Chapter 2

The Principle of Open Government in Schengen and the European Union: Democratic Retrogression?

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2.1 Introduction

The natural inclination of the governing institutions of a totalitarian state is to draw a veil of secrecy over their activities, their archives and, above all, their policy and legislative plans, in the process elevating structural secrecy to the level of a principle for all areas of government. Open government cannot exist in such a state, because openness implies the possibility of exercising public control over government and of empowering the opposition. By definition, democratic government functions through widespread public deliberations on important issues. Democratic power remains in the citizens and for a democratic society to succeed, its citizens must be informed in order to be able to criticise their governors, that is their governing institutions.

A right to public knowledge of government deliberations, albeit a qualified one, is therefore necessary for effective democratic control. Yet some kinds of information may be more critical to citizens in a democracy than others. In systems which hold respect for and compliance with the "rule of law" as central, the knowledge most fundamental to democracy is legislative knowledge, that pertaining to the origin and rationale behind the law itself. The general rule now prevailing in Western Europe and further afield is that legislative assemblies operate under the full glare of publicity whenever they are carrying out their legislative functions and that this is an absolutely essential component of the democratic systems prevailing in these countries. This fundamental principle applies in all 15 Member States of the European Union. The "publicity" in question at the national level is comprised of multiple elements: open sessions of plenary sittings of legislative organs, in the majority of cases open committee sessions where legislation is under consideration (as opposed to matters mandating more confidential treatment such as internal security or monetary policy etc.), publication of all draft legislation, verbatim reports of debates etc.

Moreover, in addition to this fundamental principle at the root of democracy itself, an increasing number of these same Member States have recognised the fact that the imperatives of democracy also demand that the business of the executive arm should be subject to the scrutiny of the general public. The belief underlying these developments...

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1 This article has first been published in: 32 C.M.L.R. 1995, pp. 391-442. For the purpose of retaining a uniform system of style in all chapters of this book, minor editorial revisions have been made.

2 In the majority of EU Member States, legislative (and, in some cases, constitutional) initiatives have specifically aimed to penetrate government secrecy and gradually replace it with a more open information supply. Only 4 out of these 15 have neither a constitutional provision nor legislation on access to administrative documents (Austria, Germany, Ireland and the UK). All the other states recognise the fundamental nature of the principle in one form or another and have regulated the matter by law. It is beyond the scope of this article to consider in detail the
is that the quality of the ultimate decisions will be improved not only by the public’s contribution to the decision-making process itself but perhaps even more by the knowledge of the decision-makers that they are acting in the public view. General understanding and acceptance of their purpose may thereby be increased.

Where certain areas of government, which are subject to public accountability within the national system, are transferred for the purposes of European integration to international bodies which accept secretiveness and confidentiality as a basic rule, an important element of national democracy in these areas will have been eliminated since rules of international law clearly prevail over rules of national law. Yet Article F. paragraph 1, of the Treaty on European Union (TEU) recognises that the systems of government of the Member States are founded upon the “principles of democracy” and guarantees to respect them.

This chapter is concerned primarily with the transfer of areas of government to the international bodies which were set up by the Schengen Implementing Agreement and the TEU for that purpose. How far does secretiveness within the European institutions go? What is the extent of open government in the context of “Schengen” and “Maastricht”? What is the cost of European integration in terms of democratic government? Does the transfer of legislative and executive powers by the Member States to “Schengen” and “Union” institutions and bodies imply the simultaneous transfer of the power to eliminate openness of legislation and government? What were the intentions of the High Contracting Parties in this respect? Does the transfer of a power imply the complete or partial abrogation of openness in every Member State?

In order to address these questions it is first necessary to determine the meaning of the term “openness” for the purposes of this chapter. The term refers to open government by public authorities regardless of whether these are international or national authorities. In this context “openness” means the possibility for everyone to acquire knowledge of government activities by granting access to the fora where public decisions are taken and by making available information carriers (documents and other visual or auditive instruments), in which these decisions are recorded and which provide insight into the preparation of these decisions. Open government therefore exists where conference rooms or other fora where government bodies make or prepare their decisions are open to the public and where documents relating to these decisions can be con-

national law of the various Member States in this regard. See, in general, the somewhat dated but nevertheless valuable account in the European Parliament report by the Committee on Youth, Culture, Education, Information and Sport on the compulsory publication of information by the European Community, Rapporteur Marck, 10 November 1987 (Document A-2-208/Ag). See also the (likewise somewhat dated and on occasion misleading) results of a research project undertaken under the auspices of the Commission of the European Communities known under the generic code-name PUBLAW, finalised in January 1991, for details of the laws of certain Member States.

3 As far as treaty law in general is concerned, this is laid down in Art. 27 of the Vienna Convention on the Law of Treaties, 23 May 1969, U.N. Doc. A/Conf.39/27. As far as Community law is concerned, this has been declared by the Court of Justice on many occasions, e.g., Case 26/62, Van Gelder en Loos, (1963) ECR 375, Case C-106/77, Simmenthal (1978) ECR 629.

4 Agreement for the implementation of the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of controls at the common borders, Trib. 1990, No. 145 ("Schengen Implementing Agreement").

sulted within a reasonable time-limit and without too much trouble. In short, this chapter deals with the problem of accessibility as opposed to secretiveness of government bodies and of their documents.

The loss of openness is not the only price which is sometimes paid for the internationalisation of government. There is more at stake when portions of government power, which is exercised by government and parliament together, are transferred to an international organisation for the benefit of international cooperation. There will be a loss of democratic content if the international organisation does not have a parliamentary body which has as many powers as a national parliament, if there is no international court which has jurisdiction to review the legality of the acts of the international organisation and if the openness which is observed at the national level in respect of the transferred areas of government is undermined as a result of the transfer of government to the closed international circuit.

The subject of this chapter is believed to be particularly topical with the recent accession to the EU of two more Scandinavian countries where systems of open government are not only deeply entrenched and accepted in the political culture but where access to official documents is regarded as something like a natural right with a counterpart in all civilised societies. As the contradictory declarations made by Sweden and the existing European Union Member States annexed to the Accession Treaty graphically illustrate the issue of openness and transparency in the decision-making processes within the European organs concerned, considered essential by a large part of its citizens, is a time-bomb slowly ticking away. Adequate defusion requires recognition of the fundamental nature of the principle at stake and a mentality revolution.

The structure of this chapter is as follows. We first of all examine, in a necessarily selective fashion, the manner in which the principle of open government found expression in other international organisations (section 2.A), in order not only to place developments within Schengen and the EU in a historical context but also as evidence that a failure to respect the principle can indeed contribute to the downfall of an international organisation. The content and relevance of the European Convention on Human Rights ("ECHR") is the subject of specific (separate) focus because of its relevance to the elaboration of a satisfactory rule of law in the context of both Schengen and the EU (section 2.B). The risk that a democratic retrogression takes place when policy areas are transferred from the national sphere to the international is highlighted (section 2.C). The subsequent sections of this chapter focus on the rules on open government in "Schengen" (section 3) and the "Union" (section 4). In both cases attention is focused on the rules on openness which apply to the principal decision-making bodies, namely the

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7 The Declaration by the Kingdom of Sweden on open government (OJ No. C 241 of 25 August 1994) reads: "Sweden welcomes the development now taking place in the European Union towards greater openness and transparency. Open government and, in particular, public access to official records as well as the constitutional protection afforded to those who give information to the media are and remain fundamental principles which form part of Sweden's constitutional, political and cultural heritage" (authors' emphasis).

A counter-declaration made by the present Member States in response states: "The present Member States of the European Union take note of the unilateral Declaration of Sweden concerning openness and transparency. They take it for granted that, as a member of the European Union, Sweden will fully comply with Community law in this respect."

8 See in this case, the Presidency Conclusions, European Council, Corfu Summit, 24-25 June 1994.
Schengen Executive Committee and the Council of the European Union. The publicity of documents and records is then dealt with. Finally, some conclusions are drawn as to whether European integration indeed implies the reduction of democratic content of European society (section 5).

2.2 General background

A Open government in international organisations
The fact that secretiveness can forcefully contribute to the downfall of an international organisation was clearly demonstrated in the last century by the German Bund. This Bund, in which the German states and free cities cooperated from 1815 to 1866, and which is comparable with the contemporary European – and non-European – international organisations, was severely weakened by a lack of openness and the secretiveness of everything which took place in its decision-making body, the "Bundesversammlung". The Bundesversammlung was composed of the representatives (the ministers) of all the participating states. After a promising start, the Bund lost much of its influence and almost all of its authority with the citizenry due to its secretive mode of operation. In a memorandum of 12 March 1848 the Member State Bavaria observed:

"Und wodurch wurde der Bund zu dieser Nullität, zu dieser Aufschwungfeindlichen Haltung gebracht? – Durch seine Heimlichkeit, durch das hermetische Verschliessen seines Stizungs-Saales gegen jede Kontrolle der öffentlichen Meinung. – Der heimliche Bundestag ist den Deutschen ein Gegenstand erst der Scheu, dann kalter Anwiederung geworden." 9

The Swiss confederation (1815-1848), an international organisation established by a treaty between the Swiss cantons which had treaty-making powers, escaped a similar fate. At first, the meetings of the highest body of this organisation, the Landtag, were not open to the public. However, in 1834 a new rule was introduced in response to the rise of democratic movements: the meetings were public, unless a majority of the cantons present decided otherwise. 10

The largest contemporary international organisation, the United Nations, started off in 1945 in an atmosphere of almost complete openness. The meetings of the General Assembly, the Economic and Social Council and the Trusteeship Council were usually public. The International Court of Justice observed the openness which, at least in Western Europe, is normal for a national judicial body. From the outset, the documents produced by the principal bodies mentioned were accessible for everyone. The documents published by the subsidiary organs of these principal bodies were and still are public.

9 "And what caused this nullity of the Bund, what caused this hostile attitude to prosperity? It was its secretiveness, the fact that its conference rooms were hermetically sealed against the control of public opinion. 'The secretive Bundestag first became an object of fear, and then of cold disgust to the German people" (authors' translation). Noted in H.A. Zachariä, Deutsches Staats- und Bundesrecht 1, 3d ed. 1865, at p. 199. See, also, A.J.P. Tammes (who quotes this phrase), Hoofdstukken van internationale organisaties [Chapters of International Organisations], pp. 29-38, especially at p. 34.

10 See Tammes, id., p. 22 and the works referred to. As will be highlighted hereafter the decision-making bodies of "Schengen" and "the Union" adopted precisely the reverse position as their basic rule.
Following a proposal of The Netherlands, Resolution 13(I), which embodies the principle of the openness of all United Nations documents, was adopted unanimously by the General Assembly on 13 February 1946. That Resolution commences as follows:

"Information"
"The United Nations cannot achieve its purposes unless the peoples of the world are fully informed of its aims and activities."

This generous approach to open government, which perhaps was a reaction to the ambush politics of the dictatorships defeated in 1945 and which reached full maturity, thanks to the active influence of the United States, led to the establishment of large depository libraries in all the Member States. As far as the publicity of documents is concerned, the League of Nations had already set a good example as of 1920. But it was not until the United Nations developed its policy of openness that it was actually possible to trace, without too much difficulty, the activities of diplomats in the United Nations from the moment they adopted texts in sub-committees.

There is one United Nations body which in the course of time has actually reduced the degree of openness of its activities. Since the 1970s the Security Council has adopted the practice of preparing its official public meetings in a plenary consultative meeting in a separate conference room. The public does not have access to this meeting. Previously, "most of the work of the Council took place in its public meetings". The leading principle on the accessibility of United Nations bodies is laid down in the "Rules of Procedure" of the General Assembly:

"Rule 62. The meetings of the General Assembly and its Main Committees shall be held in public unless the body concerned decides that exceptional circumstances require that the meeting be held in private. Meetings of other committees and subcommittees shall also be held in public unless the body concerned decides otherwise."

Furthermore, Rule 63 provides that private meetings of the General Assembly and of all of its committees must be announced publicly in good time before the meeting. The decision to close a meeting for the general public must be taken by a simple majority. With the exception of the words in Rule 62, quoted above, which indicate that a meeting may only be held in private in "exceptional circumstances", the Rules of Procedure of the other principal bodies of the United Nations relating to the public character of meetings all contain a rule which is almost identical to Rule 62 of the General Assembly.

The "Specialised Agencies", such as the International Civil Aviation Organisation (ICAO) and the International Labour Organisation (ILO), all have rules on the publicity and accessibility of their meetings and documents which are similar to those of the United Nations itself.

The regional organisations in Europe have multifarious rules on accessibility and publicity. Two examples may briefly be given. The Council of Europe, which has two organs, the Consultative Assembly and the Committee of Ministers, acts on the presumption that the

meetings of the latter shall be private (Article 21 of the Statute of the Council of Europe) and of the former public (Article 35 of the Statute). The accessibility of the Assembly applies both to its meetings and its documents. The inaccessibility of the Committee of Ministers applies, as a basic rule, to both the meetings of the Committee and its documents. Documents remain closed to the public till thirty years after they appear.\textsuperscript{13}

The Nordic Council, which is composed of the representatives of the national governments and the national parliaments of the five Scandinavian States, under Article 6 of its Statute\textsuperscript{14} (which has been in force since 1952) accepts as a basic rule for its meetings and documents that these shall be open to the public, "unless, in view of the special nature of the matter, the Council decides otherwise."

B Open government and the European Convention on Human Rights

Can the guaranteeing of a large degree of open government be considered as one of the obligations to be complied with by every state which is a party to the ECHR? The European Convention does not provide a direct answer to this question. However, the preamble does state that the "Fundamental Freedoms" which are the subject of the Convention "are best maintained... by an effective political democracy...". Furthermore, Article 3 of the First Protocol to the ECHR obliges the High Contracting Parties to hold free elections at reasonable intervals "under conditions which will ensure the free expression of the people in the choice of the legislature." If what moved the members of the legislature in adopting legislation were secret, if "the people" were not permitted to have knowledge of the decisions, the draft decisions, the debate and the documents of the decision-makers, in other words if there was secret government, it would not be possible to form an "opinion" of such a government which is worthy of the name. Without sufficient insight into the preparatory stages of decisions adopted by legislators, informed opinion will not be able to develop. Without knowledge of the documents, which reveal how and by whom the decisions were made, on which voters must pass judgment by voting for or against certain decision-makers, the "opinion of the people" can only be based on rumour and allegations. Free elections require the possibility of making well-informed choices. Withholding verifiable information on the policies of those in government which are the subject of elections impedes proper and effective compliance with Article 3 of Protocol 1. In this respect it may be pointed out that Article 1 of the ECHR, which under Article 5 of the First Protocol also applies to the provisions of that protocol, prescribes that the High Contracting Parties "shall secure" the rights guaranteed by the Convention "to everyone" within their jurisdiction. It can thus be inferred from the preamble to the Convention and the First Protocol that any prohibition on having knowledge of the documents which describe the background of the policies of the decision-makers, would be contrary to the "object and purpose"\textsuperscript{15} of the ECHR.

Democratic government requires a large degree of openness. Nevertheless, in all democracies it is accepted that certain types of government information should not be available to the general public such as, for example, questions of security, "privacy" and information which is sensitive from a competition point of view. Does the ECHR provide any indications as to the border-line between the general requirement of openness

\textsuperscript{13} See the document of the Committee of Ministers entitled "Declassification of Documents" of 23 March 1994 - CM/Inf(94) 16.


\textsuperscript{15} Art. 31. para. 1. of the Vienna Convention on the Law of Treaties provides that the terms of each treaty must be interpreted "... in the light of its object and purpose."

\textit{Democracy, migrants and police in the European Union: The 1996 IGC and Beyond}
and the exceptions which can validly be made to this general principle? The right to freedom of expression is laid down in Article 10 of the ECHR and it may be presumed that that right is aimed in the first place at the freedom to express opinions about acts of government. Freedom of expression over unknown acts of government is, of course, a virtual contradicito in terminis. The very premise on which Article 10 of the ECHR implicitly rests is that considerable openness of government must prevail.

But Article 10 does not expressly say anything about openness itself. In these circumstances it is not surprising that both the European Commission and the European Court of Human Rights, as well as the Assembly of the Council of Europe in a recommendation, have expressed themselves in a manner which gives support to the "open society" and which undermines the position of "its enemies".10 Thus, in its report in the Handyside case the Commission states that the objective of Article 10 of the ECHR is "to have a pluralistic, open, tolerant society."11 In addition, in The Sunday Times case, which involved an injunction against the publication of a draft article in that newspaper, the Court referred to "the right of the public to be properly informed".12 More than seven years later (on 8 July 1986), in the Lingus case, the Commission observed that: "The democratic system requires that those who hold public power are subject to close control. To exercise such control is not only a right, but may even be considered as a "duty and responsibility" of the press in a democratic state."13 It would be difficult for the press to comply with this duty if the documents which record the activities of "those in public power" are made inaccessible to all. A government body which rules over the public cause in secret will act contrary to the object of Article 10 of the ECHR and the purpose of Article 3 of the First Protocol to that Convention, which is intended to ensure that the well-informed "opinion of the people" regarding those holding government power is decisive in whether or not their policies should be accepted.

In a Declaration on Mass Communication and Human Rights, the Consultative Assembly of the Council of Europe declared – in the spirit of the ECHR – that the freedom of expression is related to the right to collect news and information and that: "There shall be a corresponding duty for the public authorities to make available information on matters of public interest within reasonable limits..."14 The "public authorities" in Europe, including the Schengen Executive Committee and the Council of the "Union", should take this to heart.

C Democratic retrogression – the price of European integration

In Europe national rules usually only acquire the status of "law" after they have been fully debated, possibly amended and, finally, approved in the national parliament. Rules which do not require parliamentary approval can be removed as a result of parliamentary intervention. In a very general sense this is the situation in all fifteen EU Member States (and therefore also in the Schengen States) which ensures that a considerable degree of openness prevails long before draft rules become law. Apart from subordinate

legislation, law creation by a national council of ministers without the participation of a parliament does not exist in normal times. For that reason, a council of ministers which does not meet in public does not pose a threat to the level of openness of the law-making process which is necessary in a democracy. A council of ministers which, on the other hand, is able to make binding decisions and to legislate without being confronted, for as long as is necessary, with the criticism of parliament and the general public, inter alia because the whole law-making process can take place in secret, most certainly will pose such a threat. Both the “Schengen” Executive Committee and the Union Council, in particular when acting in accordance with Title VI of the TEU, can be considered in the latter terms as they have competence to enact binding rules of law without being hindered by the openness which is inherent in the parliamentary process (see further infra).

The opponents of open government in international matters often argue (by referring to diplomatic custom) that the openness which applies at the national level can never prevail at the international level. If the basic idea underlying this point of view is applied consistently, any transfer of national government to an international organisation necessarily will entail a reduction in the level of open government. That would be a very high price indeed to pay for — inter alia — European integration. It may be apparent from the foregoing sub-sections that this price need not be paid and that there are good reasons to argue that in European organisations of which all Member States are members of the Council of Europe and are party to the ECHR, rules on open government must be interpreted in such a way that any loss of openness as a result of the internationalisation of government must be prevented, if such an interpretation is at all possible. 21

2.3 Openness and “Schengen”

A Introduction

The Schengen Implementing Agreement for the greater part relates to international aliens law, including refugee law, and international criminal law. The agreement provides in Title VII for its own executive body: “An Executive Committee shall be set up for the implementation of this Agreement”.22 This Committee, which is composed of nine Ministers of the Contracting Parties, has extensive powers. It takes its decisions unanimously.23 It can adopt binding decisions and thereby issue binding rules which must be implemented in all Schengen States. These rules are aimed at individuals, particularly aliens and persons for whom international criminal law is relevant. As soon as some or all of the topics covered by “Schengen” have become the object of a measure which applies to all the Member States of the European Union, under Article 142 of the Schen-

22 According to the U.S. Supreme Court in a Judgment of 1804 which has been repeated on many occasions since, an interpretation of the national law of the United States which results in a breach of international law is not permissible “if any other possible construction remains” (The Charming Betsy, 6 U.S. 64, p. 118). There would seem to be every reason to accept a similar rule of construction within the European democracies as they exist today. This rule could be worded as follows: any interpretation of a rule of European law which leads to a breach of the principle of open government is not permissible, “if any other possible construction remains.”
23 Art. 131, para. 1.
24 Art. 132, para. 2.
gen Implementing Agreement, the Schengen system will be superseded by that more encompassing measure. 25

When the Single European Act was signed in 1985 by the twelve Member States of the European Community, it was intended that the subject matter, which now has been regulated in “Schengen”, be the subject of measures of Community law on the basis of Article 8A of the EEC Treaty. If this had materialised, both the European Parliament and the Court of Justice would have become involved with the application and the further development of the provisions of international aliens law and international criminal law we are now concerned with. Since this step has not yet been taken, as a result of the opposition of a few Member States, the further development and application of this area of European law threatens to be left to the executive power composed of the nine ministers of the Schengen States and their “high-ranking officials”. Under Article 11 of the Schengen Rules of Procedure, the latter will meet in the “Central Group”. They must prepare the decisions of the Executive Committee. Since supervisory European bodies, such as the Court of Justice and the European Parliament, cannot fulfil their democratic and controlling functions in the development and application of Schengen law, it is all the more important to examine to what extent public opinion may exercise a controlling function: how far does the openness of international government, exercised by the Executive Committee and its auxiliary bodies reach? 26

In order to deal with that question the openness of meetings, voting procedures, decisions and documents of the Executive Committee will be respectively discussed in the next sub-sections. Below, in sub-section C, we will examine to what extent the traditional role played by the national parliaments, not only as co-decision-makers in the national legislative process but also as the instigators of openness in the creation of law, will influence the openness of “Schengen”.

B  The openness of the Executive Committee

The Schengen Implementing Agreement entered into force on 1 September 1993 in accordance with Article 139, paragraph 2, of the Agreement. The second sentence of paragraph 2 of that article indicates that the Executive Committee will become operational “as from the entry into force” of the Agreement. The Committee did indeed commence its activities at the appointed time and has since adopted a large number of decisions pursuant to Title VII of the Agreement, which is devoted to the Executive Committee. Oddly enough, at the time of writing, the other Titles of the Agreement are not yet being applied. This is due to the fact that it was stipulated in a “Joint Statement concerning Article 139” in the Final Act to the Schengen Implementation Agreement that the actual application of the Agreement depends not only on fulfilment of the condition of Article 139, paragraph 2 (entry into force), but that, in addition, the entry into force of Agreement must be “effected” (“sera mise en vigueur”, “wird in Kraft gesteckt”) after “the prior conditions for its implementation are fulfilled in the signatory States...”.

On 18 October 1993, the Executive Committee in its first decision adopted its Rules

26 Besides the “Central Group” a Secretariat has also been established by the Rules of Procedure (Art. 10).

The Principle of Open Government in Schengen and the European Union: Democratic Retrogression?
of Procedure. On 14 December 1993 an amended version of the Rules of Procedure was published in The Netherlands Tractatenblad (Treaties Series). This was followed by a series of other decisions which are relevant to the openness of the meetings, voting procedures and the decisions of the Executive Committee.

1 Meetings
Article 3, paragraph 1, of the Rules of Procedure of the Executive Committee provides that: “The meetings of the Executive Committee shall be not be public, except where the Executive Committee decides otherwise.”

As the Executive Committee takes its decisions unanimously, the presumption of non-publicity can only be broken if all nine Ministers support the initiative taken by one of them for that purpose. Only “experts” who accompany a Minister and the “Commission of the European Communities” are invited to attend the meetings (Article 3 of the Rules of Procedure).

2 Voting
The meetings are therefore closed to the public. But does that mean that the public is allowed to know what position a Minister took during a meeting and how he voted? The Rules of Procedure are not very clear on this point. Article 2, paragraph 1, provides that: “Without prejudice to other provisions applicable, the deliberations of the Executive Committee are covered by the duty of confidentiality”.

But what is to be understood by “the duty of confidentiality”? That remains vague. Neither the scope of this duty, nor the persons on whom it rests have been defined. But are votes taken in the Committee “deliberations”? Is a participant to a meeting of the Executive Committee permitted to disclose afterwards how a given Minister voted? The answer remains unclear for the time being.

3 Decisions
Is the general public permitted to know what decisions the Ministers adopted in their closed meeting? Are the decisions of the Executive Committee public? These decisions will often affect the law which is to apply in each of the nine Schengen States in the fields covered by the Agreement. Are these decisions covered by “the duty of confidentiality”? Article 9, paragraph 2, of the Rules of Procedure provides that the “Acting President” of the Executive Committee will notify the Contracting Parties of these decisions “within eight days after they have been adopted”. Does this mean that each Contracting Party may publish such notifications in accordance with its own national rules on publicity? At first, the answer to this question appeared to be affirmative following the publication of the Rules of Procedure on 18 October 1993. On 14 December 1993, however, revised Rules of Procedure were published in which a (new) third paragraph had been added to Article 9. That paragraph provides that although the “publication of the content of decisions” of the Executive Committee will be determined according to the national law of each of the Schengen States, this will be “without prejudice to the confidential character which in the event may be attached to these (decisions) on their adoption”.

Publication, therefore, is dependent on the “confidential character” of a decision and that is decided upon by the Executive Committee at the time of the adoption of the decision. Does the presumption of non-publicity which has been laid down in Article 3, paragraph 1, for the meetings of the Executive Committee also apply to those decisions? If that

28 Rules of Procedure of the Executive Committee established pursuant to Title VII of the Agreement implementing the Schengen Agreement, Trb. 1994, No. 39, pp. 4-8.

Democracy, migrants and police in the European Union: The 1996 IGC and Beyond
question must be answered in the affirmative, the Schengen State which wishes to maintain the lowest level of openness, will determine the level of openness for all decisions in all Schengen States. The fact that this question must indeed be answered affirmatively may be inferred from a statement made by the Dutch Government. That Government is in favour of a large degree of openness in government. It expressed the view in the Dutch Parliament that "the number of confidential decisions taken is exaggerated to a disgraceful extent." Thus, the "list of states whose nationals must be in possession of a visa when entering the Schengen area" was classified as confidential at the initiative of one "partner-state" (Germany). For this reason, the Dutch Government had "to refrain from publishing the common list." Thanks to one Schengen State, it remains a secret which persons are subject to visa requirements in order to enter the Schengen area and which persons are not.

No matter what the Executive Committee may have decided in respect of the publication of legally binding decisions (up till now this has not been clearly established), the examples of Schengen decisions which have become public are not encouraging in that they do not reveal any inclination to prevent, as a matter of principle, the development of a body of secret law. Even if the international rules of law which have been laid down in these decisions - and which take precedence over national law - are implemented in rules of national law which are published, a secret Schengen decision creates a strange inequality between the public body (which knows these decisions) and the private individual (from whom they are kept secret). Legal counsel defending a client whose interests have been affected by a Schengen rule will only be able to invoke the national provisions implementing that rule, whilst his opponent, the state, will have knowledge of the higher rule which is decisive for the correct interpretation of the national rule and must secretly apply that higher rule. There can be no question of equality of arms in such circumstances.

The Rules of Procedure do not define the key term "confidential" nor do they indicate whether there is a difference with the term "not public". If "confidential" means that only certain extremely "reliable" officials are permitted to have knowledge of the decisions, documents and events (e.g., votes) concerned, then the inhabitants of the Schengen area, as well as the aliens seeking entry and their legal counsel, will be denied information which is essential to them. Up till now - and to the extent that this can be traced - the decisions of the Executive Committee have been published. However, as regards information on rules and criteria which can be of great importance for individuals, reference is frequently made to confidential annexes and lists, such as Annexes 1, 5, 8, 9 and 10 of the "Common Instructions to Diplomatic and Consular Services" who are entrusted with dealing with visa applications.

Pursuant to Article 9, paragraph 3, of the Rules of Procedure "the confidential character" of a decision of the Executive Committee is "attached" to it by the Executive Committee "at the time of its adoption." The adoption of a decision is subject to the general rule laid down in Article 132, paragraph 2, of the Schengen Implementing Agreement: "The Executive Committee shall take its decisions unanimously." However, according to the seventh paragraph of the Administrative Rules adopted by the Executive Committee,

30 Ibid., p. 9.
31 Id., p. 78.
"the Presidency shall determine the degree of confidentiality of the documents." These two words, "the documents", include documents in which decisions are recorded. Apparently the decision as to the confidential character of decisions is made by the Executive Committee, whilst the Presidency determines the degree of confidentiality of the documents in which the decisions are recorded. What is to be understood by "the degree" of confidentiality is nowhere indicated. Ambiguity seems (probably confidentially) to have become an aim in itself.

4 Documents
In order to fulfil its tasks, the decision-making body of the Schengen organisation, the Executive Committee, must have adequate documentation at its disposal. Besides the decisions discussed above, Article 7 of the Rules of Procedure determines that the records will include the minutes of the meetings of the Executive Council, documents presented to the Executive Committee, draft decisions, conclusions and declarations, either of the Executive Committee itself or of one of its members. Are all of these documents classified or are some of them perhaps public?

In the case of a national government exercising it functions, documents such as those referred to in Article 7 of the Rules of Procedure undoubtedly, and with minimal exceptions, would be made generally accessible by including them in the parliamentary documents. But how has this been arranged in parliament-less "Schengen"? Even that is hardly clear and it is not to be expected that things will become much clearer in future in the absence – in contrast with the situation in the European Union – of an international judicial body with jurisdiction to decide on actions brought by individuals who wish to oppose the confidentiality of a document. There will therefore be no unifying case law in this field.

The decision which was adopted by the Executive Committee on the openness of documents does not clarify much for the individual regarding the exact criteria determining whether or not Schengen documents are publicly accessible. Paragraph 1 of a decision of the Executive Committee of 14 December 1993 reads as follows:

"1. Irrespective of the different national rules, certain documents must retain their confidential character, for the following reasons:
   - For certain documents publication would be in direct conflict with the objectives pursued.\textsuperscript{16}
   - Certain documents may contain personal data or a description of administrative procedures, which are not suitable for being disseminated.
   - Certain documents may contain information concerning manufacturing processes or which is connected with the security in international relations."

Disregarding the confusing language (what is at issue is not, for instance, as is stated in the opening phrase, "the retaining of the confidential character"); neither is it a question of giving three "reasons" but of criteria or legal grounds for determining the openness

\textsuperscript{33} Tdb. 1994, No. 39, pp. 70-71.
\textsuperscript{34} The Dutch Member of Parliament De Hoop Scheffer in commenting on this rule during a parliamentary debate said: "If the authorities adopt that [i.e. whether publication is contrary to the objectives pursued], confidentiality will become the rule and openness the exception. I do not think that this agrees with the kind of Europe we want to see." Documents of the Second Chamber of the Dutch Parliament, 1993-1994, 19 346, No. 80, p. 5.
of Schengen documents), the lines noted behind the first two indents will not be of much assistance to an inhabitant of one of the Schengen countries who is seeking to establish whether he has a right to examine certain documents. Both sentences contain tautologies. In the first sentence, it may be presumed, no more is said than that certain documents describe certain secret plans or activities and that these are to remain secret. The second sentence states that certain documents "may" contain data which (also) must remain secret, whereas other data should not. The fact that "international relations" (themselves) may be secure or insecure needs some explanation, especially where there is a connection between this, especially for diplomats, possibly disquieting situation and the non-publicity of documents. If, on the other hand, the third sentence of this Executive Committee decision is intended to refer to the security of the Schengen States which maintain relations with other states, this criterion should be drafted more explicitly in these terms.

The openness of decision-making by the Schengen Executive Committee has not been regulated clearly. Expressions such as "public", "confidentiality", "degree of confidentiality", "duty of confidentiality" are used side by side with each other. Perhaps they are interchangeable but no indications of this have been provided. They remain undefined key concepts. The "confidential character" of Schengen documents cannot be determined on the basis of sufficiently precise criteria, as might have been expected in relation to such an important subject as the openness of government. The limits of the powers of the two bodies which are to decide whether or not certain acts and documents are to be made public (the "Executive Committee" and the "Presidency") are not defined and the same defect exists in respect of the presumptions which ought to apply to the principle of open government. Finally, no international judicial body has been appointed, as a supervisor of the executive and interpreting Schengen bodies, with jurisdiction to eliminate the inaccuracies indicated and the lacunae by means of unifying interpretation.

Might the basic principles of the national parliamentary democracies provide inspiration in finding an escape from the tangle of provisions which has grown in relation to openness in respect of Schengen, a tangle which could easily lead to arbitrariness in respect of what perhaps finally must be regarded as the sumnum bonum of the European democracies, openness in the application of the law and in the process of creating the law?

C The traditional influence of the national parliaments on openness

At the instigation of the Dutch Parliament, the Dutch Government succeeded in having a provision added to the Schengen Implementing Agreement (now Article 132, paragraph 3) which enables the national parliaments to exert influence on decision-making by the Executive Committee. That provision reads as follows:

"At the request of the representative of a Contracting Party, the final decision on a draft on which the Executive Committee has taken its decision may be postponed until no more than two months after the submission of that draft."

In addition, Article 6, paragraph 4, of the Rules of Procedure provides that a member of the Executive Committee may invoke Article 132, paragraph 3, of the Implementing Agreement inter alia "because the approval of his national parliament is required." The national parliaments must be kept informed of everything done for the implementation of the Implementing Agreement by the Executive Committee or other bodies. With that objective in mind, the following obligation was included in the Final Act to the Schen-
gen Implementing Agreement: "The Contracting Parties shall inform their national parliaments of the implementation of this Agreement." The fact that this statement refers to "the" implementation means that the obligation to inform applies to the whole implementation of "Schengen": nothing may be kept secret from the national parliaments.

The Netherlands is one of the Schengen States which in the Act for the ratification of the Implementing Agreement stipulated that: "Approval of the States-General [the Dutch Parliament] is required before the representative of the Kingdom can cooperate in adopting a decision" by the Executive Committee. The first paragraph of the article concerned provides that "A draft decision which is intended to bind the Kingdom must be made public and presented to the States-General, as soon as the text of the draft has been finalised and before any decision has been taken on it by the Executive Committee referred to in Title VII." This legislation was accepted by the Schengen States. This is reflected inter alia in the Rules of Procedure which in general terms refer to the applicable national law. This means that two sets of rules concerning the openness of decision-making in Schengen matters must be reconciled. On the one hand, there are the very patchy and unclear arrangements contained in the various Executive Committee decisions discussed above and, on the other, the national, time-proven rules on openness of the legislative process which exist in The Netherlands and the other Schengen States for the national parliaments concerned.

The main rule for these parliaments is that law-making can only take place by or pursuant to an Act which has been discussed publicly in and accepted by Parliament; the documents which are made available to Parliament in connection with the process of law-making are, barring certain very narrow exceptions, public. This rule is regarded as a fundamental principle of democracy in all Schengen and Union States and must be considered as one of the fundamental rights referred to in Article F of the Maastricht TEU, as guaranteed by the ECHR (see supra) and the constitutional traditions common to the Member States.

Under Articles 134 and 142 of the Schengen Implementing Agreement, Schengen law must be compatible with Community law and Union law. Evidently, neither Union law nor Schengen law relating to openness of the law-making process may be applied in such a way that the rules just accepted by all European States, rightly considered as democracies, are affected in any way. Through the combined effect of Article 132, paragraph 2, of the Schengen Implementing Agreement and the related provisions of the Rules of Procedure of the Executive Committee, the ECHR and the Preamble to and Article F of the TEU, democratic Europe has lifted the principle of openness in law-making to the international level.

There are unquestionably exceptions to this principle. Sometimes these have been

37 See Arts. 6, para. 4; 9, para. 3; and 12, para. 2, of the Rules of Procedure.
38 In the Dutch Act ratifying the TEU, similar arrangements to those adopted in respect of the Schengen Implementing Agreement were included in relation to openness and the parliamentary right of approval, Act of 17 December 1992, Stb. 1992, No. 692.
39 On the relationship between Union law and, inter alia, Schengen law, see H. Meijers, supra note 24, p. 356 et seq.
clearly defined in the relevant European provisions, sometimes they have not been so clearly defined. To what extent the European principle of openness in law-making prevails over rules laid down in European decisions which deviate from that principle is not yet certain. However, the rule of interpretation which must be applied to the rules on openness of "Schengen" (and also of the Union) can be derived from what was explained above: openness in law-making is presumed as the basic rule; the exceptions to this rule only apply in so far as they are necessary and are precisely defined. To this extent clarity may be construed.

In the final phase of the law-making process, the decision is made in which the new law is laid down. In democratic societies that decision, i.e., the newly created law, is also accessible to all. Access to decisions, too, may only be restricted to certain circles of specialists and politicians on the basis of limited and precisely defined exceptions. Here, again, the basic presumption of openness applies for the reasons given earlier. Particularly with a view to states whose legislation is more generous in respect of open government than Schengen or Union law, it is perhaps useful to add that under general international law, limitation of the power of independent states to observe openness and to legislate accordingly is not presumed. In the Lotus case, the International Court of Justice said: "Les limitations de l'indépendance des Etats ne se présument...pas."40

D Some preliminary conclusions: Schengen

"Schengen", i.e., the Agreement of 1985 and the Implementing Agreement of 1990, was conceived as a preparation and also as a stimulus for what could have been achieved within the framework of Community law and what now has been provisionally included, for the greater part in incomplete form, in Title VI of the Maastricht TEU. Neither the Court of Justice nor the European Parliament were given any powers in relation to "Schengen." Especially in view of the absence of these two European institutions, which contribute significantly to the supervision over the executive, and of the objective expressed so explicitly by the ministers and Heads of State involved of creating an "open Europe", it might have been expected that the rules on openness which were to apply in the context of Schengen would be drawn up with much care and precision.

These expectations, however, were not fulfilled. On reading the Schengen Implementing Agreement, it becomes clear that it is intended to transfer important areas of national government to an international executive body composed of ministers and operating under the name "Executive Committee". However, it is only with great difficulty that the first steps towards creating guarantees that the transfer of powers from the national to the international level will not entail any loss of openness can be traced in that Agreement. Even after the entry into force of the Implementing Agreement, the Contracting Parties failed to develop a consistent system of rules on openness, rules

40 The Lotus case concerned criminal law. See P.C.I.J. Series A. No. 10. p. 18. A similar statement may be found in the decision of the international arbitral tribunal on territorial sovereignty in the Lac Lanoux case between France and Spain: "La souveraineté territoriale joue à la manière d'un présupposition." 12 RIAA, p. 301.

41 Agreement between the Governments of the States of the Benelux Economic Union, The Federal Republic of Germany and the French Republic on the gradual abolition of controls at the common borders. Schengen. 14 June 1985. Trb. 1985, No. 102. This Agreement contains no more than a sketch of a procedure for drawing up what finally became the Schengen Implementing Agreement of 1990, as well as cooperation on a number of issues relating to the easing of motorised transport across the common borders between the Parties.
which would secure the rights of the inhabitants of the Schengen area to follow, if they so wish, all the developments occurring in this new area of European government. In the Rules of Procedure and other legislative documents of the Executive Committee, a number of guidelines have been issued aimed at curtailing openness but these lack the precision and clarity of definition which is necessary in order to provide a journalist or any other Schengen citizen with a clear standard on this point.

In democratic Europe, the secret conception of rules of law is something which is considered to be fundamentally unacceptable, with the exception of precisely formulated and strictly necessary exceptions to openness of government. “Schengen”, moreover, concerns the legal position of individuals and in this area in particular, secret law, secret law-making and secrecy of documents should be reserved to authoritarian régimes.

It is easier to draw up proposals for the amendment of the relevant Schengen rules than to have these adopted. This is especially so because it may be expected that those who are responsible for the current lacunary rules on openness will contend that “Schengen” is merely intended to pave the way for future Union law and that for that reason it would be preferable (especially in this politically sensitive area) to await future developments in the system of the European Union. Such a wait-and-see attitude carries the risk that in the – presumably lengthy – meantime, habits of secrecy will develop which are conducive to the development of a closed Europe and of a corresponding evolution of Union law.

An amendment of the Schengen Implementing Agreement is not in the offing. However, it is possible to amend, e.g., the Rules of Procedure of the Executive Committee relatively quickly. First of all, the amendment of Article 9, paragraph 3, of the Rules of Procedure, which on 14 December 1993 was added to Article 9 barely two months after it had been adopted, should be reworded in such a way that it provides that “the content of the decisions of the Executive Committee will be published in accordance with the national law of the Contracting Parties”. These words repeat the opening phrase of the provision at issue in its current form. The second phrase which, since 14 December 1993 provides that in its meetings behind closed doors the Executive Committee can determine the confidential character of its decisions, would then have to be deleted, so that each Schengen State would be able to determine for itself which decisions it wishes to make public. In practice, that would mean that the state with the most liberal rules on open government would determine the degree of confidentiality of decisions. This is the mirror image of the situation as it exists today, in which as a result of the rule of unanimous decision-making in the Executive Committee, it is the state which wishes to maintain the lowest level of openness which determines the level of openness in all nine Schengen States.

A similar result as regards the documents could be achieved by introducing, through the Rules of Procedure, a presumption of openness for all Schengen documents. At the same time, and avoiding vague concepts and tautologies, the exceptions to this openness should be defined precisely and as restrictively as possible in the Rules of Procedure. Finally, it may be warmly recommended to give effect to the existing plans to give the Court of Justice jurisdiction for all, or part of, Schengen law and at least to extend the competence of the Court to all matters concerning the openness of “Schengen.”

2.4 Openness and the European Union

A Introduction: the European Union’s first tentative steps towards openness

Even before the Treaty of Maastricht there was a trickle of interest shown by the European Parliament and the European Commission on the question whether democracy demands that the business of the legislative and executive arms should be subject to the glare of publicity and scrutiny and a dual active and passive information supply initiated. Not surprisingly, given its vested interest in improving the existing democratic deficit, the European Parliament showed a pioneering interest in the subject more than a decade ago adopting a resolution in 1984, calling for the introduction of legislation on openness of government; 43 two further resolutions in very similar terms were adopted in 1988 and in 1994 respectively. 44 Interestingly, the Legal Affairs Committee in its opinion annexed to the Report finally adopted in 1988 by the Committee on Youth, Culture, Education, Information and Sport stressed the link with citizenship. In its view the right to be informed, as a corollary of an overall duty on the part of public authorities to supply information, should be clearly recognised in Community law as one of the “basic rights” of citizens.

The Commission’s only concrete initiative has been taken in the specific field of environmental information and has related to the duty of Member States to provide information in their possession on request. 45 However, the Commission recognised, as early as 1988, that free access to information (on the environment) must not only be imposed on the public authorities but also “on the Community institutions and the Commission in particular. The reasons for the need to broaden the possibilities of access to information held by national, regional or local administrations apply equally to Community institutions”. 46 The Commission included a hortatory statement to the effect that it would take specific follow-up proposals “designed to introduce the same transparency within the Community institutions as proposed for the national authorities in the Member States”, but did not do so. The Economic and Social Committee in its opinion on this proposal 47 went further stating more generally that “if the need for a Directive of this kind is recognised, there is an equally strong need for Community bodies and authorities to provide access to information. The Committee sees no reason for putting off this legislation until a later date”.

In fact not only did the Commission not actively seek to open up access to its own documents in practice, it positively balked at the idea of freely providing information on request from its archives. This point is most graphically emphasised by the facts which gave rise to an order of the Court of Justice in the Zwartend case in 1990. 48 The Commission refused to supply a Dutch Rechter-commissaris (investigating magistrate) with

45 See Proposal for a draft directive on the freedom of access to information on the environment, OJ No. C 335/5 of 1988. In 1990, the Council of Ministers adopted the directive (OJ No. L 158/56 of 1990) and it entered into force on 1 January 1993. The rules apply to environmental information held by the competent authorities of the Member States and not to environmental information held by the Community institutions.
information (including internal and inspection reports drawn up by EEC inspectors) sought by him so as to assist him in the conduct of a fraud investigation in The Netherlands. In so doing, the Commission relied inter alia on Article 2 of the Protocol on the Privileges and Immunities of the European Communities, annexed to the EC Treaty which states that the archives of the Community are inviolable. Article 2 does not define the terms “archives” and “inviolable” but in practice this is explained by the Commission in the broadest sense with “archives” meaning all documents held by the Institutions and their members and officials and “inviolable” meaning “top secret” if the documents are more recent than 30 years. This interpretation was codified in 1983 in a decision of the Commission and a directive of the Council, laying down uniform rules about the access to the archives of the Communities older than 30 years and the general exceptions to this rule. These highly restrictive rules oblige the Member States to keep secret those national documents which reproduce the content of documents of the Community institutions, even if these national documents would be open to the public under that Member State’s national legislation. Moreover, before the Court the Commission relied on the fact that the reports drawn up by its inspectors were documents which by their nature could not be used except for internal information. The Court gave short shrift to these arguments by the Commission and ruled that “it is incumbent upon every Community institution to give its active assistance to such national legal proceedings, by producing documents to the national court and authorising its officials to give evidence in the national proceedings”. The Court’s innovative judgment was widely hailed at the time as the first step towards creating greater openness in the administration of the Community in general. It was an imposed first step, contested to the bitter end by the Commission itself.

B The emergence of the Code of Conduct and Implementing decisions

The first sign of any serious Member State interest in the subject of openness surfaced during the intergovernmental conference preceding the signing of the Maastricht Treaty when the Dutch tabled in January 1991 a proposal to amend the Treaty of Rome by inserting an express provision, a new Article 213 bis. Their idea was to confer an explicit Treaty competence on the Council to adopt by qualified majority vote a regulation on the access to the information held by the Community institutions and organs (excluding specifically the Court of Justice, the Court of Auditors, the European Investment Bank and the European Central Bank for imperative reasons tied to their independence from political interference). This regulation would be adopted on the legal basis of Article 213 bis of the EC Treaty obliging the relevant Community institutions to

51 Case C-2/88, Imm., supra note 48, consid. 22.
52 It comes close to admitting that the Court of Justice in fact enjoys inherent jurisdiction; see further, Arnulf, Does the Court of Justice have inherent jurisdiction?, 27 C.M.L.R. (1990), p. 683.

Democracy, migrants and police in the European Union: The 1996 IGC and Beyond
allow access to information retained by them, subject of course to detailed provisions on the permitted exceptions from the principle of access to information as well as the methods of recourse in event of refusal. In making this proposal, modelled along the lines of the parallel provision of the Dutch Constitution, the primary concern of the Dutch appears to have been to emphasise the fact that it is not so much a matter of the internal working procedure of the institutions but rather the paramount importance of the public aspect of access to information (viz. enforceable legal rights for third parties).

The departure point of this Treaty amendment proposal was clearly meant to copper-fasten the principle of openness, subject only to necessary and desirable restrictions. The exclusion of certain institutions and organs seems to be premised on the assumption that their tasks do not directly entail public administration as such. In any event, this proposal to give the subject a specific Treaty base as such was not successful and does not appear to have been taken up by either the Commission or the European Parliament in their submissions to the Intergovernmental Conference.

There was, however, a consolation prize for the Dutch tucked away in the small print of the voluminous Treaty of Maastricht which was finally published at the end of 1991. This was packaged in the wrapping of a "declaration" on transparency promising further study and action in the not too distant future. Here for the first time was a statement by the Contracting Parties to the effect that they considered that:

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

After the signing of the Maastricht Treaty in December 1991 and prior to its entry into force (November 1993) political difficulties in ensuring ratification in several countries (in particular Denmark and France) ironically ensured that the seemingly innocuous declaration on transparency, regarded at the time as a "sop" to the Dutch demands for open administration, assumed a pivotal place in the politicians' efforts to reassure potential voters that winds of change were blowing, and to inject the Union enterprise with renewed credibility in the eyes of its citizens. Having placed such reliance on the follow-up to be given to the transparency declaration in the context of attempts to change the minds of the Danish voters, concrete steps had indeed to be proposed. Alongside hortatory statements at both the Birmingham and Edinburgh European Council Summit meetings to the effect that the Community had to be brought closer to its citizens, specific Commission measures were noted and welcomed which operated so as to increase transparency (for example, the production of work programmes in October of each year, wider consultation on the basis of green papers, codification of legal texts etc.). Moreover, the Commission was asked to complete by early 1993 its work resulting from the declaration to the Maastricht Treaty on improving public access to the information available to the institutions.56

The result was two relatively superficial communications by the Commission to the

55 See, in particular, the declaration by the Heads of State and of Government entitled "A Community close to its citizens", European Council, Birmingham, 16 October 1992 and the chapter "A Community close to its citizens" in the conclusions of the European Council Summit, Copenhagen, 22 June 1993.

56 See conclusions of the Copenhagen European Council, id.
Council and the European Parliament in May and June 1993 respectively. Despite the fact that what was at issue was a novel and important matter of policy, the Commission did not undertake independent research for the specific purpose of studying the relevant access legislation, practice and pitfalls in the various Member States and applicant Member States. Rather the chosen approach was largely to cull information from an earlier report undertaken in the different context of the information market, presenting its overall findings in a very cursory fashion indeed. Moreover, the Commission entirely glossed over an issue which is terribly important in the context of EU transparency and that is the issue of the Council of Ministers legislating behind closed doors and access to information relating to the legislative process as such.

The proposal of the Commission advanced in its communications of 1993 was the adoption of an inter-institutional agreement containing a minimum set of requirements. These were essentially the adoption of a document based system, that a member of the public would not be required to identify an interest, and permission of only limited grounds of refusal (personal privacy, industrial and financial confidentiality, public security and information passed to the Institution in confidence). If the request was refused then the Institution would be obliged to reason such refusal. The Commission did not express itself as to the appropriate form in which the putative act should implement the rights of access of third parties.

The Copenhagen European Council of 22 June 1993 invited the Council and the Commission to continue their work “based on the principle of the citizens having the fullest possible access to information”. The aim, the European Council stated, was to have all the necessary measures in place by the end of 1993. In the period July to December 1993, the Council and the Commission separately continued their work on this subject. The main subjects of these discussions were the form of the instrument to be adopted as well as its legal effect, the scope of the concept of information as well as the permissible grounds of exemption and the judicial protection of the citizen.

With regard to the form of the putative instrument it was ultimately decided that a common instrument would be adopted by both the Commission and the Council, the provisions of which would then be separately implemented in legally binding “decisions” by the respective institutions. More or less around the same time an inter-institutional declaration on democracy, transparency and subsidiarity was signed by Parliament, Commission and the Council, reaffirming their attachment to the implementation of transparency by the institutions. The European Parliament recalled that in

57 See, COM (93) 191 final, Public Access to the Institutions Documents, 5 May 1993; COM (93) 258, final, Openness in the Community, 2 June 1993.
59 Given this crucial difference with the national situation where legislation in principle takes place in public, it would have been relevant for the Commission to undertake (or commission) a comparative study of the situation in the various Member States and other relevant democratic systems with regard to parliamentary openness, plenary sessions, parliamentary committees etc. The fact that this preliminary study has not been undertaken does not facilitate the discussion. Arguably the Commission has not fully complied with the mandate imposed upon it by the Maastricht Declaration on openness since “measures designed to improve public access to the information available to the institutions” must necessarily include information pertaining to legislative measures, relevant preparatory documents, minutes and voting records of meetings where the decisions were actually made.
60 Authors’ emphasis. Bull. EC 6-1993, point 1-22, p. 16.
amending its Rules of Procedure on 15 September 1993, it confirmed the public nature of the meetings of its committees and its plenary sessions.

It subsequently transpired that a majority of Member States within the Council preferred to implement the inter-institutional instrument (the Code of Conduct as it was finally to be known) via the Council's Rules of Procedure. It so happened that at precisely the same moment, the Council's Rules of Procedure were, in any event, undergoing thorough revision as a result of the substantial changes introduced by the Maastricht Treaty. The decision-making on the Code of Conduct and the Rules of Procedure took place during the General Affairs Council of 6 December 1993. By virtue of the provisions of Article 151 of the EC Treaty and the link made between the Rules of Procedure and the Code of Conduct, simple majority voting procedure was followed for both measures. In both cases the Dutch delegation voted against the adoption of the measures in question. The result of this outcome was that on matters of openness, one of the basic values of democracy, decisions were taken by simple majority vote. It followed that a rule could be introduced by a majority to the effect that one Member State could frustrate openness on, for example, any decision made by the Council under Article K.3 of the Maastricht Treaty. And that is exactly what happened in practice.

Whereas the Code of Conduct largely followed the Commission's approach to the matter, stressing the general principle that the public have the widest possible access to documents held by the Commission and the Council, and then outlining of the procedure to be followed in the handling of applications, it provided for more extensive exceptions to be made to the general principle than those originally suggested by the Commission during its preparatory studies. Alongside five mandatory exceptions (public interest, privacy, commercial and industrial secrecy, protection of the Community's financial interests and protection of confidentiality as requested by private parties or as required by the legislation of the Member States supplying the information) one facilitative exception made its first stealthy outing. The institutions could also refuse access in order to protect an institution's interest in the confidentiality of its proceedings. It is that lone sentence which explains the otherwise cryptic Council statement at the end of the inter-institutional Code of Conduct as adopted on 6 December 1993:

“This code of conduct and the decisions which the Council and the Commission will severally adopt on the basis thereof are intended to allow public access to Council and Commission documents.

They alter neither the existing practices nor the obligations of Member States Governments toward their parliaments.”

This Council statement was included at the insistence of the (out-voted) Dutch Government which genuinely feared that the Code of Conduct would operate in practice so as to deprive the Dutch Parliament of rights which it currently enjoyed by virtue of the operation of more generous provisions of national constitutional law. Given the obvious aim of the Code to increase the public's rights of access and expressly to guarantee them the widest possible access, the effect of actually worsening currently enjoyed access (at least in the context of the operative Dutch legislation) was obviously unacceptable. The fact remained, however, despite the Council's explanatory statement as to the intended effect of the Code vis-à-vis national legislation, that the fear of the Dutch in particular was not without foundation.

The inter-institutional agreement cast in the form of a Code of Conduct enabled institutions to deny access where their interest was in protecting "the confidentiality" of their own proceedings. In other words, access could continue to be denied to minutes, voting records etc. of Council meetings. Where national parliaments, such as the Dutch one, obtained such information from national ministers as a matter of national law, such existing obligations prevailed. What, however, of the circumstances where national access legislation might enable individuals to obtain information on documents or events restricted as a matter of European Union law? The fear in this respect was that by finally adopting an (inadequate) Union measure it operated so as to override the provisions of (more progressive) national access laws and other provisions of national constitutional law.

C The Council's Rules of Procedure

1 The meetings
Article 4, paragraph 1, of the Council's Rules of Procedure ("1993 Rules") provides that: "Meetings of the Council shall not be public except in the cases referred to in Article 6." Article 6, paragraph 1, states that: "The Council shall hold policy debates on the six-monthly work programme submitted by the Presidency and, if appropriate, on the Commission's annual work programme. These debates shall be the subject of public retransmission by audiovisual means".

In line with earlier Rules of Procedure the only other possibility for other meetings of the Council to be opened up to the public is by a unanimous decision to that effect. Article 6, paragraph 2, of the 1993 Rules adds only an explicit gloss of audiovisual technicolour:

"The Council may decide unanimously and on a case-by-case basis that some of its other debates are to be the subject of retransmission by audiovisual means, in particular where they concern an important issue affecting the interests of the Union or an important new legislative proposal. To that end it shall be for the Presidency, any member of the Council, or the Commission to propose issues or specific subjects for such a debate."

2 The votes
What of the possibilities for members of the public to know - despite the fact that meetings take place behind closed doors - how the various government ministers actually voted on a given issue? The 1993 Rules are quite explicit on this and do represent some movement forward as compared to earlier Rules of Procedure. Article 7, paragraph 5, states in mandatory terms that:

"The record of the votes shall be made public:
- when the Council is acting as legislator within the meaning of the term given in the Annex to these Rules of Procedure, unless the Council decides otherwise. This Rule shall apply when the Council adopts a common position pursuant to Article 189b or 189c of the Treaty establishing the European Community,
- when they are cast by the members of the Council or their representatives on the Conciliation Committee set up by Article 189b of the Treaty establishing the European Community,
- when the Council acts pursuant to Titles V and VI of the TEU by a unanimous Council decision taken at the request of one of its members, in other cases, by Council decision taken at the request of one of its members."

Democracy, migrants and police in the European Union: The 1996 IGC and Beyond
Two points are particularly noteworthy. First, a unanimous decision of the Council can keep secret the record of votes when the Council is acting as a legislator. Second, the much stricter rule which applies in the context of second and third pillar matters: publication of voting records on decisions made in this context can be prevented by a single Council member.

Finally, where the record of a vote in Council is made public in accordance with Article 7, paragraph 5, Article 5, paragraph 1 provides to the effect that:

"the explanations of vote made when the vote was taken shall also be made public at the request of the Council members concerned, with due regard for these Rules of Procedure, legal certainty and the interests of the Council".

The wording used makes it clear that such publication of the explanations of vote presumably contained in the minutes of the relevant Council meeting is largely discretionary, not only subject to the initiative of the member concerned but also to the amorphous catch-all proviso of being in "the interests of the Council", these (interests) being probably determined by majority vote.

Publication of decisions

Article 15 of the 1993 Rules states the general rule that Regulations, Directives and Decisions adopted in accordance with the Article 189b procedure as well as Regulations and Directives of the Council or the Commission addressed to the Member States are to be published in the Official Journal. Common positions adopted by the Council in accordance with the procedures referred to in Articles 189b and 189c of the EC Treaty and the reasons underlying those common positions are also to be published. This represents an improvement in the discretion enjoyed by the Council (acting by unanimous decision only) regarding the publication of instructions and decisions for the purpose of information. Article 18, paragraph 5, continues such discretion in the case of "directives other than those referred to in Article 191, paragraphs 1 and 2, of the EC Treaty, Council decisions and recommendations" as well as "conventions signed between the Member States".

What is remarkable is the restrictive attitude of the Council in its Rules of Procedure to publication of decisions (common positions defined in the joint actions, implementing measures and measures implementing K.3, paragraph 2, Conventions) in the new policy areas enshrined in the second and third pillars. Article 18, paragraph 3, categorically provides that the decision to publish in the Official Journal "shall in each case be taken by the Council acting unanimously when the said instruments are adopted". In practice, this of course means that any single Member State can object to publication and prevent it. The situation prevailing with regard to the second and third pillars is therefore much worse in terms of openness than the normal rule prevailing in the context of the first pillar that all decisions are more or less automatically published in the Official Journal. Only Conventions drawn up by the Council in accordance with Article K.3, paragraph 2, must be published in the Official Journal (Article 18, paragraph 4).

Access to documents

The ultimate step, at least for the time being, along the road of Union initiative in the field of access to information was the follow-up adoption by the Council and Commission respectively of a decision implementing the Code of Conduct with regard to their separate institutional set-ups. They were supposed to do so by the end of 1993. The Council succeeded; the Commission did not manage to adopt the relevant decision until 8 February 1994.
Different approaches were followed. The Commission simply declared that the Code of Conduct had been adopted in Article 1 of the Decision and then proceeded to elaborate briefly the procedural rules on how applications for access to documents shall be dealt with by the Commission. The Council’s approach differed in an important respect. The Council Decision adopted on the basis of Article 151, paragraph 3 of the EC Treaty (which enables it to adopt its Rules of Procedure) does not confine itself to elaborating the necessary procedural rules in order to implement the principles set out in the Code of Conduct but lays down instead all the rules and conditions governing public access to Council documents, thus repeating in the process, with some modifications, a large number of provisions already contained in the Code of Conduct.

The Council Decision, being based on Article 151 of the EC Treaty, and the Council’s Rules of Procedure were adopted pursuant to a majority vote. The clear implication of the choice of legal basis was that this was primarily a matter of the internal rule-making procedure of the institutions themselves and that the issue of legal rights for third parties was an ancillary side-effect. The philosophy followed was that access to documents and transparency were simply an extension of the requirements of good administration rather than the outcome of any belief in the value of participatory democracy. The Dutch voted – yet again – against the Decision (this time joined by the Danes) on the grounds that its provisions were too restrictive and that it was adopted pursuant to an incorrect legal basis, but they were once more outvoted. The Dutch felt that the measures being adopted “did not bring about any meaningful transparency for the citizens and that they therefore would not contribute towards a positive opinion formation about the Union, which is so badly needed at the moment”.

The (loaded) dice were finally cast and the game could finally begin in earnest. This has concentrated above all on the playing field of the Council decision-making and behaviour, the Commission Decision having to date given rise to considerably less controversy and no legal challenges. It is of course indisputable that the principles on which the Commission Decision is based are the same: those contained in the inter-institutional Code of Conduct and a legal basis permitting the adoption of internal rules of procedure (respectively Articles 151 and 163 of the EC Treaty). For that reason, the discussion which follows the Council Decision can to a certain extent be regarded as applying to the Commission Decision with the caveat that due regard be paid to the different nature and tasks of the two institutions concerned.

D Legal challenges to the Union’s policy on public access to Council documents

1 Internal rules of procedure v. access rights for third parties
Within six weeks of the adoption by the Council of its implementing Decision, the Dutch Government lodged an Article 173 of the EC Treaty procedure before the Court of Justice in Luxembourg seeking the annulment of the Council Decision of 20 December 1993, Article 22 of the Council’s Rules of Procedure and the inter-institutional Code of Conduct

64 See Art. 2 of its Decision.
65 For instance, Art. 8 effectively added another ground of exemption additional to those already found in the Code of Conduct when it added that “this Decision shall apply with due regard for provisions governing the protection of classified information”. See further, infra.
to the extent that legal consequences may be ascribed to it. The main grounds advanced were violation of Treaty rules (Articles 4, 151 and 190 of the EC Treaty) and misuse of powers. One of the main arguments advanced by the Dutch Government is that the legal basis of Article 151, paragraph 3, of the EC Treaty and Article 22 of the Council’s Rules of Procedure is incorrect since these provisions are concerned solely with the Council’s internal organisation. The disputed Council Decision, however, contains pivotal provisions on a matter directly affecting Community citizens, going well beyond the scope of the Council’s internal organization and budget. In its view the Rules of Procedure as an instrument with a purely internal working cannot form a sufficient legal basis for the adoption of a Council Decision which expressly purports to create legal rights for citizens.

The Dutch case raises, in our view, the much broader issues of whether it is acceptable that the Council approaches the issue of access to documents purely from the perspective of the administration of its own services (in the interests of good administration) and subject to the basic rule of confidentiality of its proceedings (Article 5, paragraph 1, of its 1993 Rules). The chosen approach by the Council encasing the principle in its rules of procedure negates the fundamental nature of the principle, which has to be seen in the light of the nature of the democratic process itself (see in particular the preamble to the Treaty, Article 6 and the ECHR and its First Protocol, discussed supra). In other words, the legal right for individuals (citizens) to obtain access to documents (subject, of course, to the necessary restrictions) is of a fundamental nature which should preferably be regulated in the Treaty itself.

The parameters of the dispute between the Dutch and the other members of the Council is therefore the difference of opinion regarding the legal nature of the principle of access to documents in the Union context. The Dutch emphasise the fundamental nature of the principle of access to documents from the perspective of democratic philosophy and maintain that the primary purpose of the Decision was to regulate the openness of the administration for third parties. On the other hand, the other members of the Council (with the probable exception of the Danes) are convinced that the Code of Conduct and Council Decision constitute a simple policy orientation rather than a legal right of a fundamental nature, subject as a matter of course to the other Rules of Procedure as well as the stringent and discretionary exceptions outlined in the Decision itself. Rather the Code of Conduct simply enables the Council in certain circumstances to permit access but does not in any way affect the (confidential) basis upon which it operates as an institution.

In any event, it seems clear that rules of procedure of a Community (Union) institution cannot – given the democratic character of the Union Treaty and its antecedents in the ECHR – reduce national law regarding freedom of information and openness, especially for those Member States enshrining that openness in their Constitution. When it comes to legislation and the openness of parliamentary documents all 15 have such constitutional guarantees. It follows from such openness that individuals in all the Member States have the right to have access to all parliamentary documents which are part of the legislative process. This right and the generally prevailing openness with regard to documents of a legislative nature is an essential component of the democratic systems of government prevailing in the Member States. The Union is bound in accordance with the terms of Article 6, paragraph 1, to respect “the national identities of

68 Art. 22 of the Council’s Rules of Procedure provides that “the detailed arrangements for public access to Council documents disclosure of which is without serious or prejudicial consequences shall be adopted by the Council”.
69 See their intervention in Case T-194/94, Carvel and Guardian Newspapers Ltd., still pending.
the Member States, whose systems of government are founded on the principles of democracy".

2. The Council’s stewardship of its access decision

The Council Decision of 20 December 1993 entered into force on 1 January 1994 and grants the public access to Council documents (not information) which must be specified in a sufficiently precise manner enabling the document or documents in question to be identified. The procedure which applies is that an initial application for access to a Council document is examined by the relevant departments which suggest what action is to be taken. The applicant is informed within one month of the success or rejection of the claim by the department in question. In the event that the response is negative the applicant is to receive a reasoned reply. In this event the applicant has a further one month during which to make a so-called “confirmatory application” for the initial position of the Council department to be reconsidered. Finally the Decision equates a failure to reply with a negative response and the time limits operate in the same fashion as with an explicit response.

Although not stated explicitly in the Decision, it seems that a decision to reject a confirmatory application is made by the Council itself. The practice evolved early on of having the draft reply to the confirmatory application established by the General Secretariat and rubber-stamped by the Council itself. The problem soon emerged that the Danish and Dutch delegations objected to the procedure of putting such replies on the Council’s Agenda as “A” points (hence no discussion) and quickly insisted on discussing several of the initial replies before the Council as a whole, despite the fact that a majority of the delegations (in practice the other 10 delegations) had already agreed to the replies to be issued at the level of the relevant COREPER Working Group (the so-called “GAG” Group: Groupe des Affaires Générales and subsequently by the Amis de la Présidence and then by the so-called “Information Working Group”). The result of this practice was that the Council reached its decision to confirm the reply drafted by the General Secretariat by a simple majority vote (given the legal basis of the Council Decision itself) and that the Danish and Dutch had no recourse other than to issue declarations (unilateral or joint) objecting to the majority decision and the manner in which the decision was reached. Moreover, it emerged that in the event of one or more Member States objecting to the content of a draft negative reply there was a greater likelihood of the mandatory time limits imposed in the Decision not being respected and hence that the refusal by virtue of Article 7, paragraph 4, would be deemed implicit. The attraction of the latter course of events, it has been suggested, is that not only does the Council not need to reason its refusals but, moreover, it does not then need to alert applicants to their possibilities of legal recourse or of initiating a complaint to the Ombudsman.71

When the General Secretariat or relevant department of the Council is considering

70 This less than satisfactory evolution of the practice of the Council in granting/refusing access to documents led the Dutch and Danish delegations to call for an in-depth debate on the entire matter. However, their proposed draft guidelines to the Council Secretariat on the procedure to be followed once a decision has been made to reject a confirmatory application in a given instance were rejected by a slim majority of 7:3 at the General Affairs Council of 19 July 1993. Interestingly, those delegations voting in favour included, for the first time, not only the Dutch and the Danish but also the British, Irish and Spanish. See, The Guardian, 19 June 1994. See further, Agence Europe, 23 July 1994.

the question of the appropriate reply to be given to an individual application for documents, Article 4 of the Council Decision assumes paramount importance. The application of the first paragraph, although including broader exceptions than those initially suggested by the Commission in its preparatory work on the matter (viz. the protection of the public interest and the protection of the Community’s financial interests) is mandatory and would appear not to have given rise to substantial difficulties in its application thus far. The same fate has not, however, been reserved to the discretionary second paragraph of Article 4 pertaining to the protection of “the confidentiality of the Council’s proceedings”. Basically the most significant problems in this respect seem to have arisen with regard to requests from individuals for Council minutes, voting records and preparatory documents.

For the first six months of the application of the Code of Conduct and the Council Decision, the Council appeared to systematically refuse applications for Council minutes and voting records on the grounds that documents cannot be released which might identify the positions which various national governments might have taken on any particular issue. The first case in which this issue arose is also the first case to have availed of the option explicitly conferred in the Decision to enable an unsuccessful individual applicant to bring an action for annulment against a refusal before the Court of First Instance in Luxembourg. This is the case of The Guardian Newspapers and John Carvel, its European Editor, against the Council. They were refused access to justice and agricultural Council minutes and voting records and told that similar documents which had been previously sent on the Social Affairs Council in October and November 1993 were sent pursuant to an “administrative error”. The negative reply was agreed upon by a majority of delegations at the level of COREPER and placed on the “A” level of the General Affairs Council Agenda. At this stage the Danish insisted that the matter be debated, thereby ensuring that no agreement could be reached as to the content of the reply until after the deadline of one month specified in the Decision had expired. When the reply was finally adopted both the Danish and the Dutch delegations entered formal reservations which stated as follows:

"the Danish and Dutch Governments would like to point out that no comparative analysis has taken place of, on the one hand, the interests of the citizens seeking information, and, on the other hand, the criteria of secrecy of Council deliberations, as is required in the opinion of the Dutch and Danish Governments in case the Council bases its rejection on this specific criteria. Had such a comparative analysis taken place, this should have been communicated to The Guardian."

When the reply was finally received by the applicant (after the deadline had expired) it simply stated that:

"the Council takes the view that access to these documents cannot be allowed since they refer directly to the deliberations of the Council and its preparatory instances. If it did allow such access, the Council would fail to protect the confi-

72 Case T-194/94, still pending.
73 Presumably this discrepancy is to be explained by the fact that the initial decision to grant access was made by different departments within the Council without consulting with one another and that the “mistake” only came to light when the subsequent “confirmatory application” was considered by COREPER/the General Affairs Council itself.
74 The declarations were made available in press releases subsequent to the Council meeting.
dentality of its proceedings. The documents contain confidential information relating to the position taken by the members of the Council during its deliberations.

The last sentence is the critical one. The Council effectively admits that it is applying a systematic policy of refusing access to all documents which might reveal Member State positions, thereby effectively eliminating any possible (national) parliamentary scrutiny. In practice it has indeed not granted access to any Council minutes or other related documents other than those released pursuant to an "administrative error" as detailed above and – in July 1994 – in two Danish cases. This comes close to the imposition of an absolute criterion whereby access to minutes will be refused automatically since the very purpose of minutes is to reflect the content of the proceedings covered by confidentiality.

A different approach is based on a relative assessment of the confidentiality of proceedings. Each case would be examined to see whether confidentiality needs to be protected and the decision to release a document would be taken by a majority. In other words, a case-by-case assessment must be made. This process of ad hoc balancing of interest in confidentiality and the public's right to information is perhaps not without its own drawbacks. It can be argued that the subjective approach is vague and somewhat unpredictable, allowing a majority of the members of the Council to reach any conclusion that it wishes. This is not, however, of necessity the case and what needs to be developed is a common unit of measurement to place upon the opposing side of the scale.

In any event, it seems clear that the Council is currently de facto applying an objective approach systematically refusing to make available minutes on the grounds of the confidentiality of its proceedings (Article 5, paragraph 1, of its Rules of Procedure). This view is supported not only on the case evidence available (all applications for minutes thus far having been turned down on grounds of confidentiality and one "administrative error") but also by the fact that no evidence exists of a serious "weighing" of the conflicting interests involved as would be essential in the more subjective approach to the matter. On the contrary, the fact that serious weighing of the different interests involved has not taken place has been precisely the complaint of the Dutch and Danish delegations throughout the entire period of application of the Council Decision, witness their explicit reservations to many of the Council decisions refusing access thus far.

The other issue which has been the subject of persistence is that of obtaining access to the voting records of the 12 Member States. This issue was tested by a Financial Times journalist, David Gardner, who requested selected voting records of the 12 Member States since 1989 on foreign affairs, the single market, social affairs and agriculture and was turned down in first instance. On appeal this approach was confirmed: the voting records requested were actually turned down on the rather extraordinary ground that the General Secretariat has not compiled lists of voting records "and is not in possession of any such statistics". It followed that the request for access to documents did not fall within the terms of the Council Decision since the latter only covers actual texts held by the Council. However, the Council did appear to offer a "carrot" for the future. It stated that

76 These concerned the confirmatory applications made by the journalist Ms Bundegaard and the student Mr Ravin who were successful in their request for minutes at the ECOFIN Council of 27 July. Having examined the documents supplied by the Council it may be validly doubted whether it amounts to a precedent indicating future grant of such minutes. In any event, it seems clear that the minutes actually released contained no information other than that which had been included in the press releases of the respective Council meetings at the time.
since the adoption of the Code of Conduct (and pursuant to its new Rules of Procedure) most of the votes taken in the Council have been made public in the press release issued after every meeting, and, for the future, the Council intends to arrange for statistics on votes made public under Article 7, paragraph 5, of the Rules of Procedure of the Council to be periodically published.\(^78\)

But this latter hint of a compromise is not quite as generous as it might appear at first blush: after all, it simply states that the Council will compile statistics (the Legal Service will keep a register of votes on legislative issues of future sessions\(^79\)) for those voting records that it is already obliged to release in accordance with its own Rules of Procedure. For other agenda items on which the Council is not acting as legislator *stricto sensu* (second and third pillars?) no attempt to increase transparency will presumably be made. The Danish delegation abstained from voting on this compromise solution and the Dutch voted against it.\(^80\)

Finally, the last group of cases to have arisen concern several attempts to force the Council to disclose the preparatory documents pertaining to how it operates its openness policy, including details of the types of documents sought by the various applicants under the Code and Council Decision, as well as details of the replies given by the Council to the applications and confirmatory applications. In one of the first such cases the Council ordered that the lid was to be kept on the workings of the public access rules and that related documents were themselves covered by the secrecy rules.\(^90\) It stated that “this is a particularly sensitive file and the preparatory documents which it contains are covered by the obligation of professional secrecy, as provided by Article 5, paragraph 1, of the Rules of Procedure of the Council.” Shortly thereafter, in another case initiated by *The Guardian Newspaper*, the Council nuanced its reply somewhat, apparently sensitive to the ridicule to which it was exposing itself on this particular refusal. It agreed that the Council Secretariat would write to all the authors of applications (at that time some 27) to obtain their permission that either their names be revealed or blanked out.\(^81\) Once such permission has been received copies of the relevant (doctored) applications are to be forwarded along with the replies issued by the Council. The approach ultimately adopted in this context constitutes evidence of a willingness to take small, albeit hesitant, steps in the direction of greater openness.

**E Some preliminary conclusions: the European Union**

After the tricky ratification process of the Maastricht Treaty in several Member States of the Union, the focus by the European Council on the obvious alienation of the citizens from the decision-making process by the political elite in Europe was understandable. The key to the opening of the hearts and minds of the citizens of the European Union was much greater transparency and openness of the Community institutions. Sadly, it must be concluded that the heady and spirited declarations as to the Union’s position as a community of democracies,\(^82\) the resultant need to ensure that citizens had the fullest possible access to information,\(^83\) thereby ensuring a better informed public debate on

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80 See further, Agence Europe, 18 May 1994, p. 11.
81 See, Financial Times, 8 July 1994.
83 Birmingham Declaration, supra note 55.
84 Copenhagen Council, supra note 55.
the activities of the Union,\textsuperscript{85} were mocked by the substantive content of the measures actually adopted and in particular by the Council Decision itself as well as its manner of implementation thus far. Section 4 of this chapter has attempted to highlight the banalisation of the issue by the Council in particular. This is illustrated not only by its choice of legal basis for its Access Decision – its Rules of Procedure – but also by the extremely restrictive manner in which it has implemented the Decision since its entry into force. The implementing decisions which it has made thus far, especially its replies to a few notorious confirmatory applications, have shown to what extent the Council itself was not prepared to make anything resembling a quantum leap in terms of the evolution of its existing philosophy on the paramount confidentiality of its proceedings.

The stakes are high and it is crucial that the citizen-critic remains vigilant. It is of critical importance that the focus of attention is not too exclusively on access documents but that vigilance is maintained as regards connected developments. For example, at the same time that the Declaration on transparency was included in the Maastricht Treaty, Working Parties of COREPER were busy debating a proposal on the security measures applicable to classified information exchanged between Member States.\textsuperscript{86} At the Edinburgh EC Summit in December 1992, the Commission’s draft secrecy regulation was one of the proposals withdrawn under the subsidiarity clause. But a little remarked provision in the Council’s Decision on Access to Documents provides that the Decision applies “with due regard for provisions governing the protection of classified information”. In other words, this is designed to constitute a further exception to the principle of access to Council documents: once a document is “classified” no access is possible. The classification issue has, however, resurfaced, albeit very secretively, in 1994, in COREPER’s Working Parties in the context of justice and internal affairs.\textsuperscript{87}

Another part of the basic background canvas on which access legislation is highlighted is the question of the role of the European Parliament and the failure by Ministers to “regularly inform” the European Parliament of discussions in the areas covered by Title VI (as per Article K.6). As a rule, the public availability of information is as important to the European Parliament in its various roles as to the public. Without an adequate flow of information even post facto accountability is meaningless. The point is that the European Parliament is also supposed to receive draft Title VI decisions before the Council makes its decision. Otherwise it will not be possible for the European Parliament to influence the decision – hence it will not be possible that “the views of the European Parliament are duly taken into consideration” (see the wording of Article K.6, paragraph 2).

The disrepute which has ensued for the Council as a result of the manner in which it has chosen to implement in practice the declarations by the European Council underlines the need for a much more fundamental approach to be adopted in future. The material is too important to be left to national civil servants and government ministers in the habit of operating – at least in the Union context – in the cushioned twilight of ministerial, diplomatic and administrative antechambers. It must be included as a fundamental constitutional right enshrined explicitly in the TEU (or an amended version thereof) and the connection must finally be made with citizenship of the Union itself.\textsuperscript{88} An important conse-

\textsuperscript{85} Birmingham Summit, supra note 55.
\textsuperscript{86} Under a regulation which was proposed in February 1992, officials in Brussels and their counterparts in the 12 Member States would have been able to classify documents on Community proposals and policies. The proposal was a blanket provision applicable to any area of EC policy.
\textsuperscript{87} See for further details, Statewatch (January-February 1994), p. 15.
\textsuperscript{88} It is not meant to suggest that it would not be feasible for the Court of Justice were it so minded and were a suitable case to present itself to construe such an unenumerated constitutional
quence of a fundamental right status is that in restricting the right to public access more rigorous standards have to be met than with respect to legal rights generally. Limitations on a fundamental right of access should only be permitted if prescribed by law and if they are necessary in a democratic society for the protection of specified public or private interests. "Necessary" should imply the existence of a pressing social need and the denial of access should be narrowly tailored to serve this interest.

The reason for its inclusion in the entire Union system is not of course to facilitate the institutions in their internal regulation of procedural matters but rather as a critical aspect of the democratic foundations of the Union, a "community of democracies", a means of ensuring that the Union, in the words of Article F of the Maastricht Treaty, indeed respects "the national identities of its Member States, whose systems of government are founded on the principles of democracy". Such explicit constitutional copperfastening is desirable at the 1996 Inter-Governmental Conference. Moreover, the very specificity of the Community legal order and decision-making process bolsters recognition of the fundamental nature of enabling citizens to have access to the information necessary for the free and democratic formation of opinions. It could be an effective way to confer more "social legitimacy" on the European Union and to imbue real substantive content to a notion of European "citizenship".

2.5 Concluding remarks

Does European integration imply the reduction of the democratic content of European society?

For the time being it does. In the many areas of government which have been transferred by the European States participating in the integration process to the European executive bodies, there is a loss of supervision over the executive power. The international councils of ministers and their officials who exert executive power at the European level are controlled to a lesser degree and in a more limited way than is usually the case in respect of national governments, which are controlled by (1) a parliament operating at the same, i.e., the international, level and (a) by an independent court at that level. Within "Schengen" a European parliament and a European court are even totally absent.

Both within "Schengen" and the "Union", the third and perhaps most supporting pillar of democracy, the openness of government, recently has been adversely affected: the European citizen is only permitted to acquire knowledge in piecemeal fashion - and, in certain areas of government, not at all -- of what the decision-makers are doing. The conference rooms of the decision-makers (ministers and "senior" officials) usually remain closed to the citizen. The records of votes taken within the European executive bodies usually are not allowed to be made public, and sometimes, even the final decisions -- no matter how important they may be for individuals -- can be kept secret if the minister of but one state so wishes. Perhaps the interest of the European "citizen" (who in the TEU, at least in name, is given a place of prominence) in all matters of European integration is undermined most by this blocking of the flow of information to the public. The supporting documents with right from the specificity of the entire Community legal system as well as from existing provisions contained in international human rights treaties, in particular the provisions of the ECHR and its First Protocol.

which the ministers and officials making decisions as well as the preparation of their decisions are usually kept secret. In any event, the principle of secrecy is applied in a much more widespread fashion than would normally prevail at the national level. The control of European decision-makers by public opinion, at least, is thus severely impeded.

A number of countervailing forces are, however, working to prevent a closed society of European decision-makers from arising. The European Parliament has repeatedly made it known that it is in favour of a large degree of effective openness. The representatives of the national parliaments and of the European Parliament applauded a proposal to that effect by a Dutch Member of Parliament, Erik Jurgens. According to that proposal, all members of parliament were to request their respective governments to make public “all documents relating to European legislation."90 The Dutch Government declared in the Dutch Parliament “… that (it) can fully inform the Tweede Kamer, even if this concerns confidential documents relating to the second and third pillars and that the Tweede Kamer is at liberty to discuss these confidential documents in public.”91 On the basis of the duty to inform Parliament (a principle which applies in all European democracies), a Government may therefore in fact make confidential documents accessible to the public. This constitutes a very feasible interpretation of the rules on openness currently applicable in the Union, which can also be applied in relation to Schengen and which, in principle, can counter any claim of confidentiality invoked in respect of documents in the Government’s possession.

However, the urge to be shielded, the desire of many European decision-makers to maintain as much “confidentiality” as possible, remains strong. In order to prevent a slide towards secret European government, it is first of all necessary that the European decision-makers accept the culture of secret diplomatic negotiations which existed in the nineteenth and early twentieth centuries can no longer be applied in the new European order in which large sections of national government are being transferred to executive bodies at the European level. European government under Schengen or Union law should, as a matter of principle, be no less open than is customary at the national level for the area of government involved.

It is particularly important that the principle of openness be introduced as the basis for proper government in the TEU, Title VI of which, in particular, is intended (ultimately) to replace the Schengen Agreements. Where documents of and decision-making by the European executive bodies are involved, the relevant rules which give expression to this principle should be based, more clearly than is now the case, on the presumption that the relevant documents are accessible to everyone. Strictly necessary exceptions to this principle of openness, it may be hoped, would be worded in such a way that every interested citizen would be able to ascertain which rights to information he enjoys. Perhaps then, a truly democratic “Europe of the Citizens” will indeed be able to develop.