

## ‘A step towards transparency’ from Le Monde (18 December 2001)

**Caption:** On 18 December 2001, the French daily newspaper Le Monde publishes an article on the issue of transparency in the Council of the European Union. The article comments on Case Council v Hautala concerning access to documents, on which the Court of Justice of the European Communities has been asked to rule.

**Source:** Le Monde. 29.11.2005. Paris. "Un pas vers la transparence", auteur:Corone, Stéphane , p. 4.

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## A step towards transparency

by *Stéphane Corone*

Transparency, without which there can be no democracy, is also something which gives people confidence in their political institutions, since it recognises that people are entitled to have access to the documents which those institutions produce. This right of access is not automatic; it is achieved only at the end of a lengthy legislative process, since, in some ways, it is a mark of democratic maturity. Like any political body, the Europe that is now gradually taking shape is wavering between an entirely natural tendency towards secrecy and a political desire for transparency.

It is Heidi Hautala, a Member of the European Parliament, who deserves the credit for having raised the issue. Concerned about the EU policy on arms exports, she asked the Council the following question: ‘What will the Council do to put an end to human rights violations which are assisted by arms exports from EU Member States? What are the reasons for the secrecy surrounding the guidelines which the Council’s Working Group on Conventional Arms Exports has proposed [...]?’ And, for good measure, Ms Hautala asked to be given access to the report in question.

The Council replied that decisions on arms sales took account of respect for human rights, and it refused, under the provisions of a particular Decision (93/731), to release the report on the ground that it contained highly sensitive information. Ms Hautala then applied to the Court of First Instance to have the Council’s Decision overturned. She argued that the Council was in breach of the fundamental principle of Community law that citizens of the European Union must be given the widest and fullest possible access to the documents produced by their institutions. The Council replied that its only obligation was to consider whether the document requested could be disclosed as it stood. If it could not, the Council was not required to amend it or even to create a new document in order to disclose only the information that was suitable for disclosure. It felt that such an obligation would involve a considerable burden of work. In its view, there was no right to ‘information’ but a right of access to existing ‘documents’ if they could be disclosed, which was not the case here. The Court of First Instance disagreed and ruled that the Council should have examined whether partial access could be granted and should have disclosed the non-confidential information by reworking the text, where necessary.

The Council then appealed to the Court of Justice of the European Communities (CJEC). In his Opinion, Advocate-General Philippe Léger noted a convergence of national laws towards a principle that citizens should have access to information, and that this convergence warranted recognition of that right as a fundamental principle. In thirteen of the 15 Member States, a national legislation granted the public a right of access to documents held by the administration. In European law, the Amsterdam Treaty had introduced Article 255 (of the EC Treaty) in 1997, which provides that: ‘Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.’

Furthermore, this process of acknowledging the public’s right of access was put into practice in the Council and the Commission when, in 1993, they adopted an internal Code of Conduct which states: ‘The public will have the widest possible access to documents held by the Commission and the Council [...]. The institutions will refuse access to any document where disclosure could undermine the protection of the public interest [...]’ Decision 93/731, on which the Council based its refusal to allow Ms Hautala access to the report that she had requested, reiterates and expands the provisions of the Code of Conduct. Article 4 of the Decision states: ‘Access to a Council document shall not be granted where its disclosure could undermine the protection of the public interest [...]’

As the Advocate-General himself notes, where a general principle is established and exceptions to that principle are then laid down, the exceptions should be construed and applied restrictively, in a manner which does not defeat the application of the general rule. Furthermore, the principle of proportionality requires measures taken to remain within the limits of what is appropriate and necessary for the attainment of the aim

in view. In the present case, he says, the principle of proportionality argues in favour of granting partial access so that sensitive information may be kept secret — which is the aim in view but without violating the principle of transparency.

The Advocate-General also points out that the establishment of a European right of access to documents is the result of a political will that has never been refuted. The Final Act of the Maastricht Treaty includes a Declaration No 17, which states: ‘The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in the administration.’ This desire for transparency was reaffirmed at the Birmingham and Edinburgh European Councils in 1992 and then in Copenhagen in 1993. In its judgment of 6 December 2001 (Case C-353/99P), the CJEC followed the Advocate-General’s reasoning and dismissed the Council’s appeal. This step towards greater transparency may appear very theoretical and modest, but it should nevertheless be welcomed as progress in European democracy at a time when the ‘European machine’ is accused of being technocratic, impenetrable and remote from the public.