of its scope. In this context, it would be useful to compare the workings of the EU system with those of other openness regimes, such as those in the U.S. and in Australia.*