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How open is 'open as possible'? Three different approaches to transparency and openness in regulating access to EU documents

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Reihe Politikwissenschaft

Political Science Series

How open is ‘open as possible’?

Three different approaches to transparency and openness in regulating access to EU documents

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How open is ‘open as possible’?

Three different approaches to transparency and openness in regulating access to EU documents

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November 2001

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Founded in 1963 by two prominent Austrians living in exile – the sociologist Paul F. Lazarsfeld and the economist Oskar Morgenstern – with the financial support from the Ford Foundation, the Austrian Federal Ministry of Education, and the City of Vienna, the Institute for Advanced Studies (IHS) is the first institution for postgraduate education and research in economics and the social sciences in Austria. The **Political Science Series** presents research done at the Department of Political Science and aims to share "work in progress" before formal publication. It includes papers by the Department's teaching and research staff, visiting professors, graduate students, visiting fellows, and invited participants in seminars, workshops, and conferences. As usual, authors bear full responsibility for the content of their contributions.

Das Institut für Höhere Studien (IHS) wurde im Jahr 1963 von zwei prominenten Exilösterreichern – dem Soziologen Paul F. Lazarsfeld und dem Ökonomen Oskar Morgenstern – mit Hilfe der Ford-Stiftung, des Österreichischen Bundesministeriums für Unterricht und der Stadt Wien gegründet und ist somit die erste nachuniversitäre Lehr- und Forschungsstätte für die Sozial- und Wirtschaftswissenschaften in Österreich. Die **Reihe Politikwissenschaft** bietet Einblick in die Forschungsarbeit der Abteilung für Politikwissenschaft und verfolgt das Ziel, abteilungsinterne Diskussionsbeiträge einer breiteren fachinternen Öffentlichkeit zugänglich zu machen. Die inhaltliche Verantwortung für die veröffentlichten Beiträge liegt bei den Autoren und Autorinnen. Gastbeiträge werden als solche gekennzeichnet.

Abstract

Since the Treaty of Maastricht transparency and openness have been prominent catchwords to counter the European Union's (EU) so called 'democratic deficit'. The working paper discusses the rank and position of these principles in democratic theory and looks at their realisation at the EU level. Since the EU-bodies equal transparency and openness mainly with access to information the paper concentrates on the question, which institution is willing to provide best for access to documents. In the course of shaping a new regulation on access to documents in May 2001, the contrasting views of Commission, European Parliament and Council showed up in their respective draft proposals. The different proposals are analysed and assessed with regard to transparency and openness.

Zusammenfassung

Seit dem Vertrag von Maastricht dienen die Begriffe "Transparenz" und "Offenheit" als beliebte Schlagwörter, um dem sogenannten Demokratiedefizit der Europäischen Union (EU) zu begegnen. Das Working Paper widmet sich dem Stellenwert dieser Prinzipien in der Demokratietheorie und zeichnet ihre Implementierung auf EU-Ebene nach. Da die EU-Institutionen Transparenz und Offenheit hauptsächlich mit Zugang zu Informationen gleichsetzen, konzentriert sich die Analyse auf die Frage, welche Institution für den bestmöglichsten Zugang eintritt. Im Mai 2001 wurde eine neue Verordnung über den Zugang der Öffentlichkeit zu Dokumenten verabschiedet. Die Vorschläge, die im Vorfeld von Kommission, Europäischem Parlament und Rat erstellt wurden, dienen in der vorliegenden Arbeit als Grundlage zur Analyse der unterschiedlichen Interpretationen von Transparenz und Offenheit.

Bemerkungen

Mag. Cornelia Moser absolviert derzeit ein zweijähriges Post-graduate-Studium am Institut für Höhere Studien, Abteilung Politikwissenscharft

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1. Introduction

Since the early 1990s scholarly debate and political rhetoric has increasingly concentrated on the issue of democratization of the European Union. This shift in perspective is mainly due to the "organic and evolutionary way" (Westlake 1998: 127) of the Union's development. Along with the increase in communitarized policy fields and a growing number of decisions taking place at the European level, the question of legitimacy in the European Union substantially gained in importance. Although the single Member States continue to enjoy democratic legitimacy of policy-making in the national arena by well-established mechanisms, the fusion of national and supranational policies is attended with deficiencies in legitimacy. This became obvious with rising popular discontent accompanying the shaping of the Maastricht Treaty.

One of the solutions offered by the European Union to counter the so-called 'democratic deficit' has been the call for more transparency and openness in the working of the European Union's institutions and the decision-making at the European level. In the EU's actual steps to increase transparency and openness, the notion of these principles has been mainly realized in access to information. 'An ever closer Union' where decisions are taken 'as open as possible' seemed achievable by changing the ways of how to grant citizens access to documents. But how open is 'open as possible'?

Since the EU equals openness and transparency mainly with access to information the relevant provisions may reveal how these principles are implemented. The issue in question has been put once more on the EU-agenda recently. Following the obligations of the Amsterdam Treaty, the Council in codecision with the European Parliament agreed on a new regulation on access to documents in May 2001. Until then, the Commission, the Council, and the European Parliament followed fairly the same codes of conduct. However, research indicates that the EU bodies interpreted access to documents in different ways (Gronbech-Jensen 1998). The proposals issued by the Commission, the European Parliament, and the Council allow a comparison of the present views on how to define and restrict openness and transparency. The analysis will concentrate on the question, which EU-institution is willing to provide best for access to information thus providing for democratic legitimacy through transparency and openness.

In the course of this paper transparency and openness will be pinned down to the specific instrument of access to documents that is designed to fulfill a specific purpose in a specific institutional arrangement. It will be looked at how major players in the framework of the European Union aim to fulfill the basic ideas of these catchwords. The first part of the paper concentrates on the rank and position of transparency and openness in democratic theory and looks at how these principles have evolved and been realized by the main European bodies. The second part is devoted to the comparison of the different views of Commission,

European Parliament and Council on access to documents. The findings will be finally reassessed with regard to the implications on the democratic quality of policy-making in the European Union.

2. The debate on transparency and openness

The discussion on transparency and openness in the European Union covers a large variety of perspectives. In terms of a lack of democratic legitimacy, the two ideas are closely related to an 'information deficit' (Lodge 1994). Transparency through information is perceived as a major instrument to improve democracy in the EU thus not only taming the secretive nature of the Council's policy-making (Curtin 1995). The Council's policy has been proven to be disappointing when focusing on special requests for documents (Carvel 1998). Closely related to the Council's information policy in general is its strong position in the intergovernmental pillars which consequently renders fields as Justice and Home Affairs hardly accessible (de Boer 1998). The Community's policy is generally discussed highly critical hence advocating more transparency, openness, and visibility (Guggenbühl 1998). Comparative research has shown that the Community's standards do not come up to the tradition of the Nordic countries in open government, suggesting the latter as a solution for the Union's problems in legitimacy (Gronbech-Jensen 1998). However, contributions from information professionals indicate that access to information has changed for the better (Thomson 1998). This is confirmed by historic review pointing out that transparency has enormously improved, which is partly due to the impact of an expanded role of the European Parliament (Westlake 1998). Transparency is nowadays seen at the very heart of 'good administration' (Söderman 2000). The European Ombudsman Jacob Söderman likewise focuses on the democratic nature of the principle. The free flow of information and ideas between departments could very well further transparent and efficient administration which is e.g. in the Commission highly troubled by the fact that different Directorate Generals are in a "state of near civil war" (Lord 1998: 83). However, these approaches neglect the internal working of an institution and its internal transparency.

2.1. Defining transparency and openness

The common denominator of these different approaches is their linking of transparency and openness to legitimacy. They are focusing on the transparency of political institutions in their relation to civil society, be they private individual or business interest, the media or elected representatives. However, definitions of transparency vary among the various approaches and stress particular features of the underlying idea. Transparency is viewed and defined differently: ranging from a narrow perspective of simple and clear procedures up to as broad as "effective popular access to the decision making process" (de Boer 1998: 99). Transparency at its simplest is "the ability to look clearly through the windows of an

institution" (de Boer 1998: 105). The very idea is made clear by this metaphor: to open up the working procedures not immediately visible to those not directly involved in order to demonstrate the good working of an institution.

Adapted to political systems, transparency is a feature in the relationship between ruler and ruled, namely by granting "that the operation of the government is sufficiently open to public view and simple enough in its essentials that citizens can readily understand how and what it is doing" (Dahl 1998: 126). Given these attributes, transparency is usually used along the same lines as openness and frequently linked to simplicity and comprehensibility. Openness and transparency can also be viewed as slightly different concepts (see Larsson 1998: 40), but they are usually equaled since they both refer to a certain quality. So "openness and transparency is clearly one and the same thing (…), the activity of lifting the veil of secrecy." (Davis 1998: 121). Transparency and/or openness are seen as a prerequisite for modern policy-making by adding the distinctive flavor of democratic legitimacy.

2.2. Transparency and openness as tools for democratic legitimacy

When talking about democracy, one should bear in mind the distinction between ideal democracy and actual democracy as Robert Dahl (1998: 26) has rightly observed. The first provides us with requirements and goals of democracy. The second offers empirical evidence given the restrictions of the real world. The latter can then be measured against normative demands. Differentiating between these two perspectives may be crucial to assess if the assumed democratic tools are suitable to achieve democratic aims and to place them in the entirety of democratic practices. A given number of people eager to decide on a certain type of polity may have a mixture of diffuse ideas and hopes as well as practical considerations of the future polity in mind. Modern large scale democracies have to develop institutional arrangements to satisfy democratic criteria, namely effective participation, control of the agenda, voting equality, full inclusion, and enlightened understanding (Dahl 1998: 85).

In the course of legitimizing the emerging EU polity, transparency has been a prominent catchword designated to stand as one of the principles capable of rendering the European Union more democratic. Interesting enough, the debate over transparency has mainly been inspired by practical steps whereas "democratic theory has very little to say in this field" (Larson 1998: 40). Transparency and openness are in general linked to individual rights as e.g. freedom of speech, freedom of press, or the right to vote, but the principles are not at the very heart of democratic theory. However, "classical and contemporary theories of democracy are posited on the belief that secrecy menaces democracy, follows philosophy of a totalitarian state" (Curtin 1998: 107). Opening up the legislative and executive procedures is an essential for democratic policy making. Subsequently, what people learn by using these open and comprehensible channels may help them in participating in policy making. It is in

this sense one means to achieve legitimacy according to a modern understanding of democracy in a bundle of mechanisms. Transparency and openness are instruments to satisfy democratic criteria, especially the ability for citizens to participate in governance and to hold leaders accountable.

Different ideal models of democracy highlight different democratic qualities inherent in transparency and openness. Traditional representative democracy mainly stresses that transparency allows and simplifies accountability and control of rulership. This is well illustrated by describing transparency as follows: "[t]hus it must not be so complexly constructed that citizens can readily understand how and, because they do not understand their government, cannot readily hold their leaders accountable, particularly at elections" (Dahl 1998: 126). The basic idea is that power corrupts. Those equipped with the means for leadership should therefore be observed and scrutinized. Control is necessary in democratic systems and "essentially about preventing abuses by those we have chosen to govern us" (Verhoeven 2000: 2).

Participatory and deliberative approaches offer a slightly different perspective by assuming that transparency and openness promote a vivid civil society. "The reason why information should be open and accessible in any democracy worthy of its name is to enable political participation by citizens" (Curtin 1998: 110). This approach obliges the political elites to grant openness in order "to create channels for the people enabling them to participate in the work of the government" (Larsson 1998: 41). A democratic government has to be based on public deliberation and has to dissociate from the idea of policy-making in closed circles. Access and subsequently participation are in this line of thinking crucial, taking it for granted that "openness in government cannot be limited to forms of parliamentary control but must include a wide range of mechanisms enabling participation of citizens in the policy process by means of an effective access to the process and voice within it" (Verhoeven 2000:5).

Both approaches basically rely on access to information as a tool to achieve transparency and openness. Access to information plays a central role:

Information and the availability or accessibility of information is and remains the currency of democracy. Without an adequate flow of information even ex post facto *accountability of the governors to the people is meaningless. It is regarded as essential to the democratic process that individuals are able to understand the decision-making process and the means by which the decision-makers have reached their conclusions in order to effectively evaluate government policies and actions and to be able to choose their representatives intelligently. An equally important objective of openness in democratic government is to enhance public confidence in the government (Curtin 1998: 107).*

Apart from these two approaches that heavily rely on democratic justifications, a third can be identified. It is rather concerned with the restrictions to transparency due to conflicting

values, namely efficiency. "Although it is certainly important that the public have access to relevant information about administration, working in a goldfish bowl can rarely be as efficient as working in private" (Peters 1995: 297). The basic assumption stresses that policy-making is mainly about positive outcomes for a given population. Too much openness may hamper negotiations and may "lead to attitudes of legalism and risk aversion" (Verhoeven 2000: 2). This view focuses on the bargaining character of policy-making. The very character of political trade-offs makes it necessary to withhold information for some time. In order to achieve the best possible outcome, information can be used when appropriate in the deliberative processes. So openness as legitimizing positive quality is weakening efficiency as a legitimizing quality.

Even if efficiency is not given priority over transparency, openness is never an absolute category in the actual shaping of political systems. Actual democratic practice has to take into account that there may be other conflicting values, e.g. the right to privacy of individuals. Moreover, different political systems have created different degrees of openness over time. The variety of diverse regulations in the 15 EU Member States illustrates that a broad spectrum of actual regulations within both democratic and efficient political systems is possible. Transparency and openness are neither a dependent nor an independent variable, "[a] certain type of government and a certain type of institutional arrangement will produce a certain type of openness on the one hand, but on the other hand a certain type of openness will affect the institutional setting" (Larsson 1998: 44).

3. Transparency and openness in the European Union

Neither democracy nor transparency was on the agenda of the early European Community for Coal and Steal. As Carvel puts it, the "EEC were a benevolent conspiracy by the elites of Europe to bind their peoples and stop another war" (Carvel 1998: 56). Cooperation between European nation states resembled an international regime with diplomatic negotiations prevailing. However, things changed with the growing communitarization of European policies. The shift in power relations and the evolvement of a new style of policy-making with intermingling national and supranational levels cast shadow on usual ways how to handle EU politics. Democratic and transparent decision-making would have been an alienated idea in diplomatic interaction but was seen as an adequate answer to the increase in popular discontent over the development of the European Union.

The growing discrepancies due to the changes in policy making showed up in many areas and were also highlighted with regard to access to information. In September 1992 the Dutch Member of Parliament, Alman Metten, asked a Dutch ministry to hand over documents concerning various ECOFIN-meetings which he considered important for his parliamentary work. He referred to the Dutch law granting openness and argued that "Council deliberations

and decisions (...) should be subject to the law on openness, otherwise a growing area of formerly transparent policy and decision-making will be brought out of reach of the law of openness as well as that of democratic control." (Metten 1998: 86f) After lengthy deliberations the Netherlands finally refused in 1995 to release the documents stating that the Community's concerns and needs were in this case prior to national law.

Issues of legitimacy had long been up to the single Member State, but it seemed to become increasingly important to include related commitments and provisions in the acquis communitaire. Transparency and Openness came first on the agenda in the early 1990s. On 15 December 1991 declaration No. 17 attached to the Maastricht Treaty confirmed, "the Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration" (cit. a. Lodge 1994: 349). Transparency was used as a handy answer to rising popular concern of what was going on at the European level. Given the qualities of transparency, one can only admire the audacity to put transparency on the EU agenda ever. Decision-making had by then already gained increased impact and complexity. To render the EU decision-making process open, simple and therefore understandable seems a rather risky goal.

Nevertheless, this presumed remedy of the so called 'democratic deficit' was particularly promoted by the Member States which did not want to trouble themselves to discuss the practices of the Council and the implications of a substantial shift in decision making away from the national level. The addressee was first of all the Commission, which was frequently referred to as "byzantine, inaccessible and an affront to the conduct of democratic politics" (see Lodge 1994: 345). Attacking the Commission and calling for more openness had unintended consequences. Involuntarily, the discussion and subsequent measures to enhance transparency and openness brought into light again the rather obscure procedures of the Council's internal working and decision-making.

When France almost rejected the ratification of the Maastricht Treaty in its 1992 referendum and the Danes also refused to give consent in the first referendum, increasing concern focused on the people's interest in the project "European Union." Along with frequent reference to democracy and subsidiarity as adequate tools to meet the people's demands, the notion of transparency was introduced. A firmly declaration stressed the aim to create „an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen" (Article 1 (A) TEU). Transparency was subsequently transposed into the specific instrument of access to documents with Article 255 (191a) saying that

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.

3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.

The distinctive status of the Council was acknowledged in Article 207 leaving it up to its will to decide whether documents touched its role as legislator or not. Article 207 (151) specified for the Council that

4. The Council shall adopt its Rules of Procedure. For the purpose of applying Article 255(3), the Council shall elaborate in these Rules the conditions under which the public shall have access to Council documents. For the purpose of this paragraph, the Council shall define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in those cases, while at the same time preserving the effectiveness of its decision making process. In any event, when the Council acts in its legislative capacity, the results of votes and explanations of vote as well as statements in the minutes shall be made public.

The introduction of the right to information in the context of internal rules of procedure has provoked critical remarks (see e.g. Curtin 1998:112). The Dutch government, which regarded the right to information as a fundamental right, lodged a plea with the European Court of Justice (Case 58/94), but was eventually repudiated. It was therefore up to the body's internal code of conduct how to shape transparency.

Following the Treaty's obligations, the different EU bodies made up their own regulations on access to documents. The Council adopted a code of conduct concerning public access to Council and Commission documents in December 1993, which was adopted by the Commission in February 1994. The European Parliament implemented a similar system in 1997. Moreover, the Treaty of Amsterdam fixed that a regulation on access to documents of all three bodies should be adopted under the codecision procedure within two years of entry into force of the Amsterdam Treaty.

None of the bodies has committed itself to absolute transparency. The Commission's and the Council's code of conduct listed several exceptions including public interest, individual privacy, commercial and industrial secrecy as well as the Community's financial interests. Access to documents was likewise denied if requested by the supplier, were it a Member State or another third party. Documents also remained confidential if the EU-body claimed an interest in the confidentiality of the proceedings. The European Parliament decided to refuse access to documents of certain parliamentary meetings in order to protect the confidentiality

of deliberations of political groups. The rather narrow definition of the Commission and the Council has been challenged on various occasions. The subsequent judgments of the European Courts and the investigations of the European Ombudsman can be regarded as an invitation to reconsider the practice of the institutions.

Most of the refusals to grant access referred to the confidentiality of the proceedings. In Guardian versus Council (Case T–194/94) the English newspaper demanded documents concerning Justice and Agricultural Councils without success. The decision of the Court of First Instance turned the Council's position down and ordered the release of these documents. Moreover, it stressed the necessity of an accurate balancing test guaranteeing that the interest of citizens to get hold of documents should be carefully examined against the needs of internal proceedings. The same idea was expressed in WWF UK versus Commission (Case T–105/95). The Court conceded that certain documents out of a bundle might be withhold but that those which failed the balancing test should be handed over to the applicant. The discrepancies between Member State's practice and the Council's position were again highlighted when Swedish journalists demanded documents relating to Europol. Sweden handed over 18 out of 20 documents, the Council only 4. The Swedish journalists lodged a plea before the Council of First Instance (Svenska Journalistförbundet versus Council, T–174/95) and the Court finally annulled the Council's decision for not sufficiently reasoning the refusal. Generally, the judgments of the European Court suggest a careful examination of requests on a case-by-case basis. Moreover, the Court has frequently taken the side of applicants who were denied access to documents by the EU institutions. Its judgments therefore have "broadened the scope of access rights" (Verhoeven 2000: 9).

Another way to reassess the interpretations of the rules of conduct is by complaining to the European Ombudsman. He has been installed to serve as an intermediary between single citizens and the European Union. Transparency and access to information is one of the major tasks of the Ombudsman. His own-initiated inquiry aimed to close the loophole in Article 255, which covers only the Commission, the Council, and the European Parliament. The Ombudsman's inquiry included 15 EU institutions and bodies and suggested improvements regarding access to documents. Although his inquiries lack the virtue of law the conclusions of the Ombudsman have some impact given the very nature of the office. Complaints to the Ombudsman on transparency concern most of all the infringement procedure, recruitment procedures and access to documents (see Söderman 2000). The Ombudsman was also used to defy the Council's restrictive dealing with documents concerning the Third Pillar. Frequent requests on documents made by a British Journalist on behalf of the human rights organization "StateWatch" had frequently been refused.

Since the emergence of the transparency theme access to information on EU politics has substantially improved. Thanks to the use of electronic media, the lack of information on the EU bodies and their working has been enormously reduced. Many bodies and institutions nowadays offer registers of documents. Press releases, minutes and previews of the agenda

are readily available. However, comprehensive information on the working of the EU at large or thematic information sheets rather highlight the service-orientated character of an institution than stressing the frequently proclaimed democratic upgrading by adding transparency. Likewise, the very idea of broadcasting Council meetings may promote the understanding of EU policy-making, the actual programs are rather uninformative and moreover, "flavored with propaganda" (Guggenbühl 1998: 24). "Enlightened understanding" as a democratic criteria channeled through the intermediaries of an active civil society will not be achieved by this means.

4. Transparency and openness in comparison

The debate on the new regulation regarding public access to European Parliament, Council and Commission documents gave the opportunity to analyze the current positions of the three EU-bodies with regard to transparency and openness. The comparison works on the assumption that access to information strengthens democratic legitimacy. If everybody has access to each single document drawn up in the public administration as well as to those documents worked out during legislative policy-making, transparency and openness are maximized. Criteria for assessing the differences and similarities between the positions of the EU-bodies are the question of who has access to what documents under which conditions. However, the very nature of the EU polity causes scenarios, which go beyond the scope of the analysis. Since legislation on access to information vary among the Member States, an upgrading of access on the EU-level might override provisions on the national level. Extensive access to documents on grounds of the new regulation could then lead to an upgrading of transparency in some Member States while at the same time weakening the right to information in others, namely the Nordic countries. The question of how to deal with the so-called "Third party"-documents, which includes those of Member States, will be therefore touched, too.

Transparency and openness by means of access to information are frequently linked to accountability and participation but actual democratic practice illustrates that access to documents is always limited in one way or the other. Yet, not only the institutional arrangement but also the nature of the institutions itself is shaping the degree of openness and transparency. Along the lines of how much transparency may possibly be granted, the institutional view will define how access is granted under which conditions, what kind of information is accessible and why access is granted or denied. The institution's culture, its self-perception, and its inherent institutional targets will influence the degree of openness, which is consequently defended against conflicting and concurrent positions.

4.1. Foci of the three proposals on the regulation of access to documents

In accordance with the EC-Treaty obligations Article 251(2) and 255(2) the Commission issued a proposal for public access to documents of the Council, the Commission and the European Parliament. The Commission proposal (COM (2000) 30 final/2) of 21 February 2000 was forwarded to both Parliament and Council.

The European Parliament primarily dealt with the new regulation in several meetings of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, which considered opinions of other committees, too. The Committee adopted its draft legislative resolution on 24 October 2000 by 28 votes to 4, with 2 abstentions and made it available to the public (Doc. No. A5–0318/2000). This draft would have been subject to the vote in plenary session, which was eventually postponed in order to open up informal meetings with both Commission and Council.

Somewhat different and highly indicative is the proceeding in the Council, which dealt with the regulation in various sessions of the COREPER working group on information under subsequent the Portuguese, the French and the Swedish presidency. Common positions are much more difficult to find since the positions of each of the 15 Member States has to be considered. Access to documents is subject to a wide range of implementation forms in respective national legislation. Differences with regard to Member States legislation cover the whole range between narrow definitions of openness and a very extensive practice in granting access to documents. A review of national legislations shows that e.g. Great Britain makes extensive use of the so-called secrecy act thus withdrawing official documents from public scrutiny. On the opposite, the Nordic countries have long times practiced the open government approach. The adoption of a common position at the General Affairs Committee meeting was tabled for the end of November, then postponed to January 2001. The Swedish Presidency's working paper of that meeting which is the basis for comparison still reflects internally unsettled issues.

The obvious difficulties to find a compromise provoked a substantial delay in the adoption of the new legislation. A series of informal "trilogue meetings" started at the end of January 2001 and was concluded with a compromise. The regulation was finally adopted on 30 May 2001 (Regulation (EC) No 1049/2001).

The Commission's proposal stresses in its recitals the necessity to broaden transparency and openness, thus enabling "citizens to participate more closely in the decision-making process, and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable vis-à-vis the citizen in a democratic system" (Comm, recital 2). It reaffirms this commitment by reminding of the European Councils of Birmingham, Edinburgh and Copenhagen, which extensively dealt with transparency. The prime

addressee of the regulation is therefore "the citizen." Despite this commitment, the making of the Commission's proposal has provoked criticism for not involving representatives of civil society. The European Committee of the British House of Lords judged that "[a]n important political opportunity was missed. Extensive external consultation would have demonstrated commitment to openness. It might have gone some way to restore to the institution some of the legitimacy and credibility it lost with the collapse of the Santer Commission."[1] However, the draft confirms the will to shape the European Union as a democratic system. The principle of openness shall guarantee civic participation and accountability.

Apart from the rights of Member States, the scope of the Parliament's regulation is much broader than that of the Commission. Specific rules on access only stay in force if they provide more access. The parliament intends an extensive approach including remarks on future provisions on access to documents: "On the same basis, the present regulation is the legal framework for existing and future interinstitutional agreements in relation to methods of drafting laws, content and format of the Official Journal, managing and storing documents with a view to granting access, and guidelines on the rules on modalities for access to documents" (EP, recital 3).

With regard to the principal motivation of the regulation on access to documents this draft shows other focal points. The proposal makes reference to the acquis communitaire and declaration 17 as well as the Charta of Fundamental Rights. It stresses in its justification to recital 0 that "[a] truly democratic debate cannot develop in the European Union without open institutions" and promotes the right of information. Transparency through access to documents suffices another principle by granting protection "against the arbitrary use of and the abuse of power and against corruption and fraud" (EP, recital 2). The draft is clearly aimed at the citizen and the general public.

The Council's working paper issued under Swedish presidency[2] reflects a rapprochement between the Member States and makes some concessions to the European Parliament's draft. The position of the Council diverges however from those of Commission and the European Parliament. The draft confirms in its recitals the principle of openness and transparency as a means to achieve greater legitimacy, effectiveness and accountability. It follows the Commission's wording in saying that "[o]penness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system" (Council, recital 2). The aim is "to widen access to documents as far as possible"

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1 House of Lords, European Communities Committee, Sixteenth Report: Public Access to EU Documents, HL 102; 1 August 2000

2 None of the working papers and drafts of the Council was accessible through the Council's register of documents. However, several documents were played into the hands of the British human rights organization StateWatch which made them available to the public via Internet (www.statewatch.org)

(Council, recital 4). However, the Council makes special reference to Article 255(3) in proclaiming that Council's documents concerning legislative issues should be more accessible "while at the same time preserving the effectiveness of their decision-making process" (Council, recital 6).

4.2. Transparency in perspective

Getting information is a way of empowerment in terms of democratic citizenship. Access to documents therefore centers on the question how much access is granted. This includes definitions of those who benefit as well as procedures on access. Another important criterion is the scope of access. The accessibility of documents refers both to the stage in the policy-making cycle as well as to policy fields. A rather special case due to the nature of the European Union has to be considered, too. The multi-level system offers multiple points of access, notably the EU-institutions and the Member States. The question of how to deal judicially with this configuration cannot be assessed in terms of more or less access since national provisions vary. Whether Member States have the final say in the disclosure of documents originating from a nation state or not rather touches the question of weakening the Member States or strengthening the European Union's impact.

4.2.1. Beneficiaries of the regulation

The provision on who should be entitled to access shows little divergences. Beneficiaries shall be all Union citizens, all enterprises having their office within the territory of the EU, and all legal residents. The Parliament's as well as the Council's drafts exceed this right to non-EU natural or legal persons although the wording indicates that this right is not enforceable. This is a slight but however important improvement towards more openness since namely accession states may have a strong interest to get hold of certain EU-documents. All three proposals in principle agree that no reason has to be given by the applicant as far as his specific interest is concerned. However, only the European Parliament's position is without reservation: "The institution concerned may ask the applicant for further details regarding the application" (Comm, par. 5.1). A similar wording is used in the Councils respective paragraph (Council, par. 3A(2)). The wording of both the Commission's and the Council's proposal open a backdoor to revise this principle, whereas the Parliament's draft defines rather narrowly that asking back is only possible "for the purposes of identifying the documents" (EP, par. 5.1). The European Parliament's draft does not mention large documents or repeated requests whereas both Commission and Council consider these cases and make specific provisions. A specific rule applies in case of large documents or repeated requests. The Council follows the suggestions of the Commission saying that "[i]n the event of general and repetitive applications or applications relating to very large documents or a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution" (Council, par. 3a(3)).

Speeding up the process of application is seen as a citizen-orientated approach by the Parliament. Whereas the Commission sets a time limit of one month to reply to an initial application, the Parliament's approach reduces the answering time to two weeks and demands to hand over at the same time the requested documents in case of a positive decision (EP, par. 5.2). The Council's draft expresses its commitment that applications "shall be handled promptly" (Council, par 5.1), but leans on the Commission's position of a deadline for response limited to one month.

As far as requests for documents are concerned, each draft foresees in its paragraph 5 a fairly similar procedure. If the application is not accepted, the applicant is entitled to make a confirmatory request. If this request is turned down, the institution has to inform about possible remedies, namely a complaint to the Ombudsman or the lodging of the complaint with the European Court of Justice. The Council's proposal foresees however that "[c]onfirmatory applications for sensitive documents shall be handled only by those persons who have a right to acquaint themselves with those documents according to the internal rules of the institution concerned" (Council, par. 6(1)). The European Parliament takes a somehow different view by demanding, "[p]arliamentary scrutiny of all documents excluded from public access shall be assured by regularly informing a body of the European Parliament" (EP, par. 7).

Table 1: Beneficiaries of access to documents according to EU-institution's drafted positions

	Commission	**Parliament**	**Council**
BENEFICIARIES & PROCEDURE	Natural and legal persons within EU-territory	Natural and legal persons worldwide	Natural and legal persons worldwide
Reservation	no reason has to be given, but: institution may ask for further details	no reason has to be given	no reason has to be given; but: institution may ask for further details
Reservation	special treatment for large document or repeated request	no provision	special treatment for large document or repeated request
Time	time-limit of one month	time-limit of two weeks	time-limit of one month
Remedies	Two stage procedure and possibility to appeal to Ombudsman or European Court	Two stage procedure and possibility to appeal to Ombudsman or European Court	Two stage procedure and possibility to appeal to Ombudsman or European Court

4.2.2. Proactive measures

In its efforts to shape the regulation on access as an overall guideline on the future access to information, the European Parliament's proposal embraces the detailed handling of registers, unlike the Commission's initial draft. Although many bodies and institutions of the European Union already offer registers accessible by the Internet, the European Parliament sets great store of regulating this point specifically and incorporates a proactive approach to information on documents. It suggests therefore the installation of a register for each institution. These have to include at a minimum "all documents created by that institution in the course of a procedure for the adoption of legally binding measures, notably all proposals, opinions, working documents, agendas, documents for discussion at formal meetings, minutes, declarations and positions of Member States" (EP, par. 9a(3)). The register has to list those documents that are excluded from access indicating reasons for exclusion (EP, par. 9a(2)). Apart from that, these documents have to be incorporated in the public register from the moment of time a decision has been made or at the moment a document is sent to others like third parties, institutions or internal bodies (EP, par 9a(1)). Whenever possible

documents shall be available directly thus creating registers as an interface between the institutions and citizens.

The Council follows this approach by stating that this would "make the citizens' rights arising from this Regulation effective" (Council par. 9a(1)). Differing from the EPs position the Council simply demands a short description of the content. A huge difference shows up in the treatment of documents subject to exceptions: "Reference shall not be made if disclosure of the reference could undermine the protection of information provided for in Article 4" (Council, par. 9a(2)). Sensitive documents are excluded likewise.

Table 2: Proactive measures in access to documents according to EU-institution's drafted positions

	Commission	**Parliament**	**Council**
PROACTIV MEASURES	Access to registers shall be provided	Register shall include reference to all documents as soon as they are sent to another body or a decision is taken, documents falling under exceptions have to be listed, documents shall be accessible directly	Registers shall be established, no reference if this could harm protection as granted by the exceptions, no reference to any sensitive documents

4.2.3. Scope of the regulation

The regulation is intended to encompass "all documents held by an institution, that is to say, documents drawn up by it or received from third parties and in its possession, in all areas of activity of the European Union" (Council, par. 1(2)). The European Parliament makes a point in stressing that 'all areas' refers to the 2nd and 3rd pillar as well. The Council agrees on that with certain reservations stating that sensitive documents shall get a special treatment.

Commission, Parliament and Council are generous as far as the type of medium is concerned. Written as well as electronic or sound, visual or audiovisual-recorded information may be requested. Generosity stops here, and the approaches to exceptions vary significantly in various fields. In case of the future EU-regulation, the European Parliament offers the smallest number of exceptions. The draft foresees that access to documents can be denied if disclosure could significantly undermine public security, monetary stability,

defense and military matters, and vital interest relating to the EU's international relations (EP, par. 4(1a)). Individual privacy is likewise protected. Commercial secrecy is mentioned under the European Parliament's exceptions, too, but has to be balanced against private or public interest in case of disclosure. However, the European Parliament sets certain limits to the protection by demanding that a classification is done immediately and shall be limited in time. If access is denied for an unlimited period of time, the reason for withholding has to be revised regularly (EP, par. 3a(2)).

The Commission's initial proposal gives a much longer and detailed list of exceptions including "the effective functioning of the institutions" (Comm, par. 4(1a)). This draft does not require a "balancing test" as the European Parliament's proposal does. The Council's position is similar to that of the Commission, but is outstanding in stating "[a]ccess to a document which relates to a matter where the decision has not been taken by the Institutions may be denied if its disclosure could seriously undermine the Institution's decision-making process, unless it is clearly in the public interest to disclose the document" (Council, par. 4.2).

The Commission suggests likewise excluding "texts for internal use such as discussion documents, opinions of departments, and excluding informal messages" (Comm par. 3a). The two other concurrent drafts take also account of the so-called 'space to think' clause. The Parliament's draft limits its exceptions however to documents intended for exchange of idea and brainstorming. The 'space to think' is limited to "informal information in the form of written messages which serves the provision of personal opinion or the free exchange of ideas ("brain storming") within the institutions" (EP, par. 3a). The Council's proposal resembles the approach of the Commission in its subsequent paragraph, excluding documents "for internal use as part of preliminary consultations and deliberations within the institutions such as discussion documents, unfinished documents or draft documents and documents whose content reflects personal opinions" (Council, par. 3a). The European Parliament chooses obviously the most restrictive wording, but leaves broad space for future interpretation, too.

Another source of divergence is the definition of those bodies subject to the proposed regulation. Following the obligations of the Amsterdam Treaty, access to documents of the Council, the European Parliament and the Commission has to be considered. The Council's draft makes no further provisions on that subject. Both Commission and EP define the respective bodies more precisely. The EP mentions the "internal and subsidiary bodies (such as Parliament Committees, Council Committees, Working Groups and Commission Directorates-General)" (EP, par. 3b). The Commission's draft is even more precise, citing each body and the main subbodies (Comm, par. 3c,d,e). It also views the EP's political groups within the reach of the regulation, a provision that is missing in the EP's draft.

Table 3: Scope of access to documents according to EU-institution's drafted positions

	Commission	**Parliament**	**Council**
SCOPE	all documents held by an institution (drawn up or received)	all documents held by an institution (drawn up or received)	all documents held by an institution (drawn up or received)
Medium	written as well as electronic or sound, visual or audiovisual recording	written as well as electronic or sound, visual or audiovisual recording	written as well as electronic or sound, visual or audiovisual recording
Accessible documents up to subject	Exclusion on grounds of – public security, – defence and international relations, – relations between and/or with the Member States or Community or non-Community institutions, – financial or economic interests, – monetary stability, – the stability of the Community's legal order, – court proceedings, – inspections, investigations and audits, – infringement proceedings, including the preparatory stages thereof, – the effective functioning of the institutions privacy business interest	Exclusion on grounds of – public security, – monetary stability, – defence and military matters – vital interest relating to the EU's international relations privacy business interests (balancing test)	Exclusion on grounds of – public security; – defence and military matters; – international relations; – relations between a Member State and an institution of the Community, or between the institutions of the Community and non-Community institutions; – the financial, monetary or economic policy of the Community or a Member State; – court proceedings; – efficiency of inspections, investigations and audits; – infringement proceedings, including the preparatory stages thereof privacy, business interests

Accessible documents up to pillar	No specific provision, no overruling of existing rules of access	Documents in all areas of activity including 2nd and 3rd pillar, overruling of existing rules granting less access	Documents in all areas of activity including 2nd and 3rd pillar, but special procedure for sensible documents
Accessible documents up to stage	Possibility to protect internal documents	Possibility to protect informal information ("Harm test")	Possibility to protect documents if no decision has been taken ("Harm test")
Accessible documents up to holder	Documents held by the three institutions and those of internal bodies	Documents held by the three institutions and those of present and future internal bodies and agencies accountable to them	No specific provision

4.2.4. Documents involving 3rd parties

A special point due to the nature of the EU polity is the insertion of provisions concerning third parties. Whereas the definition of third parties remains the same for all three proposals saying that 'third party' shall mean "any natural or legal person, or any entity outside the institution, including the Member States, other Community and non-Community institutions and bodies and non-member countries" (Comm, par. 3f, EP, par. 3f, Council, par. 3c), the question of how to handle documents originating from third parties is contested. The crucial point is, of course, the role of the Member States. The Commission suggests to grant confidentiality according to the preferences of a Member State (Comm, par. 3d) and to apply the regulation only for documents sent to the institutions after entry in force of the regulation (Comm, par. 2 (1)). The European Parliament turns down this approach fearing an undermining of the future regulation. It therefore suggests that Member States and other third parties shall indicate reasons for withholding on the grounds of the exceptions laid down in the EU-regulation on public access. The institution even has the right to decide against the wishes of the third party but is at the same time under obligation to grant a certain space of time to give the opportunity to search for legal intervention (EP, par. 4c). The Council's definite position on this point was not available for comparative analysis. In the recital it is however laid down that Declaration No 35 attached to the Final Act of the Treaty "will allow a Member State to request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement" (Council, recital 9).

Another possible scenario for request is not covered by the Commission's proposal although it has proven to be a touchstone between the Community institutions and a Member State. The case of Sweden, releasing more documents under its presidency than the Council, has highlighted the problematic nature of divergent information policies. The European Parliament provides in this case that "the Member State shall immediately inform the institution" (EP, par. 4d) but leaves it up to the Member State whether to disclose or not on grounds of national legislation. In its justifications the European Parliament however expresses the hope that the Member States respect the "spirit of loyal cooperation." The Council's common position with regard to this point remains contested and unclear. The wording, which does not get the agreement of all Member States, provides that the Member State "should forward it promptly to this institution for a decision to be taken" (Council, recital 14).

Table 4: Status of 3rd parties according to EU-institution's drafted positions

	Commission	**Parliament**	**Council**
Treatment of 3rd party documents	Confidentiality is granted if requested by 3rd party	3rd party must claim confidentiality on grounds of EU exceptions, institution decides, possibility of court proceeding	Member States have to agree prior to the release
Treatment of EU-documents by 3rd parties	"spirit of loyalty" demanded, no special provision	"spirit of loyalty" demanded, but: Member State takes the eventual decision	Member State has to forward request to the EU-institutions for final decision

4.3. The three proposals in terms of openness and transparency

When assessing the three positions offered by Commission, Parliament and Council, one observes apparent differences in the shaping of openness and transparency. The European Parliament clearly takes the most far-reaching position on granting access to documents. It reaffirms the commitment of ready-at-hand information by introducing not only the shortest time limit for answering to requests. It also offers the most detailed provisions concerning public registers in terms of quick and extensive availability. The proposal is much more generous towards repeated requests than the concurrent drafts. These are treated the same way as all other requests. This is especially important given the aims that are to be fulfilled by transparency and openness. The institutionalization of a European public sphere depends on evolving intermediaries, which work on a regular basis. Interest groups, the media as well

as scientific research therefore need the possibility to access information without discrimination.

The European Parliament's draft is also far reaching with regard to the type of document. Though the relevant provisions are somehow vague, the Parliament is clearly more ambitious in granting access to as many documents as possible. This is especially important for those papers drawn up in the initial stages of the policy-making cycle. Public availability of internal documents allows an active participation in policy making as well as accompanying control thus not only relying on ex-post accountability. The proposal is firm in avoiding provisions, which would allow escaping from the regulation by including all three pillars. It therefore denies the setting up of special codes of access granting less access than once established. Wherever the necessity to withhold documents is conceded by its proposal, the Parliament urges a balancing between conflicting interests. A regular revision of classified documents shall moreover grant the strict commitment to the principle 'as open as possible'.

The Commission's and the Council's position are in contrast less open than the European Parliament's, although different points are highlighted. Both grant a degree of openness and transparency that is not conducive to civic participation and even renders ex post accountability more difficult. The Commission's proposal encompasses the existing sub-bodies and by doing so, follows the same principles as the Parliament. In deviation from the Council's position it restricts beneficiaries to legal and natural persons residing in the European Union and is, therefore, less open than the Council. As far as the scope of the future regulation is concerned, the Commission stresses the importance of granting confidentiality in order to ensure the effective functioning of the institutions. Internal documents are therefore largely covered by exceptions restricting access. A 'harm test' to balance the applicants interest in disclosure towards the institution's interest in confidentiality is in no case provided.

The Council is even more restrictive than the Commission. The Council is less concerned with internal "space to think"-provisions but considers the confidentiality of the decision-making process. Although a 'harm test' is foreseen for internal documents concerning issues where a decision has not yet been taken, it is restrictive in another area. It reaffirms its commitment to include documents of all areas but foresees at the same time special procedures for sensitive documents. This attitude is extended to the provisions on public registers. Online registers, which list all documents and provide for direct access to the actual paper, would enormously improve opportunities for participation and accountability throughout Europe. The establishment of such registers would allow individuals and interest groups, which are not located at Brussels to bridge the geographic distance and monitor EU politics. Yet, the Council neglects the European Parliament's considerations on speedy and comprehensive access to registers. Even more important, it restricts the cases to be listed in registers therefore hampering even ex post accountability. The Council is as restricted as the

Commission in treating repeated requests or applications for large documents in a special way.

Gronbech-Jensen stresses that the Commission has adopted several measures to strengthen transparency since Amsterdam, e.g. by involving organized interests. By doing so, it went much further than the Council (Gronbech-Jensen 1998: 191). However, when focusing on public access to documents only, these findings have to be reconsidered. It is mainly the European Parliament which acts as a motor for more transparency whereas the Commission's and the Council's attitude reflect reservation on public access to documents.

5. Conclusion

Transparency and openness as tools for democratic legitimacy stress the importance of open, simple, and comprehensible policy-making. They are seen as prerequisites to hold political leaders and administrative bodies accountable. Transparency and openness may also prompt civic participation by allowing direct engagement in politics. The most basic instrument to enhance transparency and openness is granting extensive access to information. Access to information enables citizens and civic intermediaries to scrutinize the political processes and to engage in them either directly or by means of public debate.

Access to information has been one of the means designed to strengthen the legitimacy of the EU-polity. Since Amsterdam, this approach has been pursued and improvements in the information policy and accessibility of the European Union through civil society have been achieved.

The final shaping of the regulation on access would be subject to yet another paper.[3] In any case, when studying the different suggestions on the regulation regarding public access to European Parliament, Council and Commission documents, current institutional views on transparency and openness turn out to be somehow dissatisfying. The different drafts of Parliament, Commission, and Council reflect the aim to protect the institution's most vital and sensitive areas. The European Parliament is eager to exclude documents concerning party deliberations, the Commission tries to shield internal administrative documents as far as possible and the Council is anxious to protect its decision-making process. The comparison of the drafts on the European Union's regulation on public access to European Parliament, Council and Commission documents shows that there is no overall perception and conception of democracy, and eventual compromises will continue to reflect these ambiguities.

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[3] For in-depth analysis of the regulation see e.g. Jacobs 2001

Even very open systems like the Swedish one do exclude documents from public scrutiny for various reasons. Taking this into account, the European Parliament's position is still the most far reaching with regard to an opening up the policy-making process by means of granting access to documents. It suggests a speedy procedure, has no reservations on beneficiaries and provides for extensive access to documents in almost all phases of the policy cycle and in many policy fields. It is consequently outstanding in granting opportunities for both accountability and participation. Commission and Council, in contrast, rely more heavily on internal deliberations, which have to be protected up to some degree against the outside world. The Council even renders ex post accountability more difficult. In following the philosophy of diplomat's secret deliberations, the Council provides for opportunities to hide the very existence of documents. Hopefully, the strengthening of the Parliament's position has positive effects on better opportunities for civil society. It challenges contrasting views as represented by Commission and Council and may well have some impact on existing power relations, inherent attitudes and final political outcome.

Transparency and openness are double-edged weapons. If people use the channels open to them, they may eventually conclude that they do not agree to what is going on in day-to-day politics. An upgrading of democratic legitimacy by granting more access to information may then have delegitimizing effects. Output-orientated approaches, stressing that democratic legitimacy is best achieved by providing optimal political outcome, namely rules and laws on behalf of the people's demand, will remain sceptical about the positive effects of participation and accountability through the highest possible degree of transparency and openness. Conversely, one has to put up with possible unintended consequences of transparency if a political system is to be created as a 'democracy by the people' instead of a 'democracy for the people'.

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