



**COUNCIL OF
THE EUROPEAN UNION**

**Brussels, 22 December 2000 (22.01)
(OR. fr)**

13275/00

LIMITE

**INF 149
API 127
JUR 379**

NOTE

from :	Secretary-General of the Council
to :	Delegations
Subject :	Third report on the implementation of Council Decision 93/731/EC on access to Council documents (1998-1999)

Pursuant to Article 9 of Decision 93/731/EC on access to Council documents (OJ L 340, 31.12.1993, p. 43), as amended by Decision 96/705/EC (OJ L 325, 14.12.1996, p. 19) and Decision 2000/527/EC (OJ L 212, p. 9), the Secretary-General of the Council is required to submit a report every two years on the implementation of the Decision.

This report contains factual information for the period referred to (1998-1999) and some general thoughts on access to documents.

1. Milestones

Public register of documents

The period covered by this report was marked in many respects by the introduction of the public register of Council documents.

In its first report on the implementation of Decision 93/731/EC (8330/96), the Secretary-General of the Council raised the possibility of the establishment of such a register in order to facilitate public identification of documents.

On 19 March 1998, the Council decided to create a register intended to contain the titles, dates and document numbers of unclassified Council documents. The intention was to provide a multilingual tool, accessible via the Internet, which would provide a range of possibilities enabling every citizen to identify Council documents. The register entered into service in January 1999.

The Council subsequently decided, on 6 December 1999, that the public register of Council documents should contain the document numbers of classified documents. However, there should be no reference to the subject of a classified document if the disclosure of such information was likely to harm other interests.

The number of persons having visited the instrument in 1999, viz. 73 530 out of a total of 593 550 screens consulted, is proof of the register's usefulness.

As at 31 December 1999, the public register provided references for approximately 85 000 documents (all languages combined).

Legislative transparency

Pursuant to Article 207 of the EC Treaty, as amended by the Amsterdam Treaty, and to the subsequent amendment of the Council's Rules of Procedure on 31 May 1999, the results and explanation of the voting, together with the statements entered in the minutes whenever the Council acts in its legislative capacity, are automatically released to the public.

This information is contained in the monthly updates of Council activity drawn up by the General Secretariat and made available to the public on the Internet.

On 29 June 1998, the Council also adopted conclusions whereby access to Council documents should be granted whenever the Council acts in its legislative capacity and recourse to Article 4(2) of the Decision (access refused in order to protect the confidentiality of the Council's proceedings) should be kept to the minimum required.

Moreover, the Council decided on 6 December 1999 to release to the public the lists of provisional agenda items for meetings of the Council and of the Council's preparatory bodies involving cases in which the Council acts in its legislative capacity. The fact that these lists are available on the Internet and contain references to documents examined in connection with each agenda item facilitates, inter alia, the identification of documents likely to be requested.

When adopting its decision on 6 December 1999, the Council invited the Secretary-General to:

- start the technical preparations necessary to indicate in the register the documents which have already been released to the public with a view to making the contents of those documents available on the Internet
- suggest, having regard to the provisions on access to Council documents in the EC Treaty, in particular Articles 207(3) and 255 thereof, which categories of Council document, particularly those concerning the legislative process, could be systematically made available to the public on the Internet.

Meanwhile, it has become possible to access via the public register the content of documents released to the public on request. On 16 November 2000, the register allowed access to the entire contents of 13 396 documents in all languages.

The following suggestions for Council documents which could be released to the public on the Internet are submitted for the Council's consideration:

Differential arrangements would be adopted depending on whether or not the document involved related to the Council's legislative activity.

A. Legislative documents

"Legislative documents", which are defined as "any unclassified document relating to the examination and adoption of a legislative act within the meaning of Article 7 of the Council's Rules of Procedure or to the legislative programme", should be published

- either on production (original Council documents) or on registration (documents from a third party);
- or after adoption of a Council Decision in the course or wake of the legislative procedure.

I. The following would be accessible in this category on production or registration:

- (a) cover notes and copies of letters to the Council, from other institutions and bodies of the European Union or by a Member State, concerning a legislative act;
- (b) information notes, reports, interim reports and progress reports on the proceedings of the Council or of one of its preparatory bodies which do not reflect delegations' individual positions;

- (c) "I/A" and "A" item notes and legislative documents referred to therein;
- (d) decisions adopted by the Council during the co-decision procedure (common position, decision on the rejection/approval of Parliament amendments under Article 251(3) TEC and the joint draft approved by the Conciliation Committee (Article 251(5) TEC);
- (e) any final version of a legislative act text finalised by the Working Party of Legal/Linguistic Experts which is for adoption by the Council and publication in the Official Journal.

II. Still in the category of "legislative documents", the following would be accessible following adoption of a Council Decision during or on completion of the legislative procedure (i.e. one of the decisions referred to in (d) and (e) above): any document with the reference "LIMITE" relating to the act in question established prior to that Decision, with the exception of opinions and contributions from the Legal Service, such as information notes, reports, interim reports and progress reports on the proceedings of the Council or of one of its preparatory bodies ("outcome of proceedings") reflecting delegations' positions.

B. Non-legislative documents

The following documents in this category would be accessible on production or registration:

- documents external to the Council made accessible by their drafter at the time of their submission to the Council;
- provisional agendas for meetings of the Council and of its preparatory bodies;

- any document intended for release to the public, whether through publication in the Official Journal, through the Internet, through a press release or through any other means, in particular any final version of a text to be adopted by the Council or Coreper (Article 17(4) of the Council's Rules of Procedure);
- Council meeting minutes approved by the Council.

2. Development of the policy of releasing Council documents to the public

As was to be expected, the facilities offered for identifying Council documents on the Internet have directly influenced the number of applications for access.

Statistics for public access to Council documents in 1999 (see Annex) rose sharply from the 3 984 documents considered in 1998 (338 individual dossiers introduced – fairly close to the 1997 figure of 282 individual dossiers/2 431 documents) and stood at, respectively, 6 747 documents (up by 69% on 1998) and 889 individual dossiers (up by 163% on the previous year).

This upward trend was confirmed during the first half of 2000, with the six-monthly figure for documents examined following applications already standing at 3 514 and the number of dossiers at 684.

However, the increased number of applications due in great measure to the public register has not altered the upward trend apparent in the number of favourable replies received by the public since the inception of this policy.

Hence, for the whole procedure (examination of applications firstly by the General Secretariat and then, following any confirmatory applications, by the Council), the document release rate rose from 78,3% in 1997 to 82,4% in 1998 and 85,6% in 1999. This trend continued during the first half of 2000, when the rate rose to 87,3%.

The level of favourable replies to applications is particularly significant if it is remembered that decisions on most dossiers are taken during the initial stage (by the General Secretariat). Out of the 3 984 applications and 6 747 documents considered in 1998 and 1999, 2 947 and 5 406 respectively benefited from a favourable Council Secretariat decision.

In addition to the increased quantities achieved under this policy, statistics point to a substantial diversification in terms of the source and subject matter of applications, attributable in great part also to the public register and to the other instruments made available on the Internet by the Council.

As far the reasons for denial of access to documents, increasingly less frequent recourse to Article 4(2) of the Decision (refusal in order to protect the confidentiality of the Council's proceedings), down to 51% in 1998 and 30% in 1999 from 68% for 1996/1997, is a particularly significant factor. This trend is consistent with the Council's firm determination to increase the level of transparency, particularly when acting in its legislative capacity.

3. Organisational questions

The entry into force of the register and the resultant rise in the number of applications have called for a considerable administrative effort on the part of the Council Secretariat.

A "Transparency Unit" and a "Public Information Unit" have been set up, with the latter in charge of the growing number of applications for information which cannot be answered under the procedure for public access to documents.

The processing of applications for documents and information in general has been made easier by the use of electronic mail (access@consilium.eu.int for applications for documents and public.info@consilium.eu.int for information), with the result that most applications are now received and most documents and/or information are/is now forwarded by that means.

As stated above, the public register of documents has become an instrument for both identifying documents with a view to possible applications and accessing the entire contents of documents already released to the public in the wake of applications.

In addition to making available documents published on the Internet and to increasing the use of electronic mail for forwarding documents, the General Secretariat has also gradually dispensed with the charging of the fee prescribed in Article 3(1) of Council Decision 93/731/EC since no direct costs are involved in obtaining documents by electronic means.

4. Contentious matters

Decision 93/731/EC lays down that in the event of refusal the applicant will be informed of the content of Articles 195 and 230 of the Treaty establishing the European Community, relating respectively to the conditions for referral to the Ombudsman by natural persons and review by the Court of Justice of the legality of Council acts.

a) Legal appeals

i. Judgments of the Court

The Order of the President of the Court of First Instance of 4 March 1998 in case T-610/97 (*Norup Carlsen et alii v. Council* – Reports of Cases before the Court II-485) whereby the Court recognised the need to grant special protection for the opinions of an institution's Legal Service has already been referred to in the previous report (6715/1/98 REV 1, point 3.2) and has recently been confirmed in the Court's judgment of 8 November 2000 in case T-44/97 (*Ghignone et alii v. Council*, point 47).

On 17 June 1998, the Court delivered a judgment in case T-174/95 (*Svenska Journalistförbundet v. Council* – Reports of Cases before the Court II-2289). This judgment first of all clarified two questions regarding the admissibility of an appeal in the matter of access to documents.

- on the one hand, the Court rejected the Council argument that the applicant had no interest in challenging the denial of access to documents which it had already received from the Swedish authorities, arguing that "*a person who is refused access to a document or to part of a document has, by virtue of that very fact, established an interest in the annulment of the decision (point 67). The fact that the requested documents were already in the public domain is irrelevant in this connection (point 69).*".
- On the other hand, the Court confirmed that Decision 93/731/EC applies to all Council documents, irrespective of the contents thereof, and therefore also to documents within the scope of Title VI of the EU Treaty. The fact that the Court has, by virtue of Article L (now Article 46) of the EU Treaty, no jurisdiction to review the legality of measures adopted under Title VI does not curtail its jurisdiction in the matter of public access to those measures (point 85).

As to the substance, the Court annulled the contested Council decision on the grounds that it did not comply with the requirements for reasoning as laid down in Article 190 TEC. The Council had invoked both the mandatory exception, based on protection of the public interest (public security), and the optional exception, based on protection of the confidentiality of its proceedings. It had not, however, made it clear whether it was invoking the two exceptions cumulatively in respect of all refused documents or whether it considered that some documents were covered by the first exception and others by the second. Furthermore, in the decision in question, the Council had neither stated the reasons why disclosure of the documents would in fact be liable to prejudice a particular aspect of public security nor indicated whether it had actually balanced both the interests of citizens requesting information and the criteria governing the confidentiality of the Council's proceedings.

It should be emphasised that the decision in this case dates from 6 July 1995. Council practice regarding the reasoning of its decisions in the matter of access to documents has since evolved considerably.

The most striking judgment in the period covered by this report is that of the Court on 19 July 1999 in case T-14/98 (*Hautala v. Council*, Reports II-2489), in which the Court annulled the Council's decision of 4 November 1997 refusing access by the applicant to the report of the Working Group on Conventional Arms Exports, which comes within the scope of Title V of the EU Treaty. It is of general interest mainly since the Court does not focus on the reasoning of the contested decision but offers a new interpretation of both Decision 93/731/EC and the scope of the judicial review.

The Court began by recalling that the Council's discretion is connected with the political responsibilities conferred on it by Title V of the Treaty on European Union and that it is on that basis that the Council should determine the possible consequences which disclosure of the contested report might have for the international relations of the European Union. The Court went on to state that, in those circumstances, its review "*must be limited to verifying whether the procedural rules have been complied with, the contested decision is properly reasoned and the facts have been accurately stated and whether there has been a manifest error of assessment of the facts or a misuse of powers*" (point 72 of the judgment). The Court found that, in the circumstances of the present case, there was no reason to fault the Council's assessment.

The Court went on to state that Article 4(1) of the decision on public access to Council documents must be interpreted "*in the light of the principle of the right to information and the principle of proportionality. It follows that the Council is obliged to examine whether partial access should be granted to the information not covered by the exceptions*" (point 87 of the judgment). Since the Council had clearly made no such examination, submitting that it was under no obligation to do so, the Court of First Instance held that "*the contested decision is vitiated by an error of law and must therefore be annulled.*".

The Council appealed against this judgment on the ground that the Court had committed an error of law in interpreting Article 4(1) of Decision 93/731/EC as legally requiring the Council to consider whether partial access should be given to its documents, in holding that the aforesaid Decision confers a right of information and that granting partial access is a matter of the application of the principle of proportionality (point 86 of the judgment). This appeal is currently pending before the Court of Justice (case C-353/99 P).

ii. Further disputes

The application of Decision 93/731/EC gave rise to two further disputes in the period covered by this report:

- On 4 December 1998 proceedings for the annulment of a Council Decision refusing access to certain reports drawn up by the Centre for Information, Discussion and Exchange on Asylum (CIREA), to certain joint or Member State mission reports forwarded to the latter body and to the list of contact persons dealing with asylum applications in the Member States were brought before the Court by Mr Kuijer in case T-188/98.
- In a plea registered at the Court on 23 September 1999 (case T-204/99), Mr Mattila brought proceedings against the Council and the Commission for the annulment of their respective decisions to refuse him access to certain documents concerning the European Union's relations with the countries of Eastern Europe and Central Asia.

(b) Activities of the European Ombudsman concerning the implementation by the Council of Decision 93/731/EC on public access to Council documents

For the period covered by this report (1998-1999), the activity of the European Ombudsman in connection with the implementation by the Council of Decision 93/731/EC on public access to Council documents may be summarised as follows:

1. Following a complaint to him in 1996 claiming that the Council had failed to keep an up-to-date listing, open to the public, of measures adopted by it in the areas of Justice and Home Affairs (ref. 1055/25.11.96/Statewatch/UK/IJH), the European Ombudsman recommended that the Council "make available to the public, on request, the list of all measures approved in the field of Justice and Home Affairs which is maintained by the Institution's General Secretariat".

By letter dated 29 January 1999, the General Secretariat of the Council informed the Ombudsman that the Council had adopted the following measures:

- a database of Council activities in the fields of Justice and Home Affairs was made accessible on the Internet (<http://ue.eu.int>), enabling the public to obtain at any time an up-to-date listing of pertinent Council measures adopted.
 - a monthly summary of all acts adopted by the Council was drawn up as from January 1999, the first part containing final legislative acts adopted by the Council (and statements in the minutes released to the public) and the second part containing all other acts adopted by the Council, i.e. non-legislative acts (including acts in the field of Justice and Home Affairs) and non-final acts (in particular, common positions). This monthly summary is published on request and is available on the Internet.
2. Following a complaint to the Ombudsman regarding the Council's refusal to allow access to a series of TREVI documents coming within the scope of intergovernmental cooperation in the field of Justice and Home Affairs (complaint 1259/99/ME), the Council made a complete inventory of TREVI documents and agreed on a procedure for processing such requests in the future.
 3. After a further complaint brought against the European Commission (ref. Omb 2/97) regarding the confidentiality rules applicable to documents held by certain committees set up by the Council, the Ombudsman, addressing the Council on 3 April 1998, asked if the rules relating to public access to the Council's documents were applicable to the documents of committees set up by the Council in order to assist the Commission in the exercise of the powers conferred on the latter by the Council pursuant to Article 145 of the EC Treaty (Committee Procedure).

Replying, the Council said that it was not competent to decide, on the basis of Decision 93/731/EC, to publish documents drafted by a committee comprised of Member States' representatives which it had set up in order to assist the Commission in the exercise of the powers conferred on it under Article 145 (now Article 202) of the EC Treaty. Such committees are not Council Working Parties and their documents are not Council documents. The Council does not hold these documents and cannot, therefore, authorise access to them.

5. Future developments in the document access policy

Article 255 of the Treaty establishing the European Community, as amended by the Treaty of Amsterdam, states that general principles and limits on grounds of public or private interest governing the right of access to documents shall be determined in accordance with the co-decision procedure within two years of the entry into force of the Treaty.

On 21 February 2000, the Commission sent the Council a proposal for a Regulation on the implementation of this Treaty Article. The Council and the Parliament are continuing to examine the proposal with a view to reaching agreement within the prescribed period.

One aspect on which both institutions will have to agree concerns documents of especially sensitive subject-matter.

In the context of the implementation of security and defence measures adopted by the Helsinki European Council in December 1999, the Council adopted on 14 August 2000 Decision 2000/527/EC amending Decision 93/731/EC on public access to Council documents and Decision 2000/23/EC on the improvement of information on the Council's legislative activities and on the public register of Council documents.

The Council adopted this Decision on the sole basis of Article 207, on the understanding that Council rules in this area will need to be reviewed in the light of the implementation of Article 255.

STATISTICS ON PUBLIC ACCESS TO COUNCIL DOCUMENTS**1. Number of applications under Decision 93/731/EC**

1997	1998	1999	2000 (1st half)
282	338	889	684

2. Number of documents considered

1997	1998	1999	2000 (1st half)
2 431	3 984	6 747	4 051

3. Documents provided by the General Secretariat of the Council at the initial stage

1997	1998	1999	2000 (1st half)
1 787	2 947	5 406	3 514

4. Number of confirmatory applications

1997	1998	1999	2000 (1st half)
37	36	43	18

5. Documents released by the Council following confirmatory applications

1997	1998	1999	2000 (1st half)
124	338	238	21

6. Rate of document release for the procedure as a whole

1997	1998	1999	2000 (1st half)
78,3%	82,4%	85,6%	87,3%

7. Professional origin of applicants

	1996/97	1998	1999	2000 (1st half)
Members of the European Parliament	3%	5%	2%	3%
Lobbies	10%	12%	8%	7%
Lawyers	17%	12%	9%	8%
Journalists	6%	2,5%	2%	3%
University research workers	43%	35%	24%	27%
Industry	3%	4,5%	10%	10%
Other (libraries, other institutions, third country missions, undeclared professional origin)	18%	29%	45%	42%

8. Geographical spread of applicants

	1996/97	1998	1999	2000 (1st half)
Belgium	27%	33%	34%	28%
Denmark	2%	4%	2%	0,5%
Germany	15%	13%	11%	13%
Greece	-	-	1%	0,5%
Spain	5%	6%	4,5%	7%
France	4%	9%	9%	9%
Ireland	2%	1%	1%	1%
Italy	4%	4%	5%	5%
Luxembourg	4%	2%	1%	0,5%
Netherlands	6%	5%	6%	4%
Austria	2%	7%	1,5%	1,5%
Portugal	-	-	1,5%	1%
Finland	4%	0,5%	1%	1%
Sweden	1%	0,5%	2%	2%
United Kingdom	21%	10%	9%	10%
Third countries (United States, Norway, Switzerland, Japan) + unspecified	2%	5%	10,5%	16%

9. Subject of applications ⁽¹⁾

	1996/97	1998	1999	2000 (1st half)
Legal questions	1%	0,3%	2%	5%
Agriculture, Fisheries	4%	1,5%	6%	3,5%
Internal Market	13%	3%	5%	12%
External Relations – CFSP	13%	4%	9%	9,5%
Functioning of the Institutions	5%	3%	4%	4%
Economic and Monetary Policy	3%	2,5%	6%	8,5%
Justice and Home Affairs	46%	77%	37%	29%
Environment	4%	3,5%	9%	6,5%
Social Policy	3%	2,5%	2%	3%
Transport	0,5%	0,6%	2%	4%
General policy questions (IGC, European Council)	3%	0,1%	1%	3%
Other	5%	2%	17%	12%

10. Reasons for refusal of access ⁽²⁾

	1996/97	1998	1999	2000 (1st half)
Protection of the public interest, the individual and privacy, protection of confidentiality in commercial and industrial matters and of the Community's financial interests	21,5%	12%	47%	43%
Protection of the confidentiality of the Council's proceedings	68%	51%	30%	30,5%
Several reasons together	9%	0,5%	1%	0,5%
Not a Council document/other author	-	36%	19%	25%
Other reasons	-	1,3%	3%	1%

(1) Certain applications referred to more than one area.

(2) With reference to initial replies from the General Secretariat.