OPINION

of the {AFET} Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy

for the {LIBE} Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs

on the proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents

Draftsman: Cecilia Malmström

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It considered the draft opinion at its meetings of 19 September and 10 October 2000.

At the latter meeting it adopted the amendments below unanimously.

The following were present for the vote: Elmar Brok, chair; Baroness Nicholson of Winterbourne and Catherine Lalumière, vice-chair; Cecilia Malmström, draftsman; Sir Robert Atkins (for Silvio Berlusconi), Alexandros Baltas, Bastiaan Belder, Emma Bonino, Andre Brie, María Carrilho, Gunilla Carlsson, Daniel Marc Cohn-Bendit, Ozan Ceyhun (for Elisabeth Schroedter pursuant to Rule 153(2)), Andrew Duff (for Francesco Rutelli), Olivier Dupuis (for Karel C.C. Dillen), Giovanni Claudio Fava (for Sami Naïr), Pernille Frahm (for Efstratios Korakas), Michael Gahler, Jas Gawronski, Vitalino Gemelli (for The Lord Bethell), Alfred Gomolka, Bertel Haarder, Klaus Hänsch, Magdalene Hoff, Alain Lamassoure, Pedro Marset Campos, Lennart Sacrédeus (for José Ignacio Salafranca Sánchez-Neyra), Tokia Saïfi, Jannis Sakellariou, Jürgen Schröder, Ioannis Souladakis, Francesco Enrico Speroni, Ursula Stenzel, Hannes Swoboda, Freddy Thielemans, Gary Titley, Johan Van Hecke, Geoffrey Van Orden, Matti Wuori, Christos Zacharakis.
SHORT JUSTIFICATION

Introduction

The activities of public life are of concern to all citizens. This is the reason why it is important to provide insight into the work of public authorities, both on local and national levels. Access to documents and correspondence can be considered as a necessary means to guarantee rule of law, efficiency and a democratic debate. Transparency in the public administration, bringing it closer to its citizens.

Increased competencies and a new role for the European Union has increased public interest in the European integration process during the past decade. The recent development in the European integration process has raised critical voices against the EU administration, where many institutions lack transparency. There is a need for a regulation providing comprehensive rules on access to documents, making openness the access to documents, making openness the general principle of and limits on this right of access. Nevertheless, it is to the Council to determine, within a period of two years and in codecision with the Council, in codecision with the EP, the general principles and limits on this right of access. A new Article 255 has been added to the TEC allowing the Member States to request the Commission to establish the general principle of and limits on this right of access.

The legal base

The Amsterdam Treaty has first of all amended the second paragraph of Article 255, establishing the right of access of Union citizens and of natural or legal persons residing in a state and related to a document originating from that state without its prior agreement.

It is up to the Council to determine, within a period of two years and in codecision with the Council, in codecision with the EP, the general principles and limits on this right of access, whilst each Institution will establish its own rules of procedure respecting in its own rules of procedure specific provisions. To this extent, it is important to ensure that the transparency of Union decisions is taken as closely as possible to the citizen but also as openly as possible. Furthermore, a new Article 255 has been added to the TEC allowing the Member States to request the Commission to establish the general principle of and limits on this right of access. Nevertheless, it is to the Council to determine, within a period of two years and in codecision with the Council, in codecision with the EP, the general principles and limits on this right of access.

The introduction of transparency and openness in th...
regrettable that the implementing measures are left to the rules of procedure of the Institutions, something which the EP explicitly opposes.

It is very important (not surprisingly) that the new regulation will be applied by all European institutions as it is very important that the new regulation will be applied by all European institutions.

The Commission's Proposal

Following the Commission's proposal, the European Parliament, the Council and the Commission. This widening in the scope of the access system is a major step forward compared to the current system, which only covers documents produced by the institutions. However, it is understood that access to a document will not be granted if the document is covered by one of the exceptions provided for in Article 4.

The term "document" is defined as any form of content irrespective of the medium irrespective of the medium on which it falls within the institution's remit, excluding documents expressing individual opinions or reflecting free and frank discussions or the provision of advice as part of informal consultations and deliberations, as well as informal messages such as e-mail messages which can be considered the equivalent of telephone conversations.

Since the main task of the Committee on Foreign Affairs is to concentrate on public access to documents related to the Common Foreign and Security Policy, reactions to the proposal are described in the justifications of the proposed amendments.

Scope of regulation within the CSFP field

Articles 28(1) of the Treaty on European Union expressly provide that the right of access also applies to documents relating to the Common Foreign and Security Policy, the Council will consult the author of the document first, although it reserves the right, if no reply is forthcoming, to take the final decision on whether to allow access to the document or not. A document first, although it reserves the right, if no reply is forthcoming, to take the final decision on whether to allow access to the document or not. Access to documents from third parties will be limited to those sent to the institution after the date of entry into application of this Regulation.

The decision taken by the Council on 14 August 2000, excluding all ESDP documents from this Regulation.

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unless disclosure might seriously harm certain specific interests, unless disclosure might seriously harm certain specific interests, which are spelled out in Article 4. As far as CFSP is concerned, Article 4 states that this article states that access to documents where disclosure could seriously undermine the protection of the public. This necessary principle of public access. By allowing institutions to apply grounds of defence and military matters or vital interests relating to the EU’s international relations, the necessary confidentiality, as that requested by NATO, can be ensured. Contrary to the recent decision taken by the Council, this exception would allow access to documents related to non-military crisis management. All requests for access to documents classified as secrets and excluded from public access, should be handled case-by-case.

Unfortunately, the Commission's proposal does not refer to the Council's Rules of Procedure. Council has recently and unilaterally reacting by producing a first Decision of the Secretary General of the Council/ High Representative for the CFSP of 27 July 2000 on measures for the protection of classified information: application of the protection of classified information applicable to the General Secretariat of the Council. This Decision was also issued on 14 August. It is true that these decisions refer to the Council's Rules of Procedure. Nevertheless, it is obvious that these two extemporary Decisions neither could escape to the protection of classified information: application of the protection of classified information applicable to the General Secretariat of the Council. A second Council Decision on public access to Council documents was also issued on 27 July 2000.

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Parliamentary scrutiny of ESDP documents and control mechanisms

In its recent resolution of 6 September on EU external action priorities the EP has urged the Council to address matters relating to parliamentary scrutiny of the European security and defence policy (ESDP) and deplored the decision by the Council to exclude ESDP documents from application of the Council's decision on access to documents. This necessary parliamentary scrutiny of the documents classified as secrets and excluded from public access could be carried out by one of the following "ad hoc" organs:

- The Committee on Foreign Affairs as a whole;
- The Enlarged Bureau of this Committee;
- The "ad hoc" Standing Delegation for the relations with the NATO-Parliamentary Assembly actually being set up with the Institute of Human Rights, Common Security and Defence Policy;
- A selected Committee of 5 up to 7 EP Members (namely AFET, LIBE and CONST). Alternatively, the leaders of the (namely AFET, LIBE and CONST) could form this committee.
Registers

The Commission's proposal indicates that to make it easier for citizens to exercise their rights arising from this Regulation, each institution shall provide access to a register of documents.

All documents held by an institution should be included in the register. This applies to both classified documents, to which access may be denied on the grounds of national security or other reasons, and to public documents. The register shall cover all documents, citizens can get a clear picture of the institution's activities, despite the fact that not all documents are disclosed.

Administration of requests

Requests for documents should be handled speedily by the institution, within no more than two weeks. For all negative replies to requests, the institution must give reasons for the denial in writing. The citizen should also be informed on how to ask for reconsideration of the decision and other remedies available.

The institutions need to make further preparations for the implementation of the new regulation. The number of requests for access, resulting from the new regulation, may increase substantially, no doubt leading to a heavier workload for many of the officials dealing with access to documents, providing education about the practical consequences of the regulation, as well as the ideas behind it. This can also lead to a more effective administration of requests and improved protection of the legal rights of the individual. Building new bureaucracies only to handle requests for documents should be avoided to the greatest possible extent.

Openness and maximum transparency also in CFSP matters must be not the exception, but the rule. The right of public access also applies to documents relating to CFSP.

Conclusions and Proposals

OpennesSness and maximum transparency also in CFSP matters are main concern of the proposed Regulation. The right of public access to documents related to CFSP should be not the exception, but the rule. The Ombudsman's Code of Conduct provides comprehensive recommendations to the institutions in this respect.
shall state the grounds for its refusal, provide individual proof and inform the applicant of the remedies open to him. Each application should be handled case by case.

The public register of documents kept in each institution should contain references to all documents held, including classified information. In case of classified documents held, including classified information, the grounds for refusal should be mentioned.

Officials dealing with access to documents should undergo special "Transparency Training", providing for increased understanding of the new regulation. The institutions must also ensure that all officials are able to inform citizens on how and where to request access to documents.

Among the current existing possibilities the most convenient way of assuring the necessary parliamentary scrutiny of the CFSP classified documents excluded from public access, could be through the "ad hoc" Standing Delegation for the relations with NATO, directly answerable before the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy as well as the Plenary Sitting.

Nevertheless, should a similar parliamentary framework were to be established in order to guarantee the parliamentary scrutiny of all classified documents excluded from public access, the best formula could be by the above mentioned Select Committee of the most concerned Committees, or the leaders of the political groups. This Select Committee would be then directly answerable to the Plenary Sitting.

### AMENDMENTS

The Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy calls on the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendments by Parliament</th>
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(Amendment 1)

Recital 0 (new)

Trust and confidence in the European Union and its institutions can only be ensured if an open and democratic political debate and decision-making process takes place at all levels.

Justification:
A truly democratic debate cannot develop in the European Union without open institutions. To ensure such a debate is nevertheless important in order to gain trust and confidence, especially among young people, who are the future of Europe.

The rules on public access to documents should be drafted as clearly as possible. They should outline the limits of access as well as the procedure for complaints.

These rules are directed at a broad public that might be interested in requesting access to documents. It is therefore particularly important that it is clear and easy to understand for all possible users which rights they have and how they could possibly enforce those rights.

In order to ensure that the right of access is fully observed, the present two-stage of administrative procedure, with the possibility of court proceedings or complaints to the Ombudsman, should be maintained, whilst the principle should be introduced whereby at the confirmatory stage no response is treated as a positive response.

A failure to reply should never be treated as a positive decision since that could harm the interests that are protected according Article 4 of this Regulation.

Each institution should encourage and educate the staff concerned to help and assist the citizens when they try to exercise their rights arising from this Regulation.
These rules are directed at a broad public that might be interested in requesting access to documents. It is therefore particularly important that the staff and institutions can help the citizens getting access to the documents.

Recital 12

12. Even though it is neither the object nor the effect of this Regulation to amend existing national legislation on access to documents, it is nevertheless clear that, by virtue of the principle of loyalty which governs relations between the Community institutions and the Member States, Member States should take care not to hamper the proper application of this Regulation.

Justification:

The regulation should be without prejudice to higher standards of access under national legislation. Thus, the scope of national legislation granting access to documents should not be limited by the regulation.

(c) "European Parliament" shall mean Parliament bodies (and in particular the Bureau and the Conference of Presidents), Parliamentary Committees, the political groups and departments;

(d) "Council" shall mean the various configurations and bodies of the Council

(c) Delete

(d) Delete
(and in particular the Permanent Representatives Committee and the working parties), the departments and the committees set up by the Treaty or by the legislator to assist the Council;

(e) "Commission" shall mean the Members of the Commission as a body, the individual Members and their private offices, the Directorates-General and departments, the representations and delegations, committees set up by the Commission and committees set up to help it exercise its executive powers;

A list of the committees referred to in points (d) and (e) of the first paragraph shall be drawn up as part of the rules giving effect to this Regulation, as provided for in Article 10.

<TitreJust>Justification:</TitreJust>

<AmJust>All three institutions and their internal organs should be covered, but no descriptive definition is necessary.</AmJust>

5. The staff of the institutions shall as far as possible help and inform the citizens how and where applications for access to documents can be made.

<TitreJust>Justification:</TitreJust>

The introduction of coherent internal procedures and, in particular, of a comprehensive register of documents by each institution, would significantly reduce the time needed for processing requests.

<Amend><LANG:EN><Amend>(Amendment <NumAm>7</NumAm>)

<Article 5.5 (new)</Article>

5. The staff of the institutions shall as far as possible help and inform the citizens how and where applications for access to documents can be made.

<TitreJust>Justification:</TitreJust>

The introduction of coherent internal procedures and, in particular, of a comprehensive register of documents by each institution, would significantly reduce the time needed for processing requests.

<Amend><LANG:EN><Amend>(Amendment <NumAm>8</NumAm>)

<Article 6</Article>

5. The staff of the institutions shall as far as possible help and inform the citizens how and where applications for access to documents can be made.

<TitreJust>Justification:</TitreJust>

The introduction of coherent internal procedures and, in particular, of a comprehensive register of documents by each institution, would significantly reduce the time needed for processing requests.
Processing of confirmatory applications; remedies

1. Where the applicant submits a confirmatory application, the institution shall reply to him in writing within **one month** of registration of the application. If the institution decides to maintain its refusal to grant access to the document requested, it shall state the grounds for its refusal and inform the applicant of the remedies open to him, namely court proceedings and a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively.

2. In exceptional cases, the time-limit provided for in paragraph 1 may be extended by **one month**, provided that the applicant is notified in advance and that detailed reasons are given.

Failure to reply within the prescribed time-limit shall be treated as a positive decision.

**Justification:**

*The one-month time-limit for reply by the institutions cannot be considered appropriate for a modern and efficient administration. The introduction of coherent internal procedures and, in particular, of a comprehensive register of documents by each institution, would significantly reduce the time needed for processing requests. The provision concerning the legal effect of a lack of reply on behalf of the institutions should be deleted, as it is not foreseen in a regulation as an alternative reaction of an applicant. The power to presume that an application is withdrawn if the applicant fails to reply should be abolished as contrary to the objective of the regulation.*

A failure to reply should never be treated as a positive decision since that could harm the interests that are protected according to Article 4 of this Regulation.

(Amendment 9)

Article 7.3 (new)
3. Parliamentary scrutiny of all documents excluded from public access should be assured by regularly informing the Committees involved in closed session, the enlarged bureau of those committees, or a Select Committee according to the classification and the topic of the documents concerned.

**Justification:**

The Parliamentary scrutiny should be assured at different levels according to the nature of the document and its classification.

```xml
Amend>(Amendment <NumAm>10</NumAm>)
Article 7.4 (new)
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4. An edited version of the requested document shall be provided if part of the document is covered by one of the exceptions in article 4.1. If a requested document is covered by article 4.2 a summary of its factual content shall in any case be provided.

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TitreJust>Justification:</TitreJust>
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In cases where it is impossible to remove traces to individual officials by editing a document, the institution shall at least provide a summary of its factual content.

```xml
Amend><LANG:EN><Amend>(Amendment <NumAm>11</NumAm>)
TitreAm>Article 8</TitreAm>
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8. Reproduction for commercial purposes or other forms of economic exploitation

An applicant who has obtained a document may not reproduce it for commercial purposes or exploit it for any other economic purposes without the prior authorisation of the right-holder.

```xml
TitreJust>Justification:</TitreJust>
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8. Reproduction for commercial *gain*

This regulation does not interfere with existing rights with regard to documents or information contained in documents which the institutions have received by third parties by virtue of intellectual or industrial property legislation.
The Commission's proposal is far too vague and could, as it stands, be used against normal journalistic use of a document for the purpose of informing the public.

*(Amendment)*

**Article 9**

9. Each institution shall **take the requisite measures to inform the public of the rights they enjoy as a result of this Regulation.** Furthermore, to make it easier for citizens to exercise their rights arising from this Regulation, each institution shall provide **access to a register of documents.**

9. Each institution shall **keep a register of all documents drawn up, received and sent by the institution.** Documents shall be entered into the register at the time of their completion or reception. The register shall be easily accessible to all citizens and specify any classification of confidentiality of each document.

**Justification:**

It is essential to regulate in a clear manner the time at which a document is entered into the register.

*OJ C 177, 27.06.2000, p. 70*