

Chapter 4

TRANSPARENCY

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TRANSPARENCY

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EXECUTIVE SUMMARY

THE POWER OF THE TRANSPARENCY IDEAL

“Transparency” is one of the most powerful concepts in the European Union today. It means many things to many people, and only a few of those meanings are explored in this Chapter. Specifically, we deal here with (1) the citizen’s ability to obtain information about the structure and function of the principal Community institutions of government and to have access to and participate in their processes; (2) the important subset of obtaining information that is access to documents produced and accumulated by government; and (3) the increasingly significant and complex issue of data protection and privacy, which has dimensions in the EU absent in the U.S. and which often conflicts with attaining transparency.

INFORMATION ABOUT AND PARTICIPATION IN GOVERNMENT PROCESSES AT THE COMMUNITY LEVEL

The World Wide Web is central to the EU’s transparency efforts. *Europa.eu* is the gateway for the institutional websites of the Commission, the European Parliament and the Council. These not only house the access points for their document Registers, but also provide thousands of webpages of explanatory, contact and interactive material to assist citizens in understanding and communicating with EU institutions. To a degree far beyond what is currently available for U.S. federal government entities, the Internet is the medium for information about and participation in government processes at the Community level.

Some of these websites have advanced enormously in content and functionality in recent years. In particular *Europarl* (Parliament’s site) and sections of *EC* (the Commission’s site) make sophisticated use of the Web’s unique capacity to present vast amounts of complex material, in a form accessible to the novice. Given the byzantine complexity of the EU institutional structure, the myriad forms of its governance processes, and its ever-expanding geographical boundaries, the Web may be the only practicable way for the EU to enable citizens to understand its processes and participate in them. Therefore the key to this dimension of transparency – and the legitimacy perceived to flow from it – is continued attention to the content and functionality of the institutional websites.

Particularly noteworthy instances of web-based information and participation opportunities include: the visual flow charts on *Europarl* of the co-decision process and the budget process;¹ the excellent tracking services in *PreLex* (on the Commission’s site) and *OEIL* (on Parliament’s) site that not only elucidate the decisional process of a particular matter but also collect the various relevant documents and allow direct access via links to them;² the concise and lucid explanations of players and procedures in a well-organized set of mini-windows in *PreLex*;³

¹ See <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=46&pageRank=4&language=EN>; <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=46&pageRank=7&language=EN>.

² See text accompanying *infra* note 147; Sections IIB1c, IIB2bi.

³ See *infra* note 56.

Europarl's dual series of explanation screens that allow the user to select whether she wants an overview or more detailed examination of Parliament's organization, powers and role;⁴ the entire website devoted to the conciliation committee and co-decision process;⁵ and the Voice in Europe website for conducting the Commission's consultation process.⁶ Similarly, the Document Registers of the three institutions increasingly provide immediate access through hyperlinks.

All this is vastly superior to most of what is offered on official U.S. government sites. Still, there is room for improvement. The Council's site, *Consilium*, offers relatively little educational material or proactive use of technology such as links and webcasting (rather than merely videostreaming) by comparison with the other institutional sites. Given the pivotal importance of the Council in EU governance, this is a significant transparency gap. Even the other institutions might continue their pioneering efforts by, e.g., increasing the breadth of material available for immediate download and webstreaming, and by aggressively seeking user feedback to identify areas in which the pages are still not as user-friendly as they might be.

Because the EU institutions have relied, outside the area of Access to Documents, on non-binding texts (such as codes of conduct and procedure) to establish general rules about citizen access and participation, it is especially important that they continue to take the highly public steps of opening their processes and documents through the World Wide Web.

ACCESS TO DOCUMENTS

The Treaty Establishing The European Community⁷ establishes a right of access to EU documents, which is currently implemented by the EU Access Regulation.⁸ The Access Regulation, like the American Freedom of Information Act, grants EU citizens a legally enforceable right of public access to documents, spells out the procedures governing exercise of that right, delineates exemptions from required disclosure, and authorizes both judicial and Ombudsman review of decisions to deny access. In all situations, there is a presumption of public access to documents, subject to limited exceptions.⁹ The Access Regulation applies to the European Parliament, Council, and Commission, as well as certain subordinate bodies.¹⁰ In the event that more liberal disclosure mechanisms apply to a set of documents (for example, environmental information), a party can choose which access rule to use.

⁴ See <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?language=EN&id=146>.

⁵ http://www.europarl.europa.eu/code/about/default_en.htm. See Section IIB2bii.

⁶ http://ec.europa.eu/yourvoice/index_en.htm. See Section IIC1b.

⁷ Treaty Establishing The European Community (Consolidated Version), O.J. (C 325) 33, 24.12.2002, available at http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/pdf/12002E_EN.pdf.

⁸ EP and Council Regulation 1049/2001, 2001 O.J. (L 145) 43 (EC) (regarding public access to European Parliament, Council and Commission documents), available at http://europa.eu/eur-lex/pri/en/oj/dat/2001/l_145/l_14520010531en00430048.pdf.

⁹ See Section IIIC.

¹⁰ See Section IIIA2.

The scope of the Access Regulation is quite broad¹¹ – “documents” are expansively defined to include “any content, whatever its medium.” This encompasses paper records, computer files, sound, visual, and audiovisual recordings, among other things, as long as they concern “a matter relating to the policies, activities and decisions falling within the institution’s sphere of responsibility.” Any citizen of the European Union or natural or legal person residing or having a registered office in an EU Member State has standing to gain access to documents.¹² Furthermore, the Commission and Council have extended this right to non-citizens by official decisions, and the Parliament in practice responds to non-EU residents as well.

Any document or set of documents prepared by or in the possession of an EU institution may be requested, although Member States have an absolute right to object and preclude the disclosure of documents prepared by their governments.¹³ Other third-party authors have a right to be consulted, but if they oppose disclosure their opinion is not binding on the institution.¹⁴ If documents are to be disclosed over their objection, they do have the right to seek an injunction.

A request for documents may be submitted by mail, fax, or e-mail. The institution must respond within 15 working days in most cases. If the institution rejects the request or fails to respond, the applicant may file a confirmatory request (effectively an administrative appeal).¹⁵ If an institution refuses access to some or all of the documents sought, it must provide its reasons for doing so in writing, disclose discrete portions of documents if possible, and notify the applicant of the right to appeal. An applicant dissatisfied with its resolution has recourse either to the European Ombudsman, who can issue a nonbinding opinion and offer informal mediation, or to the court system.

Only if an exception applies, based on a document-by-document analysis, can an institution refuse a request.¹⁶ It must reject an application where disclosure would undermine the public interest in public security, defense or military matters, international relations, or the financial, monetary, or economic policy of the EU or a Member State. It must also decline to provide documents that would compromise private commercial interests, court proceedings or legal advice, or inspections, investigations, or audits, although in these cases disclosures may still be made if the applicant demonstrates an overriding public interest in the documents. Furthermore, internal deliberations are privileged, especially on matters that have not yet been finally decided. Sensitive or classified documents are also excepted.

A request must be “sufficiently precise” to allow an institution to identify responsive documents, but an institution usually cannot reject a request because it is overbroad or too burdensome.¹⁷

¹¹ See Section IIIB2.

¹² See Section IIIB1.

¹³ See Sections IIIA2d, IIIB2.

¹⁴ See Section IIIB11.

¹⁵ See Section IIID.

¹⁶ See Section IIIC.

¹⁷ See Sections IIIB3-4.

Unless the request violates the rule of proportionality, requiring so much effort that complying would impose an administrative burden that “could very substantially paralyze the proper working of the institution,” the institution can only confer informally with the applicant to clarify or narrow the request. (Nonetheless, some institutions have regulations for dealing with abusive or repetitious requests.) While an institution has the authority to charge for the actual costs of producing and sending copies of documents to applicants (but not for identifying, searching, or compiling them), they rarely do so because the invoicing procedure is too complicated.¹⁸

Each EU institution is also required to make certain classes of documents publicly available in official registers and/or through the Internet.¹⁹ Many institutions disclose additional information on their websites, in the Official Journal, or through other means.

The EU institutions, courts, and Ombudsman, along with nongovernmental organizations, the press and academicians, have all contributed toward the creation of a workable framework for providing public access to EU documents. However, the goal of maximizing both widespread dissemination of public records and granting timely access to requested information has not yet been achieved.

Recognizing that public confidence in European institutions is declining, a European Transparency Initiative was launched in November 2005 by the Commission. One of the objectives of the Initiative will be to initiate a debate on the Access Regulation in 2006, followed by “a public consultation on a possible review of the Regulation.”²⁰ In short, the scheme for affording the public access to documents in the EU appears to remain a work in progress, with the potential for continuing improvement ahead.

DATA PROTECTION

The data access regulation reflects the understanding in the EU that transparency is of fundamental significance. The EU also regards data protection as being of fundamental significance. The EU has broad and extensive protections for personal data. Both the Member States²¹ and EU institutions are subject to data protection legislation,²² and these provisions are far more extensive than privacy legislation in the United States. While the EU regulates all private entities and governmental institutions that process personal data, data protection legislation in the U.S. is limited to only some sectors, such as education records, consumer credit reports, and health care provider records. Moreover, EU requirements are generally more stringent than U.S. requirements regarding the same types of information. Thus, although the

¹⁸ See Section IIIB6.

¹⁹ See Section IIIE.

²⁰ Communication to the Commission from the President, Ms. Wallstrom, etc. proposing the Launch of a European Transparency Initiative, available at http://europa.eu.int/comm/commission_barroso/kallas/doc/etik-communication_en.pdf.

²¹ See Section IVA.

²² See Section IVC.

United States has legislation protecting personal privacy in some sectors, there is no comparable overall regulatory framework in this country to the regulatory regime in the EU.

The EU has directed the Member States to regulate personal data in the possession of private and public entities in Directive 95/46,²³ which establishes a general regulatory framework, and Directive 2002/58,²⁴ which applies to personal data in the electronic communications sector. Member states have established data protection authorities in response to the Directive to implement protective regulation. Regulation 45/2001²⁵ protects personal data in the possession of EU institutions. While it is similar to the Privacy Act in the United States, it provides more protection and remedies.²⁶ The regulation established the EU Data Protection Supervisor to ensure compliance with the regulation.

The protection of personal data in the EU has two ramifications for Americans. For persons doing business in the EU, they are subject to privacy regulation in the Member States. Moreover, since the EU gives extra-territorial application to Directive 95/46, the transmission of personal information from the EU to the U.S. is regulated.²⁷

The EU's efforts to protect personal data have been impacted by three developments. First, since Member States have some discretion under Directive 95/46 to develop their own implementation and enforcement policies, they have diverged in their implementation of Directive 95/46.²⁸ This development has created problems for effective implementation and the maintenance of an integrated market. While there are efforts by the EU to harmonize the approaches used in the Member States, these efforts confront the reality that Member States have somewhat different policy views concerning the details of how personal privacy is protected.

The protection of personal data has also been impacted by data access requirements.²⁹ Member states and EU institutions are in the process of reconciling the protection of personal data with data access mandates. This conflict is more of a problem in the EU than it is in the U.S. because of the stronger commitment to protecting personal data. In the US, conflicts between data protection and data access are often resolved in favor of access. In the EU, the reconciliation of these goals is more difficult because both data protection and government transparency are considered to be of fundamental importance.

Finally, the EU's efforts to protect personal data when it is transmitted outside of the EU have created conflicts with maintaining and enhancing international trade. The EU does not permit the transfer of personal data unless the recipient country offers an adequate level of protection

²³ Council Directive 95/46, 1995 O.J. (L 281) 31.

²⁴ Council Directive 2002/58/EC, 2002 O.J. (L 201) 37.

²⁵ Commission Regulation 45/2001, 2000 O.J. (L 8) 1.

²⁶ See Section IVC.

²⁷ See Section IVB.

²⁸ See Section IVA6.

²⁹ See Sections IVA7,C4.

for such data, or unless there are other arrangements in place that will offer a level of protection comparable to that in the EU.³⁰ Since the EU does not regard the United States as meeting the first option, the EU and the U.S. have negotiated a Safe Harbor Agreement and an agreement on Aviation Passenger Data under the second option.³¹ Critics, including a majority of the EU Parliament, believe that the Commission has signed the agreements despite the fact that they offer inadequate protection in order to maintain trade with the US. The second agreement has been annulled by the European Court of Justice. The tension between interest in facilitating trade and protecting personal data is not likely to abate as long as commercial and governmental interests in the U.S. and other non-EU countries seek to avoid providing comparable privacy protections in order to reduce their costs.

Despite these difficulties, Europeans have a level of protection for personal privacy that is considerably greater than in the United States. This result reflects differences in the historical, cultural and political characteristics of the EU and the US. It also means that the EU is not likely to reduce significantly the regulatory protections that it has established.

³⁰ See Section IVB.

³¹ See Sections IVB4, B6.

I. INTRODUCTION: OVERVIEW OF TOPIC AND SCOPE OF THIS CHAPTER

A. “Transparency:” *The Promise of All Good Things*

As deployed in EU discourse today, “transparency” is a politico-legal concept of enormous sweep.

Apparently, the term initially entered the EU’s legal lexicon as a translation of the French “*transparence*,” when translators were unfamiliar with the English word “openness” in the context of public access to information about government.¹ Over time, it has become a highly charged term in social and political debate, used to advance almost any species of good-government proposal. Now one of the touchstones of EU legitimacy, “transparency” is a shorthand for the collection of substantive and procedural undertakings deemed necessary “to reconnect Europe with its citizens and close both the physical and mental gap that makes it difficult for people to understand what Europe does and why it matters.”²

Specifically, a reasonably informed citizen of an EU country would have heard at least the following demands for reform made, in various highly public forums, under the rubric of transparency. Several of these reforms have indeed come to pass, or are now in progress:

- comprehensible and integrated fundamental documents (i.e., treaties and constitutions)
- legislation that is consolidated, coordinated and readily accessible³
- legislation and other official communications written in jargon-free, understandable prose⁴
- mandatory guidelines on how legislation ought be drafted, and/or technical legislation-drafting groups
- official communications made in the official language(s) of every Member State⁵

¹ FOI: a European Perspective, Speech by the European Ombudsman, Prof. P. Nikiforos Diamandouros, at the 4th International Conference of Information Commissioners, Manchester, United Kingdom, 23 May 2006 <http://www.ombudsman.europa.eu/speeches/en/2006-05-23.htm>.

² What is the Transparency Initiative? http://europa.eu.int/comm/commission_barroso/kallas/transparency_en.htm [hereinafter “Transparency Initiative”]. See also Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 2001 O.J. (L 145) Preamble ¶¶ 1-3, available at http://europa.eu/eur-lex/pri/en/oj/dat/2001/l_145/l_14520010531en00430048.pdf [hereinafter “Access Regulation”].

³ E.g., Commission of the European Communities, *European Governance: A White Paper* 10, 23 (issued July 25, 2001), available at http://www.europa.eu/eur-lex/en/com/cnc/2001/com2001_0428en01.pdf [hereinafter “White Paper on Governance”].

⁴ E.g., *id.* at 10, 11. See also Miriam Aziz, *Mainstreaming the Duty of Clarity and Transparency as Part of Good Administrative Practice in the EU*, 10 Eur. L.J. 282 (2004).

- understandable and accessible information about the policy objectives of EU decision making⁶
- understandable and accessible information about the decision making processes of EU institutions at all levels⁷
- increased attention by EU institutions during the policymaking process to opinions of different stakeholders⁸
 - greater role for lobbying groups
 - information about the identity of lobbyists
- codes of conduct for both staff and Members of the Commission⁹
- understandable and accessible information about the outcomes of EU decision making¹⁰
 - prompt communication of outcomes
- use of the most modern communication technologies, and in particular the Internet¹¹
 - better managed official websites
- access to decision making processes, including demands for open meetings akin to the provisions of U.S. “sunshine” laws

⁵ E.g., White Paper on Governance, supra note 3, at 11. Article 21 of the Treaty Establishing the European Community [TEC], 2002 O.J. (C 325); Code of good administrative behavior for the General Secretariat of the Council of the European Union and its staff in their professional relations with the public, § 4, 2001 O.J. (L 145) 43, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_189/c_18920010705en00010004.pdf.

⁶ E.g., White Paper on Governance, supra note 3, at 28.

⁷ E.g., id. at 4, 15-16.

⁸ E.g., id. at 4, 16-17; Towards a Reinforced Culture of Consultation and Dialogue – General Principles & Minimum Standards for Consultation of Interested Parties by the Commission, COM 704 final, at 3, 5 (December 11, 2002) available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0704en01.pdf [hereinafter “Minimum Standards for Consultation”].

⁹ E.g., Transparency Initiative, supra note 2. For the current codes, see Code of Conduct for Commissioners, SEC (2004) 1487/2, available at http://www.europa.eu/comm/commission_barroso/code_of_conduct/code_conduct_en.pdf; Code of Good Admin. Behavior, supra note 5; Minimum Standards for Consultation, supra note 8.

¹⁰ E.g., Code of Good Admin. Behavior. §§ 3, 4, supra note 5.

¹¹ E.g., White Paper on Governance, supra note 3, at 11. Hence, the EU’s official website, *www.europa.eu*, is described as one of the democracy-enhancing measures through which more effective information and communication about the EU institutions, policies and processes will facilitate popular participation and, ultimately, “a sense of belonging to Europe.” Id.

- televised meetings
 - public minutes of meetings
- greater information from ministries and the Commission to Parliament
- in general, a simplified and improved regulatory environment¹²

Some of these demands for “transparency” in EU government institutions and processes would not generally be understood as within the scope of administrative law. Indeed, some are only tangentially connected with “law” of any sort.

B. Scope of this Chapter

This Chapter discusses the following aspects of transparency in the EU:

Section II: Information About, and Participation in, Government Processes at the Community Level. The topics covered in this section are those which, in the US, would be governed by the Government in the Sunshine Act,¹³ the Federal Advisory Committee Act,¹⁴ and portions of Administrative Procedure Act.¹⁵

The EU does not have overarching, legally binding regimes comparable to these U.S. statutes. It relies instead on the “soft law” of internally enforced codes of conduct, guidelines and standards.

One exceptional area deserving mention involves matters relating to the environment. Here, the Aarhus Convention – the implementing Regulation of which entered into force September 2006, and must be complied with by EU institutions and all other bodies established pursuant to the EC Treaty by June 28, 2007 – creates judicially enforceable information and participation rights with respect to legislation, plans and programmes involving environmental issues.¹⁶

¹² E.g., Report from the Commission on the application in 2002 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents/COM/2003/0216final*/, EUR-Lex 52003DC0216 at 1, available at http://europa.eu.int/eur-lex/en/com/rpt/2003/com2003_0216en01.pdf.

¹³ 5 USC. § 552b.

¹⁴ 5 USC. App.

¹⁵ 5 USC. §§ 551 et seq.

¹⁶ Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making, and access to justice in environmental matters, 2005 O.J. (L 124/4) [hereinafter “Aarhus Convention”], available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_124/l_12420050517en00010003.pdf. Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, 2006 O.J. (L 264) 13 [hereinafter “Regulation implementing the Aarhus Convention”], available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_264/l_26420060925en00130019.pdf. For an excellent overview of the

Specifically, Section II discusses official obligations to:

- Provide information about government processes at the Community level
- Allow public participation, although note that treatment of participation in rulemaking is covered in Chapter 2 and party status and intervention in adjudication is covered in Chapter 1.
- Provide information about decisional outcomes
- Respond to queries from the public

Section III: Access to Documents. This section discusses the EU analog to the U.S. Freedom of Information Act¹⁷: Regulation No 1049/2001 (the Access Regulation).¹⁸ Like FOIA, the Access Regulation establishes a right to documents held by EU institutions, subject to a series of exemptions, that is judicially enforceable (as well as reviewable by the Ombudsman). This access right is rooted in Article 255 of the Treaty on European Union.¹⁹

Specifically, Section III discusses:

- Scope, history and basic principles of the Access Regulation
- Administrative provisions governing access
- Exceptions
- Review of decisions to deny access
- Dissemination of information via the public registers, Internet and Official Journal

scope of the Convention, with links to multiple relevant documents, see the dedicated webpage on the European Commission's site, <http://ec.europa.eu/environment/aarhus/index.htm>.

The questions of *who* can get such enforcement, in *which* courts, and for *what* sorts of government actions implicate complex questions of standing under EU law that are beyond the scope of this chapter. For a good introduction to these questions, see "Access to Justice" at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/03/210&format=HTML&aged=0&language=EN&guiLanguage=en>, and the EC Commissioned Study "Access to Justice in Environmental Matters – Final Report," available at http://ec.europa.eu/environment/aarhus/pdf/accesstojustice_final.pdf.

¹⁷ 5 USC. § 552.

¹⁸ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 2001 O.J. (L 145), available at http://europa.eu/eur-lex/pri/en/oj/dat/2001/l_145/l_14520010531en00430048.pdf.

¹⁹ Treaty on European Union, 2002 O.J. (C 325), available at http://eur-lex.europa.eu/en/treaties/dat/12002M/pdf/12002M_EN.pdf.

Section IV: Data Protection. This Section reviews the stringent and extensive EU protections for personal data processed by either government or private entities. There is no U.S. privacy legislation of comparable breadth and intensity. Accomplished through two Directives (applying to Member States) and one Regulation (applying to Community institutions), the EU's strong commitment to protection of personal data frequently complicates, and sometimes conflicts with, its equally fundamental commitment to transparent access to information about government processes and decisions.

Specifically, Section IV discusses:

- Directive 95/46,²⁰ the general regulatory framework for Member States and Directive 58/2002,²¹ specifically addressing the electronic communications sector
- Extraterritorial application, including safe harbor and the special issue of airline passenger data
- Regulation No 45/2001,²² the comparable framework for Community institutions, which functions like a substantially enhanced U.S. Privacy Act²³
- Tension with transparency, addressed throughout

²⁰ Council Directive 95/46, 1995 O.J. (L 281) 37.

²¹ Council Directive 2002/58/EC, 2002 O.J. (L 201) 37.

²² Commission Regulation 45/2001, 2000 O.J. (L 8) 1.

²³ 5 USC. § 552a.

II. INFORMATION ABOUT, AND PARTICIPATION IN, GOVERNMENT PROCESSES AT THE COMMUNITY LEVEL

A. *The Formal Framework: “Soft Law” and, Except for Access to Documents, the General Absence of External Enforceability Outside the Area of Environmental Matters*

Lawyers accustomed to systems in which the important substantive powers and procedural obligations of government institutions and officials are specified in legally binding, externally enforceable instruments will find the EU system unusual in one respect: Much substantive authority is defined and delegated, many government processes are created, and a great deal of the transparency to which EU citizens are “entitled” is delineated by codes of conduct, codes of procedure, guidelines, and standards. Unlike statutes and regulations, these types of instruments do not have the force of law. Rather, they are “obligations” imposed by the issuing EU institution on itself. Individuals within the institution may understand them as binding, and they may be enforced through more, or less, formal internal mechanisms – but controversy over the fact or extent of compliance with them cannot be brought before any outside authority with power to render a dispositive judgment.

Most aspects of the general obligation to provide information about, or to allow participation in, government processes at the Community level follow this pattern of intra-institutional, self-imposed, self-enforced “soft law.” The most important of these documents are the following:

For the Commission:

- 1) Rules of Procedure,²⁴ with the Annex implementing the Access Regulation²⁵
- 2) Code of Conduct for Commissioners²⁶
- 3) Code of Good Administrative Behavior²⁷ for staff, another Annex to the Rules of Procedure
- 4) General Principles and Minimum Standards for Consultation of Interested Parties by the Commission²⁸

²⁴ Commission Decision of 15 November 2005 amending its Rules of Procedure, 2005 O.J. (L 347) 83, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_347/l_34720051230en00830090.pdf [hereinafter “Commission’s Rules of Procedure”]. This decision replaced the entire text of the previous set of rules, which had been adopted in 2000. See 2000 O.J. (L 308) 26.

²⁵ Commission Decision of 5 December 2001 amending its rules of procedure, 2001 O.J. (L 345) 94, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l_345/l_34520011229en00940098.pdf [hereinafter “Commission’s Rules of Procedure Access Reg Annex”].

²⁶ Code of Conduct for Commissioners, SEC(2004) 1487/2, available at http://ec.europa.eu/commission_barroso/code_of_conduct/code_conduct_en.pdf [hereinafter “Commissioners’ Code of Conduct”].

²⁷ Commission Decision of 20 October 2000 amending its rules of procedure, 2000 O.J. (L 267) 63, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2000/l_267/l_26720001020en00630066.pdf [hereinafter “Code of Good Administrative Behavior for Commission Staff”].

For the Council:

- 1) Rules of Procedure²⁹ and the
- 2) Code of Good Administrative Behavior³⁰

For the European Parliament:

- 1) Rules of Procedure, with numerous Annexes covering internal governance, inter-institutional agreements, and Access Regulation compliance³¹
- 2) Code of Conduct for staff³²

Two areas of deviation from this pattern underscore that a deliberate policy choice has been made here.

The first, and by far the most important, is access to documents, discussed in Section III below. *This* aspect of transparency is controlled by an instrument, the Access Regulation,³³ that creates inter-institutional, mandatory duties enforceable by the judiciary and reviewable by the Ombudsman.

²⁸ Commission of the European Communities, Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission, COM (2002) 704 final (December 12, 2002), available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0704en01.pdf [hereinafter “Standards for consultation”]. The Communication form was chosen deliberately because it was non-binding. See id. § 2.02*.

²⁹ Council Decision of 22 March 2004 adopting the Council’s Rules of Procedure, 2004 O.J. (L 106) 22, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_106/l_10620040415en00220045.pdf [hereinafter “Council’s Rules of Procedure”]. Annex II of this document contains the provisions implementing the Access Regulation. The original version of the Council’s implementing provisions was the Decision of 20 November 2001, 2001 O.J. (L 313) 40.

³⁰ Code of good administrative behavior for the General Secretariat of the Council of the European Union and its staff in their professional relations with the public, 2001 O.J. (L 145) 43, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_189/c_18920010705en00010004.pdf [hereinafter “Code of Good Administrative Behavior for General Secretariat”].

³¹ Various versions of Parliament’s Rules of Procedure can be accessed at the following page of Parliament’s Register of Documents: <http://www.europarl.europa.eu/registre/recherche/ResultatsAbreges.cfm?typedoc=REGL>. For the 2007 version, see [http://www.europarl.europa.eu/registre/reglement/2007/01-01/EP-PE_REGL\(2007\)01-01_EN.rtf](http://www.europarl.europa.eu/registre/reglement/2007/01-01/EP-PE_REGL(2007)01-01_EN.rtf) [hereinafter “Parliament’s Rules of Procedure”].

Important transparency-related events in the Rules’ history include: Amendment to the Rules of Procedure: Access to European Parliament documents, 2002 O.J. (C 140 E) 116, available at <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/ce140/ce14020020613en01160116.pdf>, and Parliament’s adoption of the Bureau Decision on Public Access to European Parliament Documents, 2001 O.J. (C 374) 1, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_374/c_37420011229en00010006.pdf/.

³² Guide to the obligations of officials and other servants of the European Parliament, PV BUR March 11, 2002, available at http://www.europarl.europa.eu/register/pdf/465429_EN.pdf.

³³ Supra note 2.

The second is the Aarhus Convention, which contemplates legally binding rights to information and participation (as well as substantive justice) in environmental matters running, in different configurations depending upon various factors, to individuals and non-governmental organizations.³⁴ The Explanatory Memorandum accompanying the original version of the Regulation that has now implemented the Convention expressly noted, “Accession to the Aarhus Convention will only be possible once there are legally binding measures that apply to the European Community,”³⁵ and later explicitly declared that “[a] non-binding instrument, such as internal guidelines or codes of conduct, are not sufficient as such to allow the Community to ratify” the Convention.³⁶ In addition, two directives implementing these rights within members States have been adopted;³⁷ a third – involving the precise issue of legal remedies – is pending.³⁸

B. Information About How The Institutions Work

1. The Commission

The Commission’s website at <http://ec.europa.eu> (reachable directly at that URL, or via www.Europa.eu) has done a great deal to make its structure and process accessible to the public.

a. Meetings. A searcher interested in information about the Commission’s meetings can learn that, as contemplated in the its Rules of Procedure,³⁹ they are held at least once a week – on Wednesday in Brussels, except when Parliament is in plenary session when they are held on Tuesday in Strasbourg.⁴⁰ The meetings are not public and all discussions are confidential.⁴¹ Agendas are available, as are concise minutes within about a week of the meeting.⁴² Both are

³⁴ As explained in note 16 supra, the issues of individual and organizational standing to seek relief from the courts of the EU and/or Member States raised by Aarhus are quite complex – and by no means fully resolved as yet. See text accompanying the next note.

³⁵ COM (2003) 622, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0622en01.pdf.

³⁶ Id. at 5.

³⁷ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on Public access to environmental information and repealing Council Directive 90/313/EEC, 2003 O.J. (L 41) 26 available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_041/l_04120030214en00260032.pdf; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, 2003 O.J. (L 156) 17, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_156/l_15620030625en00170024.pdf.

³⁸ Proposal for a Directive of the European Parliament and the Council on access to justice in environmental matters, COM (2003), 624, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0624en01.pdf. This proposed directive seems to be stalled. See http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=186297 and <http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=2&procnum=COD/2003/0246>.

³⁹ Commission’s Rules of Procedure, supra note 24, art. 5.

⁴⁰ http://ec.europa.eu/atwork/collegemeetings/index_en.htm.

⁴¹ Commission’s Rules of Procedure, supra note 24, art. 9.

⁴² The most recent set of each is available directly through links on http://ec.europa.eu/atwork/collegemeetings/index_en.htm. Prior ones have to be searched out in the Register of

published in French and English. Items not on the agenda may be discussed if this is approved by majority vote.⁴³ Although a vote may be requested by any member, decisions are typically not made during the meetings.⁴⁴ Rather, a draft is circulated for comments and/or amendments within a certain time; if none are suggested, the proposal is adopted.⁴⁵ Decision is by simple majority, with the President breaking a tie if necessary.⁴⁶

b. *Monitoring the Commission's Policy Program.* Meeting agendas are built around the Commission's *work programme* adopted, pursuant to its Rules of Procedure, to "set[] out major political priorities and identif[y] legislative initiatives, executive and other acts that the Commission intends to adopt for the realisation of these priorities."⁴⁷ The 2007 programme, for example, centers around four "strategic objectives" continued from 2006: prosperity, solidarity, security and cultivating a strong European voice in the world (phrased in 2006 as "external responsibility").⁴⁸ Recent years' work programmes are available directly through a link on the work programme description page.⁴⁹ (Earlier years' can be found by using the search function in the Commission's Historical Archives.⁵⁰)

The policy detail necessary to implement the work programme is found in two other documents. The "Forward Programming Document" is a series of charts showing, inter alia, the title, legal authority, estimated adoption date, "political motivation/brief description," and budgetary

Commission Documents by date. This is not difficult, but instructions are lacking. Go to <http://ec.europa.eu/transparency/regdoc/registre.cfm?CL=en> and, after clicking "document search" at the bottom of the page, specify "minutes" or "agenda" under "type," and use a range of dates if you are unsure of the exact time of meeting.

⁴³ For more details on agenda procedure, see Commission's Rules of Procedure, supra note 24, art. 6.

⁴⁴ See http://ec.europa.eu/atwork/basicfacts/index_en.htm#meet; http://ec.europa.eu/atwork/collegemeetings/index_en.htm.

⁴⁵ http://ec.europa.eu/atwork/basicfacts/index_en.htm#meet. "The Commission can empower one or more of its members to make a decision, as long as the principle of collective responsibility is respected. These powers of decision can, under certain conditions, be sub-delegated to directors-general and heads of service in the same way...." Id. See Commission Rules of Procedure, supra note 24, art. 14. There are currently 26 directors-general and nine heads of service, who lead the principal departments ("directorates" and "services") into which the Commission is divided. Id. See also http://ec.europa.eu/dgs_en.htm.

⁴⁶ More details about meeting procedure can be found in the Rules of Procedure. See supra note 24, arts. 5-11. http://ec.europa.eu/atwork/collegemeetings/index_en.htm.

⁴⁷ http://ec.europa.eu/atwork/programmes/index_en.htm. See Commission's Rules of Procedure, supra note 24, art. 2.

⁴⁸ Communication from the Commission to the Council, the European Parliament, the European Economic & Social Committee and the Committee of the Regions, Commission Legislative & Work Programme 2007 Com (2006) 629 final, at 3-4, October 24, 2006, available at http://ec.europa.eu/atwork/programmes/docs/clwp2007_en.pdf. These objectives are to be realized through six more concrete "priorities for 2007": modernizing the European economy; addressing the challenges of European society; a better management of migration flows; secure, competitive and sustainable energy; making Europe a better place to live; and Europe as a world partner. Id at 5-8.

⁴⁹ http://ec.europa.eu/atwork/programmes/index_en.htm.

⁵⁰ http://ec.europa.eu/historical_archives/index_en.htm. Enter Commission Work Programme in the generic Search box.

implications of planned legislative proposals and major non-legislative acts for the upcoming year. The “Execution Report” is the complementary series on measures actually adopted. Both are updated monthly and can be seen via direct links on the Work Programme webpage.⁵¹

Equally important, documents produced in the course of attempting to implement these various legislative and non-legislative elements can be accessed through the “Roadmaps” links on the Work Programme page. The documents that might be found in Roadmaps are quite varied, including formal Communications from the Commission to other EU institutions, White and Green papers (see below), and Proposals setting out various options or proposed courses of action.⁵²

The work programme is the operational centerpiece of a much larger planning cycle of documents that a searcher trying to monitor the Commission’s work would want to access.⁵³

When it is first constituted, a new Commission establishes its “five-year strategic objectives,” a document containing mid- to long-range objectives to be accomplished during its term of office.⁵⁴ Each year, an “annual policy strategy” identifies particular political priorities and key initiatives for the following year, and proposes an allocation of financial and human resources.⁵⁵ The Commission President presents this to the Council and the European Parliament, beginning an extended dialogue on the policy and budget proposals. Ultimately, the product is the Commission’s work programme for the following year.

Each directorate (department) establishes its own work programme – called an “annual management plan” – to translate the strategic objectives of the Commission into concrete operations. Eventually, each Director-General (department head) submits an “annual activity report” documenting how successful the directorate was in achieving its plan.⁵⁶ All of these directorate reports are, in turn, combined into a single “synthesis report” on management achievements and performance of the previous year, in which the Commission

⁵¹ http://ec.europa.eu/atwork/programmes/index_en.htm.

⁵² See, e.g., http://ec.europa.eu/atwork/programmes/docs/clwp2007_roadmap_strategic_initiatives.pdf (Index of 2007 Strategic and Priority Initiatives Roadmaps); http://ec.europa.eu/atwork/programmes/docs/clwp2007_roadmap_priority_initiatives.pdf (2007 Priority Initiatives Index).

⁵³ This cycle is described at http://ec.europa.eu/atwork/synthesis/index_en.htm. A pictorial representation, with more detail, including dates, can be found at http://ec.europa.eu/atwork/cycle/index_en.htm.

⁵⁴ The current document, Strategic Objectives 2005-2009, COM (2005) 12, January 16, 2005, is available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0012en01.pdf.

⁵⁵ The Annual Policy Strategy for 2008, COM (2007) 65, February 21, 2007, is available at http://ec.europa.eu/atwork/synthesis/doc/aps_2008_en.pdf.

⁵⁶ Specific operational detail, chain of command, and various professional and ethical responsibilities of both the Commissioners and directorate staff in relation to the work programme and overall Commission objectives are set out in the Commissioners’ Code of Conduct, supra note 26, §§ 2.1–2.4.

also decides any measures necessary to correct major management weaknesses.⁵⁷ The Commission prepares a comparable synthesis report on policy achievements of the previous year.⁵⁸

All these documents are available via direct links on the “European Commission At Work/The Process in Detail” webpage.⁵⁹

White Papers are major issue documents that include proposals for Community action in a broad area. Recent topics have included European financial services policy, exchange of information on convictions, space policy, and EU communication with citizens. Sometimes, they follow a *Green Paper*, which launches an EU-wide public consultation process.⁶⁰ When a White Paper is favorably received by the Council, it can become the action program for the EU in the area concerned.⁶¹ White Papers since 1985, and Green Papers since 1984, are available in full text, or summary, through direct links on the Commission’s site; when only a summary is available online, the site provides Web and conventional contact information for obtaining a hard copy.⁶²

c. Information About the Co-Decision Procedure (and Other Commission Inter-Institutional Communications)⁶³). Although the procedure used for legislative decision-making will depend on what the Treaty provides in the particular substantive area, in most instances the *co-decision procedure* will be employed.⁶⁴

In co-decision, the Commission both proposes the legislation and “plays the role of mediator” as the proposal is considered by the Council and the European Parliament, who jointly have “the role of EU legislator.”⁶⁵ In the course of formulating the proposal, the Commission may consult with external expert groups as well as its own various directorates and services, use the Green and White Paper processes and – depending on the issues – may obtain the opinion of the

⁵⁷ The most recent of these reports available at the time of this chapter is Synthesis of the Commission’s Management Achievements in 2005, COM (2006) 277, June 7, 2006, available at http://ec.europa.eu/atwork/synthesis/doc/com2006_277_en.pdf.

⁵⁸ The report on Policy Achievements in 2006, COM (2007) 67, February 28, 2007, is available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0067en01.pdf.

Both the management and the policy syntheses are communicated to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions.

⁵⁹ http://ec.europa.eu/atwork/synthesis/index_en.htm#synthesis.

⁶⁰ See Section IIC1b.

⁶¹ http://europa.eu/scadplus/glossary/white_paper_en.htm.

⁶² http://www.europa.eu/documents/comm/white_papers/index_en.htm (white); http://europa.eu/documents/comm/green_papers/index_en.htm (green).

⁶³ These include budget dossiers, international agreements, and Communications from the Commission. See text accompanying infra note 69.

⁶⁴ http://ec.europa.eu/atwork/basicfacts/index_en.htm#meet See also the pages introduced at http://ec.europa.eu/codecision/procedure/index_en.htm.

⁶⁵ http://ec.europa.eu/atwork/basicfacts/index_en.htm#meet. Co-decision, as well as the other legislative procedures, are discussed in more detail in Section IIC2bii.

European Economic and Social Committee (comprised of nearly 350 representatives of business, consumer, union, professional, etc. groups from Member States) and/or the Committee of the Regions (comprised of nearly 350 representatives of local and regional government entities of Member States).⁶⁶ Co-decision can involve up to three readings in Parliament and in the Council. In the event that Parliament and the Council continue to disagree, a Conciliation Committee (composed equally of Council and Parliament representatives) will be required.⁶⁷ The Commission is involved throughout, and takes the initiative at the various stages.

Fortunately, the Commission's website offers an excellent service – *PreLex* – that: (i) provides a complete timeline of the co-decision process, in several formats; (ii) indicates the stage the matter (“dossier”) has reached, with names of relevant institutions and officials; and (iii) provides immediate links to at least the principal documents.⁶⁸

PreLex similarly allows the searcher to track, and obtain documents from, dossiers proceeding through the less common types of legislative procedure (consultation or assent),⁶⁹ as well as budget dossiers, international agreements, and Communications from the Commission to the other EU institutions.⁷⁰

d. Information About the Comitology Procedure. In its executive role, the Commission is empowered to implement the binding normative texts (regulations, decisions and directives) of the EU. The Commission's *services* (a term used, in this context, generically to include the directorates) are the institutional mechanism through which implementation is actually accomplished, and *comitology* is the procedural mechanism through which Parliament – and in some circumstances, the Council – exercises oversight of the implementation program to ensure that it remains within the authorizing text.⁷¹

Comitology (i.e. “committee process”) is a set of procedures first provided, and then modified in important respects to increase transparency and enhance Parliament's role, by three Council decisions.⁷² A large group of committees – typically, between 240 and 300 – represents major

⁶⁶ The provisions governing both are contained in Articles 257-265 of the Treaty Establishing the European Communities. See http://ec.europa.eu/codecision/stepbystep/text/index_en.htm.

⁶⁷ The process is graphed in 28 detailed steps at http://ec.europa.eu/codecision/stepbystep/diagram_en.htm. On the Conciliation Committee, see Section IIB2*aii*.

⁶⁸ <http://ec.europa.eu/prelex/apcnet.cfm?CL=en> Parliament has an at least equally excellent comparable system, *OEIL*. See Section IIB2*bi*.

⁶⁹ See Section IIB2*bi*.

⁷⁰ See <http://ec.europa.eu/prelex/apcnet.cfm?CL=en>.

⁷¹ http://europa.eu/scadplus/glossary/comitology_en.htm. For a more Commission-centric explanation, see <http://ec.europa.eu/transparency/regcomitology/aide.cfm?page=faq&CL=en>.

⁷² Council Decision of 17 July 2006 amending Decision 199/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, 2006 O.J. (L 200) 11, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_200/l_20020060722en00110013.pdf; ; Council Decision laying down the procedures for the exercise of implementing powers conferred on the Commission, 1999 O.J. (L 184) 23, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/1999/l_184/l_18419990717en00230026.pdf; Council Decision of 13 July 1987, 1987 O.J. (L 197) 33, available at <http://europa.eu/abc/treaties/archives/en/entr20.htm>.

policy areas; each is chaired by a representative of the relevant service and contains representatives of each of the Member States. (The list of current committees can be found in the Commission's Register of Comitology.)⁷³ After a binding text is adopted, the relevant service will draft proposed implementing measures. These are submitted to the appropriate comitology committee for its opinion. What happens next depends on which procedure has been invoked in the text calling for implementing measures⁷⁴:

- *advisory*: committee opinion is dispositive, and if the committee does not concur with the proposal, the Commission must give way; this procedure is generally used only for matters not very politically sensitive.
- *management*: if the committee does not concur with the proposal, the matter is referred to the Council, which makes the decision; this procedure is used for measures relating to management of common agricultural policy, fisheries, and the main Community programmes.
- *regulatory*: the proposal is approved if accepted by all the Member States within the committee; absent this, the proposal is referred to the Council. If the Council cannot reach agreement, the Commission can finally adopt the implementing measure. This procedure is used for measures relating to protection of health or safety of persons, animals or plants, and measures amending non-essential provisions of the basic legislative instruments.⁷⁵
- *regulatory procedure with scrutiny*: a new variation, added in July 2006, that enhances the power of Parliament; the proposal is defeated if a majority of Parliament (or a qualified majority of the Council) opposes it on “grounds that the proposed measures exceed the implementing powers provided for in the basic instrument or are not compatible with the aim or the content of the basic instrument or do not respect the principles of subsidiarity or proportionality.”⁷⁶ This procedure is available for measures of general scope intended to amend non-essential elements of a basic instrument adopted through the codecision procedure.⁷⁷

⁷³ The 2007 list is at http://ec.europa.eu/transparency/regcomitology/include/comitology_committees_EN.pdf.

⁷⁴ See <http://ec.europa.eu/transparency/regcomitology/aide.cfm?page=faq&CL=en>.

⁷⁵ http://europa.eu/scadplus/glossary/comitology_en.htm. More details about operation of the various types, including data on numbers and policy areas, can be found in Report from the Commission on the working of committees during 2004, COM (2005) 554 final, November 10, 2005.

⁷⁶ Council Decision of 17 July 2006 amending Decision 199/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, 2006 O.J. (L 200), art. 1 § 7e.

⁷⁷ Id. arts. 1 § 2. Within a few months of adoption of the new procedure, the Commission, Council and Parliament issued a Joint Statement identifying 26 acts already in force that would be subject to “adjustment” under the new regulatory procedure with scrutiny. See Statement, 2006 O.J. (C 255) 1, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/c_255/c_25520061021en00010003.pdf.

The comitology committees adopt their own rules of procedure, although the Commission has provided a model Standard Rules of Procedure.⁷⁸ They meet several times a year, usually in Brussels in the Commission buildings. The agendas, draft implementing measures on which the committees are requested to opine, summary records of the meeting, and the voting results are available in the Register of Comitology.⁷⁹ This database with its website interface is, unfortunately, neither as user-friendly nor as complete as *PreLex*. Most significantly, it includes materials since only January 1, 2003.⁸⁰ It also includes only material that has been transmitted to the European Parliament during the comitology process, and not all documents exchanged between the Commission and the Member States are so transmitted.⁸¹ The Commission's website is quite candid that some of its services have a more liberal practice of transmitting documents than others.⁸² At a minimum, the searcher ought to be able to find agendas, summary records, voting results of all meetings, and the draft implementing measures of matters adopted through the co-decision procedure except that any such documents classified, for security reasons, higher than "EU Restricted" (i.e., "EU Confidential", or "EU Secret" or "EU Top Secret") may not appear in the Register.⁸³ Additional draft measures of particular importance to Parliament will also be included at request of the Parliamentary committee responsible, even though the underlying matter is not subject to co-decision, as the result of an agreement between the Commission and Parliament.⁸⁴

e. Information About the Process of Obtaining External Expert Advice. As the EU broadens the reach of its economic, social, and public health and safety policymaking, the Commission in its role as initiator of policy proposals increasingly requires specialized expert advice. Someone wanting to monitor the processes through which this occurs could consult several sources.

⁷⁸ Standard Rules of Procedure – Council Decision 1999/468/EC, O.J. (C 38) 3, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/c_038/c_03820010206en00030005.pdf.

⁷⁹ <http://ec.europa.eu/transparency/regcomitology/registre.cfm?CL=en>. The Register can be searched by year, title of committee, title of document or type of document.

⁸⁰ See <http://ec.europa.eu/transparency/regcomitology/aide.cfm?page=faq&CL=en> Part II.

⁸¹ Id.

⁸² "Not all comitology documents, exchanged between the European Commission and Member States, are sent to the European Parliament. For documents that are subject to neither a legal obligation, nor covered by the political agreement between the European Parliament and the Commission, it is for the Commission to decide what documents to transmit to Parliament."

"Practices vary across the Commission services and over time. For example, some Commission services send, on a routine basis, also draft implementing measures which are to be adopted in accordance with a legal base which was not subject to co-decision. Other services have a more selective approach. Preparatory working papers or contributions for the discussions from the Member States delegations are distributed in the comitology committees. These documents are not always sent to the European Parliament, since they do not fall under the obligations set out in the Comitology Decision." Id.

⁸³ Id.

⁸⁴ See Report from the Commission on the working of committees during 2004 at 4, COM (2005) 554 (November 10, 2005, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0554en01.pdf).

The Register of Expert Groups lists external expert advisory bodies, established either by Commission decision or by the Commission services, that assist the Commission and the services in preparing legislative proposals and other types of policy initiatives and in monitoring/coordinating implementation of existing policies throughout the EU.⁸⁵ The Register was created in response to a promise of greater transparency made to Parliament by the Barosso Commission on taking office in November 2004.⁸⁶

The Register provides various types of information about these groups of specialists, who are consulted in such areas as regulating air quality, authorizing cosmetic products, establishing automobile safety standards, determining sustainable fish catches, developing strategies to tackle unemployment or public health concerns, or designing European research programs.⁸⁷ Some of the groups, such as the Permanent Group on Direct Taxes, consist of officials of relevant agencies of national governments. Others, such as Advisory Group on the Food Chain and Animal and Plant Health, are stakeholders. Still others, such as the European Research Advisory Board, include members from government, academia, private industry and civic society.⁸⁸ The Register will list the category (e.g. scientists, academics, practitioners, industry, NGOs), though not the name, of group participants; identify the lead service involved and the group's mission and tasks – which may be to identify emerging issues in a policy area, advise in preparation of policy proposals and/or to monitor implementation in Member States and evaluate program effectiveness; and provide contact information.⁸⁹ If the information is available, it will also identify the authorizing instrument and supply a direct link to the *website* of those services that publish more detailed information on the group (although unfortunately not to the relevant *webpage*). The Register search function can identify groups working in a given policy area.

The Expert Register does not include the following groups⁹⁰:

- comitology committees⁹¹
- joint committees entities created as a result of international agreement – there appears to be no systematic way to identify these

⁸⁵ See <http://ec.europa.eu/transparency/regexpert/index.cfm?lang=EN>.

⁸⁶ See id.

⁸⁷ http://ec.europa.eu/secretariat_general/regexp/faq/faq.cfm?aide=2.

⁸⁸ See id.

⁸⁹ http://ec.europa.eu/secretariat_general/regexp/faq/faq.cfm?aide=1. However, in the case of “formal” groups – those created by Commission Decision or other legal act (rather than by one of the services with agreement of the Secretariat-General), the list of members is supposed to be published either on the website of the service or in the Official Journal. http://ec.europa.eu/secretariat_general/regexp/faq/faq.cfm?aide=2. For an example, see the membership of the European Research Advisory Board, at its website within the Directorate-General for Research, http://ec.europa.eu/research/eurab/members_eurab2.html.

⁹⁰ http://ec.europa.eu/secretariat_general/regexp/faq/faq.cfm?aide=1.

⁹¹ See the previous subsection.

- “independent experts charged with assisting the Commission in the implementation of framework programmes for research and development”
- “sectoral and cross-industry social dialogue committees, whose work is particularly aimed at the conclusion of agreements implemented by the Council or autonomous agreements implemented by the social partners themselves and at adopting frameworks for action”

Comitology committees can, of course, be located through the Register of Comitology⁹² discussed in the previous subsection. There appears to be no systematic way for the searcher to learn about the others.

Unlike FACA in the US, there is no overarching EU requirement that the meetings of the expert groups covered by the Register be open to the public and the Commission requires only publication of the information listed above.

As far as availability of documents produced by such expert groups, the Commission authorizes, but does not mandate, the services to “publish on their website any summary, conclusion or other working documents from the group.”⁹³ However, once documents produced by expert groups come into the possession of the Commission, they are covered by the Access Regulation and are subject to disclosure to the extent that none of the exceptions applies.⁹⁴

f. Using the Commission’s Register of Documents to Obtain Information About Its Processes. Although discussion of the dimensions and implementation of the public’s right to get particular documents produced in the Commission’s process is left to Section III, some consideration of the Commission’s Register of Documents is required here to complete the picture of what a searcher can learn about the Commission’s processes online.

A searcher seeking documents generated in the Commission’s processes can seek them either in the Commission’s own Register,⁹⁵ or through the general EU legal document search site, *Eur-lex*.⁹⁶ Unfortunately for the public, the two have different user interfaces and quite dissimilar search protocols.⁹⁷ As described in the next paragraph, the range of documents they

⁹² <http://ec.europa.eu/transparency/regcomitology/registre.cfm?CL=en>.

⁹³ http://ec.europa.eu/secretariat_general/regexp/faq/faq.cfm?aide=2.

⁹⁴ See Sections IIIB2, C; cf. Section IIIB11.

⁹⁵ <http://ec.europa.eu/transparency/regdoc/registre.cfm?CL=en>.

⁹⁶ <http://eur-lex.europa.eu/en/index.htm>. For a detailed description of how to research legislation through *Eur-lex*, see the excellent guide by Marylin Johnson Raisch, Librarian for International and Foreign Law at the Georgetown Law Center, *European Union Law: An Integrated Guide to Electronic and Print Research*, available at <http://www.llrx.com/features/eulaw2.htm>. Although the title date is 2003, this guide was updated in September 2006.

⁹⁷ Compare <http://ec.europa.eu/transparency/regdoc/recherche.cfm?CL=en> (Commission) with http://eur-lex.europa.eu/RECH_menu.do?ihmlang=en (Eur-Lex simple search) and http://eur-lex.europa.eu/expert/sg/sga_rqst/MASTER=dev!SESS=13b9463495c71f!CTXT=2!UNIQ=1!APPLIC=celexexp!FILE=mcelex!DGP=0!expert (Eur-Lex advanced search).

cover also differs. Apart from bright-line rule that the Commission's Register of Internal and Preparatory Documents goes back only to January 1, 2001,⁹⁸ it may not be easy for the searcher to determine categorically in advance whether the document he or she seeks will be in one database but not the other. Hence, as a practical matter, the searcher should search both – and ought not necessarily conclude the presumed document does not exist if it fails to appear in either.

The range of possible Commission documents follows a basic typology:

- COM: “Commission” documents intended for the other institutions; these will include the text and rationale of proposed legislation, communications to the Council and/or Parliament, reports, etc.
- C: Documents that refer to official acts taken by the Commission in the exercise of its own or delegated powers
Eur-lex contains “those which are forwarded to the Council or to Parliament for information”⁹⁹
- CSE: Commission documents intended for the European Council
- SEC: Miscellaneous internal Commission documents associated with the decision-making process and the general operation of its departments
Eur-lex contains “only those connected with an interinstitutional procedure”
- Studies: Reports from scientific, technical or other consultants requested by the Commission in areas in which it lacks specific expertise

Achieving more consistency in the interface and functionalities of the several institutional document Registers is one of the key recommendations for improving public access to documents contained in a 2006 Resolution passed by Parliament on the general topic of improving document access. See European Parliament resolution with recommendations to the Commission on access to the institutions' texts (2004/2125(INI)), P6_TA(2006) 0122, Recommendation 5 (adopted April 4, 2006), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2006-0122+0+DOC+PDF+V0//EN&language=EN>.

⁹⁸ <http://ec.europa.eu/transparency/regdoc/registre.cfm?CL=en>.

Even post-2001 there is some uncertainty about the completeness of the Register for these document types. The Commissions' most recent published report on compliance with the Access Regulation, Report from the Commission on the application in 2004 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, COM (2005) 348 final at § 2.1 (July 29, 2005), available at [http://www.europa.eu.int/comm/secretariat_general/sgc/acc_doc/docs/rapport_2004/COM\(2005\)348-EN.pdf](http://www.europa.eu.int/comm/secretariat_general/sgc/acc_doc/docs/rapport_2004/COM(2005)348-EN.pdf),⁹⁸ indicates that the Register does not provide direct links to even all documents in the Official Journal.⁹⁸ However, staff of the Secretariat General state that at this point the Register will normally provide direct access to all documents published in the Official Journal.

Article 17.1 of the Access Regulation requires annual compliance reports, and the Commission's failure to publish a report since the one for 2004 has led to a complaint with the Ombudsman, filed in April 2007 by Statewatch. See <http://www.statewatch.org/news/2007/apr/statewatch-ombuds-cases-april-2007.pdf>.

⁹⁹ <http://ec.europa.eu/prelex/apcnet.cfm?CL=en#> click “Description of the Database” then select “List of Document Types.”

In December 2001 amendments to its Rules of Procedure, the Commission committed to make available, “as far as possible by electronic means,” the “preparatory documents” for

- a proposed act of the Council, or of the Council and the European Parliament, after the adoption of a proposal for an act
- a proposed act, communication, report, or working document of the Commission, after the proposed action has been taken

“provided they do not reflect opinions or individual positions” and so long as no other exception recognized by the Access Regulation applies.¹⁰⁰ Hence, these documents should appear in the Register (at least after January 2001).

There is, however, continued controversy over the adequacy of the Register. The Ombudsman has already agreed with one complainant about the Register’s shortcomings¹⁰¹ and, at the time of this chapter’s publication, another complaint is pending that the Register cannot satisfy the Access Regulation because “only a fraction” of Commission documents are included.¹⁰² Hence if the searcher does not find material in response to a search of the Register (or *Eur-Lex*), he or she ought to attempt a document request regardless by providing a general description of the material sought. The form is available online¹⁰³ and can be submitted electronically. Alternatively, a request can be emailed through an electronic link, and mailed conventionally.¹⁰⁴ The Commission also publishes, in electronic and hard copy, a Citizen’s Guide to Obtaining Documents¹⁰⁵ that can be helpful.

g. General Duty To Provide Information About Commission Procedures and Appeals.

The Commission’s Code of Good Administrative Behavior directs its staff to provide certain information to the public about procedures:

- *Timely response to a query about process:* “Where a member of the public requires information relating to a Commission administrative procedure, staff shall ensure that this information is provided within the deadline fixed for the procedure in question.”¹⁰⁶
- *Giving notice of possible avenues of appeal:* “[M]easures notified to an interested party should clearly state that an appeal is possible [where Community law so provides] and describe how to submit it (the name and office address of the person or department with

¹⁰⁰ Commission Rule of Procedure Access Reg Annex, supra note 25, art. 9 § 3. On the exceptions, see Section IIIC.

¹⁰¹ See Ombudsman Case 1764/2003/ELB, decision of 12 January 2006; Section III E1.

¹⁰² See <http://www.statewatch.org/news/2007/apr/statewatch-ombuds-cases-april-2007.pdf>.

¹⁰³ <https://ec.europa.eu/transparency/regdoc/fmb/formulaire.cfm?cl=en>.

¹⁰⁴ See <http://ec.europa.eu/transparency/regdoc/aide.cfm?page=aidedocuments&CL=en>.

¹⁰⁵ http://ec.europa.eu/transparency/citguide/index_en.htm. When this chapter was written, the link to the access form within the Guide did not work. However, the link within the Register, supra note 103, is functioning.

¹⁰⁶ Code of Good Administrative Behavior for Commission Staff, supra note 27, § 2.

whom the appeal must be lodged and the deadline for lodging it). Where appropriate, decisions should refer to the possibility of starting judicial proceedings and/or of lodging a complaint with the European Ombudsman.”¹⁰⁷

By its terms, the Code not only reaches the Commission’s regular staff but also directs that “persons employed under private law contracts, experts on secondment from national civil services and trainees etc, working for the Commission” ought to be “guided by it in their daily work.”¹⁰⁸

2. The European Parliament

Even more than the Commission’s website, *Europarl*,¹⁰⁹ the site for the European Parliament, has become an excellent source for clear and concise information about the institution and its members, as well as for documents about its operations.

a. *Information About Organization and Operation.*

i. **Members.** A searcher wanting to know the name of any of the more than 700 Members of Parliament can find it by clicking on a nicely designed map of the EU by country.¹¹⁰ With the name, the searcher gets ready access to a treasure trove of information. The Member’s website provides:

- photo
- political party affiliation¹¹¹
- short CV
- committee assignments, each with links to a summary committee webpage, which in turn not only explains the committee’s function but also links to the webpages of the chair and vice-chairs, *and* offers tabs to the committee’s calendar of meetings and list of reports, each of which is directly available at that site
- membership in delegations,¹¹² each with links to the delegation chair and all Members, and a tab to the delegation calendar of meetings

¹⁰⁷ Id. § 3.

¹⁰⁸ Id.

¹⁰⁹ <http://www.europarl.europa.eu>. On Parliament’s commitment to make documents directly available through the *Europarl* site, see Bureau Decision on Public Access to European Parliament Documents, 2001 O.J. (C 374) 1, 2 art. 5, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_374/c_37420011229en00010006.pdf/.

¹¹⁰ <http://www.europarl.europa.eu/members.do?language=EN>.

¹¹¹ See next subsection.

¹¹² See id.

- a list of his/her activities in plenary sessions, including
 - Questions posed,¹¹³ with a link to the actual questions and answers and a notation that questions not yet available in that location can be found in the Public Register of Documents, with a link that takes the searcher to the search page of that Register
 - Motions for Resolution, with a link to a summary description of each motion, the co-sponsors and date, with a link on that page to the motion itself in several formats
 - Reports authored by the Member, with a link to the title of the report and the committee or other context, with a link on that page to the report itself in several formats
 - Speeches, with a link to the title and date, with a link on that page to the speech itself (in the Member's language)
- a link to the Member's Declaration of Financial Interests filing
- contact information

The Archives section contains the webpages of former Members. It is organized both alphabetically and by Parliament, going back to the first parliamentary term.¹¹⁴

In addition, the site provides various data about the Members collectively. A searcher can find a chart of Members by state and political group.¹¹⁵ He/she can also search by committee or delegation name to get a Member list of those groups, showing political party affiliation and containing links to the Member websites.¹¹⁶

ii. Committees and Other Internal Structure. The searcher wishing information about Parliament's 22 standing committees, who draft legislative proposals and reports for the plenary sessions,¹¹⁷ can start with a list of the committees that (as is typical with this very helpful website) provides a gateway to much readily accessible information.¹¹⁸ From the list itself, the

¹¹³ See id.

¹¹⁴ <http://www.europarl.europa.eu/members/archive.do?language=EN>.

¹¹⁵ <http://www.europarl.europa.eu/members/expert.do?language=EN>.

¹¹⁶ <http://www.europarl.europa.eu/members/expert/searchForm.do?language=EN>.

¹¹⁷ <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=45&pageRank=5&language=EN>.

Although this information page states that there are 20 standing committees, the list of active committees at the time this chapter was published contains 22. See <http://www.europarl.europa.eu/activities/expert/committees.do?language=EN>. The last committee on this list is a temporary committee. See next footnote.

¹¹⁸ <http://www.europarl.europa.eu/activities/expert/committees.do?language=EN>. Temporary committees may also be created as needed. See Parliament's Rules of Procedure, *supra* note 31, Rules 175, 179, 181. Temporary

searcher can access *either* a summary committee webpage *or* a window that lists publicly available documents from committee meetings,¹¹⁹ organized by date and accessible via links on that page. The summary committee webpage summarizes the committee's substantive responsibilities and provides links to the webpages of the chair and vice-chairs as well as tabs to the current calendar of committee meetings. It also contains a list of present and past committee reports with immediately accessible links in multiple formats. Most important, the summary committee page provides a link to the committee *website*.

(The existence of both a summary webpage and a full website is potentially confusing to users. This could be remedied by a clear label on the former signaling that it is just a summary and not the committee's full web presence.)

From the committee website, the searcher can get access to all of the items accessible from the webpage, as well as to:

- hearings – leading to a page that will not only list hearings but also provide immediate access to transcripts and, sometimes, other miscellaneous good things such as briefing materials, posters, etc.
- important reports – direct links to various current and past reports the committee considers particularly important
- links to relevant external legal documents, activities, websites, etc. pertaining to the committee's mission
- list of subcommittees and links to their websites (which have analogous content)
- links to relevant delegations (see below) and their websites
- links to other relevant EU institutions

The chairs of the standing committees together form the *Conference of Committee Chairmen*, who coordinate committee work.¹²⁰ They may make recommendations on the agendas for Parliament's plenary sittings and on which committee should have jurisdiction over a disputed matter, although they do not have final authority on either issue (see next paragraph).¹²¹

committees appear last in the list of committees, although the searcher may need to go to the actual committee website to see the designation "temporary." At the time this chapter was written, there was one temporary committee, the Temporary Committee of Inquiry into the Crisis of the Equitable Life Assurance Society. See http://www.europarl.europa.eu/comparl/tempcom/equi/default_en.htm. For the list of former temporary committees, see http://www.europarl.europa.eu/committees/home_temp_en.htm.

¹¹⁹ See next subsection.

¹²⁰ Parliament's Rules of Procedure, *supra* note 31, Rule 26.

¹²¹ *Id.*; <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=53&pageRank=9&language=EN>.

The crucial power of agenda setting is held by the *Conference of Presidents*, comprising the President of Parliament and the chairs of the eight *political groups* currently represented in Parliament.¹²² In addition to drawing up the timetable and agenda for the plenary debates, the Conference formulates the legislative program, allocates seats in the Chamber, determines the composition of the committees and delegations (see next paragraph), and sets their assignments.¹²³ More generally, it directs the course of Parliament's relations with other EU institutions as well as with the parliaments of the Member States and other countries.¹²⁴

In addition to committee or subcommittee service, Members may also serve on one of 35 *delegations*, which interact with parliaments of countries that are not EU members.¹²⁵ A searcher seeking information on the delegations would proceed much as with committees. The list of delegations¹²⁶ provides direct access to a page of meeting documents, with links, and to the delegation's summary webpage (containing links to the members' webpages, the delegation's website, and a tab of the delegation's calendar of meetings.) The delegation websites vary somewhat in content, but tend to contain the same sorts of material and links as the committee websites. As with the committees, the chairs of the delegations together form a *Conference of Chairs* that oversees and organizes the work of the delegations.¹²⁷

The 4000-person staff of Parliament itself, the *Secretariat* (under the direction of the Secretary-General), includes a large number of interpreters and translators, both to ensure adequate language services for the Members and to accomplish the legally required translation of documents into all Member State languages.¹²⁸ A searcher wishing to know the administrative details of Parliament's functioning – including the responsibilities of the eight Directorate-Generals under the charge of the Secretary General – can consult the several webpages following the Secretariat's main page.¹²⁹ Five *Quaestors* are responsible for providing infrastructure

¹²² Parliament's Rules of Procedure, supra note 31, Rules 23-24. Nineteen Members, representing at least five States, are needed to form a political group. Members may not belong to more than one political group; Members may belong to no group ("non-attached"). The list of current groups can be found at http://www.europarl.europa.eu/groups/default_en.htm. Two representatives of non-attached Members also have seats – but no voting rights. See Rule of Procedure 23.

¹²³ Parliament's Rules of Procedure, supra note 31, Rule 24; <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=45&pageRank=7&language=EN>.

¹²⁴ Parliament's Rules of Procedure, supra note 31, Rule 23; <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=53&pageRank=2&language=EN>.

¹²⁵ Parliament's Rules of Procedure, supra note 31, Rule 188; <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?language=EN&id=59>; <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=45&pageRank=6&language=EN>.

¹²⁶ <http://www.europarl.europa.eu/activities/expert/delegations.do?language=EN>.

¹²⁷ Parliament's Rules of Procedure, supra note 31, Rule 27; <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=53&pageRank=10&language=EN>.

¹²⁸ <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?language=EN&id=54>. A searcher can find an organizational chart of the Secretariat at this webpage.

¹²⁹ The Directorate-Generals (staff departments) supporting Parliament are the DG for the Presidency, the DG for Internal Policies, the DG for External Policies, the DG for Information, the DG for Personnel, the DG for Infrastructure & Interpretation, the DG for Translation & Publishing, and the DG for Finance.

(general services, equipment, working conditions, etc.) to the Members.¹³⁰ Their names with webpage links,¹³¹ and the calendar of their meetings,¹³² can be found readily on the website. With the *President of the Parliament* and his/her 14 Vice-Presidents, the Quaestors comprise the *Bureau*,¹³³ which determines the internal operations of Parliament, prepares its draft budget, and decides “administrative, staff and organisational matters concerning Members and the internal organization of Parliament, its Secretariat and its bodies.”¹³⁴

iii. Parliamentary Sessions and Other Meetings. Parliament meets each year for 12 part-session plenary debates in Strasbourg and six in Brussels.¹³⁵ Committees and delegations meet once or twice a month in Brussels, during a specified two-week period. Political groups also meet in Brussels during a specified one-week period.¹³⁶ A searcher can access Parliament’s annual calendar showing these weeks for the entire year.¹³⁷

For upcoming plenary debates, draft agendas are available at a page that opens to the list of currently scheduled items, giving the nature of the item, the presenter, the topic, and the originating committee.¹³⁸ Most important, it also gives direct links to the documentary history of the item – whether that be found in *PreLex* for matters subject to the co-decision procedure¹³⁹ or in the OEIL procedure file¹⁴⁰ for other matters. The agenda also shows the allocated speaking times, as well as the deadlines for offering amendments. Past agendas are available both through links on a set of dedicated webpages¹⁴¹ and in the Archives.¹⁴² The same is true for debates;¹⁴³

¹³⁰ Parliament’s Rules of Procedure, supra note 31, Rule 25;
<http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=53&pageRank=6&language=EN>.

¹³¹ <http://www.europarl.europa.eu/members/expert/otherBodies/search.do?body=2369&language=EN>.

¹³²

<http://www.europarl.europa.eu/activities/expert/meetCal/calSearch.do?actionType=search&date=&genericBody=O D&body=QUE&term=LONG TERM&place=A X&refreshCache=yes&language=EN>.

¹³³ For the current list of members, see

<http://www.europarl.europa.eu/members/expert/otherBodies/search.do?language=EN&body=2370>.

¹³⁴ Parliament’s Rules of Procedure, supra note 31, Rules 21-22.

<http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=53&pageRank=4&language=EN>.

¹³⁵ <http://www.europarl.europa.eu/activities/public/staticDisplay.do?language=EN&id=102>. See Parliament’s Rules of Procedure, supra note 31, Rules 126, 128.

¹³⁶ <http://www.europarl.europa.eu/activities/public/staticDisplay.do?language=EN&id=102>. See also <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=45&pageRank=3&language=EN>.

¹³⁷ <http://www.europarl.europa.eu/pdf/general/cal2007.pdf>.

¹³⁸ <http://www.europarl.europa.eu/activities/public/plenSession.do?language=EN>.

¹³⁹ See Section IIB1c (Commission) and Section IIB2bii (Parliament).

¹⁴⁰ See Section IIB2bi.

¹⁴¹ Starting at <http://www.europarl.europa.eu/activities/expert/agenda.do?language=EN>.

¹⁴² <http://www.europarl.europa.eu/activities/archive/agenda.do?language=EN>.

¹⁴³ Dedicated pages starting at <http://www.europarl.europa.eu/activities/expert/cre.do?language=EN>; archives search at <http://www.europarl.europa.eu/activities/archive/cre.do?language=EN>.

motions;¹⁴⁴ reports given in plenary;¹⁴⁵ resolutions and other texts adopted in plenary;¹⁴⁶ questions posed by Members to the Commission or the Council, or to Parliament's own officials (the Quaestors, the Conference of Presidents or the Bureau¹⁴⁷);¹⁴⁸ hearings;¹⁴⁹ and *written declarations* (texts of no more than 200 words used to launch or relaunch debate on an issue¹⁵⁰).¹⁵¹ For the most recent past sitting and for the upcoming sitting, a great deal of information – including the principal documents and statistics such as the roll call votes – can be found at the *Séance en direct* portion of the site,¹⁵² where it is possible to watch the sitting via live webcast.

The immediately upcoming set of committee meetings can be accessed on a series of pages¹⁵³ that show, at a minimum, date, time, and location of the meeting. Depending upon the committee, the searcher may also find events such as the name of scheduled hearings and links to a draft agenda (although this is likely to be fairly skeletal). Committee meetings are open to the public, and meeting documents are publicly available through both the committee website and Parliament's Register of Documents.¹⁵⁴ The Register includes: agendas and sometimes draft agendas; final minutes and some draft ("provisional") versions; notices to members; reports and some draft versions; amendments to draft reports; opinions and some draft versions; and working documents. Most, but not all, of these are available directly through web links; the rest must be requested in hard copy.¹⁵⁵ This can be done online.¹⁵⁶

¹⁴⁴ Dedicated pages starting at <http://www.europarl.europa.eu/activities/expert/motion.do?language=EN>; archives search at <http://www.europarl.europa.eu/activities/archive/motion.do?language=EN>.

¹⁴⁵ Dedicated pages starting at <http://www.europarl.europa.eu/activities/expert/reports.do?language=EN>; archives search at <http://www.europarl.europa.eu/activities/archive/reports.do?language=EN>

¹⁴⁶ Dedicated pages starting at <http://www.europarl.europa.eu/activities/expert/ta.do?language=EN>; archives search at <http://www.europarl.europa.eu/activities/archive/ta.do?language=EN>.

¹⁴⁷ Parliament's Rules of Procedure, *supra* note 31, Rule 28.

¹⁴⁸ Dedicated pages beginning at <http://www.europarl.europa.eu/QP-WEB/home.jsp?language=en>; archives search at <http://www.europarl.europa.eu/activities/archive/qp.do?language=EN>. On Questions, see generally <http://www.europarl.europa.eu/activities/expert/staticDisplay.do?id=116&pageRank=1&language=en>.

¹⁴⁹ Dedicated page http://www.europarl.europa.eu/hearings/default_en.htm.

¹⁵⁰ Parliament's Rules of Procedure, *supra* note 31, Rule 116; <http://www.europarl.europa.eu/activities/expert/writtenDecl.do?language=EN>.

¹⁵¹ Dedicated pages beginning at <http://www.europarl.europa.eu/activities/expert/writtenDecl/wdFastOngoing.do?language=EN>.

¹⁵² http://www.europarl.europa.eu/sce/server/internet/home_page/sce_home_page_01.jsp.

¹⁵³ Beginning at <http://www.europarl.europa.eu/activities/public/parlComm/nextResults.do?language=EN&page=1&pageSize=10&abId=&actionType=&body=&genericBody=&place=&term=&date=>

¹⁵⁴ See the list at <http://www.europarl.europa.eu/registre/recherche/ListeDocuments.cfm#>, click Item I ("Documents relating to parliamentary activity"). Committee documents are the fourth entry.

¹⁵⁵ The types of documents that the searcher should be able to access directly online are set out in European Parliament decision annexing to the Rules of Procedure a list of documents directly accessible through the register of Parliament documents (2002/2005REG), available at

The Conference of Presidents meets twice a month.¹⁵⁷ A searcher can readily find when and where.¹⁵⁸ Meetings are not open to the public, but the Rules of Procedure state that minutes will be publicly available unless portions are determined to fall within confidentiality exceptions of the Access Regulation.¹⁵⁹ The minutes can be found through the Register,¹⁶⁰ although there is a time delay in their appearance there. Also available in the Register are miscellaneous other Conference documents including agendas, fact sheets, summaries of decisions and, for very occasional older meetings, verbatim reports of proceedings.

Meetings, procedures, and information available about the Bureau generally track those of the Conference of Presidents.¹⁶¹

Members can pose questions to the Conference, the Bureau and the Quaestors about their work,¹⁶² and the answers must be published in the Bulletin of Parliament, which is publicly available through the website.¹⁶³

b. Following Parliament's Process Through Its Principal Legislative Procedures

i. OEIL. Parliament's website also provides an extensive online information and research service that covers the legislative, budgetary and non-legislative procedures on which it must be

[http://www.europarl.europa.eu/omk/omnsapir.so/calendar?APP=PDF&TYPE=PV2&FILE=P5_TA\(20020514\)0216_en.pdf&LANGUE=EN](http://www.europarl.europa.eu/omk/omnsapir.so/calendar?APP=PDF&TYPE=PV2&FILE=P5_TA(20020514)0216_en.pdf&LANGUE=EN). Essentially, they fall into three categories: documents generated by Parliament itself; formal communications from other Community institutions; and third parties documents that the author would have reason to know would be subject to disclosure.

¹⁵⁶ Using the form at <http://www.europarl.europa.eu/registre/recherche/DemandeDocuments.cfm>.

¹⁵⁷ <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=53&pageRank=3&language=EN>.

¹⁵⁸

http://www.europarl.europa.eu/activities/expert/meetCal/calSearch.do?actionType=search&date=&genericBody=O&body=BCPR&term=LONG_TERM&place=A_X&refreshCache=yes&language=EN.

¹⁵⁹ Parliament's Rules of Procedure, *supra* note 31, Rule 28. On exceptions to the Access Regulation, see Section IIIC.

¹⁶⁰ Go to <http://www.europarl.europa.eu/registre/recherche/ListeDocuments.cfm#>, click #1 ("Documents relating to parliamentary activity") then #1.7 ("Documents of other parliamentary bodies"), then #1.7.2 ("the Conference of Presidents").

¹⁶¹ The same standard for making minutes public applies to the Bureau. See Parliament's Rules of Procedure, *supra* note 31, Rule 28;

<http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=53&pageRank=5&language=EN>.

The meeting calendar is available at

http://www.europarl.europa.eu/activities/expert/meetCal/calSearch.do?actionType=search&date=&genericBody=O&body=BUR&term=LONG_TERM&place=A_X&refreshCache=yes&language=EN.

To find Bureau documents, go to <http://www.europarl.europa.eu/registre/recherche/ListeDocuments.cfm#>, click #1 ("Documents relating to parliamentary activity") then # 1.7 ("Documents of other parliamentary bodies"), then #1.7.1 ("the Bureau").

¹⁶² Parliament's Rules of Procedure, *supra* note 31, Rule 28;

<http://www.europarl.europa.eu/activities/expert/staticDisplay.do?language=EN&id=119>.

¹⁶³ http://www.europarl.europa.eu/references/bull/default_en.htm.

officially consulted, or on which it has decided to draw up an *own-initiative report*. The Legislative Observatory (*OEIL*)¹⁶⁴ is structured as a series of “procedural files” that are the documents and key events relating to a given procedure, as well as the players involved at each stage. Each *procedural file* allows the searcher to monitor the progress of the matter, find out the stage it has reached, and understand the stages to come and future deadlines. The file also contains summaries of the main stages based on the relevant documents or events related to the procedure and, in many cases, links to the documents themselves. (In effect, procedural files in *OEIL* are the equivalent of dossiers in *PreLex*.) As of May 2007, it covers all currently ongoing procedures regardless of when they began; all completed procedures since the beginning of the July 1994 term; and documents the Commission forwarded to Parliament for information beginning nine months after the date received.¹⁶⁵

Two particularly helpful features of *OEIL* are:

- the Observatory Tracker, to which a searcher can subscribe to monitor topical areas, key stages of procedures, and recent developments by e-mail notification; each procedural file contains a button for the Tracker in the upper right corner, which opens a form to enter an email address for the purpose of receiving notice when changes occur to this file;
- a cumulative list of updates to the database, which allows users to see what new functionalities have been added.¹⁶⁶

OEIL's search function is probably the most user-friendly of any of the EU institutional websites. The “simple” search is a set of nested pages¹⁶⁷ that provides the searcher with a range of relatively intuitive and easily manipulated choices for search criteria. Almost any choice will open a window that in turn gives one or more drop-down options, so that the searcher is prompted with the set of possible right answers.

In terms of content: *OEIL* offers summaries (indicated with a page icon) of many of the documents, which is quite useful to the searcher; it records primarily the dates of documents themselves but not additional dates (e.g., transmission, receipt); it provides a forecast of the dates of future events; it links to the appropriate *PreLex* dossier. Visually, the *OEIL* file is much simpler than the *PreLex* dossier: it is laid out in the form of a strong single vertical pattern, without a graphical timeline of the procedures involved. Overall, it is easier to understand – and conveys less information. This tradeoff will be attractive to some searchers and displease others.

¹⁶⁴ <http://www.europarl.europa.eu/oeil/index.jsp?language=en>. For additional detail on searching in *OEIL*, consult Marilyn Raisch's excellent research guide at <http://www.llrx.com/features/eulaw2.htm>.

¹⁶⁵ See <http://www.europarl.europa.eu/oeil/> FAQ #3 “Content of the Legislative Observatory Database.”

¹⁶⁶ See id. last FAQ.

¹⁶⁷ Beginning at <http://www.europarl.europa.eu/oeil/search.jsp>.

Probably the optimal strategy for the searcher needing comprehensive information is to work between the two databases.¹⁶⁸

ii. The Procedures Covered. To help searchers understand what they're looking for and reading in *OEIL*, Parliament's website has some of the most comprehensible short descriptions of EU lawmaking procedures:¹⁶⁹

Codecision & Conciliation. As the co-decision page¹⁷⁰ explains, once the Commission presents a proposal to Parliament (and the Council), Parliament on the *First Reading* may or may not offer amendments. What then happens is up to the Council. If Parliament has not adopted amendments, or has adopted them and the Council agrees to them without other changes in the proposal, the proposal becomes law if it is accepted by a Council majority. If Parliament has adopted amendments that are rejected in whole or part by the Council, the Council will adopt a majority *common position* that it forwards to Parliament with explanation. At this point, the Commission gives Parliament its opinion on the common position, and the matter proceeds to *Second Reading*.

At Second Reading, Parliament has three options. If it approves the common position, or gives no opinion within three months, the proposal as amended by the common position is adopted. If a majority of Members reject the common position, the act is deemed not adopted. Finally, it may adopt amendments to the common position, in which case the matter returns to the Council and the Commission. The searcher looking for Parliament's position on the First or Second Reading will be looking in the set of "consolidated legislative documents" (COD).¹⁷¹ If the Council approves Parliament's amendments, the newly amended proposal becomes law. If the Council does not approve them in whole or part, a *Conciliation Committee* will be formed.

The Conciliation Committee comprises 27 Members of Parliament and an equal number of Council representatives.¹⁷² The political groups appoint the parliamentary members, in proportion to their representation within Parliament.

¹⁶⁸ To make your own comparison, Appendix A contains screenshots of the *OEIL* and *Prelex* pages tracking the Regulation to implement the Aarhus Convention. Or you can look at the links yourself:

OEIL: <http://www.europarl.europa.eu/oeil/file.jsp?id=237362>

Prelex: http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=186270.

¹⁶⁹ Beginning at <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?language=EN&id=55>.

¹⁷⁰ <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=55&pageRank=3&language=EN>.

¹⁷¹ <http://www.europarl.europa.eu/activities/expert/doclegcons.do?language=EN>.

¹⁷² http://www.europarl.europa.eu/code/information/what_is_en.htm. Details of the committee's procedure are set in Article III of Joint Declaration of the European Parliament, the Council and the Commission of May 5, 1999 on the new codecision procedure, available at

http://www.europarl.europa.eu/omk/omnsapir.so/pv2?PRG=DOCPV&APP=PV2&SDOCTA=14&TXLST=1&TPV=PROV&POS=1&Type_Doc=ANNEX&DATE=050599&DATEF=990505&TYPEF=A4&PrgPrev=TYPEF@APRG@QUERY|APP@PV2|FILE@BIBLIO99|NUMERO@206|YEAR@99|PLAGE@1&LANGUE=EN.

Three vice-presidents are appointed as permanent members of the Parliament's conciliation delegation, and the chair and secretary of the relevant standing committee serve *ex officio*. The committee must be appointed within six weeks of the Council's rejection of Parliament's amendments, and it has six (or sometimes eight) weeks to reach agreement on a joint text.¹⁷³ The searcher can find joint texts on a dedicated web page¹⁷⁴ as well as through *OEIL*'s general search function.

The searcher who requires detailed information about Conciliation is fortunate to have access to a 42-page guide,¹⁷⁵ as well as to an entire area of the *Europarl* website devoted to the Conciliation and codecision process.¹⁷⁶ Here, the searcher can view Codecision News, an overview of all pending procedures in first and second reading and a summary of the stage of negotiations of all matters in or going to conciliation;¹⁷⁷ a calendar of all meetings relevant to codecision;¹⁷⁸ a page on "Ongoing procedures" which provides links to dossiers under first and second reading;¹⁷⁹ a page on Conciliations, with comparable links to dossiers in that process;¹⁸⁰ a page on Concluded Procedures, with links to those dossiers;¹⁸¹ and finally, General Information¹⁸² and Photo¹⁸³ pages with a variety of useful links and data.

Consultation. Depending upon the subject of the proposed legislation, consultation with Parliament may be either required or optional.¹⁸⁴ If required, the proposal can become law only if Parliament gives its opinion. Although the Council is not required to *accept* this opinion, it is required to obtain it. In addition to approving or rejecting the entire proposal, Parliament's opinion may ask for specific amendments. In cases of optional consultation, the Commission asks the Council to consult Parliament. Either way, the searcher can find these

¹⁷³ Id.

¹⁷⁴ <http://www.europarl.europa.eu/activities/expert/jointText.do?language=EN>.

¹⁷⁵ http://www.europarl.europa.eu/code/information/guide_en.pdf.

¹⁷⁶ http://www.europarl.europa.eu/code/about/default_en.htm.

¹⁷⁷ http://www.europarl.europa.eu/code/newsletter/default_en.htm.

¹⁷⁸ http://www.europarl.europa.eu/code/calendar/default_en.htm.

¹⁷⁹ http://www.europarl.europa.eu/code/ongoing_procedures/default_en.htm.

¹⁸⁰ http://www.europarl.europa.eu/code/ongoing/default_en.htm.

¹⁸¹ http://www.europarl.europa.eu/code/concluded_procedures/default_en.htm.

¹⁸² http://www.europarl.europa.eu/code/information/default_en.htm.

¹⁸³ http://www.europarl.europa.eu/code/photo_gallery/album1/default_en.htm.

¹⁸⁴ <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=55&pageRank=4&language=EN>. A useful source on when the various procedures are appropriate is Fact Sheet 1.3.2 European Parliament: Powers, available at http://www.europarl.europa.eu/facts/1_3_2_en.htm. This is one of a large number of Fact Sheets on a variety of process, structure and substantive topics. See http://www.europarl.europa.eu/facts/default_en.htm. Unfortunately, it's not at all obvious how the searcher accesses them through the site. (This one was originally found through the web researcher's staunch ally, the Google search.)

opinions through the dedicated “Texts Adopted” page¹⁸⁵ or by using *OEIL*’s “Procedure Tracking” search function and searching under “Consultation procedure (CNS).”¹⁸⁶

Assent. In this procedure, used in a limited group of particularly important matters specific by the EC Treaty, Parliament must either accept or reject, in whole, the proposal put forward; it cannot offer amendments.¹⁸⁷ Under the Rules of Procedure,¹⁸⁸ the relevant committee may attempt to facilitate assent by presenting an “interim report” containing resolutions that recommend either implementation of the proposal, or improving amendments. Depending on which, if any, resolution is adopted, the President will ask for further discussion with the Council. Based on the outcome of discussion, the committee makes a final recommendation to Parliament.¹⁸⁹ The searcher seeking documents from this process will find the committee-generated documents in the places identified in Section IIB2aii. Parliament’s actions on assent can be found by using the *OEIL* “Procedure Tracking” search function and searching under “Assent procedure (AVC).”¹⁹⁰

c. *Miscellaneous Documents Available.* Finally, the searcher monitoring Parliament’s work is entitled, under Parliament’s Rules of Procedure,¹⁹¹ to miscellaneous other sorts of documents. Some of these will be available directly through links on the Register; others will have to be requested in hard copy, although this can be done through an online form.¹⁹² The Register of Members’ assistants (i.e., staff)¹⁹³

- Press documents¹⁹⁴

¹⁸⁵ <http://www.europarl.europa.eu/activities/expert/ta.do?language=EN>.

¹⁸⁶ <http://www.europarl.europa.eu/oeil/search.jsp?form=/procstage/familyandtype>.

¹⁸⁷ See EC Treaty, arts. 161, 192, 300
<http://www.europarl.europa.eu/parliament/expert/statiay.do?id=55&pagecDisplRank=8&language=EN> and succeeding web pages.

¹⁸⁸ Parliament’s Rules of Procedure, supra note 31, Rule 75.

¹⁸⁹ Id.; <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=55&pageRank=9&language=EN>.

¹⁹⁰ <http://www.europarl.europa.eu/oeil/search.jsp?form=/procstage/familyandtype>.

¹⁹¹ European Parliament decision annexing to the Rules of Procedure a list of documents directly accessible through the register of Parliament documents (2002/2005REG), available at [http://www.europarl.europa.eu/omk/omnsapir.so/calendar?APP=PDF&TYPE=PV2&FILE=P5_TA\(20020514\)0216_en.pdf&LANGUE=EN](http://www.europarl.europa.eu/omk/omnsapir.so/calendar?APP=PDF&TYPE=PV2&FILE=P5_TA(20020514)0216_en.pdf&LANGUE=EN); Bureau Decision on Public Access to European Parliament Documents §5, 2001 O.J. (C 374) 1 available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_374/c_37420011229en00010006.pdf.

¹⁹² <http://www.europarl.europa.eu/registre/recherche/DemandeDocuments.cfm>.

¹⁹³ See <http://www.europarl.europa.eu/members/expert/staticDisplay.do?language=EN&id=148> and associated links.

¹⁹⁴ See <http://www.europarl.europa.eu/registre/recherche/ListeDocuments.cfm#> and expand the “Press Document bullet” under item #2.

- Studies and publications produced by Parliament: Research and Fact Sheets¹⁹⁵
- Mail incoming to, and outgoing from, Parliament and its President¹⁹⁶

3. The Council

Of the three institutional websites, the Council's is unfortunately the least effective in allowing a searcher to learn about its structure, function and procedure. Compared to *EC* and *Europarl*, *Consilium*¹⁹⁷ contains far less information about the Council's processes; moreover, it makes little use of the Internet's unique capacity, through sophisticated website design, to provide complex information effectively. (That said, this site is still vastly superior to the information about institutional structure, process and procedure available on most U.S. government sites.¹⁹⁸)

a. Structure and Membership. The searcher looking for information about the internal organization and composition of the Council would learn that it is composed of the ministers of Member States, with each country represented by the minister responsible for the area relevant to the specific issue on the agenda.

i. The Configurations. She or he would also learn that the Council, although nominally a single entity, in fact always assembles in one of nine *configurations*, each of which meets in Brussels or (in some months) Luxembourg, but at different intervals:¹⁹⁹

- *General Affairs & External Relations Council (GAERC)*²⁰⁰ – Foreign Ministers of Member States; deals with dossiers that affect more than one EU policy (general affairs) and all external relations matters; meets once a month
- *Economic & Financial Affairs (Ecofin)*²⁰¹ – Economic and Finance Ministers of Member States; deals with economic and finance dossiers and prepares draft budget; meets once a month
- *Competitiveness Council*²⁰² – European Affairs Ministers, Industry Ministers, Research Ministers, etc of Member States; deals with policies and dossiers in

¹⁹⁵ See id and expand the “Studies and publications produced by the European Parliament” bullet under item #2. the Fact Sheets referred to here are not identical to those described in note 184, although there may be some overlap.

¹⁹⁶ <http://www.europarl.eu.int/registre/recherche/ListeDocuments.cfm#> and expand item #4.

¹⁹⁷ <http://www.consilium.europa.eu/>.

¹⁹⁸ The sites being constructed in response to the E-Government Act of 2002 and the Bush Administration's 24 E-Government Initiatives, see <http://www.whitehouse.gov/omb/egov/c-presidential.html>, are beginning to improve this situation.

¹⁹⁹ <http://consilium.europa.eu/showPage.asp?id=427&lang=en&mode=g>. The number of configurations has varied over time. The current list is Annex 1 to the Council's Rules of Procedure, supra note 29.

²⁰⁰ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=388&lang=en&mode=g.

²⁰¹ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=250&lang=en&mode=g.

²⁰² http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=412&lang=en&mode=g.

various areas with horizontal and sectoral competitiveness implications; meets five to six times annually

- *Justice and Home Affairs (JHA)*²⁰³ – Justice and Interior Ministers of Member States; deals with dossiers in these areas and with Schengen issues²⁰⁴ (freedom of movement of persons without being controlled at internal borders); meets every other month
- *Employment, Social Policy, Health and Consumer Affairs Council (EPSCO)*²⁰⁵ – Employment, Social Protection, Consumer Protection, Health and Equal Opportunities Ministers of Member States; deals with working conditions, public health and consumer protection issues; meets four times a year
- *Transportation, Telecommunications, and Energy (TTE)*²⁰⁶ – Ministers for Transport, Telecommunications or Energy, depending on the agenda; matters relating to opening of borders, energy supply and efficiency, communications networks; meets every other month
- *Agriculture and Fisheries Council*²⁰⁷ – Ministers for Agriculture and Fisheries for Member States; matters related to agriculture and rural development, fisheries and maritime affairs, consumer health and protection; meets once a month
- *Environment Council*²⁰⁸ – Environment Ministers of Member States; matters implicating sustainable development, natural resources, climate change; meets about four times a year
- *Education, Youth, Culture Council*²⁰⁹ – Education, Youth, Communication and Culture Ministers of Member States; matter implicating vocational and other types of education, national and regional cultural diversity; meets three or four times a year

The searcher would find it difficult to learn the identity, or number, of the ministers who represent their States in any of the configurations. The only principal official named on the site

²⁰³ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=249&lang=en&mode=g.

²⁰⁴ So called for the small town in Luxembourg near which five countries signed the agreement originally providing for free movement of their citizens across each others' borders. Countries that have implemented the agreement are spoken of as within the Schengen area.

²⁰⁵ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=411&lang=en&mode=g.

²⁰⁶ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=413&lang=en&mode=g.

²⁰⁷ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=414&lang=en&mode=g.

²⁰⁸ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=415&lang=en&mode=g. For the separate page on climate change, see http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=792&lang=en&mode=g.

²⁰⁹ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=416&lang=en&mode=g.

is the President (who is not only identified but also has his/her own webpage).²¹⁰ The minutes refer simply to the Member States by name, or to their “delegation.” The searcher could, after a meeting has occurred, go to the photographic library of the site²¹¹ and, by scrolling through the scores of pictures there and clicking on each to get name and title of the persons photographed, piece together a list of delegates; the list may or may not be complete.²¹² There *is* a location on the site to find this information, but the average searcher would discover it only fortuitously: Press releases issued after each configuration meeting list the attending ministers.²¹³

ii. Coreper, committees and working parties. Given the importance of *Coreper* (*Comité des représentants permanents*, the Permanent Representatives Committee) to the Council’s work, there is remarkably little about it on the website. The searcher would learn that it is a group of “permanent representatives of the Member States working in Brussels and their assistants”²¹⁴ who prepares and coordinates the Council’s work.²¹⁵ The Council’s Rules of Procedure tell him/her that Coreper is responsible for “ensur[ing] consistency of the Union’s policies and actions,” and that it is to “endeavor to reach agreement at its level” to agenda items before they are submitted to the Council for action.²¹⁶ The structure and operation of the group is not further explained, although the searcher would read that Coreper’s work “is itself prepared by some 250

²¹⁰ http://www.consilium.europa.eu/cms3_applications/applications/solana/index.asp?lang=EN&cmsid=246. Past presidential pages are accessible via links at <http://www.consilium.europa.eu/showPage.asp?id=695&lang=en&mode=g>.

²¹¹

http://www.consilium.europa.eu/cms3_applications/Applications/newsRoom/GalleryViewer.asp?command=VIEW_BYDATE&BID=76&TOPIC=NODESCRIPTION&LANG=1&cmsid=433.

²¹² The canny searcher can resort to IDEA, the official directory of the EU. <http://www.europa.eu/whoiswho/en/index.htm>. Using the pathway Hierarchical Search → Council of the European Union → “[Representatives of the Governments of the Member States who regularly take part in Council meetings](#),” then clicking on the country of her/his choice, will eventually generate a complete list of ministers. Using a similar strategy, but selecting Permanent Representatives Committee will get a list of persons comprised in Coreper.

²¹³ See Section IIB3a*iii*.

On this issue of ability to learn who is representing a Member State in the Council, one of the consultants to this Project has suggested that the public’s interest in this information is different than in comparable information about Parliament or the Commission. He points out that while Commissioners and Members of Parliament are appointed or elected according to EU-specified procedures, the Council consists of representatives of Member States appointed according to internal rules of those States. Even within a single Council meeting, the spokesperson for a Member State may differ depending on the item under discussion. Hence, he suggests, by definition the identity of the spokesperson is less important since, at all times, the Member State is “speaking.”

This important observation about the respective roles of the EU institutions does perhaps discount one significant function that might be served by the public’s ability to know who is representing their country in the Council: communicating their pleasure, or displeasure, about the choice/behavior of these ministers to their national government. Of course, it is a separate question – beyond the scope of this chapter – whether facilitating democratic discourse *within* Member States is an aspect of the transparency to which the EU does, or should, aspire.

²¹⁴ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=427&lang=en&mode=g.

²¹⁵ See EC Treaty, art. 207.

²¹⁶ Council’s Rules of Procedure, *supra* note 29, art. 19 §§ 1, 2.

committees and working groups consisting of delegates from the Member States,²¹⁷ and the Rules of Procedure would tell him/her that these are set up by Coreper or with its approval.²¹⁸

If the searcher happens to know about the main *Europa* Glossary²¹⁹ (or notices the link to it that appears as the last item on the “Information to the Public” page of the Contacts tab²²⁰), he/she would learn more specifically that Coreper consists of

- Coreper II: the Member States’ Ambassadors to the EU, who are the “Permanent Representatives”; the heads of missions, they deal primarily with political, financial and foreign policy issues²²¹
- Coreper I: the Deputy Permanent Representatives, who are deputy heads and generally deal with social and economic issues

Coreper also exercises political control over the 250 *committees* and *working parties* who do the front line work of the Council. As the searcher could further learn from the Glossary,²²² some of these committees are provided for in the treaties, while others are ad hoc. Composed of representatives of the Member States, they evaluate proposals, prepare Council discussions, and follow up on actions taken. Working parties do parallel preparatory work and expert/technical studies for Coreper. Some are temporary, set up to deal with particular proposals, while about a hundred groups cover various sectors and meet regularly.²²³

b. Meetings & Process. Unfortunately, the searcher who is now intrigued by this structure can learn relatively little more, from the Council’s website, about how it actually works. *Consilium* offers nothing like *PreLex*’s mini-treatise and dossier screens or *Europarl*’s explanatory windows and *OEIL*’s procedural files.

- It lacks a systematic, step-by-step explanation of the Council’s processes that would make them comprehensible to the uninitiated;
- diagrams, charts, timelines, or similar aids in following the course of either “typical” kinds of Council matters or a particular matter that a searcher wishes to track;

²¹⁷ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=427&lang=EN&mode=g.

²¹⁸ Council’s Rules of Procedure, *supra* note 29, art. 19 §§ 3.

²¹⁹ http://www.europa.eu/scadplus/glossary/coreper_en.htm.

²²⁰ http://www.consilium.europa.eu/cms3_applications/showPage.asp?id=820&lang=en&mode=g.

²²¹ Hence Coreper II is responsible for the following Council configurations: General Affairs and External Relations (including European security and defence policy and development cooperation); Economic and Financial Affairs (including the budget); Justice and Home Affairs (including civil protection). See http://ec.europa.eu/codecision/stepbystep/glossary_en.htm. Coreper I is responsible for the others.

²²² http://www.europa.eu/scadplus/glossary/experts_committees_en.htm.

²²³ *Id.*

- a clear, straightforward means for a searcher to (1) discover and (2) access all – or at least most – of the relevant information (documents, webpages of official actors, etc.) pertaining to a specific matter through links gathered in one location.

Consilium's failure, in these areas of web design in which its institutional counterparts have succeeded, presents a significant transparency issue. Of course, the Council's function as "a kind of collective head of state of the European Community,"²²⁴ comprising only those deputed to speak on their behalf by the Member States and deciding external trade policies and conducting international agreements, might suggest that openness comparable to the other institutions is both politically unrealistic and conceptually inappropriate.

At the same time, however, the Council retains a central role in Community lawmaking and the voting strength of Members is at least crudely weighted by the State's relative population.²²⁵ Hence it appears at best a hybrid entity and so, much like the U.S. President, a prime target of demands for more transparency in the exercise of power.

i. Calendars, Agendas, Press Releases, Minutes, etc. The most direct way for a searcher to access the calendars and agendas of the Council and its various supporting entities is usually through the Press portion of the website.²²⁶ Although these items can also be accessed through the Documents tab on the Homepage, this route usually requires more screens, and it is not intuitive to seek calendar information, for example, under a Documents tab.

The Calendar page²²⁷ will list all meetings occurring on the date clicked, with time and room. (Be warned that the list is not very responsive to requests to adjust language, despite the pulldown menu.) An Open Sessions page²²⁸ – accessible through the Council tab on the Homepage – leads to a list of Council deliberations under the co-decision procedure²²⁹ that are open to the public, with dates and brief description of the issues, as well as to a list of Public Debates of the Council, again with dates and brief description of the topics.

Agendas, background notes, and briefing materials for the nine configurations of the Council are ostensibly available from the page with that name.²³⁰ However, both when the current and prior draft of this chapter were prepared, clicking on the desired configuration repeatedly produced the

²²⁴ Bermann, Goebel, Davey & Fox, *CASES & MATERIALS ON EUROPEAN LAW*, 34 (2d ed. 2002).

²²⁵ *Id.* at 34-35.

²²⁶ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=340&lang=en&mode=g.

²²⁷

http://www.consilium.europa.eu/cms3_applications/applications/meetings/getMonthcalendar.asp?lang=en&cmsID=368&date=6/01. To find the same screen via the Document tab, the searcher must click on "Timetables and Agendas" in the left column menu of the first screen that opens and click "timetable of meetings" in the main text of the next screen that opens.

²²⁸ http://www.consilium.europa.eu/cms3_fo/showPage.ASP?id=1103&lang=en&mode=g.

²²⁹ See Sections IIB1c and IIB2*bi*.

²³⁰ http://www.consilium.europa.eu/cms3_applications/applications/newsRoom/loadBook.asp?BID=104&LANG=1&cmsid=364.

response “No document found” for all the configurations.²³¹ The Agenda page reached via the Document tab²³² is more reliable. Available from here are:

- Agendas for the Council – many of which are denominated “Provisional” although no other agenda for the same date appears for that configuration²³³ – which appear to go back as far as January 1999;
- Coreper I agendas,²³⁴ apparently beginning with the 1858th meeting of Coreper I in October 2000;
- Coreper II agendas,²³⁵ apparently beginning with the 1858th meeting of Coreper II in November 2000;
- Agendas for other preparatory bodies such as working parties,²³⁶ of which there are almost 9400, the earliest dated January 2002;
- Agendas for certain other groups.²³⁷

Through a webpage denominated “The Presidency Calendar”²³⁸ the searcher will find provisional Council agendas for the upcoming six months. The page name apparently derives from the Council Rule of Procedure requiring the incoming Presidency to establish these agendas

²³¹ The page does warn: “This page contains preparatory documents for forthcoming Council meetings. These documents will be automatically removed after the meetings” so their presence on the page is fleeting at best.

²³² http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=643&lang=en.

²³³

http://register.consilium.europa.eu/servlet/driver?page=Result&typ=Agendas&lang=EN&fc=REGAISEN&srm=50&md=400&ssf=DATE_DOCUMENT+DESC&ii_PUBLIC_DOC=%3E0&ff_COTE_MATIERE_PRIM=OJ/CONS&cmsid=644.

²³⁴

http://register.consilium.europa.eu/servlet/driver?page=Result&typ=Agendas&lang=EN&fc=REGAISEN&srm=50&md=400&ssf=DATE_DOCUMENT+DESC&ii_PUBLIC_DOC=%3E0&ff_COTE_MATIERE_PRIM=OJ/CRPI&cmsid=645.

²³⁵

http://register.consilium.europa.eu/servlet/driver?page=Result&typ=Agendas&lang=EN&fc=REGAISEN&srm=50&md=400&ssf=DATE_DOCUMENT+DESC&ii_PUBLIC_DOC=%3E0&ff_COTE_MATIERE_PRIM=OJ/CRP2&cmsid=646.

²³⁶

http://register.consilium.europa.eu/servlet/driver?page=Result&typ=Agendas&lang=EN&fc=REGAISEN&srm=50&md=400&ssf=DATE_DOCUMENT+DESC&ii_PUBLIC_DOC=%3E0&ff_CODE_TYPE_DOCUMENT=TX|CM&cmsid=649.

²³⁷ The Special Committee on Agriculture and the Article 36 Committee.

http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=643&lang=en.

²³⁸

http://www.consilium.europa.eu/cms3_applications/Applications/newsRoom/loadbook.asp?BID=950&LANG=1&cmsid=952.

at least one week before beginning its term;²³⁹ this is a good example, though, of how challenging it can be to find things on the website unless the searcher already knows the intricacies of Council operation. There are two sets of these provisional agendas: those prepared by Coreper II and those prepared by Coreper I. The searcher is left to wonder why items appear on one, rather than the other, agenda. (Someone knowledgeable in Council procedure could explain that Coreper has ordained a particular allocation of the configurations between its two parts.²⁴⁰) The searcher may see that some items on one of these agendas are in a category “Likely to become ‘A’ items.” This designation is not explained on the website itself, but if the searcher consults the Council’s Rules of Procedure, she or he will learn that “A” items are those adopted by the Council without debate because agreement has already been reached within Coreper.²⁴¹ The searcher may also find agenda items under a designation “In the margins of the Council.” She or he would require someone well-versed in Council procedure to explain that these are items the ministers will take up at the meeting but *not* in their capacity as the Council.

Press releases, available either under the Press tab → Press Release heading²⁴² or under the Contacts tab → Information to the Public → Press Related Information: Latest Press Releases²⁴³ headings, are a significant source of information about Council activities. As noted in the previous subsection, they are apparently the only place on the website at which the searcher can get a comprehensive list of the ministers in a particular Council configuration. Additionally, these are often far more informative than the official minutes in explaining what transpired at Council meetings. Finally, they contain agendas of future meetings, again in often more accessible form than the official versions.

There are two types of official Minutes available, back through 1999, via direct links on the site.²⁴⁴

- Minutes concerning the adoption of legislative acts: “The Council acts in its legislative capacity ... when it adopts rules which are legally binding standards in or for the Member States, by means of regulations, directives, framework decisions or decisions, on the basis of relevant provisions of the Treaties, with the exception of discussions leading to the adoption of internal measures, administrative or budgetary acts, acts concerning interinstitutional or international relations or non-binding acts (such as conclusions, recommendations or resolutions)”,²⁴⁵

²³⁹ Council Rules of Procedure, supra note 29, art. 2, 6.

²⁴⁰ Coreper II takes institutional matters and preparation of Council meetings for General Affairs, Ecofin, JHA, Development and Budget. Coreper I takes the balance. See supra note 221 and accompanying text.

²⁴¹ Council’s Rules of Procedure, supra note 29, art. 3, § 6.

²⁴² http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=339&lang=EN&mode=g.

²⁴³ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=820&lang=EN&mode=g.

²⁴⁴ http://www.consilium.europa.eu/cms3_applications/showpage.ASP?id=552&lang=en&mode=g.

²⁴⁵ Council’s Rules of Procedure, supra note 29, art. 7.

- Minutes in general.

The distinction is rooted in Art.207(3) of the EC Treaty, which requires that the Council make public the results and explanations of its votes when it acts in a legislative capacity. To the extent that the Council chooses to make public nonlegislative acts, the two sets of Minutes contain the same sort of information. They record action taken, contain statements made by the Council or submitted by a member of the Council or Commission, and indicate documents that have been submitted.

Also available,²⁴⁶ via direct links back through 1999, are the Monthly Summaries of Council Acts, which provide a summary table of title, document number, voting rule,²⁴⁷ and actual vote, as well as any statements made about all legislative acts and a chart listing all other acts, along with any votes on them made public, that occurred in the month.

ii. Document Access in General: The Council's Register of Documents. Through the Council's Register of Documents,²⁴⁸ the searcher can learn about the existence of a large number of documents, a subset of which is publicly accessible. (It is possible to limit one's search to those.)²⁴⁹ Of the public documents, a subset is available directly via links on the site; others can be requested using a form, available on line,²⁵⁰ that can be submitted electronically by mail.²⁵¹ The Council has committed²⁵² to make the following documents available:

- cover notes and letters concerning legislative acts addressed to the Council by other EU institutions or bodies, or by a Member State so long as the State does

²⁴⁶ http://www.consilium.europa.eu/cms3_applications/showPage.asp?id=551&lang=en.

²⁴⁷ There are three possible voting rules, set by Treaty provisions according to the issue: simple majority (for procedural decisions), qualified majority (a weighted system based on Member States population; for many decisions concerning the internal market, economic affairs and trade) and unanimity (for foreign policy, defence, judicial and police cooperation, and taxation).

http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=426&lang=en&mode=g.

²⁴⁸ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=549&lang=EN&mode=g.

²⁴⁹ Both the "simple search,"

<http://register.consilium.europa.eu/servlet/driver?typ=&page=Simple&lang=EN&cmsid=638>,

and "advanced search,"

<http://register.consilium.europa.eu/servlet/driver?page=Advanced&typ=&lang=EN&fc=REGAISEN&srm=25&md=100&cmsid=639>, have a "public documents only" box that can be checked as a search criterion.

²⁵⁰ See <http://register.consilium.europa.eu/servlet/jsp/MailAccessForm.jsp?lang=EN&cmsid=928>.

²⁵¹ The address is given at http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=1013&lang=EN&mode=g.

²⁵² Council Rules of Procedure, *supra* note 29, Annex II, art. 1; Council Decision of 29 November 2001 amending the Council's rules of procedure 2001/840/EC, art. 11 § 5, 2001 O.J. (L 313) 40. The Council's 2005 report on compliance with the Access Regulation states that "all non-sensitive documents submitted to the Council or to one of its preparatory bodies which are to serve as a basis for deliberations, could influence the decision-making process or reflect the progress made on a given subject are automatically listed in the register. In the case of sensitive documents, the author specifies the references which may be permitted to appear in the register." [footnotes omitted] Council Annual report on access to documents – 2005 at 9 (October 2006) [hereinafter, 2005 Access Report], available at http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/ENCounAnnRep_acces05.pdf.

not object on grounds that it reflects the individual position of that state's delegation in the Council;

- notes submitted to Coreper and/or to Council for approval, as well as the draft legislative acts to which they refer.

It has also stated that the following “may” be made public:

- information notes, reports, progress reports and reports on the state of discussion in the Council or one of its preparatory bodies which do not reflect individual positions of delegates, except Legal Service opinions and contributions.²⁵³

The Council's 2006 Policy on Transparency²⁵⁴ stated that “most of [the Council's] official documents are accessible to the public.”²⁵⁵

C. Obligations to Allow to Access to, or Participation in, Institutional Processes

Unlike the Access Regulation with respect to documents,²⁵⁶ there is no overarching legal norm that secures public access to meetings of the EU governing institutions, or that affords participation rights in Community policymaking processes. (The Regulation implementing the Aarhus Convention creates a subject-specific regime of mandatory public access and participation for the preparation, modification and review of environmental plans and programmes by Community institutions and bodies whenever they are not acting in a judicial or legislative capacity.²⁵⁷)

Accordingly, opportunities for access and participation vary considerably depending on institution and context.

1. The Commission

a. Access to Meetings. Meetings of the Commission, which occur weekly in addition to special sittings, are not public, and its discussions are confidential.²⁵⁸ Meeting minutes, available within about a week, can be accessed on the Commission's website.²⁵⁹

²⁵³ Council Rules of Procedure, supra note 29, Annex II, art. 11 § 4.

²⁵⁴ European Council, An overall policy on transparency, June 15-16, 2006 [hereinafter “Council's 2006 Policy on Transparency”], available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/misc/90112.pdf.

²⁵⁵ For statistics on the percentage increase in documents in the Register over the prior year, as well as on percentage of documents available through direct online access and redacted for security purposes, see the 2005 Access Report, supra note 252, at 10. Some data on use demographics of the Register are also available in the Report.

²⁵⁶ See Section III.

²⁵⁷ See Regulation implementing the Aarhus Convention, supra note 16. Who can enforce these rights, and where, are complex questions. See supra note 16.

²⁵⁸ Commission's Rules of Procedure, supra note 24, art. 9.

b. Participation, including Consultation.²⁶⁰ For initiatives that are likely to:

- result in substantial economic, environmental²⁶¹ and/or social impact on a specific sector and have a significant impact on major interested parties, OR
- represent a major policy reform in one or several sectors.

the Commission has committed itself to a process of consultation with interested parties (“targeted consultation”), or the general public (“open public consultation”), for the shaping of policy prior to its decision.²⁶² “To be effective, consultation must start as early as possible. Interested parties should therefore be involved in the development of a policy at a stage where they can still have an impact on the formulation of the main aims, methods of delivery, performance indicators and, where appropriate, the initial outlines of that policy. Consultation at more than one stage may be required.”²⁶³ Consultations are often launched with publication of a Green Paper.

An entire section of the Commission’s website is dedicated to the Consultation process.²⁶⁴ A key element of this is CONECCS, the database for “**C**ONSultation, the **E**uropean **C**ommission and **C**ivil **S**ociety.” The searcher would consult CONECCS to learn about targeted consultations. The database contains information about the various advisory committees and other groups through which the Commission engages in such formal or structured consultation. These entities are relatively permanent and meet regularly; through them interests such as labor and business groups, NGOs, community-based organizations and religious groups react to proposed policy.

The principal medium through which open public consultations are accomplished is *Your Voice in Europe*,²⁶⁵ a website that serves as the “single access point” for information about and participation in Consultations and Discussions (ongoing online debates; chatrooms that provide access to a changing roster of EU leaders with transcripts of past chats; discussion forums; citizen conferences; discussion lists), as well as an Experience tab (for registering problems and complaints, seeking help, etc.) and a Links tab (with a variety of informational and public service links).

²⁵⁹ The most recent set is available directly through a webpage link http://ec.europa.eu/atwork/collegemeetings/index_en.htm. Prior ones have to be searched out in the Register of Commission Documents by date. This is not difficult, but instructions are lacking. Go to <http://ec.europa.eu/transparency/regdoc/registre.cfm?CL=en> and, after clicking “document search” at the bottom of the page, specify “minutes” or “agenda” under “type,” and use a range of dates if you are unsure of the exact time of meeting.

²⁶⁰ For detailed discussion of this process, see Chapter 2 on Rulemaking.

²⁶¹ For initiatives with significant environmental impact, the Regulation implementing the Aarhus Convention will be relevant. See text accompanying supra note 257.

²⁶² Standards for Consultation, supra note 28, at 15.

²⁶³ Id. at 15-16., 19-22.

²⁶⁴ The homepage of this section is http://ec.europa.eu/civil_society/index_en.htm.

²⁶⁵ http://ec.europa.eu/yourvoice/index_en.htm.

From the Consultations page²⁶⁶ the searcher has access to a variety of statistical views of the results in *Closed Consultations*. For *Open Consultations*, the site provides a rich set of links to enable the would-be commenter to access directly the relevant legal and policy materials. These include:

- not only the principal initiative document, but also any authorizing, implementing, etc. texts
- scientific, technical, etc. reports, statistics and other background documents
- explanations of the various process steps that have been/will be involved
- suggested important questions/issues to be addressed in the consultation
- useful links to related topics and other sites
- contact information – with a direct email link

Technical initiatives may solicit input in different forms from the expert community and the general public. For example, the consultation on Increasing the welfare of animals used in experiments,²⁶⁷ which was open through August 2006, offered both a 15-20 minute general multiple choice questionnaire (offered in all the official languages) for ordinary citizens, and a set of technical questions – to which studies, etc. – could be attached, for scientific, economic and legal experts in the field (available only in English).

Between November 2005 and August 2006, a consultation occurred on the European Transparency Initiative that included a request for public feedback on the success of application of the Commissions' consultation standards.²⁶⁸ In March 2007, a Commission Staff Working

²⁶⁶ http://ec.europa.eu/yourvoice/consultations/index_en.htm.

²⁶⁷ http://ec.europa.eu/environment/chemicals/lab_animals/ia_info_en.htm#1.

²⁶⁸ This consultation occurred through a dedicated website, <http://ec.europa.eu/comm/eti/index.htm>, although it could also be accessed via *Your Voice in Europe*. In addition to comments on the efficacy of the Minimum Standards for Consultation, the public was asked to comment on Transparency and Interest Representation (lobbying activities) and Publication of Data on Beneficiaries of EU Funds (disclosure of data about the recipients of various EU funds managed by the Commission in partnership with Member States, notably the Structural Funds and Common Agricultural Policy).

The Green Paper launching this initiative, European Transparency Initiative, COM (2006) 194, May 3, 2006, is directly accessible via the dedicated website, as are the comments submitted, <http://ec.europa.eu/comm/eti/contributions.htm>.

Document was published that summarized the principal results.²⁶⁹ Simultaneously, the Commission published a Green Paper indicating its intended steps.²⁷⁰

With respect to targeted consultations, concerns were raised with respect to balance in the designated participants: in particular, NGOs indicated that corporate and “established” interests were represented while other types of stakeholders were underrepresented or absent.²⁷¹ The Commission’s response recognized “the need for ensuring plurality of views and interests expressed in consultations” and engaged to “put more emphasis on” staff training, sharing information and best-practice information among the Directorates-General, and “reviewing the practical guidelines for stakeholder consultation.”²⁷²

With respect to open public consultations, the concerns included failure to publish all the submitted comments, inadequate time between proposal and close of consultation (typically eight weeks) and disability access issues. There were also unspecified concerns about lack of consistency in applying the consultation standards across Directorates.²⁷³ The Commission’s response explicitly addressed only the last of these, promising to “create a new standard consultation template to improve the consistency of open public consultations.”²⁷⁴

With respect to the consultation process generally, commentators expressed “a need for general reasoned feedback i.e. how received comments were or were not taken into account by the Commission.”²⁷⁵ The Commission acknowledged this as a “weakness”; again, it emphasized staff training and information and best-practices sharing among the Directorates-General.²⁷⁶ (Standard E of the current consultation protocol, “Acknowledgement and Feedback,” does call for post-consultation documents to include “an explanation as to . . . how the results [of the consultation] were taken into account in the proposal.”)²⁷⁷

c. *Contacting the Commissioners.* The Commission’s site includes a very helpful “mailbox” page.²⁷⁸ From it you can reach each Commissioner’s website, on each Homepage of which is a “Contact” button located in the upper right corner. Although this much is standardized, what happens from there varies by Commissioner. For some, hitting Contact

²⁶⁹ Results of the Commission Consultation on the Green Paper “European Transparency Initiative,” SEC (2007) 360, March 21, 2007 [hereinafter “Results”], available at http://ec.europa.eu/transparency/eti/docs/DTS_360_EN.pdf.

²⁷⁰ Follow-up to the Green Paper “European Transparency Initiative” COM (2007) 127 [hereinafter “Response”] available at http://ec.europa.eu/transparency/eti/docs/com_2007_127_final_en.pdf.

²⁷¹ Results, supra note 269, at 6.

²⁷² Response, supra note 270, at 6-7.

²⁷³ Results, supra note 269, at 6-7.

²⁷⁴ Response, supra note 270, at 7.

²⁷⁵ Results, supra note 269, at 5.

²⁷⁶ Response, supra note 270, at 6-7.

²⁷⁷ Standards for Consultation, supra note 28, at 22.

²⁷⁸ http://ec.europa.eu/contact/index_en.htm.

immediately opens an email screen. For others, it opens a webpage with a variety of contact options (which will almost certainly include email links.) Some Commissioners make it more obvious than others that your email is going to their staff.

Also on the Mailbox page is a link for “Contact Guide by Commission Activity” which opens a page of links²⁷⁹ to a large number of mailboxes containing contact information for specific areas of Commission activity.

Another Mailbox entry gets you to the links²⁸⁰ for *both* the staff directories for the Commission and for the entire EU.

2. The European Parliament

a. Access to Meetings. Debates in Parliament are public. A webstreaming link²⁸¹ allows plenary sessions to be viewed in real time. Normally, voting is public and may be by roll-call “if requested in writing by a political group or at least thirty-seven Members the evening before the vote unless the President sets a different deadline.”²⁸² However, voting can be by secret ballot on request of at least one-fifth of the Members, and such request takes precedence over a roll-call request.²⁸³

Meetings of committees and delegations are also, normally, open to the public.²⁸⁴

b. Participation. Parliament uses the methods conventionally used by large representative bodies to gather information and hear from constituents. Committee and subcommittee hearings are listed on the website,²⁸⁵ although they do not appear routinely to be transcribed. Large scale Parliamentary conferences²⁸⁶ also occur 3-5 times a year. The entire area of lobbying is outside the scope of this chapter.²⁸⁷

In addition, the *Europarl* website offers an electronic mailbox²⁸⁸ for “questions, requests for information and proposals to the European Parliament.”²⁸⁹ Responses are prepared by its Correspondence with Citizens Unit.

²⁷⁹ http://ec.europa.eu/contact/dg_en.htm.

²⁸⁰ http://ec.europa.eu/contact/members_en.htm.

²⁸¹ http://www.europarl.europa.eu/eplive/public/freetext_page_direct/20061120FTX00012-2101/default_en.htm.

²⁸² Parliament’s Rules of Procedures, *supra* note 31, Rules 160, 159.

²⁸³ *Id.*, Rule 162.

²⁸⁴ Observation is limited to admission to the galleries and is only by admission card issued by the President or Secretary-General of Parliament. *Id.*, Rule 137.

²⁸⁵ http://www.europarl.europa.eu/hearings/default_en.htm.

²⁸⁶ http://www.europarl.europa.eu/conferences/default_en.htm.

²⁸⁷ For an introduction to the area, see <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?language=EN&id=65>.

²⁸⁸ <http://www.europarl.europa.eu/registre/portail/CourrierCitoyen.cfm?langue=EN>.

c. The Right of Petition Parliament. Section 194 of the EC Treaty gives any citizen of the EU, or any natural or legal person residing or having its registered office in a Member State, a right to petition Parliament on a matter within the EU's fields of activity that affects him or her directly.²⁹⁰

Parliament's Rules of Procedure direct that petitions are to be entered in a register and forwarded by its President to the Committee on Petitions.²⁹¹ The Committee, which meets every month except during the August recess, may:

- ask the Commission to conduct a preliminary investigation and provide information regarding compliance with the relevant Community legislation;
- refer the petition to other committees for information or further action, or to the Council;
- in exceptional cases, submit a report to Parliament to be voted upon in plenary, or conduct a fact-finding visit;
- seek to cooperate with national or local authorities in Member States to resolve the issue; and/or
- take any other action considered appropriate to try to resolve an issue.²⁹²

Committee meetings are public, and petitioners are able to attend when their petition is discussed.²⁹³ The petitioner must be informed of the decision on the petition, and the reasons.²⁹⁴

Petitions are announced in plenary sittings and made part of the minutes, although a petitioner can explicitly request that her or his name (and indeed the entire petition) be held confidential.²⁹⁵ The Committee must inform Parliament every six months of the outcome of its deliberations, as well as of measures taken by the Council and/or the Commission on petitions referred to them.²⁹⁶

The *Europarl* website provides clear, easy-to-locate, and comprehensible help to a would-be petitioner – as well as the opportunity for online submission.²⁹⁷ The petitioner will learn that the

²⁸⁹ <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?language=EN&id=48>.

²⁹⁰ See also Parliament's Rules of Procedure, *supra* note 31, Rule 191 § 1.

²⁹¹ *Id.*, Rules 191-193.

²⁹² The Committee is assisted by a permanent secretariat which has an advisory role and prepares meeting materials. <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=49&pageRank=4&language=EN>.

²⁹³ <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=49&pageRank=5&language=EN>.

²⁹⁴ *Id.*; Parliament Rules of Procedure, *supra* note 31, Rule 192 § 7.

²⁹⁵ <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=49&pageRank=4&language=EN>.

²⁹⁶ Parliament Rules of Procedure, *supra* note 31, Rule 192 § 6.

²⁹⁷ <https://www.secure.europarl.europa.eu/parliament/public/petition/secured/submit.do?language=EN>. Petitions may also be emailed or mailed conventionally. This webpage provides information on both these methods as well.

petition may present an individual request, a complaint, or an observation concerning the application of EU law,²⁹⁸ or an appeal to the European Parliament to adopt a position on a specific matter.²⁹⁹ At the same time, she or he is alerted that the issue must be within an area of EU interest or responsibility (numerous examples are given), and that a general request for information is not something that will be forwarded to the Committee on Petitions.³⁰⁰ (Presumably, it will be dealt with by the Correspondence with Citizens Unit,³⁰¹ although it would be helpful to make this explicit on the webpage.) The instructions also warn that Parliament cannot override decisions of competent authorities within Member States and, because it is not a judicial authority, can neither review nor revoke decisions of the courts. Petitions seeking such courses of action are inadmissible.³⁰² If a petition is inadmissible, the petitioner may be directed by the Committee to a more appropriate body, such as the Ombudsman, the European Court of Human Rights, or an institution in a Member State.

3. The Council

a. Access to Meetings and Debates. The Council has been moving towards greater public access to its meetings. On June 16, 2006 it announced that the following will be public.³⁰³

- *all* deliberations involving legislative acts subject to the co-decision process
 - although the Council or Coreper may decide that a given deliberation is not open
- the votes and explanation of votes by Council Members for such acts
- *first* deliberations on legislative acts not subject to the co-decision process which, given their importance, are presented orally by the Commission in a session
 - the Council or Coreper may overrule.³⁰⁴

These deliberations videostreamed using a service optimized, currently, for Windows Media Player.³⁰⁵ The website through which the streaming service is available³⁰⁶ also contains archived

²⁹⁸ “Such petitions give the European Parliament the opportunity of calling attention to any infringement of a European citizen’s rights by a Member State or local authorities or other institution.”
<http://www.europarl.europa.eu/parliament/public/staticDisplay.do?language=EN&id=49>.

²⁹⁹ Id.

³⁰⁰ <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=49&pageRank=2&language=EN>.

³⁰¹ See the previous subsection.

³⁰² <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=49&pageRank=2&language=EN>.

³⁰³ Council’s 2006 Policy on Transparency, *supra* note 254, Attachment 1, Presidency Conclusions 15/16 June 2006.

³⁰⁴ Id.

³⁰⁵ Currently, the videos are uploaded in a file format that allows only Windows and Mac users to view them.

events – both deliberations and press conferences. Accessed through a simple search, the archive contains deliberations of the various Council configurations from as early as July 2006.

The 2006 Policy on Transparency also committed the Council to holding public debates on important issues “regularly.”³⁰⁷ Previously, the Code of Procedure had required one public policy debate annually on the Council’s annual operational program and, if appropriate, on the Commission’s annual work programme,³⁰⁸ and “at least one” on important new legislative proposals other than those adopted through the co-decision procedure.³⁰⁹ Debates are now videostreamed, and a search under that term in the archives of the streaming service website reveals that, in addition to a number of events classified as “Public Debate,” many of the Council’s “Deliberations” are now being jointly styled “Public Debate.”

b. Participation. There appears to be no Council process for soliciting or permitting public input or participation as part of its deliberations.

c. Contacting the Council. The Contact Us page of the Council’s website³¹⁰ is an interesting contrast to that of the other two institutions. For the Council itself, only a street address – which presumably works for conventional mail – and telephone numbers are given. Email addresses are given only for the press office, visits/public events, and the library.

It is possible, by clicking on the phrase “Who’s Who in the Council,” which appears as one of 13 choices in relatively small print at the top of the page whenever the Contacts tab is open (not, however, as information offered on the main Contact Us page), eventually to get to the IDEA database.³¹¹ This is an EU-wide directory of contact information. It does contain listings for the Council. At first glance, it appears that the searcher would need to know the name of the Council member in order to use the search function. However, it is possible to select “Council of the European Union” as the desired Institution and get a list of various permutations of Member State and Council configuration. From there, the searcher can make selections and get lists of representatives. At this point, results become unpredictable. Clicking on the names sometimes produces an email address and/or a conventional address. Often, however, it produces only the ministerial title conferred by the home state.

This has proved controversial with users of other operating systems, such as Linux. See, e.g., “Anger As EU Ignores Open-Source Video,” January 3, 2007, available at http://news.zdnet.co.uk/software/0_1000000121_39285317_00.htm.

³⁰⁶ See <http://ceuweb.belbone.be/>.

³⁰⁷ Council’s 2006 Policy on Transparency, supra note 254, Attachment 1, Presidency Conclusions 15/16 June 2006.

³⁰⁸ Council’s Rules of Procedure, supra note 29, art. 8 § 2. On the Commission’s annual work programme, see Section IIB1b.

³⁰⁹ Id. art. 8 § 3.

³¹⁰ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=315&lang=en&mode=g.

³¹¹ <http://www.europa.eu/whoiswho/public/index.cfm?lang=en>.

As with transparency generally for the Council, the appropriateness of this lack of accessibility to the public relative to the other two EU institutions depends directly upon whether one emphasizes the Council's aspect as head of state/voice of the Member States or Community legislator.³¹²

D. Obtaining Information about Decisional Outcomes

Article 253 of the EC Treaty imposes the fundamental transparency requirement of stating reasons for the exercise of binding normative authority:

Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.

1. The Commission

The Commission's Code of Good Administrative Behavior elaborates on the Article 253 duty as follows:

A Commission decision should clearly state the reasons on which it is based and should be communicated to the persons and parties concerned.

As a general rule full justification for decisions should be given. However, where it may not be possible, for example because of the large number of persons concerned by similar decisions, to communicate in detail the grounds of individual decisions, standard replies may be given. These standard replies should include the principal reasons justifying the decision taken. Furthermore, an interested party who expressly requests a detailed justification shall be provided with it.³¹³

Also, the Minimum Standards for Consultation contemplate "adequate feedback to responding parties and to the public at large," including an explanation of how the results of the consultation process were taken into account in the final proposal or action.³¹⁴ The Commission's response to results of the recent public consultation on adequacy of the consultation process indicate that its staff and Directorates-General will be reminded of this standard.³¹⁵

In addition, several of the sources of information about the Commission's processes described in Section IIB1 will provide information about its decisional outcomes.

³¹² See supra notes 224-25 and accompanying text.

³¹³ Code of Good Administrative Behavior for Commission Staff, supra note 27, § 3.

³¹⁴ Standards for consultation, supra note 28, at 22.

³¹⁵ See Response, supra note 270, at 6-7.

2. The European Parliament

In addition to the Treaty obligation on Parliament *as an institution* to provide explanation when it participates in the creation of binding legal norms, there can be transparency issues with respect to individual Members.

a. Explanation of Votes. Rule 163 of Parliament’s Rules of Procedure³¹⁶ permits a Member to give an oral explanation of no more than one minute, or a written explanation of no more than 200 words, of his or her final vote on any subject submitted to Parliament, except procedural matters.

3. The Council

In addition to the obligation it shares with Parliament and the Commission under Article 253 of the EC Treaty to explain its reasoning, the Council is required by Article 207 to make public “the results and explanations of votes as well as statements” whenever it is acting in its legislative capacity. Article 207 further directs the Council to define “acting in its legislative capacity,” which it has done as follows:

The Council acts in its legislative capacity . . . when it adopts rules which are legally binding in or for the Member States, by means of regulations, directives, framework decisions or decisions, on the basis of the relevant provisions of the Treaties, with the exception of discussions leading to the adoption of internal measures, administrative or budgetary acts, acts concerning interinstitutional or international relations or non-binding acts (such as conclusions, recommendations or resolutions).³¹⁷

The explanations required by Article 207 are published as addenda to the draft minutes.³¹⁸ Monthly summaries published by the General Secretariat list the Council’s legislative and non-legislative acts,³¹⁹ and its minutes are similarly categorized. Press releases issued by the General Secretariat after each Council meeting³²⁰ are an additional source of information. The additional public meeting and debate commitments in the Council’s 2006 Policy on Transparency are moving it toward a more transparent decisional regime, although these commitments are expressly applied to “legislative” acts.³²¹

³¹⁶ Supra note 31.

³¹⁷ Council’s Rules of Procedure, supra note 29, art. 7.

³¹⁸ http://ue.eu.int/cms3_applications/showPage.asp?id=552&lang=en.

³¹⁹ http://www.consilium.europa.eu/cms3_applications/showPage.asp?id=551&lang=en.

³²⁰ http://ue.eu.int/cms3_fo/showPage.asp?id=552&lang=EN&mode=g.

³²¹ The Council’s 2006 Policy on Transparency, supra note 254.

E. General Obligations to Respond to Queries from the Public

1. The Commission

a. *Inquiries Generally.* According to the Code of Good Administrative Behavior, “The Commission is committed to answering inquiries in the most appropriate manner and as quickly as possible.”³²²

Correspondence is to be answered within 15 working days from the date of receipt by the responsible service. If this isn’t possible – because, for example, the reply requires translation or interdepartmental consultation – staff are supposed to send a reply indicating a date by which the sender may expect a response in the light of this additional work, “taking into account the relative urgency and complexity of the matter.”³²³ In addition to the substantive response, “[t]he reply should identify the person responsible for the matter and state how he or she may be contacted.”³²⁴

Telephone inquiries are to be answered “as promptly as possible.”³²⁵ Staff “shall provide information on subjects for which they have direct responsibility and should direct the caller to the specific appropriate source in other cases. If necessary, they should refer callers to their superior or consult him or her before giving the information.”³²⁶

Email inquiries follow the telephone guidelines unless “the e-mail message is, by its nature, the equivalent of a letter” – in which case it follows the correspondence guidelines.³²⁷

Response to requests for documents must generally occur in 15 working days.³²⁸

b. *Complaints.* The Secretariat General’s website provides direct access to the text of the Code of Good Administrative Behavior, as well as instructions and an online system for filing citizen complaints.³²⁹ A special form is available there,³³⁰ although the site is also clear that an ordinary letter is sufficient.

³²² Code of Good Administrative Behavior for Commission Staff, *supra* note 27, at § 4.

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.* Staff are directed to identify themselves or their department when answering the telephone. *Id.*

³²⁶ *Id.* “When enquiries concern areas for which staff are directly responsible, they shall establish the identity of the caller and check whether the information has already been made public before giving it out. If this is not the case, the member of staff may consider that it is not in the Community interest for the information to be disclosed. In this case he or she should explain why they are unable to disclose it and refer in appropriate cases to the obligation to exercise discretion as laid down in Article 17 of the Staff Regulations.” *Id.* Staff may request confirmation in writing of inquiries made by telephone. *Id.*

³²⁷ *Id.*

³²⁸ See Section IIIB5.

³²⁹ http://ec.europa.eu/civil_society/code/index_en.htm#.

The explanation page³³¹ clearly and concisely explains that complaints will be answered in writing by the relevant service head within two months, that there is then one month to appeal to the Secretary General (running from the date the response is received), and that the request for review will be answered within a further month. It also informs the complainant that Article 195 of the EC Treaty gives him/her the right to file the complaint with the Ombudsman as well.

2. The European Parliament

The Correspondence with Citizens Unit of Parliament maintains an electronic mailbox, accessible through *Europarl*, for submission of “questions, requests for information and proposals to the European Parliament.”³³² An electronic acknowledgment is triggered by successful submission. According to the site, “Answers will be sent within a reasonable period.”³³³ If the query can’t be answered readily because, for example, it covers a complex subject, “a holding letter will be sent immediately by e-mail.”³³⁴

3. The Council

In the Council’s Code of Good Administrative Behavior, staff of the General Secretariat of the Council are directed to “act in a conscientious, correct, courteous and approachable manner” and to “endeavor to be as helpful as possible” when replying to telephone calls, correspondence or other professional contact with the public.³³⁵ In dealing with both telephone and written inquiries, staff are to identify themselves and their service.³³⁶

Information is to be provided as clearly and comprehensively as possible. If for reasons of confidentiality or similar restriction it can’t be provided, the reasons for the inability are to be explained.³³⁷

Replies to written requests are to be in the language of the initial letter, and normally within 15 working days of receipt.³³⁸ If a reply is not possible within that time, the sender is to be promptly informed of this, and the reply provided as soon as possible. Requests outside a recipient’s area of responsibility should be forwarded to the appropriate service; if the staff

³³⁰ http://ec.europa.eu/civil_society/code/complaint_form_en.htm.

³³¹ http://ec.europa.eu/civil_society/code/index_en.htm# – click on Complaint Procedure (left menu bar).

³³² <http://www.europarl.eu.int/parliament/public/staticDisplay.do?id=48&language=EN>. The mailbox itself is located at <https://www.secure.europarl.europa.eu/parliament/public/citizensMail/secured/cmRequest.do?language=EN>.

³³³ <http://www.europarl.eu.int/parliament/public/staticDisplay.do?id=48&language=EN>.

³³⁴ Id.

³³⁵ Code of Good Administrative Behavior for the General Secretariat, supra note 30, Annex art. 5.

³³⁶ Id. arts. 8, 9.

³³⁷ Id. art. 6.

³³⁸ Id. arts. 7, 9.

member considers the appropriate recipient to be another institution entirely, he/she should notify the sender of this, as well as forward it to the institution.³³⁹

F. Conclusion

Whether he/she lives in a Member State or is a resident of a non-EU country, someone seeking to understand the structure and processes of EU institutions faces a formidable challenge. The principal institutions do not have easy analogues in most domestic systems; add the subsidiary entities and the permutations introduced by a series of organic documents (treaties) that created a web of procedural forms and relationships for taking action, and the task becomes almost overwhelming.

Fortunately, years of political emphasis on transparency have yielded extraordinarily good online materials in the form of several EU institutional websites. The sites of the Commission, Parliament and the Council each have a distinctive character. Parliament's is the most well-designed and user-friendly, with fine educational materials on its structure and processes and generally excellent navigation as well as content. The Commission's is probably the deepest site in terms of content. This appropriately reflects the vast structure of Directorates-General, consultative processes, etc. that it oversees. If anything, the searcher is frustrated by the sense that additional pockets of information remain unexplored on this site, no matter how diligently he/she tries to follow all the various page hierarchies. The Council's site is both the hardest to navigate and the least informative – to a degree that seems unnecessary regardless of the view one takes of the Council's nature and role.

Each institution's Registry of Documents provides direct access to a large number of relevant documents and, although there is continued public pressure to expand the collections, the instant availability of so much primary and supporting material is likely to strike most U.S. searchers as enviable. Outside the Registry itself, documents important to understanding institutional structure and function (e.g., the various rules of procedure and codes governing staff behavior) can often be accessed from various points within the websites.

Finally, the searcher should not underestimate the value of a good general search engine in the process of understanding the institutions function and gaining access to their processes. Even a site as navigationally clear as *Europarl* contains material in places not readily discoverable from the Homepage; the Commission's site has many such treasure troves. It is often quicker to locate a document or other item through a well-phrased Google search than to continue wandering through the site trying to discover the right access point.³⁴⁰

³³⁹ Id. art. 9.

³⁴⁰ Certainly this should always be tried when a Register search for a document yields no results. Sometimes, you will get a hit somewhere else on the site. Also Member States, or various private organizations, will occasionally put up documents on an outside site, even if they are not available on an official EU site.

III. ACCESS TO DOCUMENTS

A. *Public Access To Documents: Regulation (EC) No 1049/2001*

1. Access To Documents Generally

Just as the Freedom of Information Act¹ (FOIA) provides the starting point for understanding the legal framework governing the public’s right to obtain access to government information in the United States, the starting point for understanding that framework for the European Union is *Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.*² Like the FOIA, Regulation No 1049/2001 (the Access Regulation) establishes a legally enforceable right of public access to documents, spells out the procedures governing exercise of that right, delineates exemptions from required disclosure, and authorizes both judicial and Ombudsman review of decisions to deny access.

The Access Regulation plays a central role in fulfilling the EU’s goal of transparency, which is discussed in its full meaning and context in Part I.³

While the Access Regulation was preceded by a 1993 Code of Conduct granting requesters a right of access to documents of the Commission and the Council (the Code did not apply to European Parliament documents), the Code itself did not have binding legal effect.⁴ The Access Regulation, however, is grounded on Article 255 of the EC Treaty, as amended by the Treaty of Amsterdam in 1999, which states 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 . . . documents subject to the principles and the conditions to be defined . . .”⁵ The Access

¹ 5 U.S.C. § 552. For a Blackletter Statement of the Freedom of Information Act, see generally A Blackletter Statement of Federal Administrative Law, 54 Admin. L. Rev. 1, 60 (2002). The U.S. Department of Justice publishes a comprehensive guide to the FOIA, available at <http://www.usdoj.gov/oip/foi-act.htm>. The most comprehensive treatise on the subject is James T. O’Reilly, *Federal Information Disclosure* (3d ed. 2000).

Over 60 nations now have legislation governing public access to government information. See John M. Ackerman and Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 Admin. L. Rev. 85, 95 (2006). As of May 2004, the laws have been collected and summarized in David Banisar, *The freedom.org Global Survey*, available at http://www.freedominfo.org/documents/global_survey2004.pdf.

² EP and Council Regulation 1049/2001, 2001 O.J. (L 145) 43 (EC) (regarding public access to European Parliament, Council and Commission documents), available at <http://www.iue.it/EC/Archives/pdf/1049EN.pdf>.

³ On the role of access to information in promoting transparency and the relationship between transparency and legality, see Sophie van Bijsterveld, *A Crucial Link in Shaping the New Social Contract between the Citizen and the EU*, in P.J. Stolk, Aida Tunović, H. Kranenborg, and W. Voermans, eds., *Transparency in Europe II—Public Access to Documents in the EU and its Member States* (November 2004) [hereinafter *Transparency in Europe II*].

⁴ *Kingdom of the Netherlands v. Council*, Case C-58/94, 1996 E.C.R. I-2169; see § A.3(a) *infra* and text accompanying notes 36-38.

⁵ Treaty Establishing The European Community (Consolidated Version), O.J. (C 325) 33, December 24, 2002, available at http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/pdf/12002E_EN.pdf. This right-of-access language is identical to Article 42 of the Charter of fundamental rights of the European Union. O.J. (C 364) December 18, 2000, p. 1. That Charter was, according to Advocate General Léger, “intended to constitute a

Regulation thus “enshrines the principle of public access to European Parliament, Council and Commission documents.”⁶

The Access Regulation begins with a series of recitals. The first of these sets out the foundation for the Regulation – Article 1 of the Treaty on European Union,⁷ which “enshrines the concept of openness” – and then precedes in the next clause to provide the classic arguments for greater openness in government: It “enables citizens to participate more closely in the decision-making process,” “guarantees that the administration enjoys more legitimacy and is more effective and more accountable to the citizen in a democratic system,” and “contributes to strengthening the principles of democracy.”⁸

Perhaps the most important language of the recitals is found in clause 11, stating “In principle, all documents of the institutions should be accessible to the public.” Although this clause then goes on to qualify that statement, cautioning that “certain public and private interests should be protected by way of exceptions,” the principle establishing a presumption of public access – also enshrined in the FOIA – provides a foundation for interpreting the regulations by both the institutions covered and reviewing courts. This principle finds foundation in sections 1 and 2 of article 255 of the EC Treaty, creating a right of access balanced by exceptions.

2. Application To Parliament, Council, Commission, And Other Entities

a. Parliament, Council, And Commission. By its terms, the Access Regulation is designed “to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission documents in such a way as

privileged instrument for identifying fundamental rights. It is a source of guidance as to the true nature of the Community rules of positive law.” Quoted in Network of Independent Experts on Fundamental Rights, Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002, at 236 n.15 (March 31, 2003), available at http://europa.eu.int/comm/justice_home/cfr_cdf/doc/rapport_2002_en.pdf.

⁶ Report from the Commission on the Implementation of the Principles in Regulation (EC) No 1049/2001 Regarding Public Access to European Parliament, Council and Commission Documents, COM (2004) 45 final (January 2004), available at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2004/com2004_0045en01.pdf [hereinafter “2004 Implementation Report”]. One author questioned whether the decision to place the right of access in that part of the Treaty applicable to the three institutions (Council, Commission and Parliament) and not in the section dealing with reasonably general principles of the Union could be interpreted as an attempt to deny the fundamental status of the individual’s ‘right’ to information. . . . Instead the implication “could be inferred that the right of access to documents remains as matter of the internal functioning of a number of the institutions themselves.” This author concludes: “Such inference is not however supported by the more general and foundational provisions introduced by the Treaty of Amsterdam itself.” Deirdre Curtin, Citizens’ Fundamental Right of Access to EU Information: An Evolving Digital Passepartout?, 37 Common Market L. Rev. 7 (2000).

⁷ Treaty on European Union [TEU], available at <http://europa.eu.int/en/record/mt/top.html>. Article 253 EC requires legislation to include reasons, usually incorporated in recitals.

⁸ See also Declaration No 17 to the TEU, “transparency of the decision-making process strengthens the democratic nature of the institutions and the public confidence in the administration,” available at <http://europa.eu.int/en/record/mt/final.html>.

to ensure the widest possible access to documents.”⁹ Each of these institutions has adopted implementing rules.¹⁰

The Access Regulation applies not only to documents submitted to or considered by Council members at the ministerial level, but also to the Council’s preparatory bodies, including the Committee of Permanent Representatives (Coreper) and other committees, groups, working parties, and other entities listed in the Council’s Rules of Procedure.¹¹ The Presidency is considered part of the Council.¹²

The Council initially took the position that documents that had not been considered by the Council itself or one of the specifically listed preparatory bodies (but only by officials in the General Secretariat) were *not* covered by the Access Regulation because they were not held by the Council. However, following a recommendation by the Ombudsman,¹³ the Council accepted the proposition that documents in the possession of the General Secretariat are Council documents for purposes of the Access Regulation.¹⁴

By virtue of a decision by the Court of First Instance¹⁵ and a Commission Decision on Comitology¹⁶ that preceded adoption of the Access Regulation, comitology committees are considered part of the Commission for purposes of the Access Regulation. As the Court in

⁹ EP and Council Regulation 1049/2001, *supra* note 2, at art. 1(a).

¹⁰ Commission Decision of 5 December 2001, Detailed Rules for the Application of Regulation (EC) No 1049/2001 of the European Parliament and of the Council Regarding Public Access to European Parliament, Council and Commission Documents, 2001 O.J. (L 145), available at <http://www.statewatch.org/secret/comrules.htm> [hereinafter Commission Access Rules]. The European Parliament adopted a Decision on public access to documents on November 28, 2001, 2001 O.J. (C 374), available at <http://www.statewatch.org/news/2001/dec/eprules.pdf> [hereinafter EP Access Decision]; the Parliamentary Rules of Procedure include a provision (as of 2004), Rule 172, on Public Access to Documents, available at <http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//TEXT+RULES-EP+20040501+RULE-172+DOC+XML+V0//EN&HNAV=Y>. The Council amended its Rules of Procedure via a decision in November 2001, Council Decision 2001/840/EC, 2001 O.J. (L 313) 40 (amending the Council’s Rules of Procedure), available at http://ue.eu.int/uedocs/cmsUpload/L313_40_EN.pdf. The Access Regulation is currently implemented in Annex II to the Council’s Rules of Procedure, 2004 O.J. (L 106), 23.

¹¹ Council decision 2004/338/EC, 2004 O.J. (L 106), 22 (adopting the Council’s Rules of Procedure), as updated by List of Council preparatory bodies, document 15180/05, available at <http://register.consilium.eu.int/pdf/en/05/st15/st15180.en05.pdf>.

¹² Decision of the European Ombudsman on complaint 2172/2005/MHZ against the Council of the European Union (4 December 2006), available at <http://www.europarl.europa.eu/ombudsman/decision/en/052172.htm> (the Council agreed with the Ombudsman that the President was not a separate institution from the Council, but nonetheless concluded that corporate sponsorship of the Presidency website was not a matter under control of the Council); European Ombudsman, Annual Report 1998, 1998 O.J. (C 300), 97 ¶ 2.2.

¹³ European Ombudsman, Annual Report 2001, at 196, 199, available at http://www.euro-ombudsman.eu.int/report01/pdf/en/rap01_en.pdf.

¹⁴ See Martin Bauer, Transparency in the Council, in Martin Westlake & David Galloway, *The Council of the European Union*, 366, 375 (3d ed. 2004).

¹⁵ *Rothmans International BV v. Commission*, Case 188/97, 1999 ECR II-2463.

¹⁶ Council Decision 1999/468 of 28 June 1999, 1999 O.J. (L 184) 23 (laying down procedures for the exercise of implementing powers conferred on the Commission).

Rothmans observed, “refusal of access to the minutes of the numerous “Comitology” committees would amount to considerable restriction on the right of access to documents” and thus “for the purposes of the Community rules on access to documents, ‘comitology committees’ come under the Commission itself.”¹⁷

b. Other EU Entities. The Parliament, Council, and Commission declared unequivocally a month after the 30 May 2001 adoption of the Access Regulation that agencies and similar bodies created by these institutions should be subject to that Regulation and that other institutions and bodies should adopt their own internal rules on public access based on the Regulation.¹⁸ The Commission adopted its proposal for an amendment applying the regulations to Community bodies in July 2002,¹⁹ and a year later the Council adopted 15 regulations applicable to Community entities that applied the Access Regulation to documents held by these agencies and bodies and required them to adopt their own regulations by 1 April 2004.²⁰ (The Regulations also subjected to judicial and Ombudsman review decisions of those agencies and bodies refusing access to documents.)

c. Courts. Courts are not Community institutions mentioned in Article 255(i) of the Treaty and thus are not covered by the Access Regulation, which by its terms (in article 1(a)) applies only to documents of the EP, Council and Commission. However, documents from the courts are subject to disclosure under the Historical Archives regulation after the passage of 30 years.²¹ There is no automatic right of access for third parties to case-files in the courts, in contrast to the practice of U.S. courts in maintaining public dockets. The Court of Justice apparently exercised

¹⁷ *Rothmans International*, Case 188/97, at ¶¶ 61-62.

¹⁸ Joint Declaration of 27 June 2001, 2001 O.J. (L 173) 5 (regarding public access to European Parliament, Council and Commission documents), available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_173/l_17320010627en00050005.pdf. The Ombudsman had earlier declared that other EU bodies and institutions have a legal obligation to adopt access rules and that failure to do so would constitute maladministration. European Ombudsman Decision and Recommendation in his own-initiative inquiry into public access to documents held by Community Institutions, 616/PUBAC/F/IJH 15 Dec. 1997, available at <http://www.euro-ombudsman.eu.int/recommen/en/317764.htm>. Many of the access rules of different EU entities are collected in Steve Peers, *From Maastricht to Laeken: The Political Agenda of Openness and Transparency in the European Union* in Veerle Deckmyn, *Increasing Transparency in the European Union?* 7, 15 (2002).

¹⁹ Commission of the European Communities, Proposal for Amendment of the Constituent Acts of Community Bodies Following the Adoption of the New Financial Regulation, COM (2002) 406 final (July 2002).

²⁰ Regulations (EC) No 1641-1655/2003, 2003 O.J. (L 245), 1-41. See, e.g., the Council Joint Actions of 20 July 2001 that established an EU Institute for Security Studies (2001/555/CFSP, 2001 O.J. (L 200) 5) and an EU Satellite Center (2001/555/CFSP, 2001 O.J. (L 200) 5) and Council Decision 2002/187/JHA, 2001 O.J. (L 63) 1– in each case these bodies are required to adopt rules on public access to documents that take into account principles and limits of the Access Regulation. The EU Institute for Security Studies Board adopted rules on 17 July 2002 (<http://www.iss-eu.org/about/content/ruls.pdf>) and the Satellite Centre Board adopted similar rules on 16 July 2003. See generally 2004 Implementation Report § 2.1.3.

²¹ See Council Regulation (EEC, Euratom) 354/83 of 1 February 1983, 1983 O.J. (L 043) 1 (governing historic archives), and the Council Annual Report on Access to Documents 2003 (April 2004), at 9, available at <http://ue.eu.int/uedocs/cmsUpload/EN-AR-02.pdf>. Access to historic archives is discussed below at § B.14(b). Note that the 2004 Implementation Report § 2.1.3 states that the Access Regulation will not apply to the courts “except in cases where they are not acting as judicial bodies,” but this comment is not explained and appears to contradict the text of the Regulation (art. 1(a)).

its discretion to permit “its Research and Documentation Service to publish on the Court’s Internet website those notes which have been prepared in respect of cases which have finally been decided by the Community judicature.”²²

d. Member States. The Access Regulation applies to documents from third parties, including Member States, when they are in the possession of institutions subject to the Access Regulation, but it confers no rights to request or obtain any EU documents directly from Member States. When an EU institution receives a request for a document prepared by a Member State, the Member State is given an absolute veto right over disclosure of its documents by EU institutions; applications for access to documents prepared by Member States, governed by article 4(5), are discussed below.²³ However, the Access Regulation is not available for obtaining information in the possession of Member States. Article 5 provides guidance to the Member State on how to handle a request for an EU document in the Member State’s possession.

When a Member State, under Article 5, “receives a request for a document in its possession, originating from an institution,” the Member State may:

- release or withhold the document if “it is clear that the document shall or shall not be disclosed”;
- consult with the institution “to take a decision that does not jeopardize the attainment of the objectives” of the Access Regulation; or
- “refer the request to the institution.”

Although the Preamble (clause 15) directs Member States “not to hamper the proper application of this Regulation and . . . [to] respect the security rules of the institutions,”²⁴ Member States nonetheless retain some ability under Article 5 “to decide on the release of EU documents under their own national access rules”²⁵ Article 5 of the Regulation leaves a margin of discretion to Member States; they decide whether the institution should be consulted, and they are not bound by the institution’s opinion; in practice, however, Member States will avoid disclosures against the recommendation of the institution.²⁶

²² Noel Travers, *Access to Documents in Community Law: On the Road to a European Participatory Democracy*, 35 *Irish Jurist* 164 (2000). For additional discussion of judicial disclosure issues, see *id.* at ¶ 219 & n.132.

²³ See *infra* § B.12.

²⁴ The principle of “loyal cooperation” dictates that Member States “refrain from interfering with the proper application of the Regulation.” Marc Maes, “The New Regulation on Access to Documents,” in Veerle Deckmyn, *Increasing Transparency in the European Union?* 199, 204 (2002).

²⁵ Member State legislation on access to documents is surveyed in *Transparency in Europe II*, at 183-288.

²⁶ Despite the apparent discretion left to Member States, one commenter observed that in practice Article 5 leaves “little discretion to Member States to deviate from the opinion of the institution.” See Magdalena Elisabeth de Leeuw, *The Regulation on Public Access to European Parliament, Council and Commission Documents in the European Union: Are Citizens Better Off?*, 28 *Eur. L. Rev.* 324, 340-41 n. 681 citing (2003), citing the conflict between the Council and Sweden concerning the release by Sweden of Council documents. *Svenska Journalisten förbundet v. Council*, Case 174/95, ECR II-2289 (1998).

3. Brief History Of Adoption

a. Code Of Conduct On Public Access. The European Union's first effort to effect a public right of access to documents began shortly after adoption of the Treaty on European Union (Maastricht Treaty). Specific proposals (by the Netherlands, Denmark, and the Parliament) had been made to include access and openness provisions in the treaty, but those were not accepted by the drafters.²⁷ Only Declaration No 17 – a broad statement of the principle that “transparency . . . strengthens the democratic nature of the institutions and the public confidence in the administration” – appeared in the final Treaty.

Commentators cite the difficulties of the Treaty ratification process as laying the foundation for adoption of specific rules governing citizens' access to documents.²⁸ As one observer suggests, “The essential point was that the citizens of Europe, civil society, and non-governmental organizations had become fed-up with the secrecy of the Commission and of the Council.”²⁹

The Council took the first concrete steps toward openness on 6 December 1993, when it adopted a new version of its Rules of Procedure that provided for the possibility of public debates and public disclosure of the record of votes and explanations of votes³⁰ and, along with the Commission, agreed upon a Code of Conduct concerning public access to Council and Commission documents.³¹ Two weeks later the Council adopted rules implementing this Code of Conduct;³² a few months later the Commission issued a decision implementing the Code.³³

The Code of Conduct was criticized for a number of shortcomings.³⁴ Two important ones were its exclusion of documents written by third parties (the “authorship rule”) and its broadly written

²⁷ See generally Achim Berge, *Improved Rules on Public Access to Documents?* 37, 54-56 (Master Thesis Paper 2000), available at <http://www.uni-frankfurt.de/~sobotta/thesisart255.doc>.

²⁸ See, e.g., Laurens Jan Brinkhorst, *Transparency in the European Union*, 22 *Fordham Int'l L.J.* S128 (1998-1999); Morten P. Broberg, *Access to Documents: A General Principle of Community Law*, 27 *Eur. Law Rev.* 194 (2002); Jean-Claude Piris, *After Maastricht, Are the Community Institutions More Efficacious, More Democratic, and More Transparent?*, 19 *Eur. L. Rev.* 449 (1994).

²⁹ Brinkhorst, *id.*, at S132.

³⁰ Council Decision 93/662 EC of 6 December 1993, 1993 O.J. (L 304) 1 (adopting Council Rules of procedure).

³¹ Code of Conduct 93/730/EC of 6 December 1993, 1993 O.J. (L 340) 41 (concerning public access to Council and Commission documents). Background on adoption of the Code of Conduct can be found, e.g., in Tony Bunyan, Deirdre Curtin and Aidan White, *Essays for an Open Europe*, Statewatch (November 2000), available at <http://www.statewatch.org/secret/essays2.htm> at Ch. 1.

³² Council Decision 93/731/EC/ECSC/Euratom on public access to documents, 1993 O.J. (L 340) 43. The Council's initial Decision on access to documents was subsequently amended in 1996, Decision 96/705, 05 1996 (L 325) 19 (extending the time allowed for response to applications) and in 2000, Decision 2000/527, O.J. (L 212) 9 (expanding exemptions from access rules).

³³ Commission Decision 94/90/ECSC, EC, Euratom: Commission Decision of 8 February 1994 on public access to Commission documents, 1994 O.J. (L 46) 58 (Euratom on public access to Commission documents).

³⁴ E.g., Tony Bunyan, *Secrecy and Openness in the European Union* (September 30, 2002), available at <http://www.statewatch.org/secret/freeinfo/index.html>; Curtin, *supra* note 6.

exemptions.³⁵ The Code was the subject of a lawsuit brought by The Netherlands, arguing that the Code was not valid because it did not confer the full citizens' rights as required by Treaty. The Netherlands was not attacking the provision for access to documents, but was seeking "recognition from the Court that access to documents is one of the citizens' fundamental rights" or, if that did not happen, "to convince the Court to annul the Council decision with a view to replacing it by new rules providing more generous access to documents."³⁶ The European Court of Justice dismissed the challenge and held that the Code could in fact confer rights:

so long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organization, which authorizes them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration.³⁷

The Court stopped short, however, of declaring that access to documents constitutes a "general principle of law."³⁸

b. Adoption Of Access Regulation. The Access Regulation emerged from an intriguing and Byzantine interplay among the Commission, Council, and Parliament. Although none of the Commission's preparatory documents was officially published during the development of the Regulation, a complete legislative history of the Access Regulation with links to drafts and discussion papers has been compiled by the nongovernmental organization Statewatch.³⁹ The

³⁵ See de Leeuw, *supra* note 23, at 325; Steve Peers, From Maastricht to Laeken: The Political Agenda of Openness and Transparency in the European Union, in Veerle Deckmyn, *Increasing Transparency in the European Union?* 7, 12 ("secrecy and confidentiality were still the rule, with openness and transparency the exception").

³⁶ Broberg, *supra* note 28, at 199 (footnotes omitted).

³⁷ *Kingdom of the Netherlands v. Council*, Case C-58/94, 1996 E.C.R. I-02169 (April 30, 1996), ¶ 37.

³⁸ Broberg, *supra* note 28, at 200. The Advocate General argued that a general principle of public access to documents, arising from the principle of democracy, existed before the Code was adopted. Opinion of the Advocate General Tesaro in *Netherlands v. Council*, note 37. Legal scholars apparently disagree on whether the Court supported the Advocate General's Opinion. See sources cited in Berge, *supra* note 27. Advocate General Fennelly, in a lecture delivered at Edinburgh, February 4, 2000, "Transparency and Access to Documents in the European Union," observed that in the *Netherlands v. Council* case, "the Court wished to encourage the establishment of a legal principle of public access to documents, but that it was constrained by the tenuous legal basis for Community action from going further than an explicit rejection of the attack on the Council's resort to its power to adopt internal rules." Quoted in Travers, *supra* note 22, at 183 n.65; see Broberg, *supra* note 28, at n. 42.

³⁹ Found at <http://www.statewatch.org/secret/observatory.htm>, the "Observatory" has sections on current drafts on the table, current Decisions on public access to EU documents and the Commission proposals, reports from the European Parliament committees, European Parliament vote on 1st reading report, proposals by the Council, and critiques and comments by civil society, along with discussion papers. The European Ombudsman criticized the Commission's secrecy surrounding development of its Access proposal. Jacob Söderman, *The EU's Transparent Bid for Opacity*, *Wall St. J. Europe* (February 24, 2000); see Jacob Söderman, "The Early Years of the European Ombudsman," in *The European Ombudsman—Origin, Establishment, Evolution* 83, 97 (2005).

role of the various countries and institutions involved in developing the Access Regulation has been perceptively explored in the literature.⁴⁰

The final Regulation defining the principles, conditions, and limits governing access to documents was adopted by the Council and Parliament in May 2001 and went into effect on 3 December 2001.⁴¹ Each of the three institutions praised the significance of the new Regulation⁴² and adopted its own rules to implement the Access Regulation.⁴³

4. Overview And Basic Principles

The Access Regulation is similar in many ways to the FOIA. It establishes a general right of access to documents, granted to all persons; no showing of particular interest in a requested document is necessary. The term “document” is broadly defined. The general right of access is qualified by specifically delineated exceptions setting out the public and private interests to be protected by nondisclosure. Requirements for requesting documents are set out, and an administrative appeal is allowed. Refusal to grant access may be challenged through judicial review; in the alternative, a complaint may be made to the European Ombudsman.

While these basic principles also underlay the Code of Conduct, the Access Regulation did introduce “innovations which have considerably broadened the right of access”⁴⁴:

- Applicability is extended to all documents – including documents from third parties, sensitive (classified) documents, and documents relating to the second and third “pillars” of the Union – held by the institutions covered.
- Certain exceptions are subject to a public-interest counter-balance; if there is an overriding public interest in disclosure, the document will be released even if an exception applies.
- Each institution must establish a public register and make additional documents directly available over the Internet.
- The principle of partial access (applied to the Code of Conduct under case law) is incorporated in the Access Regulations.

⁴⁰ A comprehensive analysis of the politics surrounding development of the Access Regulation is found in Bo Bjurulf & Ole Elgström, *Negotiating Transparency*, 42 *J. Common Mkt. Studies* 249 (2004); see Tony Bunyon, *Secrecy & Openness in the EU*, Statewatch (October 1, 2002), www.freedominfo.org/case/eustudy.htm, at Ch. 5. An equally comprehensive analysis of the history of the Freedom of Information Act, including a political perspective of those developments, is found in James T. O’Reilly, *Federal Information Disclosure* Ch. 2 (3d ed. 2000).

⁴¹ *Supra* note 2.

⁴² See Joni Heliskoski & Paivi Leino, *Darkness at the break of noon: The case law on Regulation No 1049/2001 on access to documents*, 43 *Common Market L. Rev.* 735, 736-37 nn. 6-8 (2006).

⁴³ *Supra* note 10.

⁴⁴ 2004 Implementation Report at ¶¶ 7-8.

- The one-month time limit for reply is reduced to 15 working days (with an extension if justified).

The following sections explore the provisions of the Access Regulation in detail.⁴⁵

B. Administrative Provisions Governing Access

1. Who May Obtain Access

Consistent with Article 255 of the Treaty on European Community, the Access Regulation may be invoked by citizens of the Union and natural and legal persons residing or having their registered office in a Member State.⁴⁶ The Commission and Council have nonetheless, in their implementing rules under Article 2(2) of the Access Regulation, granted the right of access to all other natural and legal persons.⁴⁷ The Parliament has extended this right “where possible,”⁴⁸ but in practice it apparently does not refuse to respond to requests from citizens in non-EU countries who do not reside in the EU.⁴⁹

While the Access Regulation does not apply to requests for documents made by Member States and Community institutions and bodies,⁵⁰ individual Members of the Parliament may use the

Regulation to obtain documents from the Council and Commission,⁵¹ just as Members of Congress in their individual capacity may use the FOIA to obtain documents from federal agencies. In fact,

⁴⁵ Though it has no legal force or effect, a “Users Guide on Access to European Parliament, Council and Commission” has been prepared to facilitate public use of the Access Regulation, available at http://www.europarl.eu.int/opengov/pdf/2001_1834_en.pdf. Compare Citizens Guide on Using The Freedom of Information Act and The Privacy Act of 1974 to Request Government Records, H.R. Rep. 109-226 (20 September 2005), available at <http://reform.house.gov/UploadedFiles/FOIA%20Report.pdf>.

⁴⁶ Article 255(1) of the Treaty, quoted in text accompanying note 5 supra; Access Regulation art. 2(1).

⁴⁷ Council Decision 2001/840, supra note 10, amending Article 1 of Annex III of Council’s Rules of Procedure; Commission Decision 2001/937 (amending its rules of procedure), Annex, Article 1, second paragraph. However, persons to whom the right is extended under these Decisions may not lay a complaint before the Ombudsman, although they may, if access is denied, bring an action in the Court of First Instance. *Id.*, third paragraph.

⁴⁸ Rule 97.1.2 of the European Parliament Rules of Procedure.

⁴⁹ 2004 Implementation Report § 2.2.2. This report goes on to note that “since more and more applications are being lodged by e-mail, it is not always possible to check whether applicants are citizens of the Union.” *Id.*

⁵⁰ The Regulation is “without prejudice to existing rights of access to documents for Member States,” Recital cl. 16, and “the principle of loyal cooperation” continues to govern relations between the institutions and Member States, *id.* cl. 15.

⁵¹ *Hautala v. Council of the European Union*, Case 14/98, 1999 E.C.R. II-2489; and *Council of the European Union v. Hautala*, Case 353/99 P, 2001 E.C.R. I-9565 (that the applicant was a member of the European Parliament not in issue in case seeking access to Council document). See also decision (document 14692/02) that is the subject of *Turco v. Council*, Case 84/03, appeal pending, Cases C-39/05, C-52/05 (Council treated applicant, a Member of Parliament, like any other applicant). See also European Ombudsman, Draft recommendation to the European Parliament in complaint 1919/2005/GG, available at <http://www.euro-ombudsman.eu.int/recommen/en/051919.html> (Member of Parliament as complainant).

[t]he authority that decides on the public access of a certain document is not allowed to take into account why someone asks for access, nor is it allowed to weigh the importance of access to the person involved.⁵²

As the ECJ opined, “the particular interest of an applicant in obtaining access to documents cannot be taken into account by the institution”⁵³

Under Art. 6.1, as under the FOIA (and under the Code of Conduct⁵⁴), the Access Regulation requires no statement of reasons on the part of a person requesting disclosure of documents.⁵⁵ Additionally, simply because an applicant is able to obtain access to some documents in the course of Court proceedings does not deprive it of the right to obtain access.⁵⁶

2. Documents Covered

Article 2.3 specifies that the Access Regulation “shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.” As defined in Article 3(a), “document” covers “any content, whatever its medium,” thus including information on paper, in electronic form, including e-mails and sound, visual, or audiovisual recordings, so long as the documents concern “a matter relating to the policies, activities and decisions falling within the institution’s sphere of responsibility.”⁵⁷

Under the Code of Conduct, an “originator” or “authorship” rule allowed the author of a document in the possession of the institution to have absolute veto power over disclosure. The Access Regulation pointedly changed this, applying the exemptions to documents whether created by or received by the institution.⁵⁸

⁵² European Data Protection Supervisor, Public Access to Documents and Data Protection, July 2005, available at http://www.edps.eu.int/publications/policy_papers/Public_access_data_protection_EN.pdf, at ¶ 10.

⁵³ Jose Maria Sison v. Council, Case 266/05 (E.C.J. Feb. 1, 2007) (not yet reported), ¶ 47 (hereafter *Sison*). The Court observed that when the Access Regulation was being developed, “consideration was paid to the possibility of extending the subject-matter of the regulation by providing for account to be taken of certain specific interests of which persons could avail themselves in order to obtain access to a particular document. . . . [N]one of the suggestions . . . was incorporated in the provisions of Regulation No 1049/2001.” *Id.* ¶ 45.

⁵⁴ See, e.g., *Interporc Im- und Export GmbH v. Commission*, Case 124/96, 1998 E.C.R. II-231, ¶ 48, applying the Code of Conduct.

⁵⁵ This principle is incorporated in the institutions’ implementing rules. E.g., EP Decision art 8.4 (“The applicant is not obliged to state the reasons for the application.”).

⁵⁶ *Id.* at ¶ 44 (“Whilst . . . *Interporc*, in its capacity as applicant, was able to rely on the Provisions of the Rules of Procedure . . . to obtain some of the documents it had requested . . . , it none the less retains the option of requesting access to the same documents pursuant to Decision 94/90” [the Code of Conduct]).

⁵⁷ In *Hendrickx v. Council*, Case 376/03 (C.F.I. Apr. 5, 2005) (not yet reported), the CFI did not address the argument that personal notes of a member of the board whose records were requested were not Council documents. Some U.S. courts have distinguished between agency records subject to the FOIA and personal records that are not. E.g., *Bureau of National Affairs, Inc. v. Department of Justice*, 742 F.2d 1484, 1488-96 (D.C. Cir. 1984).

⁵⁸ See the characterization of these changes as a controversial compromise in *Bjurulf & Elgström*, *supra* note 40.

Access to sound and video recordings and databases has proved challenging to the institutions. At one time, in what may be an isolated case, the burden of reviewing, making decisions on partial release, and copying of audiovisual recordings led the Parliament to require that citizens “justify such applications, especially in the case of repetitive applications.”⁵⁹

The Commission, which has received fewer applications for recordings than the other institutions, requests the applicant to listen to them in Commission offices.⁶⁰ In the U.S. this issue has been less troublesome because of the agencies’ ability in most cases to charge for searching and copying of disclosed records. At the same time, access to databases has proved problematic in both the EU and U.S. The Commission regards “as a document any report extracted from such [database] systems which corresponds to normal use of them.”⁶¹ Apparently the Commission does not treat the database itself as a document subject to disclosure. Courts in the United States have not been consistent on this subject, but the weight of decisions appears to tilt against treating databases as records subject to disclosure under FOIA.⁶²

Like the FOIA, the Access Regulation imposes no obligation for an institution to create a document in response to a request for access;⁶³ the Regulation authorizes access only to documents already in existence when the request is made.⁶⁴ Moreover, where the institution responds that a document does not exist, there is a presumption that this is correct.⁶⁵

⁵⁹ 2004 Implementation Report § 2.3.4. The EP now provides DVDs of all plenary sessions.

⁶⁰ Id.

⁶¹ 2004 Implementation Report § 2.3.5.

⁶² Compare *Petroleum Info. Corp. v. Dep’t of Interior*, 976 F.2d 1429 (D.C. Cir. 1992) (computer compilation of records must be disclosed) and *DeLorme Publ’g Co. v. Nat’l Oceanic & Atmospheric Admin.*, 917 F. Supp. 867 (D. Me. 1996) (digitized data used in electronic charting system is agency record subject to disclosure), with *Tax Analysts v. Dept. of Justice*, 913 F. Supp. 599 (D.D.C. 1996), *aff’d*, 107 F.3d 923 (D.C. Cir. 1997) (JURIS database is not an agency record due to contractual limitations imposed by provider) and *Bazier v. U.S. Dept. of the Air Force*, 887 F. Supp. 225 (N.D. Cal. 1995) (database of Supreme Court cases not an agency record).

⁶³ Applying the Code of Conduct, the Court of First Instance observed that the right of access to documents does not imply a right to information that does not exist in the form of a document, but applies only to documents in existence. *Order, Meyer v. Commission*, Case 106/99, 1999 E.C.R. II-3273, ¶¶ 35-36. Likewise, responding to a complaint against the failure of the Council to establish certain lists, the Ombudsman dismissed the complaint on the basis that the Access Regulations impose no obligation on an institution to create a document. Ombudsman Complaint 1015/2002/PB of 29 May 2002. See Council’s 2003 Annual Report at ¶ 32.

However, even where a document does not exist, Article 6 of the “Code of good administrative behaviour for the General Secretariat of the Council of the European Union and its staff in their professional relations with the public,” 2001 O.J. (C 189) 1, requires staff of the General Secretariat to provide the public with information requested, within their area of responsibility, and to ensure that the information is as clear and comprehensible as possible. Decision 2001 (C 189) 01 of the Secretary-General of the Council/High Representative for Common and Foreign Security Policy of 25 June 2001. The Commission has also established an e-mail portal for answering questions from the public, available at <http://europedirect-cc.cec.eu.int/websubmit/?lang=en>.

⁶⁴ The Ombudsman has concluded, however, that even without regard to any regulatory requirement, “principles of good administrative behaviour require that an official who has responsibility for the matter concerned shall supply members of the public with the information that they request.” The complainant requested names of persons who made submissions to the Commission during an investigation and who had attended a meeting. Decision of the European Ombudsman on complaint 713/98/(IJH)/GG against the European Commission, and Special Report to the

Under the FOIA, the Supreme Court has established the requirements of possession and control for determining whether something constitutes an “agency record” subject to that statute.⁶⁶ The Access Regulation, for its part, applies under Art. 2.3 to “documents held by an institution.” Each institution has adopted its own interpretation of the concept of “held by an institution.”

Rule 97 of the Parliament’s Rules of Procedure defines “Parliament documents” as any content within the meaning of Article 3(a) of Regulation (EC) No 1049/2001 which has been drawn up or received by Officers of Parliament within the meaning of Title I, Chapter 2, of these Rules, Parliament’s governing bodies, committees or interparliamentary delegations, or by Parliament’s Secretariat.” The Access Regulation thus does not apply to documents of members that have not been introduced according to the Rules of Procedure.⁶⁷

While the Council has not defined “Council document,” it does distinguish Council documents drawn up by Member State governments or delegates in the context of their work on the Council from documents drawn up by a Member State and expressing that Member State’s position as such.⁶⁸ Likewise, while the Commission has established no definition of “Commission document,” it regards any document held by the President, a Vice-President, a Member of the Commission, or a member of a cabinet “in the same way as documents held by one of its departments.”⁶⁹ Also, documents drafted by committees that assist the Commission in the performance of its duties are considered Commission documents.⁷⁰

3. Procedures For Obtaining Access

Requests for information, called “applications” under Art. 6 of the Access Regulation, must be made in writing and may be in any of the languages referred to in the EC Treaty. Mail, fax, or e-

European Parliament on the same matter (11 December 2001), available at <http://www.euro-ombudsman.eu.int/decision/en/980713.htm>; see Decision of the European Ombudsman on complaint 3054/2004/TN against the European Central Bank ¶ 1.4 (1 July 2005), available at <http://www.europarl.europa.eu/ombudsman/decision/en/043054.htm> (“where it is not possible to provide the requested information, the Ombudsman considers that the institution or body refusing the request should give the citizen sufficiently specific reasons to show clearly and unequivocally its reasoning for the refusal”).

⁶⁵ *British American Tobacco v. Commission*, T-311/00, 2002 E.C.R. II-02781, ¶ 35; *JT’s Corporation v. Commission*, T-123/99, 2000 ECR II-3269 ¶ 58.

⁶⁶ *Dept. of Justice v. Tax Analysts*, 492 U.S. 136 (1989).

⁶⁷ European Parliament, Rules of Procedure 16th ed., July 2004, 2005 O.J. (L 44) 1.

⁶⁸ *Id.* at ¶¶ 2.3.3 & 3.5.2. See discussion of access to Member State documents *infra* § 2.12.

⁶⁹ 2004 Implementation Report § 2.3.3, elaborating that Parliament documents cover: the documents drafted or received by the members holding a mandate [the President, Vice-President, and the Quaestors], by the bodies [the Bureau, Conferences of Group Presidents, Committee Chairs, and Presidents of Delegations], committees and delegations, and by the Secretariat. The documents drafted by other members or by political groups are Parliament documents when they have been lodged in accordance with the Rules of Procedure. Parliament therefore considers that the documents drafted by members or by political groups that have not yet been lodged, and the documents by third parties held by members, do not come within the scope of the Regulation.

⁷⁰ *Rothmans*, 1999 E.C.R. II-2463, ¶ 62.

mail are all accepted,⁷¹ and according to data collected, e-mail is the most widely used medium for making applications.⁷²

Applications must be “sufficiently precise” to allow the institution to identify the document. (The FOIA requires that the requester “reasonably describe” the record sought in accordance with applicable rules.⁷³) Unlike in the U.S., where imprecision on the part of a requester will often lead to denial of the request, EU institutions are committed under Art. 6.2 of the Access Regulation to seeking clarification from the applicant and are committed to assisting the applicant in doing so.⁷⁴

4. Repetitive Or Burdensome Requests

Art. 6.3 addresses what has become a chronic problem under the open records regimes of many nations: requests for very long or large numbers of documents:

In the event of an application relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution.

This provision does not permit the institution unilaterally to limit the application to a specific time-frame, for example. And while the applicant may be asked to come in to read the documents and obviate copying, this may not be a workable solution.⁷⁵ The principal solutions an institution has to address what it considers unfair, repetitive, or unreasonable applications are to obtain an agreement to limit the request through consultation with the applicant, as provided in Art. 6(3), or to invoke the principle of proportionality.⁷⁶

The Commission has invoked the principle of proportionality and refused to process applications that would impose an administrative burden that would undermine the principle of good administrative practices. In one instance, the Commission denied access to an entire investigatory file without having conducted an individualized review of each document in that file. The file, which had been requested by a consumer organization, contained over 47,000 pages. The Commission divided the documents into categories and then proffered reasons for denial of each category without carrying out an examination of each individual document. The

⁷¹ E.g., Commission Access Rules art. 2; EP Access Decision art. 8.

⁷² Council Annual Report on Access to Documents 2004 at ¶ 14 (May 2005), available at <http://ue.eu.int/uedocs/cmsUpload/new08896.en05INT.pdf> (reporting that in 2004 there were 8529 e-mail applications for documents, compared with 698 applications by letter).

⁷³ 5 U.S.C. § 552(a)(3)(A).

⁷⁴ E.g., Commission Access Rules art. 2 (“if an application is imprecise . . . the Commission shall invite the applicant to provide additional information making it possible to identify the documents requested”); EP Access Decision art. 8.4.

⁷⁵ 2004 Implementation Report § 4.3.

⁷⁶ Other possibilities include charging applicants for copying costs or processing the request without regard to time deadlines. Bart Driessen, *The Council of the European Union and access to documents*, 30 Eur. L. Rev. 675, 691 (2005).

Court of First Instance, considering a challenge to that failure, recognized in *Verein für Konsumenteninformation v. Commission* that

It is possible for an applicant to make a request for access, under Regulation No 1049/2001, relating to a manifestly unreasonable number of documents, perhaps for trivial reasons, thus imposing a volume of work for processing of his request which could very substantially paralyze the proper working of the institution.⁷⁷

Nonetheless, even in this circumstance, the institution is not off the hook:

where the institution has adduced proof of the unreasonableness of the administrative burden entailed by a concrete, individual examination of the documents referred to in the request, it is obliged to try to consult with the applicant in order, on the one hand, to ascertain or to ask him to specify his interest in obtaining the documents in question and, on the other, to consider specifically whether and how it may adopt a measure less onerous than a concrete, individual examination of the documents.⁷⁸

Finding that the Commission failed to explore alternatives with the applicant or to explain specifically why any alternatives would represent an unreasonable amount of work, the Court overturned the institution's refusal to process the application.⁷⁹

In an observation reminiscent of agency complaints in the U.S., the Commission's 2004 *Implementation Report* charged that "Some systematic and repetitive applications can constitute unfair use of the Regulation." The Commission decried the "professional applicants, who also make use of the remedies available to them," that "are putting the institutions on the defensive by confronting them with demands which the latter cannot satisfy"⁸⁰ The concern about misuse or abuse of the Access Regulation has given rise to adoption of various approaches designed to relieve the institutions of burdens imposed by these complex or extensive requests. Presaging this concern, one author writing for the advocacy NGO Statewatch asserted that the Commission rule singling out the situation where an application for documents is "complex"⁸¹ has no basis in the Regulation.⁸² The Parliament proposes to find a fair solution where there

⁷⁷ Case 2/03, 2005 E.C.R. II-13, at ¶ 101.

⁷⁸ Id. at ¶ 114.

⁷⁹ Id. at ¶ 131. Commentators have expressed concern that the Court in *VfK* not only deviated from the express language and intent of the Access Regulation, but also that its dicta could open the floodgates to unwarranted limitation on rights to partial access. See Heliskoski & Leino, *supra* note 43, at 759.

⁸⁰ 2004 Implementation Report § 4.3.

⁸¹ Commission Access Rules art. 2, ¶ 2 (extending the time for "complex or bulky applications").

⁸² Tony Bunyan, *Secrecy and Openness in the European Union* (posted September 30, 2002), available at <http://www.freedominfo.org/case/eustudy/>. But see *Verein für Konsumenteninformation v. Commission*, Case 2/03, 2005 E.C.R. II-13, ¶ 11:

the amount of work entailed in considering a request for access depends not only on the number of documents referred to in the request and their volume, but also on their nature. Consequently, the need to undertake a concrete, individual examination of very numerous documents does not, on its own, provide any indication of the amount of

have been “repeated”⁸³ or “successive” applications. This provision has also been criticized as being “clearly beyond the legal scope of Article 255(3) EC, as it adds to the regulation instead of merely implementing it.”⁸⁴ In one case involving a request to the Commission for all documents “concerning the preparations for possible negotiations” on a WTO agreement, the Commission issued a blanket denial on the basis that the documents were “internal preparatory work.” The European Ombudsman brokered a friendly solution involving the Commission’s providing a list of 296 documents that fell into the requested category. The complainant agreed to accept the list and thereafter to specify those individual documents to be requested.⁸⁵

5. Time Limits

Under Art. 7.1, an initial application must be answered in 15 working days.⁸⁶ This can be extended for an additional 15 working days under Art. 7.3 in exceptional cases. (Appeals made by way of a confirmatory application are subject to the same 15/15 rule under Art. 8.1.) If an application is imprecise and the Commission invites additional clarification, “the deadline for reply shall run only from the time when the Commission has this information.”⁸⁷

The Commission has reported that in some cases the institutions, particularly the Commission, were required to extend the time limit for reply; the Commission considers the deadline of 15 working days to be “generally insufficient to process the applications” because of the need to look for and locate documents (especially old ones), to identify documents where the application is vague, to find staff with necessary expertise to assess potential damage from disclosure, to consult with third parties, or to translate the applications and replies.⁸⁸

By contrast, the Council reported that in 2004, “the average time for processing initial applications was 9 working days.”⁸⁹

work entailed in processing a request for access, since the amount of work also depends on the required depth of that examination.

⁸³ The Code of Conduct referred also to “repeat applications,” in art. 3.2, but this concept was dropped from the Access Regulation.

⁸⁴ See de Leeuw, *supra* note 26, at 345. Interpreting the Code of Conduct, the Ombudsman found that “repeat applications” mentioned in Art. 3(2) – calling for a fair solution where there are “repeat applications and/or those which relate to very large documents” – “does not include applications by the same person for different documents, nor is the Article to be interpreted so as to bring a very large *number* of documents within its scope.” Decision of the European Ombudsman on complaint 1053/25.11.96/STATEWATCH/UK/IJH against the Council, available at <http://www.euro-ombudsman.eu.int/decision/en/961053.htm>.

⁸⁵ Decision of the European Ombudsman on complaint 415/2003/(IJH)TN against the European Commission (27 February 2004), available at <http://www.europarl.europa.eu/ombudsman/decision/en/030415.htm>.

⁸⁶ “Working days” do not include holidays. European Ombudsman Draft decision to The European Parliament in complaint 1919/2005/GG, ¶ 2.11, available at <http://www.euro-ombudsman.eu.int/recommen/en/051919.htm>.

⁸⁷ Commission Access Rules art. 2 ¶ 3.

⁸⁸ 2004 Implementation Report § 4.2.

⁸⁹ Council Annual Report on Access to Documents 2004, *supra* note 67, at ¶ 10. Delay has been a chronic problem for requesters under the FOIA. For a general discussion of this problem, see generally Thomas M. Susman, *Delay*

Confirmatory applications must be decided within 15 working days, with reasons provided the applicant for any denial.⁹⁰

6. Charges Or Fees

The institutions under Art. 10.1 may charge for actual cost of producing and sending copies of documents to an applicant, but not for costs of identification, search, or compilation. The Commission rules allow a charge of EUR 0,10 per page, plus carriage costs, if the volume of documents requested exceeds 20 pages.⁹¹ “However, it appears that the option of invoicing is rarely used because of the cumbersome procedures and the fact that the cost of invoicing and collection of the sums would be higher than the amounts collected.”⁹²

7. Response To Initial Applications

Under the Access Regulation⁹³ and the rules of the institutions,⁹⁴ an acknowledgement of receipt of an initial application should be sent to the applicant as soon as the application is logged in. (This step is customarily undertaken under FOIA, though the statute does not require it.) As is required by FOIA, the Access Regulation requires any response that refuses access in whole or part to be in writing, to state the reasons for the refusal, and to inform the applicant of the right to an administrative appeal.⁹⁵ The responding institution may offer brief reasons if more detailed disclosure could reveal the contents of the documents sought.⁹⁶

and the Freedom Of Information Act: Senator Cornyn’s legislative prescriptions, 1 Open Government: A Journal on Freedom of Information (issue 2, July 2005), available at <http://www.opengovjournal.org/>.

⁹⁰ While a failure to reply constitutes a denial allowing the applicant to institute a court proceeding or to complain to the Ombudsman, in such case the complainant would “be unable to know on what substantive reasons the refusal to grant access was based” and this would “therefore be likely to impair the applicant’s capacity to pursue his case.” For that reason, the Ombudsman takes the view that failure to provide a reasoned reply to a confirmatory application constitutes maladministration. Decision of the European Ombudsman on complaint 322/2003/IP against the European Commission (26 November 2004), available at <http://www.europarl.europa.eu/ombudsman/decision/en/030322.htm>.

⁹¹ Commission Access Rules art. 7 ¶ 3; see EP Access Decision arts. 22, 23.

⁹² 2004 Implementation Report § 4.4. Compare the history of FOIA fees in the U.S., where the statute initially carried no limitation on fees and has been amended a number of times to place various limitations on fees and requirements for fee waivers. See 5 U.S.C. § 552(a)(4)(A).

⁹³ Access Regulation art. 6.1.

⁹⁴ E.g., Commission Access Rules art. 3 ¶ 1; EP Access Decision art. 9. For a detailed description of the Council’s procedures for handling applications, see Driessen, *supra* note 77, at 689-90.

⁹⁵ Access Regulation art. 7.1.

⁹⁶ *Sison* ¶ 82. See the additional discussion of Reasons for Refusal *infra* § B.9.

Additionally, where the institution responds that a requested document does not exist, there is a presumption supporting the agency's conclusion that may be rebutted by "relevant and consistent evidence" presented by the applicant.⁹⁷

8. Disclosure Of Segregable Portions Of Documents

Under Article 4.6, as under the FOIA,⁹⁸ segregable portions of documents must be disclosed upon request. This language codifies the holdings in the *Hautala* cases,⁹⁹ where the courts ruled that classification of an entire document as secret did not preclude disclosure of less sensitive parts. The decisions in that case pointed to a partial right of access allowing a balance "between the interests of the public in having partial access to the document, on the one hand, and of the burden of work that provision of such partial access represented, on the other" – a restriction not appearing in the Access Regulation.¹⁰⁰ These decisions were confirmed by the Court of Justice in *Mattila v. Council*,¹⁰¹ which held that the Council and Commission must in every instance consider whether to make a partial release and that the courts have authority to enforce that requirement.¹⁰²

Even where the numbers of documents requested are great, the institution is not relieved of its obligation to examine each document to determine whether an exception applies: "an institution is obliged to assess in a concrete and individual manner whether exceptions to the rights of access apply to each of the documents opined to in a request."¹⁰³ However, such an examination may not be necessary "where it is obvious that access must be refused or, on the contrary, granted" because the documents "were manifestly covered in their entirety by an exception . . .

⁹⁷ *Id.*; *British American Tobacco International (Investments) Ltd. v. Commission*, Case 311/00, 2002 E.C.R. II-2784, ¶ 35; *JT's Corporation Ltd. v. Commission*, Case 123/99, 2000 E.C.R. II-3269, ¶ 58.

⁹⁸ 5 U.S.C. § 552(b) (sentence immediately following exemptions) ("Any reasonably segregable portion of a record shall be provided . . .").

⁹⁹ *Hautala*, 1999 E.C.R. II-2489, ¶ 87; *Council v. Hautala*, 2001 E.C.R. I-9565, ¶¶ 25-31. This is an example of how "the courts were arenas for judicial processes that interpreted existing transparency rules simultaneously with the Council decisionmaking process." Bjurulf & Elgström, *supra* note 40. The Court in *Hautala* observed that refusal to grant partial access would be manifestly disproportionate for ensuring the confidentiality of the items of the information" covered by a Code of Conduct Exception, *Hautala* ¶ 29. Should the process of redacting exempt information give use to an unreasonable administrative burden, the institution reserves "the possibility of safeguarding the interests of good administration in particular cases." *Id.* ¶ 30.

¹⁰⁰ E.U. Network of Independent Experts in Fundamental Rights (CFR-CDF), Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002, *supra* note 5, at 236.

¹⁰¹ *Olli Mattila v. Council of the European Union and Commission*, Case C-353/01 P, 2004 E.C.R. I-01073, ¶¶ 30-32.

¹⁰² For historical discussions of the foundation for according access to "information" as opposed to "documents," see Curtin, *supra* note 6, at 16-18; Bo Vesterdorf, Transparency – Not Just a Vogue Word, 22 *Fordham Int'l L.J.* 902 (1998-1999). Before the 1974 Amendments to the FOIA, agencies often endeavored to withhold entire documents containing only small amounts of exempt information and even withheld entire files because some material was exempt. The 1974 amendments added a sentence at the end of section 552(b) mandating "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b).

¹⁰³ *Verein für Konsumenteninformation*, *supra* note 83, ¶ 72.

or, conversely, manifestly accessible in their entirety, or finally, had already been subject of a concrete individual assessment . . . in similar circumstances.”¹⁰⁴

Recognizing the potential additional burdens placed on the institutions by the requirement for partial disclosures, one author has concluded that it is incumbent upon the institutions to take appropriate measures to allow such [partial] access and, if necessary, for the budgetary authority to vote credits allowing the allocation of the resources necessary to this end. It would appear that the principle of proportionality can now only be invoked in cases where the administrative burden would be manifestly disproportionate and would obviously conflict with sound administration.¹⁰⁵

The Council has, consistent with the partial disclosure requirement, instituted a practice of deleting delegation identification in preparatory documents.¹⁰⁶

9. Reasons For Refusal

Just as the FOIA requires agencies to give reasons for any denial of access,¹⁰⁷ so also must an EU institution proffer reasons for refusing access to documents under the Access Regulation.¹⁰⁸ The institution “must disclose in a clear and unequivocal fashion the reasoning followed by the institution” in rejecting the application for disclosure.¹⁰⁹ The institution must

provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, second, whether the need for protection relating to that exception is genuine.¹¹⁰

¹⁰⁴ *Id.*, ¶ 75.

¹⁰⁵ M. Schauss, *L'accès du citoyen aux documents de institutions communautaires*, J.T.D.E., 2003, p. 1, here p. 3, cited in E.U. Network of Independent Experts in Fundamental Rights (CFR-CDF), *Report on the Situation of Fundamental Rights in the European Union and its Member States in 2002*, supra note 5, at 236, n.16.

¹⁰⁶ Council Annual Report on Access to Documents 2004, supra note 67, at ¶ 23.

¹⁰⁷ 5 U.S.C. § 552(a)(6)(A)(i).

¹⁰⁸ Art. 7.1 (“the institution shall either grant access . . . [or] state the reasons for the total or partial refusal”).

¹⁰⁹ *Sison* ¶ 80, affirming *Jose Maria Sison v. Council*, Joined Cases 110/03, 150/03 & 405/03, 2005 WL 101335, ¶ 60, citing by analogy *Netherlands and Van der Wal v. Commission*, Cases 174/198 P and 89/98 P, 2000 E.C.R. I-1, ¶ 24.

¹¹⁰ *Jose Maria Sison v. Council*, Joined Cases 110/03, 150/03 & 405/03, 2005 WL 101335, ¶ 61, affirmed in *Sison*. “The fact that a statement of reasons appears formulaic does not, in itself, constitute a failure to state reasons since it does not prevent either the understanding or the ascertainment of the reasoning followed.” *Id.* at ¶ 63. Despite this clear mandate in the Regulation and by the courts, a Parliament report on public access under the Access Regulation during its first year of operation found that “the Commission invoked as a reason for refusal in 38% of the cases ‘various exceptions and unspecified exception’.” European Parliament Report, *Comm. At Citizens’ Freedoms and Rights Justice and Home Affairs*, A5-0298/2003 final (on public access to Parliament, Council and Commission documents), at ¶ 11.

The duty to give reasons finds grounding beyond the Access Regulation and directly in Article 253 of the EC Treaty.¹¹¹ “The duty to give reasons for a decision has two purposes,” according to the CFI: “to allow interested parties to know the justification for the measure so as to enable them to protect their rights and to enable the Community judicature to exercise its power to review the legality of the decision”¹¹² In applying the Access Regulation, then, the institution must consider whether for “each document . . . disclosure is in fact likely to undermine one of the facets of public interest protected by the first category of exceptions.”¹¹³ Although not specifically stated in the Regulation, cases make clear that the institutions must carry out concrete and individual assessment of the requested records.¹¹⁴ The failure of an institution to give reasons for denying access to every document withheld thus results in judicial annulment of that failure.¹¹⁵

Where documents are withheld because they originated from a Member State that objected to release, the institution’s reasons are adequate if they cite the Member State’s objection; the institution does not itself have to proffer further justification for nondisclosure,¹¹⁶ and the Member State itself need not give reasons for its decisions.¹¹⁷ Where sensitive documents are in issue, the originating authority may “require secrecy as regards even the existence of a sensitive document” and even the very identity of the originating authority because of the special nature of that type of document.¹¹⁸

10. Administration Of The Regulation

a. Council. The General Secretariat receives and processes initial applications for access made to the Council. If a confirmatory application is filed, the General Secretariat re-examines the documents and prepares a draft reply; the documents and draft are reviewed by the Council Working Party on Information. A final decision is adopted by the Council based on a simple majority.¹¹⁹

b. Commission. All applications for access are to be sent to the Secretariat-General of the Commission or to the relevant Directorate-General or department.¹²⁰ The power to take

¹¹¹ Vesterdorf, *supra* note 93, 903-906 (referring to art. 190 EC, since renumbered).

¹¹² *Kuijer v. Council*, Case 188/98, 2000 E.C.R. II-01959 at ¶ 36.

¹¹³ *Id.* at ¶ 37 (citing the *Svenska Journalistförbundet* case and applying the Code of Conduct).

¹¹⁴ E.g., *Verein für Konsumenteninformation*, *supra* note 83, at ¶ 72.

¹¹⁵ *IFAW Internationaler Tierschutz-Fonds gGmbH v. Commission*, Case 168/02, 2004 WL 2709130. *World Wildlife Fund UK v. Commission*, Case 105/95, 1997 E.C.R. II-313 (decided under The Code of Conduct).

¹¹⁶ *IFAW Internationaler Tierschutz-Fonds gGmbH v. Commission*, Case 168/02, 2004 WL 2709130.

¹¹⁷ *Isabella Scippacercola v. Commission*, Case 187/03, 2005 WL 887116 at ¶ 58.

¹¹⁸ *Sison* ¶¶ 101-102.

¹¹⁹ See Martin Bauer, “Transparency in the Council,” in Martin Westlake & David Galloway, *The Council of the European Union*, 366, 384 (3d ed. 2004).

¹²⁰ Commission Decision of 5 December 2001 amending rules of procedure, 2001/937/EC, ECSC, Euratom, O.J.L 345/94 (29.12.2001), Annex containing Detailed Rules for the Application of Regulation (EC) No 1049/2001 of the

decisions on confirmatory applications is delegated to the Secretary-General (except OLAF activities).¹²¹

c. Parliament. The European Parliament's Access Decision (as amended¹²²) provides that the Secretary General is competent to answer initial requests for access and the Vice President responsible for transparency is ultimately in charge of answering confirmatory requests eventually, after having consulted the Bureau.

11. Applicability To Third-Party Documents

Under Article 2.3, the Access Regulation applies to “all documents held by an institution, that is to say documents drawn up or received by it and in its possession.” Thus the Access Regulation applies to a requested document prepared by a third party, defined in Article 3(b) as meaning “any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries.”

The debate over the “authorship rule” was the subject of substantial dispute during development of the Access Regulation; third-party originators of documents had been given veto power over disclosure under the Code of Conduct.¹²³ The politics of the controversy have been described thusly:

In Sweden, the sender of a document (‘the originator’) cannot influence whether the document will be classified as open or not. In the continental tradition, originator control was seen as natural. Differences also existed as to whether states and organizations outside the EU – for example, NATO – should be able to exert such control and on how rights of third parties, *inter alia* NGOs, would be affected.¹²⁴

The result of this controversy was a compromise under which third-party originators of requested documents would be consulted, but their negative opinion would not be binding on the institution

European Parliament and of the Council Regarding Public Access to European Parliament, Council and Commission Document, art. 2, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_345/l_34520011229en00940098.pdf.

¹²¹ Id. at art. 4.

¹²² Rules Governing Public Access to European Parliament Documents, 2005 O.J. (C 289), 6, arts. 12 & 15.

¹²³ Under the authorship rule, as adopted in the Code of Conduct, “an institution was not authorized to disclose documents originating from a wide category of third parties, including Member States, and the person requesting access was obliged, where necessary, to make his request directly to the third party in question.” IFAW Internationaler Tierschutz-Fonds, 2004 WL 2709130, ¶ 53. The authorship rule was upheld and applied by the Court of Justice in *Interporc Im- und Export GmbH v. Commission*, Case 41/00 P, 2003 E.C.R. I-02125. However, the authorship rule under the Code of Conduct “must be construed and applied strictly.” *Co-Frutta Soc. coop. rl. v. Commission*, Case 47/01, 2003 E.C.R. II-04441, ¶ 57, citing *Rothmans International BV v. Commission*, Case 188/97, 1999 E.C.R. II-2463, at ¶ 55, and *David Petrie v. Commission*, Case 191/99, 2001 E.C.R. II-3677, at ¶ 66. See generally Curtin, *supra* note 6, at 21.

¹²⁴ Bjurulf & Elgström, *supra* note 40.

except where the request is for a sensitive document or where the author is a Member State (discussed in the next section). The required consultation with and notice to third-parties is comparable to the submitter-notification rules adopted by agencies in the U.S. pursuant to Executive Order 12600.¹²⁵

The Council, Commission, and EP have detailed provisions in their rules for consultation with third parties. If the document is neither sensitive nor authored by a Member State, then the institution may withhold or disclose it without consultation if it appears clear or obvious that the document shall not or shall be disclosed under an exemption in the Access Regulation.¹²⁶ Where the answer is not clear or obvious, then the third party shall be consulted and given time to reply and provide its views on the matter.¹²⁷

The third party's views are not determinative. If the General Secretariat disagrees with a third party's negative opinion, the Council is "seized of the matter." However, "a negative opinion of the originator may be an important factor in the institution's assessment of whether one of the exceptions apply."¹²⁸ The Commission may also give access to a document "against the explicit opinion of the author."¹²⁹ If the Council or Commission determines to release the document, its originator must be given 10 working days before disclosure to apply for an injunction before the Court of First Instance pursuant to Article 243 of the EC Treaty.¹³⁰

"In practice, reasons are generally given for refusals, and account is taken of the third party's opposition. It is very rare that the institutions would notify an originator of their intention to divulge a document against his/her will, and even in the cases that have arisen, disclosure did not give rise to litigation."¹³¹

The Ombudsman took the position under the Code of Conduct that, contrary to the Council's assertion, a document jointly authored by the Council was not a third-party document.¹³² The Ombudsman has also concluded that reports by an independent consultant concerning compliance with Community Directives, which had been commissioned by the Commission, were not third-party documents.¹³³

¹²⁵ 3 C.F.R. 235, reprinted in 5 U.S.C.A. § 552.

¹²⁶ Council Decision 2004/338/EC, *supra* note 11, Annex II, art. 2.2; Commission Access Rules art. 5.2-3.

¹²⁷ The Council provides for "a reasonable time limit" for the reply (art. 2.3); the Commission affords a deadline "no shorter than five working days" (art. 5.5); the EP allows "five working days" (art. 9.3).

¹²⁸ Bauer, *supra* note 14.

¹²⁹ Commission Access Rules art. 5.6.

¹³⁰ Commission Access Rules art. 5.6; Council Decision 2004/338/EC, *supra* note 11, Annex II, art. 2.4.

¹³¹ 2004 Implementation Report § 3.5.1. See Driessen, *supra* note 77, at 686 ("The Council will not easily go against the opinion of a third party").

¹³² Decision of the European Ombudsman, *supra* note 77.

¹³³ Decision of the European Ombudsman on complaints 271/2000/(IJH)JMA and 277/200/(IJH)JMA against the European Commission (31 May 2001), available at <http://www.euro-ombudsman.eu.int/decision/en/000271.htm>. The FOIA tends to take a "functional rather than a literal test in assessing" whether documents are internal ("inter-

Where sensitive (classified) documents are involved under Article 9 of the Access Regulation, the institutions are required to adhere to the decision of a third-party originator.¹³⁴

12. Applicability To Documents From Other Institutions Or Member States

The requirement for consultation with the originator of a document also applies between institutions and between institutions and Member States.

As to consultation with other institutions, where an application is made for documents held by one institution but originating from another, a 9 July 2002 Memorandum of Understanding provides for sharing of information and consultation among the European Parliament, the Council, and the Commission to ensure coordination of decisions and expedited handling of applications.¹³⁵

As to documents originating from Member States, under Art. 4.5 of the Access Regulation, “A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.”¹³⁶ While this language literally suggests that the institutions remain free to disregard such a nondisclosure request from a Member State, in practice they have not done so: “It is not for the institutions, in fact, to take a decision contrary to a decision adopted by a Member State pursuant to its own national laws.”¹³⁷ Member States have an effective veto over disclosure of documents originating from them, and the Courts have held that absent an agreement to disclose from an originating Member State, the institution may refuse access without relying on an exemption in the Access Regulation.¹³⁸ Additionally, the Member State is not bound to give reasons for its request for nondisclosure; the only reason that need be given by the institution denying access is that “the national authorities had requested that

agency or intra-agency”), and courts have held that the exemption protecting internal documents (exemption 5) protects documents generated by consultants for the agency, at agency request, for the benefit of agency decision-making. See *Lead Indus. Ass’n v. Occupational Safety & Health Admin.*, 610 F.2d 70, 83 (2d Cir. 1979).

¹³⁴ Compare 10 U.S.C. § 130c, which authorizes the withholding of “sensitive information” to the extent that the withholding is requested by a foreign government of international organization. 10 U.S.C. § 130c(a). The provision requires that certain criteria be satisfied (in § 130c(b)) and has been held to comply with 5 U.S.C. § 552(b)(3), which exempts such information from disclosure under the FOIA. *ACLU v. Dept. of Defense*, 04 Civ. 4151 (AKH), S.D.N.Y. (Sept. 29, 2005).

¹³⁵ Council Annual Report on Access to Documents 2002 (April 2003) at 14.

¹³⁶ This provision reflects both legal and political restraints on the institution imposed by the Treaty of Amsterdam, decl. 35. This declaration, according to one scholar, was added at the insistence of the French government. Alasdair Roberts, *Multilateral Institutions and the Right to Information: Experience in the European Union* 18 (November 2001), available at http://www.aroberts.us/documents/journal/epl_2002.pdf.

¹³⁷ 2004 Implementation Report § 3.5.2.

¹³⁸ Judgment, *Scippacercola*, 2005 WL 887116, ¶¶ 56-57; Judgment, *IFAW Internationaler Tierschutz-Fonds*, 2004 WL 2709130, ¶ 58; Judgment, *Mara Messina v. Commission*, Case 76/02, 2003 E.C.R. II-03203, ¶¶ 40 and 55. The Court in *IFAW* pointed out that Art. 4.5 of the Access Regulation “reflects Declaration No 35, by which the Conference agreed that the principles and conditions set out in Article 255 EC would allow a Member State to request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement,” and observed that “it is neither the object nor the effect of that regulation to amend national legislation on access to documents.” ¶ 57.

it not be disclosed,” and there is no responsibility on the part of the institution to explore partial access if the Member State opposes “disclosure of the whole document.”¹³⁹ Finally, there is no requirement that the document be confidential under the applicable law of the Member State. As summarized by a member of the Council’s Legal Service, “it may be clear that the document ‘shall not be disclosed’, in which case no consultation takes place.” In other cases, consultation is necessary “when the document is ‘sensitive’ . . . or where it was submitted to the Council before 3 December 2001, or when the Member State concerned requested that it not be released without its prior agreement.”¹⁴⁰

Because many documents circulated in the Council are drafted by Council Members or their delegates, an argument might be made that these are third-party Member State documents subject to the absolute veto accorded under article 4(5). The Council has not asserted this position. As Bart Driessen observes, the Council has decided

that, when participating in the work of the Council and its committees and bodies, Member State representatives are not persons or entities outside the institution, but part of it. Consequently, parts of documents summarizing oral statements by members of the Council or their delegates within the Council or one of its preparatory bodies submitted in the context of the institution’s discussions—even when contained in a separate document—are not third-party documents. They are Council documents. The same applies to the written positions of delegations. . . .

On the other hand, documents that are not clearly submitted “in the context” of the Council’s work do benefit from the protection of Art. 4(5)—although the all-encompassing nature of the institution’s work greatly reduces the size of this category.¹⁴¹

Collection by the Commission into a single computer database of data provided to it by Member States does not divest the Member States of their authorship and transform the data into Commission data for purposes of applying the Access Regulation.¹⁴² Also, Commission reliance on those data for decision-making does not alter application of the rule.¹⁴³

The need to deal with requests for documents originating from a Member State principally arises at the Commission, since the Council has

restrictively interpreted the concept . . . to take account of the fact that Member State representatives take part in its work. According to this interpretation, representatives of Member States’ governments or their delegates are not, in the

¹³⁹ *Scippacercola*, 2005 WL 87116, at ¶¶ 58, 68, 77; *IFAW Internationaler*, 2004 WL 2709130, at ¶¶ 59, 71 (applying the Code of Conduct).

¹⁴⁰ Bart Driessen, *The Council, Member States, and access to documents*, in *Transparency in Europe II*, at 107, 110.

¹⁴¹ Driessen, *supra* note 77, at 687 (footnotes omitted).

¹⁴² *Co-Frutta*, 2003 E.C.R. II-04441 at ¶ 47 (applying the Code of Conduct).

¹⁴³ *Id.* ¶¶ 57-63.

context of their involvement in the work of the Council and of its committees and groups, persons or entities outside the institution; rather, they form part of it.¹⁴⁴

Although the courts consistently uphold Member State vetoes of disclosure of documents originating from them,¹⁴⁵ challenges to and complaints against withholding by the Commission of documents whose disclosure was opposed by originating Member States have been filed with the courts and the Ombudsman.¹⁴⁶ There has been vigorous academic criticism of the unwillingness of the courts to interpret the Member State document provision more narrowly and thus more consistent with the fundamental principle of widest access to documents held by EU institutions.¹⁴⁷

13. Exceptions – Generally

While the Access Regulation contains exceptions, like FOIA's exemptions, the general frameworks for applying them differ widely. FOIA's exemptions are permissive, not mandatory. Only where an unwarranted invasion of personal privacy is implicated does FOIA require a balancing between the public interest in disclosure and any individual interest in privacy. By contrast, the Access Regulation's exceptions are compulsory, although some must expressly be balanced against the interest of the public in disclosure; where this public interest is overriding, the documents must be disclosed. The Access Regulation's exemptions are addressed more fully in C. below.

As is the case under the FOIA,¹⁴⁸ the exceptions to disclosure contained in the Access Regulation are to be construed and applied strictly, in a manner not defeating the application of the general rule.¹⁴⁹ This general statement, however, was qualified by the ECJ when it held that the "principle of strict construction [of exceptions] does not, in respect of the public-interest exceptions provided for in Article 4(1)(a) . . . , preclude the Council from enjoying a wide discretion for the purpose of determining whether disclosure of a document to the public would undermine the interests protected by that provision."¹⁵⁰ Likewise, as under the FOIA,¹⁵¹ the

¹⁴⁴ 2004 Implementation Report § 3.5.2. As one participant in the process puts it, "the Council's clientele is different [T]hird parties tend to be mostly states or other public parties." Bart Driessen, *The Council, member States, and access to documents, in Transparency in Europe II* at 107, 109 (November 2004).

¹⁴⁵ E.g., *Messina*, 2003 E.C.R. II-03203.

¹⁴⁶ *IFAW Internationaler Tierschutz-Fonds*, 2004 WL 2709130; *Nuova Agricast srl v. Commission*, 139/03 and 151/03 (complaint); *S.I.M.S.A. srl v. Commission*, 287/03 (complaint); complaint to the European Ombudsman 1753/2002/GG.

¹⁴⁷ E.g., *Heliskoski & Leino*, supra note 43, at 769-77 nn. 6-8; Pedro Cabral, "Access to Member State documents in EC law," 31 *Eur. L. Rev.* 378 (2006).

¹⁴⁸ *Dep't of Air Force v. Rose*, 425 U.S. 352, 366 (1976).

¹⁴⁹ *WWF UK*, 1997 E.C.R. II-313, ¶ 56.

¹⁵⁰ *Sison* ¶ 64.

¹⁵¹ While there is language in some early decisions to the contrary, e.g., *General Services Admin. v. Benson*, 415 F.2d 878, 880 (9th Cir. 1969), the most widely accepted view has been advanced by the court in *Wellford v. Hardin*,

institutions have no authority or discretion to deny access for reasons not explicitly set out in the Access Regulation. “The only limitation on this general right of access is that it must be exercised subject to the limits or exceptions as explicitly worded in the text of the legal instrument. . . .”¹⁵²

14. Other Provisions

The Access Regulation contains requirements relating to dissemination of certain information without regard to an application, similar to those found in FOIA (relating to Federal Register publication and availability of information in reading rooms¹⁵³) and instituted by the E-FOIA Amendments (relating to dissemination of information through agency websites¹⁵⁴). Specifically, information should be made available in a Register on the subject matter and content of documents (Art. 11), and documents shall “as far as possible” be made available to the public in electronic form (Art. 12). Finally, under Article 13, specified documents must be published in the EU’s Official Journal.

a. Conformity Of Other Access Rules. Article 18.3 of the Access Regulation directs the Commission to examine the conformity of other provisions in Community legal acts on the same subject matter that might undermine application of the Regulation. The Commission has not identified any incompatible rules; it observed in one annual report that “the Commission examined more than 120 specific provisions contained in current Community legislation concerning the conditions under which certain documents or pieces of information can be transmitted” and concluded that “none of these rules appear to be incompatible with the principles set out in Regulation 1049/2001.”¹⁵⁵

In addition, Article 2.6 provides that the Access Regulation “shall be without prejudice to rights of public access to documents held by institutions which might follow from instruments of international law or acts of the institutions implementing them.” This allows application of other access provisions, such as those relating to environmental information,¹⁵⁶ notwithstanding potential conflict with exceptions contained in the Access Regulation. A discussion of the implications of the access regime of the Århus Convention on access to documents under the

444 F.2d 21, 25 (4th Cir. 1971), which rejected the argument that an agency has equitable discretion to refuse to disclose requested information on the ground that subsection (d) of the FOIA, providing that the act “does not authorize withholding of information . . . except as specifically stated,” is to be read literally.

¹⁵² Curtin, *supra* note 6, at 15.

¹⁵³ 5 U.S.C. §§ 552(a)(1)-(2).

¹⁵⁴ E.g., *id.* § 552(a)(2)(D).

¹⁵⁵ Report from the Commission on the Application in 2002 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council Regarding Public Access to European Parliament, Council and Commission Documents, COM (2003) 216 final (April 29, 2003), available at http://europa.eu.int/eur-lex/en/com/rpt/2003/com2003_0216en01.pdf at 8.

¹⁵⁶ E.g., UN/EC Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Århus Convention), adopted 25 June 1998, available at <http://www.unece.org/leginstr/cvenvi.htm>. See generally Jens Hamer, The Århus Convention, available at <http://www.eel.nl/documents/aarhus.pdf>.

Access Regulation is found in [CROSS REFERENCE TO CYNTHIA’S DISCUSSION OF AARHUS]

This concept of conformity carries forward the principle established under the Code of Conduct that a party can use whichever access rule is most favorable to disclosure. In *Interproc v. Commission*¹⁵⁷ the Court of First Instance held that an applicant for access under the Commission’s Decision implementing the Code of Conduct could also seek documents under court rules when the applicant was also a party in a judicial proceeding. Likewise, in *JT’s Corporation*¹⁵⁸ the Court held that a confidentiality requirement applying to customs investigations could not preclude access that would be required by the Code of Conduct. In this respect, the Access Regulation’s disclosure requirements would appear to override confidentiality requirements of other laws, in potential contrast to the operation of exemption 3 of the FOIA.¹⁵⁹

The CFI also held in two customs remission proceedings that a party’s right to information in the enforcement agency’s file ran only to those documents relevant to the case: If the party desires additional documents it believes “are relevant for establishing the existence of a special situation . . . , then it is for the party concerned itself to request access to those documents in accordance with” the Access Regulations.¹⁶⁰

However, this conclusion appears not to have been adopted in practice by the Commission or the CFI regarding relationship between Staff Regulations and the Access Regulation.¹⁶¹ By contrast: “In practice, the Council accepts that requests for such staff relations documents can be made under Regulation 1049/2001, provided the request explicitly refers to it.”¹⁶²

b. Historical Archives. Article 18.2 requires the Commission to examine the conformity of the regulation governing historical archives¹⁶³ with the Access Regulation “in order to ensure the preservation and archiving of documents to the fullest extent possible.” Archive documents “are covered by the public’s right of access and their disclosure can be refused only on the basis of

¹⁵⁷ *Interproc Im – und Export GmbH v. Commission*, Case 92/98, 1999 ECR II-3521, ¶¶ 44-45.

¹⁵⁸ 2000 E.C.R. II-3269.

¹⁵⁹ Under 5 U.S.C. § 552(b)(3), a statute specifically requiring withholding or allowing withholding under specific criteria will prevail over the FOIA’s disclosure mandate.

¹⁶⁰ *Bonn Fleisch Ex – und Import GmbH v. Commission*, T-329/00 (27 February 2003) ¶ 46; *Hyper Srl v. Commission*, T-205/99, ECR II-3141, ¶ 63 (11 July 2002).

¹⁶¹ In *Le Voci v. Council*, Case 371/03, 2005 E.C.R.-S.C. II-971, ¶¶ 120-24; and *Hendrickx v. Council*, supra note 58, at, ¶¶ 54-57, the CFI held that the access provisions of the Staff Regulations prevailed over those of the Access Regulation. The court concluded that the more particular rules (*lex specialis*) prevailed over the more general. This conclusion seems to fly in the face of both the intent of the Access Regulation and the decisions cited in notes 157-158 above.

¹⁶² Driessen, supra note 77, at 695.

¹⁶³ Council Regulation 354/83, supra note 21 (concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community).

the exceptions set out in Article 4 and the provisions relating to sensitive documents in Article 9.”¹⁶⁴

c. Annual Reports. Article 17 of the Access Regulation requires each institution to publish an annual report providing, for the preceding year, data on the number of instances where the institution refused to grant access, the reasons for the refusals, and the number of sensitive documents not recorded in the Register. In practice, the reports have contained detailed substantive discussions regarding administration by the institution of the Access Regulation, ranging from profiles of the categories of requesters to descriptions of court cases filed challenging denial of access.¹⁶⁵

d. Interinstitutional Committee. Article 15 requires the institutions to establish an “interinstitutional committee to examine best practice, address possible conflicts and discuss future developments on public access to documents.” The early annual reports of the institutions contained descriptions of the membership and activities of this committee.¹⁶⁶ The Committee has not met in recent years.¹⁶⁷

e. Training. Article 15.1, directing that the institutions should develop good administrative practices to facilitate rights of access guaranteed by the Regulation, provides the foundation for training of staff, especially since processing of requests are decentralized. A network of responsible officials within various Directorates-General was created to serve “as a forum for the exchange of information, experience and good practice.” Also, a practical guide has been developed for officials to assist in processing requests, and a module on public right of access has been incorporated into the training course for new officials.¹⁶⁸

C. Exceptions

1. Generally; “Overriding Public Interest” Test

Exceptions to the right of access are contained in the first three paragraphs of Article 4 of the Access Regulation. Because these are similar to the exceptions contained in the 1993 Code of Conduct, the case law interpreting the earlier language remains relevant. The Access

¹⁶⁴ COM (2003) 216 final, supra note 138, at 7. On 9 August 2002, the Commission adopted a proposal to amend Council Regulation 354/83 to bring it in line with the Access Regulation, COM (2002) 462 final; the Parliament concurred, PE 319.253 (both cited in the 2003 Commission Access Report at 7 nn.17-18) The Council adopted Reg. 1700/2003 in September 2003. See Council 2003 Annual Report at ¶ 9.

¹⁶⁵ E.g., COM (2003) 216 final, id.; Council Annual Report on Access to Documents (2004), supra note 73. Annual reporting by each federal agency of FOIA implementation data has been required since 1974. 5 U.S.C. §552(g).

¹⁶⁶ E.g., COM (2003) 216 final, id.; Report from the Commission on the Application in 2004 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council Regarding Public Access to European Parliament, Council and Commission Documents, COM (2005) 348 final (July 2005), available at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2005/com2005_0348en01.pdf.

¹⁶⁷ Id. The Committee last met at the political level in 2003.

¹⁶⁸ COM (2003) 216 final, supra note 138, at 11.

Regulations – like the Code of Conduct before it¹⁶⁹ (and the FOIA¹⁷⁰) – must be narrowly interpreted and applied.¹⁷¹

Exception 1 (article 4, first paragraph) provides the highest level of protection, subjecting the requested information to a “harm test” without qualification. This exception requires the institution to refuse to disclose a document where disclosure would undermine protection of:

- a. the public interest as regards
 - public security,¹⁷²
 - defense and military matters,
 - international relations,
 - the financial, monetary or economic policy of the Community or a Member State;
- b. privacy and integrity of the individual, in particular in accordance with community legislation regarding the protection of personal data.

Exception 2 (article 4, second paragraph) also applies a “harm test” but allows a public interest override; it requires the institution to refuse to disclose a document where disclosure would undermine protection of:

- commercial interests of a natural or legal person, including intellectual property,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

Finally, Exception 3 (article 4, third paragraph) applies various rules to access to documents drawn up by an institution for internal use, documents received by an institution in relation to a matter where the decision has not yet occurred, and documents containing opinions for internal

¹⁶⁹ E.g., *World Wildlife Fund v. Commission*, 1997 E.C.R. II-3113 at ¶ 56; *Van der Wal v. Commission*, Case 83/96, 1998 E.C.R. [1998] 545, at ¶ 27.

¹⁷⁰ See e.g., *John Doe Agency v. John Doe Corp.*, 492 U.S. 146, 152 (1989).

¹⁷¹ See Steve Peers, *The New Regulation on Access to Documents: A Critical Analysis*, available at <http://ideas.repec.org/p/erp/queens/p0028.html>, at text accompanying note 30.

¹⁷² According to Maes, *The “New” Regulation on Access to Documents*, in Veerle Deckmyn (ed.), *Increasing Transparency in the European Union?* 199, 201 (2002), this exception applies “to documents concerning the so-called third pillar of the EU (justice and home affairs),” while the next “covers mainly the European Security and Defense Policy.”

use as part of deliberations under certain circumstances. This exception protects internal deliberations – the so-called “space to think.”

The exceptions that protect important public interests and individual privacy allow no overriding public interests to trump the nondisclosure mandate; other exceptions – relating to commercial interests, court proceedings, investigations, and deliberations – are subject to being trumped by an overriding public interest. The first category has been called “absolute,” while the second has been called “relative.”¹⁷³ Both are mandatory however; an institution has no discretion to disclose excepted documents (unless they are in a category subject to the public-interest override, and the institution determines that the public interest militates disclosure). This stands in marked contrast to the FOIA, under which – in the absence of an independent statutory or regulatory directive to the contrary¹⁷⁴ – an agency retaining the discretion may disclose information covered by one of the statute’s exemptions.¹⁷⁵

The Ombudsman has observed that the burden is on the requester to demonstrate an overriding public interest, unless it is manifest.¹⁷⁶ A private or personal interest is not sufficient to satisfy this “overriding public interest” test, since disclosure to one means disclosure to all. Additionally, the public interest in disclosure must go beyond the general interest in transparency, since this already underlies the Access Regulation.¹⁷⁷ One potential example of an overriding public interest is specified in Article 6(1) of the Århus Regulation, providing that a commercial confidentiality interest may be overridden “when the information requested relates to emissions into the environment.”

According to the Commission’s report on implementation of the Access Regulation, the institutions routinely conclude that the public interest in disclosure is not overriding. That is not surprising in light of the Commission’s belief that “the public interest is quite a vague legal concept” and that “the public interest in disclosure is . . . an ‘exception to the exception’, which should be applied restrictively.”¹⁷⁸

No determination by an institution nor any decision by a court has been found to date where a document that was found to fall within one of the relative exemptions of the Access Regulation was nonetheless released or ordered released because the institution or court identified an

¹⁷³ de Leeuw, *supra* note 26, at 332. Under the Code of Conduct, all exceptions were “absolute” except the one relating to the deliberative process.

¹⁷⁴ Exemption 3 of the FOIA incorporates other federal statutes conditioning or prohibiting disclosure. For example, the statute prohibiting unauthorized disclosure of trade secrets, 18 U.S.C. § 1905, has been held to mandate withholding under the FOIA. *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

¹⁷⁵ E.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 294 (1979) (“Congress did not limit an agency’s discretion to disclose information when it enacted the FOIA”).

¹⁷⁶ Ombudsman’s decision on Complaint 412/2003/GG against the Commission, available at <http://www.euro-ombudsman.eu.int/decision/en/030412.htm>.

¹⁷⁷ See ¶ 8 of the Council’s opinion on the Ombudsman’s draft recommendation in complaint 1542/2000/(PB)SM, quoted in the Special Report from the European Ombudsman on this complaint, available at <http://www.euro-ombudsman.eu.int/special/pdf/en/001542.pdf>.

¹⁷⁸ 2004 Implementation Report, 3.4.5.

overriding public interest that dictated disclosure.¹⁷⁹ This has led one commentator to characterize the overriding public interest test as “a dead letter.”¹⁸⁰

2. Public Interests Relating to Security, Defense, and Other Matters

The first category of exceptions in Article 4(1) protects aspects of the public interest – public security, defense and military matters, international relations, and the financial, monetary or economic policy of the Community or a Member State – and the privacy and integrity of the individual. No balance or showing of harm is required.¹⁸¹

a. Public Security. The concept of security covers both internal security of a Member State and external security, including law enforcement.¹⁸²

b. Defence And Military Matters. The “defence and military matters” exception is new in the Access Regulation, and it has seldom been invoked.

c. International Relations. The Court of First Instance has given wide discretion to the Council regarding withholding of documents falling under the international relations exception. The Court held that judicial review of Council decisions to withhold documents relating to its activities under Title V of the Treaty on European Union, which relate to political responsibilities, will be confined to reviewing whether procedural rules have been complied

¹⁷⁹ In one case involving audit documents, the European Ombudsman, during the course of his inquiry, “found the complainant’s arguments persuasive both as regards the absence of a likelihood that disclosure would cause real harm to the protected interest and as regards the overriding public interest in disclosure.” Decision of the European Ombudsman on complaint 1764/2003/ELB against the European Commission ¶ 1.11 (12 January 2006), available at <http://www.europarl.europa.eu/ombudsman/decision/en/031764.htm>. This led the Ombudsman to propose that the Commission consider granting access to parts of the report, and it did so by providing an expunged audit report. Commission staff has indicated that the Commission came close to disclosing a document discussing effects of locating a facility in a neighborhood, based on the public interest override, but concluded that the applicant had not carried its burden of showing the importance of disclosure.

The Council may, in practice, take a narrower view of the meaning of public interest, interpreting it in the French tradition in which “interet publique” emphasizes interests of public administration rather than interests of the general public. A member of the Legal Service of the Council observed: “It is evident that the word ‘public’ in this context is an adjective and not—as many applicants mistakenly believe—a noun: the public interest must be overriding, not the public’s interest.” Driessen, *supra* note 77, at 681. Compounding the potential for confusion is reference in article 4(1) to protecting “public interests as regards” the listed areas of activity.

¹⁸⁰ H.R. Kranenborg, *Is it Time to Revise the European Regulation on Public Access to Documents?*, 12 *European Pub. L.* 251, 262 (2006).

¹⁸¹ The ECJ in *Sison* established a highly deferential standard of review in these cases: “the Community Court’s review of the legality of such a decision [to withhold under article 4(1)(a)] must therefore be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers.” ¶ 34. The Court called for a “margin of appreciation” of the “complex and delicate nature” of the decision by the institution regarding whether disclosure would undermine one of the stated public interests. ¶ 35.

¹⁸² *Svenska Journalistförbundet*, 1998 E.C.R. II-2289, ¶¶ 121-122. See generally Steve Peers, *Access to Information on EU External Relations and Justice and Home Affairs*, in Veerle Deckmyn, *Increasing Transparency in the European Union?* 209 (2002).

with, the decision properly reasoned, and the facts accurately stated, and whether there has been a manifest error of assessment or a misuse of powers.¹⁸³ For example, access to a document that “contains formulations and expressions which might cause tensions with non-member countries,”¹⁸⁴ or that “could compromise the European Union’s position in current or future negotiations with third countries,”¹⁸⁵ can be denied under the “international relations” exception. Access may not be denied, however, if the document comprises descriptions and factual findings, particularly when already in the public domain, or where other factors remove any risk of negative repercussions on relations with the countries concerned.¹⁸⁶

More broadly, the Council could not assert generally that release of a whole category of documents (such as country situation reports potentially for use in asylum determination proceedings) would damage international relations with any third state which was the subject matter of the documents, without examining the state of relations with the third countries in question and the content of the documents.¹⁸⁷

d. Financial, monetary or economic policy of the Community or a Member State. This exemption was asserted by the Commission in one case involving a request for a letter from the Portuguese Minister of Finance to the Commission. The Commission denied access on the basis of the exemption without consulting the relevant Member State. When the Ombudsman determined that Portugal had no objection to release of the requested letter, the Commission provided it to the complainant.¹⁸⁸

3. Privacy Interests

Under Article 4.1(b), information is excepted from disclosure where disclosure (1) may undermine (2) “privacy and integrity of the individual” (3) in particular in accordance with Community legislation regarding the protection of personal data.¹⁸⁹ All these elements must be assessed under this exemption. There is no balancing of the public interest in disclosure where personal privacy is at stake, as there is in this arena under the FOIA¹⁹⁰ and as there is as to other interests protected under Articles 4.2 and 4.3 of the Access Regulation.

¹⁸³ *Hautala*, 1999 E.C.R. II-2489, ¶¶ 71-72. Under FOIA, although the standard for judicial review of agency withholding involving national security and foreign policy is the same as for other information, courts in practice defer to agency determinations that confidentiality is required. E.g., *Students Against Genocide v. Department of State*, 257 F.3d 828, 837 (D.C. Cir. 2001).

¹⁸⁴ *Hautala*, 1999 E.C.R. II-2489, ¶ 73.

¹⁸⁵ *Mattila*, 2001 E.C.R. II-02265, ¶ 65.

¹⁸⁶ Judgment, *Aldo Kuijer v. Council of the European Union*, Case 211/00, 2002 E.C.R. II-488, ¶¶ 60-68.

¹⁸⁷ Peers, *supra* note 159, at 218.

¹⁸⁸ Decision of the European Ombudsman on complaint 116/2005/MHZ against the European Commission (20 December 2005), available at <http://www.europarl.europa.eu/ombudsman/decision/en/050116.htm>.

¹⁸⁹ See generally part III, Data Protection.

¹⁹⁰ FOIA’s exemption 6 allows withholding of information where disclosure “would constitute a clearly unwarranted invasion of personal privacy,” which has been held to require “a balancing of the individual’s right of

Application of the Access Regulation's exemption relating to privacy interests and its relationship to data protection requirements are explored extensively in [INSERT REFERENCE TO SHAPIRO CHAPTER OR SECTIONS ON DATA PROTECTION].

4. Court Proceedings

The court-proceedings exception applies both to Community courts and to national courts.¹⁹¹ The exception covers only documents prepared for specific court proceedings, but includes not only pleadings and documents lodged, but also internal documents and correspondence concerning the case.¹⁹² “The purpose of this definition of the scope of the exception is to ensure both the protection of work done within the Commission and the confidentiality and safeguarding of lawyers’ professional privileges.”¹⁹³

In *Netherlands v. Commission*, the ECJ imposed a responsibility on the Commission (under the Code of Conduct), when the documents requested were Commission filings with national courts, to “consult with the national court and refuse access only if that court objects to disclosure. . . .”¹⁹⁴ The Court found that the Commission was not relieved of its obligation to disclose documents even if national law precluded disclosure.

Parties are ordinarily free to disclose their own written submissions, except in those cases where disclosure might adversely affect the proper administration of justice,¹⁹⁵ though not the pleadings of the other party.¹⁹⁶

5. Legal Advice

The Council has consistently taken the position that any documents or portions containing advice by the Legal Service, including opinions, fall under the legal-advice exception (subject to the overriding public interest), and asserted that even after adoption of any act to which a legal opinion refers, disclosure of the opinion would undermine the interest of the Council in receiving independent legal advice. The Ombudsman argues, to the contrary, that opinions relating to the Council’s legislative activities do not fall under Article 4.2, but are covered by Article 4.3.¹⁹⁷

privacy against the preservation of the basic purpose of the Freedom of Information Act ‘to open agency action to the light of public scrutiny.’” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 372 (1976).

¹⁹¹ *Netherlands*, 2000 ECR I-1.

¹⁹² *Interporc Im- und Export GmbH v. Commission*, 2003 E.C.R. I-2125, ¶¶ 41-42.

¹⁹³ Caroline Naômé, *The Case-Law of the Court of Justice and of the Court of First Instance of the European Communities on Transparency: From Carvel to Hautala II (1995-2001)*, in Veerle Deckmyn, *Increasing Transparency in the European Union?* 171 (2002).

¹⁹⁴ *Netherlands*, 2000 ECR I-1 at ¶ 28.

¹⁹⁵ Order of 3 April 2000, *Germany v. Parliament and Council*, Case 376/98, 2000 ECR-I-2247, at ¶ 10.

¹⁹⁶ *Svenska Journalistförbundet*, 1998 E.C.R. II-2289, ¶¶ 135-139.

¹⁹⁷ Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the Council of the European Union in complaint 1542/2000/(PB)SM available at <http://www.euro-ombudsman.eu.int/special/pdf/en/001542.pdf>; Draft recommendation of 27 March 2003 concerning Complaint 1015/2002(PB)IJH available at <http://www.euro-ombudsman.eu.int/recommen/en/021015.htm>.

The practical effect of the Ombudsman’s position would be that these opinions can only be withheld “if disclosure . . . would seriously undermine the institution’s decision-making process.”

Case law, so far, has consistently supported the Council’s position,¹⁹⁸ although both the Council interpretation and the judicial affirmations have been criticized by commentators.¹⁹⁹ The question is the subject of a pending case before the European Court of Justice; the Court of First Instance had clearly held that the wording of Article 2 of the Access Regulation “cannot support the argument that only documents capable of undermining the protection of legal advice drawn up in the context of court proceedings are covered.”²⁰⁰

6. Commercial Interests

Article 4.2 requires the institutions to refuse access to documents where disclosure would undermine protection of “commercial interests of a natural or legal person, including intellectual property.” The exemption to the FOIA for trade secrets and confidential commercial information has generated considerable controversy and litigation in the U.S.²⁰¹ The commercial interests exception of the Access Regulation is frequently used by the Commission in denying access relating to antitrust cases, merger control, and public procurement; however, so far there are no court rulings.

This exception is reinforced by Article 287 of the EU Treaty, which provides that “the officials and other servants of the Community shall be required . . . not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations, or their cost components.”²⁰² The U.S. has a similar, if much narrower, provision in its criminal code prohibiting government officials from disclosing trade secrets unless authorized by law.²⁰³

7. Inspections, Investigations And Audits

The “inspections, investigations and audits” exception is a successor to the exception relating to “inspections and investigations” of the 1993 Code of Conduct, which has been interpreted in

¹⁹⁸ Carlsen a.o. v. Council, Case 610/97 R, 1998 ECR II-485; Ghignone a.o. v. Council, Case 44/97, 2000 ECR IA-223, ¶¶ 47-48; Austria v. Council, Case 445/00, 2003 E.C.R. I-8549, ¶ 12.

¹⁹⁹ E.g., Heliskoski & Leino, *supra* note 43, at 767-69. The authors argue that the Council had sought, but failed, to obtain a broader exemption for advice provided by the legal services of the institutions when the Access Regulation was adopted, and thus its broader interpretation of the exception adopted is inappropriate.

²⁰⁰ Turco v. Council, Case 84/03, O.J. (C 112) 38, ¶ 56, appeal taken, Case C-39-05 P. “Since legal advice drawn up in the context of court proceedings is already included in the exception relating to the protection of court proceedings, . . . the express reference to ‘legal advice’ among the exceptions necessarily has a meaning distinct from that of the exception relating to court proceedings.” ¶ 65.

²⁰¹ E.g., Thomas M. Susman & Harry A. Hammitt, *Business Uses of the Freedom of Information Act*, BNA Corporate Practice Series (CPS Portfolio No 14-3rd, 2004).

²⁰² Treaty Establishing the European Community, art. 287, O.J. C 325/33, 24.12.2002.

²⁰³ Trade Secrets Act, 18 U.S.C. § 1905.

case law.²⁰⁴ According to one observer, this exception, although not explicitly stated, “mainly refers to infringement proceedings under Articles 226 to 228” of the EC Treaty²⁰⁵ and has practically no importance for the Council. The exception is relevant, in particular, for OLAF inspections²⁰⁶ and may also be relevant in the framework of competition law proceedings against companies by the Commission.

The “investigations” exception has not proved to provide blanket authority for the Commission to withhold cartel files. Historically, and under the legal framework governing access to the file, third parties have not had rights of access that are accorded the defendant or complainants.²⁰⁷ The European Court of First Instance in *Verein für Konsumenteninformation v. Commission*,²⁰⁸ however, applied the Access Regulation to require disclosure of records in a cartel investigation file where no other exemption applied.

The ECJ has held (under the Code of Conduct) that simply because a document concerns an inspection does not alone justify withholding. However, where the inspection (relating to measures taken to combat swine fever in the Netherlands) was still on-going, the report could be withheld to preserve the climate of mutual trust necessary.²⁰⁹ The Commission has agreed that even where it may be appropriate to withhold requested information during an investigation, it may properly release the documents once the file has been formally closed.²¹⁰

²⁰⁴ *WWF UK*, 1997 E.C.R. II-313, ¶¶ 62-64; *Bavarian Lager Co. v. Commission*, Case 309/97, 1999 E.C.R. II-03217; *Denkavit Nederland BV v. Commission*, Case 20/99, 2000 E.C.R. II-3013, ¶¶ 43-49; *Petrie*, 2001 E.C.R. II-3677, ¶¶ 67-96.

²⁰⁵ Bauer, *supra* note 14. Bauer continues:

When the Access Regulation was adopted, the Commission included in the minutes (document 9204/01 ADD 1) that it could agree “to infringement proceedings not being expressly included in the list of exceptions in Article 4(2) of the Regulation, as it considers that the text as worded does not affect current practice with regard to the protection of confidentiality for the purposes of its duties in monitoring compliance with Community law.”

²⁰⁶ See generally John Burke, *Furthering Transparency with OLAF*, in Veerle Deckmyn, *Increasing Transparency in the European Union* 233 (2002).

²⁰⁷ Commission notice 1997 O.J. (C 23) 3 (on the internal rules of procedure for processing requests for access to file); Communication from the Commission, 2004 O.J. (C 259), 8 (relating to the revision of the 1997 notice on the internal rules of procedure for processing requests for access to file).

²⁰⁸ *Verein für Konsumenteninformation*, 2005 E.C.R. II-13.

²⁰⁹ *Denkavit Nederland BV*, 2000 E.C.R. II-3011. FOIA’s exemption 7 protects investigatory files compiled for law enforcement purposes if disclosure “could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. §552(b)(7)(A). However, the government must demonstrate that the information pertains to a pending or prospective, not a closed, law enforcement proceeding. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978).

²¹⁰ See Decision of the European Ombudsman on complaint 3381/2004/TN against the European Commission, 6 September 2005, available at <http://www.europarl.europa.eu/ombudsman/decision/en/043381.htm>.

In another matter, the Ombudsman concluded that consultant reports drafted prior to the investigation, although used in it, were not covered by the Code of Conduct's exception for inspections and investigations.²¹¹

8. Internal Use Documents

While the internal-use exception replaces a discretionary “facultative” exception in the Code of Conduct protecting the confidentiality of the institution’s proceedings, Article 4.3 is subject to a more stringent harm test than its predecessor.²¹² Not only must an institution invoking this exception demonstrate that disclosure would “seriously undermine the institution’s decision-making process,” but, even where the “seriously undermine” criterion is met, the document must still be released if there is an overriding public interest in disclosure. Contrary to the previous rules, the requester’s intentions or personal interest are irrelevant.²¹³

Where decision has not yet been taken, access must be refused if “disclosure would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure.” This exception covers not only all documents “drawn up by an institution for internal use” – as does exemption 5 of the FOIA²¹⁴ – but also by its terms covers documents “received by an institution,” though the scope of application of this latter category has not been explored.

Once the decision has been taken, disclosure may still be refused if it “would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure,” only if the documents contain “opinions for internal use as part of preliminary consultations within the institution concerned.” Other categories of information must be disclosed after the decision has been taken.

In summary,

Article 4(3) is intended to protect the so-called space-to-think. The regulation involves a distinction between cases where the institution has not yet finished its thinking and those where the thinking period is over because the institution has made a decision.²¹⁵

²¹¹ Decision of the European Ombudsman on complaints 271/2000/(IJH)JMA and 277/200/(IJH)JMA against the European Commission (31 May 2001), available at <http://www.euro-ombudsman.eu.int/decision/en/000271.htm>.

²¹² According to Bjurulf and Elgström, *supra* note 40, at 259, the “harm’s test principle” under which “the negative effects of granting access must be weighed against public interest in openness” was initially set out by the Court of First Instance in *Interporc Im- und Export GmbH v. Commission*, 1998 E.C.R. II-231, which influenced the Council’s decision when crafting the Access Regulations.

²¹³ See *British American Tobacco International (Investments) Ltd. v. Commission*, Case 111/00, 2001 E.C.R. II-3000, ¶¶ 42-43.

²¹⁴ 5 U.S.C. § 552(b)(5)

²¹⁵ European Data Protection Supervisor, *supra* note 51, at ¶ 11.

The different institutions appear to approach the protection of internal documents with varying attitudes. For example, even though this exception covers all documents relating to ongoing discussions on draft legislative acts, it has been applied by the Council only to those portions that allow identifying the delegation that has taken a position recorded in the requested document. According to the Council, this allows the requester access to the arguments exchanged while preserving confidentiality for delegations needed to provide flexibility for negotiations and compromise.²¹⁶ Additionally, after the interim act in the co-decision procedure or the final legislative act has been adopted, the Council's Rules of Procedure require public disclosure of preparatory documents – excepting Legal Service opinions and material covered by another exception – relating to the act and prepared before adoption.²¹⁷

The Commission, by contrast, often relies on this exception. As one commentator puts it:

The Commission is also by necessity a closed body. It must act as one in proposing a legislative act, taking into account the interest of the Community as a whole. . . . The Commission could not have fulfilled the role that has been assigned to it if any dissent within its ranks were publicized. The confidential nature of the Commission is of the essence, even if it is steeped in French culture.²¹⁸

9. Classified Or Sensitive Documents

Initially, the Code of Conduct did not explicitly exclude sensitive documents, such as documents relating to the Common Foreign and Security Policy and to Police and Judicial Co-operation in Criminal Matters. In 2000 the Council acted to exclude from access under the Code documents classified as “TRES SECRET/TOP SECRET,” “SECRET,” OR “CONFIDENTIEL.”²¹⁹ This action, named the “Solana Decision” after the Secretary-General of the Council, excepted specifically security, defense, military, and crisis management and required that requests for

²¹⁶ See Council's opinion in complaint to the European Ombudsman 1641/2003/OV made by Ms. Buitenweg, MEP, available at www.ombudsman.europe.eu/decision/en/031641.htm. A thorough discussion of this issue can be found in Driessen, supra note 77, at 683-85.

²¹⁷ Council Rules of Procedure, Article 11(6) of Annex II. Martin Bauer points out that this exception “is scarcely used by Council, as it would need to demonstrate that release of a document could seriously undermine the Council's decision-making process in abstract terms.” Bauer, supra note 14. A pending case before the ECJ could resolve the issue of access to Legal Service documents. *Turco v. Council*, Case 84/03, 2003 E.C.R II-24, appeal taken, case C-39-05 P.

²¹⁸ Brinkhorst, supra note 28, at S130.

²¹⁹ Council Decision 2000/527 of 14 August 2000, 2000 O.J. (L 212) 9 (amending Decision 93/731/EC on public access to Council documents).

sensitive documents only be considered by security-vetted personnel.²²⁰ It also excluded sensitive documents from listing in the Council's Register.²²¹

The Access Regulation overturned the Solana decision. "Sensitive documents" are defined in Article 9.1 of the Access Regulation as documents originating from a Community institution or agency, a third country, or an international organization that are classified as "TRES SECRET/TOP SECRET," "SECRET," or "CONFIDENTIEL" pursuant to the rules of the institution "in the interest of public security, defence and military matters." The classification rules are set out separately in a Council Decision, a Commission Decision, and the Parliament Rules of Procedures.²²²

The definition does not cover documents classified "RESTREINT UE." While the Commission has opined that this divergence may constitute "a potential source of incoherence,"²²³ the Council considers that this exclusion does not pose any problem in practice.²²⁴ In fact, a "classified" document that is not "sensitive" can only be withheld if an exception applies; if no exception applies, then according to the Commission the document must be declassified and disclosed.²²⁵ The CFI has taken this a step further and held that even where a requested document "is classified as CONFIDENTIEL UE" and "thus falls within the category of sensitive documents," this designation "cannot, on its own, justify application of the grounds for refusal provided for in Article 4(1)" The question must still be answered whether "disclosure of the document requested could undermine the protection of the public interest in question."²²⁶

Under Article 9.3, "sensitive documents shall be . . . released only with the consent of the originator," and the originator's refusal to allow access need not be based on any exception in the Access Regulation or on any provision of law of a Member State. However, an institution refusing access to a sensitive document shall nonetheless, under Article 9.4, "give the reasons for its decision in a manner which does not harm the interests protected in Article 4."²²⁷

²²⁰ See generally de Leeuw, *supra* note 26, at 328; Bunyan, *supra* note 76.

²²¹ Council Decision 2000/23, 2000 O.J. (L 9) (on the improvement of information on the Councils' legislative activities and the public register of Council documents) overturning an earlier determination. See Public register of Council documents, General Secretariat to COREPER, Limité, 6423/1/98, 11.3.98.

²²² Council Decision, 2001/264/EC, 19 March 2001, 2001 O.J. (L 101) (adopting Council security regulations); Commission Decision 2001/844/EC, 29 November 2001, 2001 O.J. (L 317) (amending its internal Rules of Procedure); European Parliament Rules of Procedure, Annex VII 2003 O.J. (L 61) 91 (on consideration of confidential documents communicated to Parliament).

²²³ 2004 Implementation Report, 3.3.

²²⁴ Council's Annual Report on the implementation of the Access Regulation for 2003, available at <http://ue.eu.int/uedocs/cmsUpload/RapAnCons.en03.pdf>, at 23.

²²⁵ Commission Decision 2001/973, 29 Dec. 2001, 2001 O.J. (L 345) 94, at art. 6.

²²⁶ Jose Maria Sison v. Council of the European Union, Joined Cases 110/03, 150/03 & 405/03, 2005 WL 101335, ¶¶ 73, 76.

²²⁷ For a thorough exploration of how transparency and confidentiality are to be balanced with regard to requests for access to classified documents, see Jakob Thomsen and Wouter van de Rijt, Public Access to Documents versus the Need for Security, in *Transparency in Europe II*, at 87.

At least in the Council, sensitive documents may be partially released (after administrative declassification); additionally, references to sensitive documents that are contained within documents can be deleted where there is reason to keep the existence of the document confidential.²²⁸

Just as the U.S. President retains the authority, through Executive Order, to determine the classification rules governing disclosure under the FOIA of documents with defense, national security and foreign relations implications,²²⁹ so also do each EU institution's classification rules determine application of the Access Regulation. This scheme has been criticized because "the exceptions, as laid down in the [Access] Regulation, are drafted more stringently than the institutions' internal security rules."²³⁰

10. Time Limit Applied To Exempt Documents

Under Article 4.7, the exceptions in paragraphs 1-3 apply for no more than 30 years; only documents relating to privacy or commercial interests and sensitive documents may continue to receive protection after this time. This same standard applies to disclosure of materials in the historical archives.²³¹

D. Review Of Decisions To Deny Access (or Grant Access)

1. Administrative Review (Confirmatory Applications)

Confirmatory applications may be filed by an applicant under Article 7.2 asking the institution to reconsider a total or partial denial of access; this process is similar to an administrative appeal of a denial of access under the FOIA. Also, as under the FOIA, an applicant may file a confirmatory application when the institution fails to respond within the Regulation's time limits.²³²

Although the institutions frequently affirm initial denials, they may also provide broader access on appeal. "The reason for this is, on the one hand, the involvement of the Legal Service and the Member States in the confirmatory phase. On the other hand, especially in cases where

²²⁸ Driessen, *supra* note 77, at 693.

²²⁹ 5 U.S.C. § 552(b)(1).

²³⁰ See de Leeuw, *supra* note 26, at 339: "The institutions' internal security rules require only potential harm for a document to be classified ('could harm'), whereas the 'absolute' exceptions of Article 4 require actual harm in order for a document not to be released ('would harm')." For a general discussion see Curtin, *supra* note 6, at 25.

²³¹ Council Regulation 354/83, *supra* note 21, at art. 1.4 (opening historical archives to the public after 30 years). Art. 2 of Regulation No 354/83 has been amended to provide that access to documents covered by the privacy/integrity exception can be refused after 30 years. Council Regulation (EC, Euratom) 1700/2003, 22 September 2003, 2003 O.J. (L 243) 1 (amending Regulation 354/83).

²³² Art. 7.4 ("failure by the institution to reply within the prescribed time-limit shall entitle the applicant to make a confirmatory application"). Not only may a FOIA requester appeal when the agency has not complied with the statutory time limits applicable to initial requests, but even a response that the agency has "no records" may be appealed under the FOIA. *Oglesby v. Department of the Army*, 920 F.2d 57, 70 (D.C. Cir. 1990).

documents have been refused on the basis of Art. 4(3), para. 1, the negotiations that needed to be protected might well, in the meantime, have led to agreement.”²³³

The decision on the confirmatory application under Article 8 shall be notified to the applicant in writing within 15 working days, stating reasons for the refusal and informing the applicant of the right to bring an action in court or to lodge a complaint with the Ombudsman. In a decision under the Code of Conduct, the Court of First Instance observed that the institutions are required to respond to any arguments made by the applicant in a confirmatory application challenging the initial reasoning for refusal to disclose the documents requested.²³⁴

2. Judicial Review

Under, Recital (13) of the Access Regulation, “to ensure that the right of access is fully respected,” there shall be “the additional possibility of court proceedings or complaints to the Ombudsman.” Thus, pursuant to Article 8(1), where there is a denial of access the institution “shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC treaty, respectively.” As of September 2005, the Court of First Instance had issued judgments in approximately two dozen cases and the European Court of Justice a half-dozen cases involving access to documents, though a number of these cases involve interpretation of the Code of Conduct, the predecessor to the Access Regulation.²³⁵

In most of the early cases arising under the Code of Conduct, judicial review was principally focused on procedural issues (such as the duty of the institutions to give reasons for denying access). In *Hautala v. Council*,²³⁶ the court questioned “whether there has been a manifest error of assessment of the facts or a misuse of power,” suggesting a movement toward a more substantive assessment by the courts, of an institutions’ actions.²³⁷

The ECJ in *Jose Maria Sison v. Council*²³⁸ addressed the scope of review of a decision denying access under the Access Regulation:

The Council must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by

²³³ Driessen, *supra* note 77, at 692.

²³⁴ *Kuijer v. Council*, Case 188/98, 2000 E.C.R. II-01959, ¶ 49.

²³⁵ The cases are listed and summarized by Statewatch at <http://www.statewatch.org/caselawobs.htm>. They may be accessed under “case-law” through the judiciary’s Web site, <http://www.curia.eu.int/en/transitpage.htm#>. For an extremely critical assessment of the failure of the Court of First Instance, in its decisions in Access Regulation cases, to advance the principles and purposes of access to information in the EU, see Heliskoski & Leino, *supra* note 43, at 777-779.

²³⁶ *Hautala*, 1999 E.C.R. II-2489.

²³⁷ See Curtin, *supra* note 6.

²³⁸ *Sison*, *supra* note 54.

those exceptions could undermine the public interest. . . . The Community Court’s review of the legality of such a decision must therefore be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers.²³⁹

The Court went on to observe that special deference – “a margin of appreciation” – should be afforded the institution when considering disclosure of information protected by Article 4(1)(a)’s mandatory exceptions, considering “the particularly sensitive and essential nature of the interests protected.”²⁴⁰

In reviewing a denial, the court may examine the requested document in camera,²⁴¹ as is provided under the FOIA.²⁴² Following adoption by the institutions of the Access Regulation, a new article was added to the Rules of Procedure of the Court of First Instance providing that where a document to which access has been denied is produced in proceedings relating to the legality of the denial, the document must not be communicated to other parties.²⁴³ The Court now, according one author, “frequently requests the production of the litigious documents, which enables it to verify, whether the assessment made by the institution was flawed by a manifest error.”²⁴⁴

Judicial review is available only to challenge (annul) a final decision capable of producing legal effects; hence, as under the FOIA,²⁴⁵ an applicant must pursue a confirmatory application under Article 8 to exhaust administrative remedies before proceeding to court.²⁴⁶ In another case, the CFI rejected an application to the Court invoking the Code of Conduct and Declaration 17 in support of a claim of access to an administrative personnel file. The Court refused to consider the case because the applicant had not utilized the procedure for requesting access under the Code of Conduct.²⁴⁷

An application for judicial review must be filed within a specified time period from the date a request is denied, but an out-of-time filing may be allowed if the delay is excusable.²⁴⁸ Costs of the legal proceeding and attorneys fees may be assessed against the losing party.

²³⁹ Id. ¶ 34.

²⁴⁰ Id. ¶ 35.

²⁴¹ Id. ¶ 39.

²⁴² 552 U.S.C. § (a)(4)(B).

²⁴³ Rules of Procedure of the Court of First Instance, art. 67(3) (effective 1 February 2001). 2000 O.J. (L 322) 1, 4.

²⁴⁴ Bauer, *supra* note 14, citing *Kuijer*, 2002 E.C.R. II-488, at ¶ 69.

²⁴⁵ See, e.g., *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 61-61 (D.C. Cir. 1990).

²⁴⁶ See *Co-Frutta, v. Commission*, 2003 E.C.R. II-04441 at ¶¶ 29-33.

²⁴⁷ *Gouloussis v. Commission*, Case 86/98, 2000 Rept. EC Staff Cases I-A-5 (not available in English), discussed in Naômé, *supra* note 178, at 173-74.

²⁴⁸ *Athanasios Pitsiorlas v. Council and Banque Centrale Europeenee*, Case 193/01 P, 2003 E.C.R. I-04837.

3. Complaint To European Ombudsman

Complaining to the Ombudsman regarding denial of access to information is an alternative to judicial review²⁴⁹ (except where the applicant does not reside or have a registered office in a Member State²⁵⁰); the U.S. has no counterpart to this institution, nor is there any other alternative to judicial review of denials of access under FOIA.²⁵¹ The Ombudsman may not entertain an inquiry if there are parallel proceedings before the courts.²⁵² As is the case with judicial review, a complaint may be made to the Ombudsman if the institution fails to reply to a request for documents within the designated timeframe.²⁵³

The Ombudsman begins an investigation by providing a copy of the complaint (which ordinarily is *not* treated as confidential²⁵⁴) to the institution concerned and requesting an opinion in response. If the institution does not settle the dispute and the complainant does not withdraw the complaint, the Ombudsman proceeds to investigate the matter to determine whether an instance of maladministration has occurred. If none is found, the matter is closed.²⁵⁵

If the Ombudsman finds that there has been maladministration²⁵⁶ by the institution by virtue of its failure to disclose the requested information or to follow required procedures, he will attempt

²⁴⁹ See generally *The European Ombudsman—Origin, Establishment, Evolution* (2005); Ian Harden, *The European Ombudsman’s Efforts to Increase Openness in the Union*, in Veerle Deckmyn, *Increasing Transparency in the European Union?* 123 (2002).

²⁵⁰ Treaty Establishing the European Community Art. 194.

²⁵¹ Legislation introduced in 2005 and 2007 would create a U.S. Office of Government Information to perform functions similar to the European Ombudsman as regards access to government information. S. 394, 109th Congress, 1st Session; S. 849, 110th Congress, 1st Session; S._____, 110th Congress, 1st Session.

²⁵² TEC art. 195 mandates that the Ombudsman cannot conduct inquiries if the facts are or have been the subject of legal proceedings. E.g., *Decision of the European Ombudsman on Complaint 1897/2002/BB against the European Commission* (February 18, 2003), available at <http://www.euro-ombudsman.eu.int/decision/en/021897.htm>. However, “a previous decision of the Ombudsman does not preclude court proceedings on an identical matter.” Gregorio Garzón Clariana, *Holding the Administration Accountable in Respect of its Discretionary Powers: the Roles and Approaches of the Court, the Parliament and the European Ombudsman*, in *The European Ombudsman—Origin, Establishment, Evolution* 192, 196 (2005).

²⁵³ *Decision of the European Ombudsman on complaint 322/2003/IP*, available at www.ombudsman.europe.eu/decision/en/030322.htm.

²⁵⁴ Saverio Baviera, “Parallel Functions and Co-operation: The European Parliament’s Committee on Petitions and the European Ombudsman,” in *The European Ombudsman—Origin, Establishment, Evolution* 126, 128 (2005). According to Baviera, “a complaint can be classified as confidential if the complainant so requests, or when the Ombudsman considers it necessary to protect the interests of the complainant or of a third party.” *Id.*

²⁵⁵ The Ombudsman has approved the Council’s invoking different grounds for denying access following reconsideration after an Ombudsman’s comments. *Decision of the European Ombudsman on complaint 916/2000/GG against the Council*, par. 1.3, available at <http://www.euro-ombudsman.eu.int/decision/en/000916.htm>.

²⁵⁶ For an exploration of the background and meaning of “maladministration,” see *European Ombudsman, 1997 Annual Report* 22-27, available at http://www.euro-ombudsman.eu.int/report97/pdf/en/rap97_en.pdf (“maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it”). The Ombudsman’s Code of Good Administrative Behaviour art. 22 contains an obligation to provide members of the public with information on request.

to reconcile the parties, provide a “critical remark” to the institution and close the case (where there appear no general or serious implications from the maladministration), or send a draft recommendation to the offending institution.²⁵⁷ In this latter circumstance, the offending institution must provide its own opinion on the draft recommendation. In no case, however, is the Ombudsman’s conclusion binding on the institution or entity. The Ombudsman cannot invalidate a decision refusing access, and his finding of maladministration creates no enforceable right for the complaining party.

The Ombudsman set out in his first Annual Report²⁵⁸ that unjustified failure to provide requested information potentially constitutes maladministration. As summarized by one observer –

The Ombudsman understands openness to involve three elements:

- the processes through which public bodies make decisions should be understandable and include, when appropriate, suitable opportunities for participation;
- the decisions themselves should be reasoned;
- as far as possible, the information on which the decisions are based should be available to the public.²⁵⁹

Why would a disappointed applicant for access to a document select the Ombudsman route of appeal rather than going to Court? After all, “The Ombudsman’s critical remarks, recommendations, and report are non-binding; thus, even if the Ombudsman finds ‘maladministration,’ he may be unable to afford the complainant any relief.”²⁶⁰ They are also unenforceable. However, a complaint to the Ombudsman is informal, speedy, and far less costly to the applicant than a court proceeding. Additionally, the Ombudsman has the power to

²⁵⁷ The Ombudsman’s “Decisions Concerning Lack or Refusal of Information” are listed chronologically at his Web site, <http://www.euro-ombudsman.eu.int/decision/en/lri.htm>. Unfortunately, no useful summary of his activities in this area is provided.

²⁵⁸ European Ombudsman Annual Report 1995, available at <http://www.euro-ombudsman.eu.int/report95/en/default.htm>.

²⁵⁹ Ian Harden, *supra* note 169, at 125. Harden summarizes Ombudsman complaints and decisions arising under the Code of Conduct, *id.* at 132-34.

²⁶⁰ Simone Cadeddu, *The Proceedings of the European Ombudsman*, 68 *Law & Contemp. Probs.* 161 (2004), available at <http://www.law.duke.edu/journals/lcp/articles/lcp68dwinter2004p161.htm>. Because “there is no powerful parliamentary committee behind the Ombudsman” and because there is a small chance of “press-led condemnation of non-compliance,” “the freedom to reject the Ombudsman’s views is therefore seemingly far greater at the Community level than at most national levels.” Peter Gjerloeff Bonnor, *The European Ombudsman: A Novel Source of Soft Law in the European Union*, 25 *Eur L. Rev.* 39, 53-54 (2000).

stigmatize maladministration²⁶¹ and to pursue a compromise (friendly) solution – both may be successful tools for wresting documents out of a bureaucracy.²⁶²

The Ombudsman also has recently initiated efforts to obtain agreements to disclose to applicants documents withheld because they originated from Member States. In two cases the Ombudsman’s intervention with national authorities resulted in their agreements to allow the Commission to release the documents.²⁶³

The Ombudsman not only handles individual complaints arising from denial of access to documents by EU institutions and bodies, but it also initiates inquiries and issues special reports that, from the earliest days of his office, have often emphasized transparency.²⁶⁴

4. Challenging Decisions to Grant Access

Courts in the United States have recognized that even though the FOIA provides no private right of action to enjoin an agency from disclosing records, a third party that has submitted information to the government may obtain judicial review of an agency decision to disclose records under the judicial review provisions of the Administrative Procedure Act.²⁶⁵ These cases have become known as “reverse-FOIA actions,” and the traditional principles of limited judicial review apply in these cases.²⁶⁶

The third-party submitter will ordinarily receive notice from the agency in advance of any disclosure of information claimed to be protected by the exemption for confidential commercial information. This notice is provided, again, not by virtue of any mandate of the FOIA, but under

²⁶¹ “The Ombudsman’s effectiveness depends on moral authority and the ability to persuade public opinion.” Nikiforos Diamandouros, FOI: a European Perspective, (speech at the 4th International Conference of Information Commissioners, May 23, 2006), available at <http://www.ombudsman.europa.eu/speeches/en/2006-05-23.htm>.

²⁶² For example, in one instance, even after the Council formally accepted two draft recommendations from the Ombudsman, the Ombudsman concluded that in practice the Council had not fully complied with one and thus followed through by submitting a special report to the European Parliament. Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the Council of the European Union in complaint 917/2000/GG, O.J. 2001 (L 145) 43.

²⁶³ Decision of the European Ombudsman on complaint 3381/2004/TN (involving the response of the U.K. authorities to the Commission’s request in an Article 226 proceeding), available at www.ombudsman.europa.eu/decision/en/043381.htm; Decision of the European Ombudsman on complaint 116/2005/MHZ (involving a letter sent to the Commission by the Portuguese Finance Minister), available at www.ombudsman.europa.eu/decision/en/050116.htm.

²⁶⁴ See Roy Perry, Special Reports Submitted by the European Ombudsman to the European Parliament, in *The European Ombudsman—Origin, Establishment, Evolution* 186 (2005).

²⁶⁵ *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

²⁶⁶ E.g., *CNA Financial Corp. v. Donovan*, 830 F.2d 1132 (D.C. Cir. 1987), cert. denied 485 U.S. 977 (1988). In the traditional requester’s lawsuit against an agency challenging withholding of information under the FOIA, the statute provides that the court should consider the matter *de novo*, so the court need not defer to an agency’s judgment. In a reverse-FOIA case under the APA, the court will invalidate the agency’s decision only if that decision is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

a presidential Executive Order.²⁶⁷ The Order directs all agencies in government subject to the FOIA to consult with submitters and provide notice prior to release of any records claimed by the submitter to be exempt from disclosure as confidential commercial information.

Article 4(5) of the Access Regulation provides for consultation with third parties regarding third-party documents unless it is clear that the document must or must not be disclosed. The rules of the institutions provide for notice to the third party if the institution intends to give access contrary to the explicit objection of the third party. In that case, the institution must provide notice to the third party of its intention to disclose the document and must inform the third party of remedies available to oppose disclosure.²⁶⁸

There are as yet no reported cases of a third party challenging an institution's decision to disclose documents under the Access Regulation despite the objection of the third party. One case did involve a third-party challenge to the decision of a hearing officer in a competition proceeding to disclose information in a nonconfidential decision that was considered by the third party to be a business secret. The CFI observed that the court had the authority – and broad discretion – when circumstances require, to order that a contested act be suspended or to prescribe necessary interim measures. In that case, however, the court dismissed the action when it failed to find that the applicant had carried its burden of showing that disclosure of the information would cause serious and irreparable damage.²⁶⁹

E. Dissemination Of Information Via The Register, Internet, Official Journal

The Access Regulation contains various articles addressing the obligation of the institutions to disseminate information through the Register, the Official Journal, and the Internet. A summary overview of these provisions follows; the issues are addressed in greater detail in [REFERENCE TO CYNTHIA'S SECTIONS ON THESE SUBJECTS.]

1. Public Registers Of Council and Parliament Documents

Under Article 11 of the Access Regulation, institutions must provide public access to a register of documents containing references to documents (date, reference number, subject matter, and, where possible, a short description of content). The Council had created a public register of its documents in 1998,²⁷⁰ this was made available on the Internet after January 1, 1999.²⁷¹ Initially,

²⁶⁷ Exec. Order No 12,600, 52 Fed. Reg. 23,781 (June 23, 1987).

²⁶⁸ Commission Access Rules art. 5.6; Council Access Decision art. 2.3-.4; EP Access Decision art. 9.3-.4. (The Commission and Council accord the third party 10 working days to respond or challenge a disclosure decision; the EP provides 5.)

²⁶⁹ Bank Austria Creditanstalt AG v. Commission, Case 198/03, 2003 ECR II-4879.

²⁷⁰ Register of documents of the Council: <http://register.consilium.eu.int>. Information on access to Council documents in the public register can be found at http://ue.eu.int/cms3_fo/showPage.asp?id=254&lang=en&mode=g. A under a March 1998 Decision, the Register of documents would contain unclassified Council documents. Public register of documents, supra note 202.

²⁷¹ Guidelines for a public register of Council documents (document 6423/1/98 REV 1 of 19 March 1998). Under Council Decision 2001/320/EC of 9 April 2001 on making certain categories of Council documents available to the public, 2001 O.J. (L 111) 29, certain categories of documents relating to legislative activities will be published on

the Register only listed documents; applicants still had to apply for them. Later, links were made available to text of documents that were accessible to the public. The Commission,²⁷² Council,²⁷³ and Parliament²⁷⁴ each has its own Register of documents.

Full texts of documents can be accessed directly through the Register, including a large number of legislative documents, documents made public by their authors, and documents made available to an applicant under the Access Regulation.²⁷⁵ The Register was expanded to include classified documents, subject to certain restrictions, and to provide access to the public list of items of the provisional agendas of Council meetings and its preparatory entities relating to the Council's legislative activities.²⁷⁶

References to nonsensitive documents submitted to the Council or one of its preparatory bodies, relating to decision-making, are entered on the Register through an automatic archiving system as soon as the document is produced. Documents circulated during a meeting and other kinds of unnumbered documents that were not immediately entered into the Register must be transformed as soon as possible into an official (ST) document and recorded in the register.²⁷⁷

Despite the advances made in disseminating EU documents through the Registers, the Ombudsman has concluded that the Commission's Register remains incomplete and that the Commission's response, which essentially accepted but attempted to explain the situation, did not justify the Register's shortcomings.²⁷⁸

The Parliament has also established a register of references to documents "drawn up or received by The European Parliament."²⁷⁹ In January 2006, the Parliament and Council established a

the Internet through the public register, without any application. Effective 3 December 2001, this Decision was incorporated in a new Annex III to the Council's Rules of Procedure. Council Decision 2001/840, *supra* note 10, at ¶ 40.

²⁷² Register of documents of the European Commission: http://europa.eu.int/comm/secretariat_general/sgc/acc_doc/index_en.htm.

²⁷³ Register of documents of the Council: <http://register.consilium.eu.int/utfregister/frames/introfsEN.htm>.

²⁷⁴ Register of documents of the European Parliament: <http://www4.europarl.eu.int/registre/recherche/Menu.cfm?langue=EN>.

²⁷⁵ By contrast, the FOIA requires electronic dissemination of only records released under that statute that, "because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records." 5 U.S.C. § 552(a)(2)(D).

²⁷⁶ Council Decision 2000/23/EC, 2000 O.J. (L), 22, on the improvement of information on the Council's legislative activities and the register of Council documents. Note that the 2004 Network of Experts in Fundamental Rights Report at 137-38 argues that "even documents to which access may be denied, in part or in totality, under any of the exceptions listed under Article 4, should be registered, and their existence therefore made known to the public. Indeed, this is required if the right to partial access to documents . . . is to be effectively exercised."

²⁷⁷ *Kuijer*, 2002 E.C.R. II-488, ¶ 69.

²⁷⁸ Ombudsman Case 1764/2003/ELB, decision of 12 January 2006, discussed in Nikiforos Diamandouros, FOI: a European Perspective, *supra* note 235.

²⁷⁹ EP Rules Governing Public Access to European Parliament Documents, 2005 O.J. (C 289), 6.

Pollutant Release and Transfer Register to increase public access to environmental information.²⁸⁰

2. Internet Access

Article 12.1 requires that the institutions “as far as possible make documents directly available to the public in electronic form or through a register” The Council and Parliament provide direct access to the full text of documents through their Registers.

The Commission has developed the Web site “Openness and access to documents” on the EUROPA server enabling the public to become more familiar with their rights and make use of them.²⁸¹ This site “provides access to the register of internal and preparatory documents . . . , to the register of the President’s correspondence, and to various other sources of information on the Commission’s activities.”²⁸² Agendas and minutes of Commission meetings can be accessed directly from this site. The Directorates-General and other Commission departments disseminate a large quantity of documents via the EUROPA server and provide access to around 50 databases.²⁸³ Commission rules list documents to be “automatically provided on request and, as far as possible, made directly accessible by electronic means.”²⁸⁴ The Commission has established “Europe Direct” to answer questions and direct an inquiry “around the mass of information available.”²⁸⁵

Internet access for documents of EP is regulated in Rule 97.3 and Annex XV of the Rules of Procedure. The Annex contains a list of directly accessible documents.

3. Official Journal

The Official Journal (OJ) of the European Communities is available on paper or electronic form in the EU’s 23 official languages.²⁸⁶ Article 13 of the Access Regulation provides minimum standards for publication of documents in the OJ: Documents listed in paragraph 1 must be published; publication of documents listed in paragraph 2 is optional. Institutions may provide additional categories of documents to be published in the OJ.

²⁸⁰ Regulation (EC) No 166/2006 of the EP and Council, 18 Jan. 2006, 2006 O.J. (L 33), 1.

²⁸¹ http://europa.eu.int/comm/secretariat_general/sgc/acc_doc/index_en.htm.

²⁸² COM (2003) 216 final, supra note 144, (on the application of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission Documents) at 9 (listing, at 10, other documents available on the Web site).

²⁸³ Id. at 11.

²⁸⁴ Commission Decision of 29 December 2001 2001 O.J. (L 345) 94-98 (categories of documents made directly accessible are detailed in Art. 9 of implementing rules).

²⁸⁵ See the portal at http://europa.eu.int/europedirect/index_en.htm.

²⁸⁶ See the portal at <http://europa.eu/languages/en/home> (these include Irish Gaelic, which has a limited status).

F. Conclusion

The EU institutions, courts and Ombudsman, along with nongovernmental organizations, the press and academicians, have all contributed toward the creation of a workable framework for providing public access to EU documents. However, the goal of maximizing both widespread dissemination of public records and granting timely access to requested information has not yet been achieved.

The proposed Constitution of the European Union would elevate the concept of transparency and the public's right of access to information to fundamental constitutional principles. Observers who have been disappointed in the operation of the Access Regulation believe that this change would have a salutary impact on public access to documents.²⁸⁷ Since adoption of the new Constitution is now indefinite, if not in doubt, the Access Regulation will remain the sole avenue effecting public access for now.

Recognizing that public confidence in European institutions is declining, a European Transparency Initiative was launched in November 2005 by the Commission. One of the objectives of the Initiative will be to initiate a debate on the Access Regulation in 2006, followed by "a public consultation on a possible review of the Regulation."²⁸⁸ The European Parliament has also given attention to strengthening the Access Regulation and has set out specific recommendations for the Commission's consideration.²⁸⁹ In short, the scheme for affording the public access to documents in the EU appears to remain a work in progress, with the potential for continuing improvement ahead.²⁹⁰

²⁸⁷ E.g., Lorenzo Cotino, *Theory and Reality of Public Access to EU Information*, in Deirdre Curtin, Alfred E. Kellermann & Steven Blockmans (eds.), *The EU Constitution: The Best Way Forward?* 233 (2005).

²⁸⁸ Communication to the Commission from the President, Ms. Wallstrom, etc. proposing the Launch of a European Transparency Initiative, available at http://europa.eu.int/comm/commission_barroso/kallas/doc/etik-communication_en.pdf.

²⁸⁹ EP report with recommendations to the Commission on access to the institutions' texts, 2004/2125(INI) (Final) 15.3.2006, A6-0052/2006.

²⁹⁰ As this paper was going into final form, the Commission published a Green Paper to initiate the process of revisiting the issue of access to documents in the EU. *Public Access to Documents held by institutions of the European Community: A review*, xxx COM(2007) yyy (final), available at http://ec.europa.eu/commission_barroso/wallstrom/pdf/com_2007_185_en.pdf. The Green Paper contains extensive discussion and evaluation of the operation of the Access Regulation, including judicial interpretations and anticipated future developments.

IV. DATA PROTECTION

The EU has broad and extensive protections for personal data. Both the Member States and EU institutions are subject to data protection legislation, and these provisions are far more extensive than privacy legislation in the United States. While the EU regulates all private entities and governmental institutions that process personal data, the U.S. has no general personal data protection legislation. A patchwork of laws covers some specific areas of information.¹ State legislation may give additional protections to citizens of individual states in some sectors.² Moreover, EU requirements are generally more stringent than U.S. requirements regarding the same types of information.

The extensive protection given to personal data in the EU reflects a long tradition of protecting personnel privacy in Europe. There are explicit privacy rights in the constitutions of most European countries and in Article 8 of the European Union Charter of Fundamental Rights, which provides, “Everyone has the right to respect for private and family life, his home, and his correspondence.”³ Moreover, as compared to the common law, the civil law has been more protective of privacy rights. As well, significant government involvement in private markets is more traditional in Europe than in the United States, paving the way for data protection regulation of private entities. Finally, and importantly, the European concern for data protection also reflects the cruel and immoral misuse of personal data in Germany to locate and deport to concentration camps millions of Jews and other victims of the Holocaust.⁴

This section examines the protection of personal data in the EU. The discussion first focuses on the regulatory processes used to protect personal data and the institutions that implement these protections in the Member States. It next addresses parallel issues regarding data protection by EU institutions. The chapter also considers three developments that have affected the implementation of privacy regulation in the EU. Member States in the EU have differed in their implementation of privacy directives, which creates problems for ensuring effective implementation of the directive and maintaining an integrated market in the EU.⁵ In addition,

¹ These include the Cable Privacy Protection Act (1984) (codified at 47 U.S.C. §551) (cable television); Fair Credit Reporting Act (1970) (codified at 15 U.S.C. §1681 et. seq.) (credit reports); Family Education Rights and Privacy Act (1974) (codified at 20 U.S.C. §1232g) (education records); Right to Financial Privacy Act (1978) (codified at 12 U.S.C. 3401 et. seq.) (financial records); Health Insurance Portability and Accountability Act (2002) (codified at 42 U.S.C. §210) (medical records); Drivers Privacy Protection Act (1994) (codified at 18 U.S.C. §2721-2725) (motor vehicle registrations); Telephone Consumer Protection Act (1996) (codified at 47 U.S.C. §222) (telephone records); Video Privacy Protection Act (1988) (codified at 18 U.S.C. §2710) (and video rentals). See generally MARC ROTENBERG, *THE PRIVACY LAW SOURCEBOOK 2004: UNITED STATES LAW, INTERNATIONAL LAW & RECENT DEVELOPMENTS* (2005).

² See Electronic Privacy Information Center, *Privacy Laws by States*, available at <http://www.epic.org/privacy/consumer/states.html>.

³ Council of Europe, *The European Convention on Human Rights* art. 8(1), available at <http://www.hri.org/docs/ECHR50.html#C.Art8>.

⁴ Marsha Huie, Stephen F. Larabee, & Stephen D. Hogan, *The Right to Privacy in Personal Data: The EU Prods the U.S. and Controversy Continues*, 9 TULSA J. COMP. & INT’L L. 391, 441 (2002).

⁵ See Francesca Bignami, *Transgovernmental Networks vs. Democracy: The Case of the European Information Privacy Network*, 26 MICH. J. INT’L L. 807, 834-846 (2005) (describing differences among EU Member States).

the effort to protect personal data has also come into conflict with promoting transparency in EU and Member State institutions when access to information would reveal personal data about EU residents. Finally, efforts to protect personal data have conflicted with international trade because the EU seeks to ensure that personal data relating to EU residents that are transferred out of the EU receive an adequate level of protection.

A. *Directives*

The EU has promulgated two directives in an effort to harmonize the protection of personal data in the Member States and facilitate integration of the internal market.⁶ Directive 95/46⁷ establishes the obligation of the EU national authorities to regulate the “processing” of “personal data” by government and private entities, and it specifies some of the elements of the administrative process Member States must use. Directive 2002/58 amends Directive 95/46 to address the processing of personal data in the electronic communications sector.⁸

1. **Directive 95/46**

Directive 95/46 applies to the “processing” of “personal data” by “controllers.” The Directive has broad definitions for each of these elements, which will be addressed in turn.

a. Personal Data. The term “personal data” is defined as “any information relating to an identified or identifiable natural person,” known as a “data subject.” It includes all information about a person, such as economic and professional information, not only information about the person’s private life.⁹ Information relates to a data subject when that the information “can be identified, directly or indirectly” with a specific person. This includes when the person can be identified “by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.”¹⁰ The Directive indicates that “in order to determine whether a person is identified . . . account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify said person”¹¹ Thus, the Directive protects any set of data that, if taken together, would make it possible to match personal data to a particular individual or to make it easier to identify that person.¹² Despite the broad definition of “personal data,” Member States have disagreed how to determine when data identify a person, entitling that person to the protections mandated by the

⁶ Report from the Commission, First report on the implementation of the Data Protection Directive (95/46/EC) (2003), at 1, available at http://europa.eu.int/eur-lex/en/com/rpt/2003/com2003_0265en01.pdf.

⁷ Council Directive 95/46, 1995 O.J. (L 281) 31; available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML>.

⁸ Council Directive 2002/58/EC, 2002 O.J. (L 201) 37. available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_201/l_20120020731en00370047.pdf.

⁹ Id. at 50.

¹⁰ Council Directive 95/46, supra n. 7, at art. 2(a).

¹¹ Id. at recital 26.

¹² CHRISTOPHER KUNER, EUROPEAN DATA PRIVACY LAW & ONLINE BUSINESS 5 (2003).

Directive.¹³ These disagreements focus on how probable it must be that someone can determine a person's identity from the information in question. Should the issue be resolved by considering the data itself, for example, the data and other information in possession of the data user, or whether there is any possibility that the information in question can be traced back to the data subject?¹⁴

b. Data Processing. A controller engages in “processing” any time there is “any operation, or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction.”¹⁵ A controller includes any “natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data”¹⁶ Since both governmental and private entities are “controllers” that “process” personal data according to these definitions, Directive 95/46 obligates national authorities to regulate the use and disclosure of personal data by both government and private entities.

The *Lindqvist* case¹⁷ confirms the breadth with which “controller” and “process” are defined. In *Lindqvist*, the European Court of Justice (ECJ) found that the posting of information about the members of a church by another member of the church on an internet home page constituted the “processing” of “personal data.” The website contained the names of various individuals, their jobs, hobbies, telephone numbers, and in one instance, that a person had injured her foot.

c. Acquisition, Maintenance, and Accuracy. Directive 95/46 requires national authorities to ensure the following protections are available to data subjects concerning the acquisition, maintenance and accuracy of personal data. First, controllers are prohibited from acquiring personal data except for “specified, explicit and legitimate purposes,” and they cannot process such data in any way incompatible with those purposes.¹⁸ Second, controllers are obligated to ensure the accuracy and completeness of records, destroy personal data after it is no longer needed for a legitimate purpose,¹⁹ and implement appropriate technical and organizational measures to protect personal data against unlawful destruction or accidental loss, alteration, [and] unauthorized disclosure or access”²⁰ Controllers are also required to notify the Member

¹³ Joel Reidenberg & Paul M. Schwartz, *Data Protection Law and Online Services: Regulatory Responses 122* (1998), available at http://europa.eu.int/comm/justice_home/fsj/privacy/docs/studies/regul_en.pdf.

¹⁴ See *id.* (describing differences among Member States).

¹⁵ Council Directive 95/46, *supra* note 7, at art. 2(b).

¹⁶ *Id.* at art. 2(d).

¹⁷ Case C-101/01, *Criminal Proceedings Against Bodil Lindqvist*, 2003 ECR I-12971, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001J0101:EN:HTML>.

¹⁸ *Id.* at art. 6.

¹⁹ *Id.* at art. 6.

²⁰ *Id.* at art. 17.

State prior to the processing of certain types of personal data,²¹ but Member States can simplify or eliminate this requirement under several conditions,²² including when the controller appoints a “personal data protection official” responsible for ensuring compliance with the laws and regulations of the national authority.²³ The Member States have taken advantage of this exception, producing variation from country to country concerning when notification is not necessary.²⁴ Finally, controllers must provide data subjects with detailed information about what personal data they have about an individual,²⁵ and data subjects have the right to see such data, rectify, erase or block the processing of erroneous data as appropriate,²⁶ seek judicial review of the breach of any rights, and receive compensation for any damages.²⁷

2. Consent

Directive 95/46 also protects data subjects by requiring controllers to obtain consent for the processing of personal data unless the processing fits within one of the exceptions to requiring consent.²⁸ Since “processing” includes the disclosure of personal data,²⁹ a data controller cannot disclose personal data without the consent of the data subject or unless one of the exceptions to the need for consent applies.

The type of consent required depends on the nature of the information being processed. A controller must have “explicit” consent of the data subject to process information revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership and concerning health or sex life.³⁰ To process other types of information the controller must obtain the “unambiguous” consent of the data subject.³¹ To “consent,” the data subject’s agreement to the processing of data relating to him or her must “freely given,” “specific” and “informed.”³² Because consent must be “unambiguous,” the Directive restricts the use of long,

²¹ Id. at arts. 18-19.

²² Id. at art. 18.2-18.5

²³ Id. at art. 18.2.

²⁴ Article 29 Working Party report on the obligation to notify the national supervisory authorities, the best use of exceptions and simplification and the role of the data protection officers in the European Union adopted on 18 January 2005, at 8, 10211/05/EN WP 106, available at http://europa.eu.int/comm/justice_home/fsj/privacy/docs/wpdocs/2005/wp106_en.pdf.

²⁵ Id. at arts. 10-11.

²⁶ Id. at art. 12.

²⁷ Id. at arts. 22-23.

²⁸ Id. at art. 7.

²⁹ See note 15 & accompanying text.

³⁰ Directive 95/46, supra note 7, at art. 8.2(a).

³¹ Id. at art. 7(a).

³² Id. at art. 2(h).

complicated, and non-transparent consent forms,³³ such as clicking “yes” on a website where the standard terms and conditions of the person is accepting are located somewhere else on the site under several layers of hyperlinks.³⁴

The definition of “consent” does not specify whether it must be on an “opt-in” basis, where the data subject takes some affirmative action, such as checking a box on an electronic form, or on an “opt-out” basis, where the data subject consents by failing to take some action, such as by failing to click a box on an electronic form. This matter is therefore left for national authorities to decide as it relates to specific situations,³⁵ and national laws and regulations differ. For example, countries have adopted different requirements concerning what constitutes adequate consent in the employment context,³⁶ and the Commission is considering whether an additional directive concerning employment information may be necessary to harmonize the regulatory approach to this issue.³⁷ Since, however, there must be “explicit” consent to processing of “sensitive” personal data, a controller cannot use an “opt-out” system of approval for this type of information.³⁸

3. Exceptions

As noted, the Directive establishes a number of exceptions that permit the processing of personal data without the consent of the data subject. A controller, for example, can process personal data if it is “necessary” for the performance of a contract to which the data subject is or will be a party.³⁹ A controller can also process such information if it is “necessary” to comply with a legal obligation of the controller, to protect the vital interests of the data subject, perform a task carried out in the public interest, or for the purposes of other legitimate interests except where such interests are overridden by the interest of the data subject in personal privacy.⁴⁰ National data authorities have reached different conclusions concerning when data processing is “necessary” according to these exceptions, which can be explained in part by differences in business practices in these countries.⁴¹ For example, Member States differ whether a seller can disclose information about the firm’s employees to a potential buyer of the seller’s business as “necessary” to the buyer’s due diligence. Germany permits the disclosure of personal data in

³³ Jörg Rehder & Erika C. Collins, *The Legal Transfer of Employment-Related Data to Outside the European Union: Is It Even Still Possible?*, 39 INT’L LAW 129, 134 (2005).

³⁴ KUNER, *supra* n.12, at 68.

³⁵ *Id.*

³⁶ Rehder & Collins, *supra* n. 33, at 158-59.

³⁷ See Second Stage Consultation of Social Partners on the Protection of Workers’ Personal Data, available at http://europa.eu.int/comm/employment_social/labour_law/docs/secondstageconsultationdataprot_en.pdf.

³⁸ KUNER, *supra* n. 12, at 68; Jörg Gehder & Erika C. Collins, *The Legal Transfer of Employment-Related Data to Outside of the European Union: Is It Even Still Possible?*, 39 INT’L LAW 129, 136 (2005).

³⁹ *Id.* at art. 7(b).

⁴⁰ *Id.* at art. 7(c)-(f).

⁴¹ See Rehder & Collins, *supra* n. 33, at 134-36 (providing examples).

stages, but Belgium and Spain do not permit the disclosure of such data without the consent of the employees.⁴²

The Directive has additional exceptions to the ban on processing personal data without consent of the data subject. A controller, for example, does not need consent to process personal data if it involves “operations concerning public security, defence, State security . . . and the activities of the State in areas of criminal law” or if the processing is “by a natural person in the course of a purely personal or household activity.”⁴³ The latter exception, however, is unlikely to benefit anyone using personal data in the course of any business or commercial activity. For example, contact and other personal information held in computers used by professionals is unlikely to qualify as “purely” personal use, and such information is certain not to qualify if the individual’s computer is linked to or updated from a company’s database.⁴⁴

The Directive also requires Member States to provide for exceptions for the processing of personal data “carried out solely for journalistic purposes or the purpose of artistic or literary expression,” but only if “they are necessary to reconcile the right to privacy with the rules governing freedom of expression.”⁴⁵ In *Lindquist*, the controller had argued that the creation of the church website was protected by general principles of freedom of expression, and therefore permitted until this clause. The ECJ replied that the national authorities and courts were “responsible for applying the national legislation implementing Directive 95/46 to ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order,” and it reserved the resolution of that issue in this case for the national courts.⁴⁶ Since Member States are responsible for determining when the freedom of expression overrides the protection of personal data, there is considerable variation in national laws concerning data protection and the media.⁴⁷

4. Regulatory Institutions

Directive 95/46 not only establishes the type of protections a national authority must adopt, it also requires the adoption of “suitable measures to ensure full implementation” of the directive and to establish “suitable sanctions” for infringement of data protection legislation.⁴⁸ Besides this general edict, the Directive takes three additional steps. First, it obligates a Member State to establish a “supervisory authority” that has the power to conduct investigations, to order the blocking, erasure or destruction of illegal data processing, and engage in legal proceedings to

⁴² Id. at 135.

⁴³ Council Directive 95/46, supra n. 7, at art. 3.

⁴⁴ DOUWE KORFF, DATA PROTECTION LAWS IN THE EUROPEAN UNION 23 (2005).

⁴⁵ Council Directive 95/46, supra n. 7, at art. 9.

⁴⁶ *Lindquist*, supra n. 17, at ¶ 90.

⁴⁷ KUNER, supra n. 12, at 76; see Art. 29 Working Party on the Protection of Individuals With Regard to the Processing of Personal Data, Recommendation 1/97 on Data protection law and the media (February 25, 1997), available at http://europa.eu.int/comm/justice_home/fsj/privacy/docs/wpdocs/1997/wp1_en.pdf.

⁴⁸ Council Directive 95/46, supra n. 7, at art. 24.

effectuate its orders.⁴⁹ This national privacy authority, which must “act with complete independence in exercising its functions,”⁵⁰ is also obligated to receive complaints alleging the breach of privacy rights from individuals or associations that represent individuals.⁵¹ Second, a Member State must also provide a judicial remedy for the unlawful processing of information including the right to receive compensation for any damages a person might suffer.⁵²

Third, Article 29 of the directive establishes an advisory “Working Party on the Protection of Individuals with Regard to the Processing of Data.”⁵³ The “Article 29 Working Party” is composed of a representative from each Member State from its supervisory authority, a representative of the Commission, and a representative of the EU Data Supervisor. It issues interpretive documents that can be influential since they are often used by national courts and national data privacy authorities.⁵⁴ Nevertheless, the working papers are not legally binding since the role of the Working Party is only advisory.⁵⁵ Despite its potential influence, meetings of the Working Party are closed, and it does not publish its agenda.⁵⁶

5. Directive 58/2002

Since Directive 95/46 applies to any processing of personal data, it regulates the processing of personal data in the communications sector. In 2002, however, the Council approved Directive 58/2002⁵⁷ to address unique problems in electronic communications services, such as spam e-mails and the uses of cookies or spy-ware. Directive 58/2002 applies to personal data processed in “publicly-available electronic communications services in public telecommunications networks in the Community.”⁵⁸ In 2006, the Commission amended the directive to oblige Member States to adopt legislation that requires service providers to retain certain types of personal data to facilitate the investigation, detection, and prosecution of serious crime including terrorism.⁵⁹

⁴⁹ Id. at art. 28.1.

⁵⁰ Id.

⁵¹ Id. at art. 28.4.

⁵² Id. at arts. 22-23.

⁵³ Id. at art. 28.

⁵⁴ KUNER, *supra* n. 12, at 10.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Council Directive 2000/58, *supra* n. 8.

⁵⁸ Id. at art. 3(1).

⁵⁹ Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, 2006 O.J. (L 105) 54, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_105/l_10520060413en00540063.pdf.

Directive 58/2002 takes precedence over Directive 95/46 whenever one of its mandates is applicable,⁶⁰ although how the two directives interact concerning some issues is not yet clear.⁶¹ It is clear, however, the directive requires Member States to enact regulatory requirements that are unique to the electronic communications sector, such as additional obligations to safeguard personal data. Controllers must “ensure a level of security appropriate to the risk presented” taking into account “the state of the art and the cost of [implementation of such measures]” and to notify subscribers of the extent to which the risk of unauthorized disclosure is not eliminated by the measures taken by the controller.⁶² The directive also regulates unsolicited communications, which are only permitted with opt-in consent,⁶³ except that businesses can send unsolicited communications to their existing customers on an opt-out basis.⁶⁴ Further, Member States must permit the use cookies and other types of spy-ware, but only if data subjects are given clear and comprehensive information about the purposes of the processing related to the use of these devices and have the opportunity to opt-out of such uses.⁶⁵

6. Member States

The ambitious agenda to protect personal data established by the data privacy directives has been affected by two developments in the Member States. Like other directives, this one left many of the details to be decided by the Member States, producing both different interpretations of some regulatory requirements and different levels of enforcement. These differences impact both the level of privacy protection in the EU and the movement of goods between Member States.

An EU website provides links to the legislation passed in each Member State.⁶⁶ In addition, the Commission has a series of reports on data protection that contain a description of legislative and regulatory developments in each Member State during the time period covered by the report.⁶⁷

⁶⁰ KUNER, *supra* n. 12, at 23-24.

⁶¹ See Frederic Debussere, *The EU-Privacy Directive: A Monstrous Attempt to Starve the Cookie Monster?*, 13 INT’L J.L. & INFO. TECH. 70, 81 (2005) (describing interpretive problems).

⁶² *Id.* at art. 4.

⁶³ *Id.* at art. 13(1).

⁶⁴ *Id.* at art. 13(2). The Directive leaves it to Member States to determine whether to use opt-in or opt-out consent for other types of unsolicited communications. *Id.* at art. 13(3).

⁶⁵ *Id.* at art. 5(3).

⁶⁶ Status of implementation of Directive 95/46 on the Protection of Individuals with regard to the Processing of Personal Data, available at http://europa.eu.int/comm/justice_home/fsj/privacy/law/implementation_en.htm#belgium.

⁶⁷ See, e.g., European Commission, Eighth Annual Report on the situation regarding the protection of individuals with regard to the processing of personal data in the European Union and in third countries - covering the year 2004 (2005), available at http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2005/8th_annual_report_en.pdf; Seventh report on the situation regarding the protection of individuals with regard to the processing of personal data and privacy in the European Union and in third countries covering the years 2002-2003 (2004), available at http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2004/7th_report_prot_individs_en.pdf; Sixth annual report on the situation regarding the protection of individuals with regard to the processing of personal data and privacy in the European Union and in third countries covering the years 2001 (2003), available at http://europa.eu.int/comm/justice_home/fsj/privacy/docs/wpdocs/2003/2003-6th-annualreport_en.pdf.

This information reveals that Member States have different policy positions on some data protection issues and have adopted different procedural protections.⁶⁸ Some of these differences have been noted earlier.

Likewise, attitudes towards enforcement vary in the Member States, with some national data protection authorities taking proactive approaches and other authorities reserving formal proceedings for particularly egregious cases.⁶⁹ For example, the data protection authority in the Netherlands can engage in privacy audits of selected data users without their permission, but the data protection authority in the United Kingdom cannot carry out similar audits without a controller's agreement.⁷⁰ Moreover, while most data protection authorities rarely seek formal sanctions, preferring instead to employ negotiation and compromise, some data protection authorities, such as Spain, will enforce the law more strictly by imposing very substantial fines.⁷¹

Divergences among Member States can threaten the goal of harmonizing data protection regulation in order to facilitate a common market. At the same time, the divergences often reflect the varying policy viewpoints in the Member States concerning the data protection. One of the functions of the Article 29 Working Group is to recommend how some of the differences in approach should be reconciled. The Working Group, for example, has addressed issues such as how Member States have utilized exceptions to the requirement that controllers notify the national data authority prior to processing personal data,⁷² the varying enforcement activities of Member States,⁷³ and varying approaches to regulating the processing of persona data in employment contexts.⁷⁴

7. Transparency

Another problem concerns data protection and data access. The data protection directives reflect the understanding in the EU that data protection is of fundamental significance, but so is government transparency. This section considers two potential conflicts between data protection and governmental transparency. The first conflict arises when a national authority publishes

⁶⁸ Bignami, *supra* n. 5, at 827; see KUNER, *supra* n. 12, at 12-16 (describing differences in procedural protections among the Member States).

⁶⁹ KUNER, *supra* n. 12, at 41.

⁷⁰ DOUWE KORFF, HUMAN RIGHTS CENTRE, UNIVERSITY OF ESSEX, STUDY ON IMPLEMENTATION OF DATA PROTECTION DIRECTIVE – COMPARATIVE SUMMER OF NATIONAL LAWS 207 (2002), available at http://ec.europa.eu/justice_home/fsj/privacy/docs/lawreport/consultation/univessex-comparativestudy_en.pdf.

⁷¹ *Id.* at 209-210.

⁷² See note 24 & accompanying text.

⁷³ Article 29 Data Working Party, Declaration of the Article 29 Working Party on Enforcement adopted on 25 November 2004, 1206704/EN WP 101, available at http://www.datenschutz-berlin.de/doc/eu/gruppe29/wp101/wp101_en.pdf.

⁷⁴ Opinion 8/2001 on the processing of personal data in the employment context adopted on 13 September 2001, 5062/01/EN/Final WP 48, available at http://europa.eu.int/comm/justice_home/fsj/privacy/docs/wpdocs/2001/wp48en.pdf.

information that includes personal data. The second conflict arises when an individual seeks information from a Member State that includes personal data.

In both cases, Article 7(c) of Directive 95/46 is applicable. Article 7(c) authorizes the processing of personal data when it is “necessary for compliance with a legal obligation to which the controller is subject.”⁷⁵ Since Article 7(c) appears to authorize the disclosure of personal data whenever another law requires it, it appears to authorize the disclosure of personal data whenever another law requires its publication or its disclosure pursuant to a data access request. Article 7(c), however, has been interpreted to limit the authority of Member States to pass such legislation.

a. Published Information. In the *Österreichischer Rundfunk and Others* case,⁷⁶ the ECJ considered the application of Article 7(c) to a German law that required a large number of governmental bodies to disclose publicly the salaries and pensions of officials earning more than a certain amount of money. After finding the information was “personal data” within the scope of Directive 95/96,⁷⁷ the Court found that the disclosure of such information would be legitimate only if “such publicity is necessary and proportionate to the aim of keeping salaries within reasonable limits” and only if “the objective could not be attained equally effectively by transmitting the information as to names to the monitoring bodies alone,”⁷⁸ both of which were issues to be determined by the German courts.⁷⁹ The ECJ also found that if the national courts concluded that disclosure of such data did not satisfy these tests, it could not satisfy Article 7(c) of Directive 95/96.⁸⁰ In the United States, the salaries of public officials are generally considered to be public information on the ground that the information does not pose immediate harm to one’s reputation or security.⁸¹

b. Data Access Laws. The Working Group has proposed a similar interpretation of Article 7(c) as it applies to data access laws. The Working Group interprets Article 7(c) as limiting the authority of Member State to authorize disclosure of personal data in domestic data access legislation because, although Article 7(c) creates an exception for compliance with a law, a

⁷⁵ Directive 95/46, supra n. 7, at Art. 7(c).

⁷⁶ Judgment of the Court of 20 May 2003 in Joined Cases C-465/00, C-138/01 and C-139/01, OJ 2003 C171/3, 2003 ECR-4989, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000J0465:EN:HTML>.

⁷⁷ This aspect of the case is discussed later in the chapter. See infra notes 219-220 & accompanying text.

⁷⁸ *Österreichischer Rundfunk and Others*, supra n. 76, at ¶ 88.

⁷⁹ Id. at ¶ 90.

⁸⁰ Id. at ¶ 91.

⁸¹ See Daniel J. Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution*, 86 Minn. L. Rev. 1137, 1184-85 (2002) (noting that a number of courts have rejected claims that salary information falls within state FOIA privacy exceptions because disclosure does not pose immediate harm to one’s reputation or security); Margaret Westin, *The Minnesota Data Practices Act: A Practitioner’s Guide and Observations on Access to Government Information*, 22 Wm. Mitchell L. Rev. 839, 843-44 (1996) (noting that most states recognize that the public has a right to know certain information about public officials such as their names, salaries and qualifications).

Member State is still required to comply with Directive 95/46.⁸² If, therefore, a Member State had a public access law that did not have an exception for privacy interests, the Member State would be in violation of the Directive 95/46 since it would be in the position of permitting the disclosure of personal data without regard to the protections required by Directive 95/46.

According to the Working Party, Article 7(f) confirms the previous interpretation.⁸³ Article 7(f) authorizes the disclosure of personal data “as necessary for the legitimate interests pursued by the controller ... except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject under Article 1(1).”⁸⁴ Article 1(1) obligates Member States to “protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of data.”⁸⁵

Finally, the Working Group concludes Articles 7(c) and 7(f) imply that the conflict between the Directive and legislation on public access must be resolved on a case-by-case basis, “in order to conclude which of the two rights or interests should prevail [in] each particular circumstance, and therefore whether the request for access should be satisfied or rejected.”⁸⁶ The Working Group warns, however, that this interpretation does not apply to Article 8 which prohibits the processing of data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data concerning sex and health life.⁸⁷ Article 8 contains a somewhat different and more limited set of exceptions for disclosure than Article 7.⁸⁸

B. *Extra-territorial application*

The above discussion addresses activities and conduct within the EU. The EU, however, has given extra-territorial effect to its data privacy requirements to ensure that controllers cannot evade the regulatory requirements by moving processing operations to a non-EU or “third” country. Directive 95/46 has extra-territorial application because it forbids the transfer of personal data to a third country until there is a determination that it has an “adequate level of protection” for such information.⁸⁹ The effort to implement this part of the directive has been problematic because there is a conflict between the EU’s interest in facilitating international trade and its interest in providing broad protection of personal data. This section discusses the

⁸² Data Protection Working Party, Opinion 5/2001 On the European Ombudsman’s Special Report to the European Parliament following the draft recommendation to the European Commission in complaint 713/98/IJH, WP 44, 5003/00/EN/Final (May 17, 2001), at 5, available at http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2001/wp44en.pdf.

⁸³ Id. at 6.

⁸⁴ Council Directive 95/46, *supra* note 7, at art. 7(f).

⁸⁵ Id. at art. 1(1).

⁸⁶ Data Protection Working Party, Opinion 5/2001, *supra* n. 82, at 5.

⁸⁷ Id.

⁸⁸ Council Directive 95/46, *supra* note 7, at art. 8.

⁸⁹ Id. at art. 25.

extra-territorial application of the data privacy directives, the regulatory process used to implement this requirement, and the controversies that have arisen concerning these efforts.

1. Adequate Level of Protection

Directive 95/96 makes national privacy authorities responsible for determining whether a country has an adequate level of protection, and if a country lacks such protections, the national authority must block information transfers to that country.⁹⁰ A Member State can also determine adequacy on an ad hoc basis by approving a particular data transfer.⁹¹ The data privacy authority is also obligated to report any finding that a country lacks adequate protections to the Commission,⁹² which has three options. It can affirm the decision of the Member State, negotiate with the country to achieve an adequate level of protection, or initiate action to block data transfers to that country from all Member States.⁹³ In taking any of these actions, the Commission must consult a comitology committee of Member State representatives⁹⁴ and seek the opinion of the Working Party,⁹⁵ which as noted earlier, is comprised of representatives from the Member State privacy authorities.⁹⁶ The Commission must consider the opinion of the Working Party, but it is not bound by it.⁹⁷ The Commission's proposed decision on adequacy is then submitted to the European Parliament, which can make a recommendation to the Commission. The Commission will then make final decision on adequacy.⁹⁸

Although a Member State can make an adequacy determination, no Member State has decided on its own to block a data transfer,⁹⁹ apparently because of the potential political ramifications.¹⁰⁰ At the same time, no Member State has approved a country's laws as being adequate either.¹⁰¹ Instead, the Commission has on its own approved some countries as having an adequate level of

⁹⁰ The Directive requires a Member State to assess the adequacy of a country's data protection laws in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country.

Id. at art. 25.2.

⁹¹ KONER, *supra* note 12, at 134.

⁹² Council Directive 95/46, *supra* note 7, at art. 25.3.

⁹³ Id. at art. 25.4-6.

⁹⁴ Id. at art. 26.3-4.

⁹⁵ Id. at art. 30.1(b).

⁹⁶ See note 53 & accompanying text.

⁹⁷ KORFF, *supra* n. 44, at 183-84.

⁹⁸ Id.

⁹⁹ See Bignami, *supra* note 5, at 832.

¹⁰⁰ KONER, *supra* note 12, at 133.

¹⁰¹ Id.

data protection (Argentina, Canada, Isle of Man Guernsey, and Switzerland),¹⁰² has considered other countries for approval, and has engaged in bi-lateral negotiations with other countries to obtain additional safeguards.¹⁰³

2. Exceptions

If a country does not have adequate laws to protect personal data, a national privacy authority can still permit the transfer of data if the controller meets one of the exceptions in the Directive. Data transfers are permitted when the data subject has unambiguously consented to the proposed transfer.¹⁰⁴ If there is no consent, a data transfer is still possible if it is necessary for the performance of a contract between the data subject or the implementation of pre-contractual measures requested by the data subject. A transfer is also legal when it is necessary or legally required on important public interest grounds, or for the establishment, exercise or defense of legal claims, to protect the vital interests of the data subject, or the transfer is from a database to which the public in the Member State has access according to national laws on data access.¹⁰⁵

Finally, Directive 95/26 permits the transfer of data to a third country when the recipient of the data agrees to provide sufficient protection in a contract or by other means.¹⁰⁶ If a national privacy authority approves the transfer of personal data pursuant to this exception, it must notify the Commission and other Member States of its approval.¹⁰⁷ If the Commission or a Member State objects to the transfer, the Commission will make a final decision whether to approve the data transfer.¹⁰⁸ Before taking this decision, the Commission must consult the comitology committee¹⁰⁹ and seek to opinion of the Working Party,¹¹⁰ as it is required to do concerning Member State actions that block the transfer of personal data.

¹⁰² EU, Commission decisions on the adequacy of the protection of personal data in third countries, available at http://europa.eu.int/comm/justice_home/fsj/privacy/thridcountries/index_en.htm.

¹⁰³ Bignami, *supra* note 5, at 831.

¹⁰⁴ Council Directive 95/46, *supra* note 7, at art. 26.1.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at art. 26.2. According to the Directive:

a Member State may authorize a transfer or a set of transfers of personal data to a third country which does not ensure an adequate level of protection within the meaning of Article 25 (2), where the controller adduces adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights; such safeguards may in particular result from appropriate contractual clauses.

Id.

¹⁰⁷ *Id.* at art. 26.3.

¹⁰⁸ *Id.* at art. 26.3.

¹⁰⁹ *Id.* at art. 26.3-4.

¹¹⁰ *Id.* at art. 30.1(b).

3. Implementation

EU officials have expressed concern about the lax enforcement of the ban on transferring personal data to third countries that do not have adequate levels of data protection. In a report in December 2003, the Commission concluded “[m]any unauthorised and possibly illegal transfers are being made to destinations or recipients not guaranteeing adequate protection.”¹¹¹ This conclusion was based in part on the small number of notifications that the Commission had received from Member States that they had approved contract provisions as providing sufficient data protection. As Professor Bignami has observed, the small number of notifications “in light of the volume of trade between the European Union and the rest of the world, much of which does not follow the European approach to information privacy,” makes it “difficult to believe that European’s privacy is protected when their data is transferred abroad.”¹¹² Two other observers concur, finding it “is a well-known secret that, even though member states have the authority to impose sanctions on companies breaching the data privacy laws, the enforcement of these laws have been relatively lax to date.”¹¹³

The limited number of notifications may be attributable to the use by controllers of the Article 26(1) exceptions since these exceptions, when they apply, permit the transfer of data to third countries with inadequate protections. As a result, if controllers are utilizing these exceptions, there is no need for a country to rule on the adequacy of the protections in the country to which the data are being sent. The Article 29 Working Party has expressed its concern that Member States may develop different interpretations of the Article 26(1) exceptions, enabling controllers to engage in “forum shopping among Member States, depending on how loosely these provisions are being interpreted.”¹¹⁴ The Committee has responded by recommending that national authorities should narrowly construe the exemptions, but since this recommendation may be at odds with the interest of Member States in facilitating international commerce, it also stressed the importance of harmonizing how Member States interpret the exceptions.¹¹⁵

4. Safe Harbor Agreement

Directive 95/46, as noted in the last section, permits the transfer of data to a country with inadequate data protection if a data controller furnishes adequate safeguards using contractual clauses or other means. The U.S.¹¹⁶ and the EU¹¹⁷ have taken advantage of this provision to

¹¹¹ Report from the Commission: First report on the implementation of the Data Protection Directive (95/46/EC), COM(2003) 265 final, at 19, available at http://europa.eu.int/eur-lex/en/com/rpt/2003/com2003_0265en01.pdf.

¹¹² Bignami, supra note 5, at 834.

¹¹³ Rehder & Collins, supra note 33, at 157.

¹¹⁴ Working document on a common interpretation of Article 26(1) of Directive 95/46/EC: Version of 24 October 1995, 2093/05/EN WP 114, at 3, available at http://europa.eu.int/comm/justice_home/fsj/privacy/docs/wpdocs/2005/wp114_en.pdf.

¹¹⁵ Id. at 17.

¹¹⁶ Department of Commerce, Issuance of Safe Harbor Principles and Transmissions to the European Commission, 65 Fed. Reg. 45666 (2000).

reach a Safe Harbor Agreement that establishes a process for United States companies to qualify for the transfer of personal data from the EU. Firms in the United States that agree to abide by the data protection principles in the agreement are presumed to qualify for this exception.

The agreement was not easily reached. Not only were there were long and protracted negotiations, the Commission adopted the agreement despite a 279 to 259 vote in the EU Parliament that endorsed a report of a consumer rights committee critical of the adequacy of the remedies in the agreement.¹¹⁸ The Commission was not bound by the vote because the Parliament's powers were limited to determining whether the Commission had failed to follow proper procedures in negotiating and drafting the Safe Harbor agreement. The Commission, however, did reserve the right to re-think the framework of the agreement if the fears of the Parliament turned out to be accurate.¹¹⁹

The details of the safe harbor process are found in the Safe Harbor Principles,¹²⁰ a set of frequently asked questions (FAQs) and responses,¹²¹ the Commission decision approving the agreement,¹²² and various other documents relating to the agreement.¹²³ The FAQs, according to the Department of Commerce, are intended to serve as "authoritative guidance" concerning implementation of the principles.¹²⁴

An organization can indicate its intent to comply with the principles in three ways.¹²⁵ It can join a self-regulatory privacy program that adheres to the principles, develop its own self-regulatory privacy policies that conform to the principles, or agree to abide by the principles in a written agreement with parties transferring data from the EU. In addition, organizations subject to a statutory, regulatory, administrative or other body of law (or of rules) that effectively protects personal privacy may also qualify for safe harbor benefits.¹²⁶ To be eligible for the Safe Harbor

¹¹⁷ 2000/520/EC: Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the U.S. Department of Commerce (notified under document number C(2000) 2441), available at http://ec.europa.eu/justice_home/fsj/privacy/thridcountries/index_en.htm.

¹¹⁸ Marsha Cope Huie, Stephen F. Larabee, & Stephen D. Hogan, *The Right to Privacy in Personal Data: The EU Prods the U.S. and Controversy Continues*, 9 TULSA J. COMP. & INT'L L. 319, 448 & 448 n. 208 (2002).

¹¹⁹ *Id.* at 448.

¹²⁰ Safe Harbor Privacy Principles, available at <http://www.export.gov/safeharbor/SHPRINCIPLESFINAL.htm>.

¹²¹ *Id.*

¹²² Commission Decision 2000/520, *supra* note 117.

¹²³ See Department of Commerce, Documents and Public Comments Provided through the Duration of the Safe Harbor Negotiations (November 1998 - June 2000), available at http://www.export.gov/safeharbor/sh_historicaldocuments.html.

¹²⁴ Department Commerce, *supra* note 116, at 45,666.

¹²⁵ *Id.*

¹²⁶ *Id.*

presumption, organizations must self-certify to the Department of Commerce their adherence to the Principles.¹²⁷

The Principles, which are similar to the mandates in Directive 95/46, establish seven obligations:¹²⁸

Notice: An organization must inform a data subject about the purposes for which it collects and uses personal information, how the data subject can contact the organization with any inquiries or complaints, whether the information will be transmitted to third parties, and what options the organization offers the data subject for limiting the use and disclosure of personal data.

Choice: An organization must offer the data subject the opportunity to block the disclosure of personal data to third parties, the processing of personal data that is incompatible with the purpose for which it was originally collected, and the use of personal data for purposes that have not been authorized by the data subject. An organization can meet the previous commitments by establishing an opt-out system, but it cannot disclose sensitive data without the express permission of the data subject (i.e., an opt-in system) with some exceptions.¹²⁹ In all circumstances, data subjects must be provided with clear and conspicuous, readily available, and affordable mechanisms to exercise these rights.

Data Transfers: An organization may transfer personal data to a third party acting as its agent without violating Directive 95/46 in any of the following circumstances: the agent subscribes to the Safe Harbor Principles, is subject to Directive 95/46, is subject to a legal regime found to be adequate by the EU, or enters into a written agreement with the organization that it will provide at least the same level of privacy protection as is required by the relevant Principles. The organization, however, may not transfer personal information to an agent in any of the previous circumstances if it knew or should have known the agent would process the information in a manner inconsistent with the Principles and the organization failed to take reasonable steps to prevent or stop such processing.

Security: An organization creating, maintaining, using or disseminating personal information must take reasonable precautions to protect it from loss, misuse and unauthorized access, disclosure, alteration and destruction.

Data integrity: An organization must not process personal information in ways that are incompatible with the purposes for which the organization collected it or in ways that the data subject has not authorized. An organization must also take

¹²⁷ FAQ 6 - Self-Certification, available at <http://www.export.gov/safeharbor/FAQ6SelfCertFINAL.htm>.

¹²⁸ Safe Harbor Principles, supra note 120.

¹²⁹ FAQ 1 - Sensitive Data, available at <http://www.export.gov/safeharbor/FAQ1sensitivedataFINAL.htm>.

reasonable steps to ensure that data is reliable for its intended use and that it is accurate, complete, and current.

Data Access: An organization must give data subjects access to personal data in the possession of the organization, and it must correct, amend, or delete that information where it is inaccurate, except where the burden or expense of providing access would be disproportionate to the risks to the individual's privacy in the case in question, or where the rights of persons other than the individual would be violated.

Enforcement: Data subjects must have access to some available and affordable independent mechanism that will investigate and resolve complaints and award damages where appropriate. If a U.S. company is subject to regulation the Federal Trade Commission (FTC) or the Department of Transportation (DOT), it satisfies this requirement because both agencies have pledged to enforce compliance with the Safe Harbor Principles.¹³⁰ Alternatively, a company must join a private sector privacy program that includes an enforcement mechanism that meets the previous requirements. If, however, a company transfers human resources data from the EU to the U.S., it must agree to cooperate with EU data protection officials if a violation occurs.¹³¹ This requirement ensures that European employees do not have to seek a remedy in the U.S. for violation of the Principles.¹³²

In addition to providing for an effective remedy, an organization must have procedures for verifying compliance with the Principles and for remedying problems arising out of failure to comply with the Principles, including sanctions that are sufficiently rigorous to ensure compliance by employees of the organization. A company is therefore obligated to audit its data processing policies or hire an independent third party to perform the audit.¹³³

Finally, an organization that certifies that it will adhere to the Principles may be able to avoid compliance in three circumstances.¹³⁴ First, it can alter compliance as necessary to meet national security, public interest, or law enforcement requirements. Second, it can alter compliance to comply with conflicting statutes, regulations or case law, if it can demonstrate that its non-compliance is limited to the extent necessary to comply with a conflicting legal obligation.

¹³⁰ Both the FTC, see Letter to John Mogg, Director, DG XV, European Commission from Robert Pitofsky, FTC, July 14, 2000, available at <http://www.export.gov/safeharbor/FTCLETTERFINAL.htm>, and DOT, see Letter to John Mogg, Director, DG XV, European Commission from Samuel Podberesky, Assistant General Counsel for Aviation Enforcement and Proceeding, DOT, July 14, 2000, available at <http://www.export.gov/safeharbor/DOTLETTERFINAL.htm>, indicated that they could prosecute a company under their jurisdiction for an "unfair or deceptive act or practice" if it failed to fulfill commitment to abide by the principles.

¹³¹ FAQ 9 - Human Resources, available at <http://www.export.gov/safeharbor/FAQ9HumanResFINAL.htm>.

¹³² Rehder & Collins, *supra* note 33, at 148.

¹³³ FAQ 7 – Verification, available at <http://www.export.gov/safeharbor/Faq7verifFINAL.htm>.

¹³⁴ Safe Harbor Principles, *supra* n. 120.

Third, an organization need not comply with the Principles if the processing of personal data qualifies for an exception or derogation under the Directive or Member State laws, provided Member States have used an exception or derogation in a comparable context.

5. Safe Harbor Implementation

There is evidence that some companies are ignoring the Safe Harbor Agreement and other companies have failed to implement all of its provisions. A Commission Staff Working paper adopted in 2002 found that a relatively few companies had become self-certified.¹³⁵ By the time of a 2004 staff report, there had been 400 self-certifications, which was still “lower” than the Commission initially had anticipated.¹³⁶ There are currently over 950 currently registered participants.¹³⁷ The 2004 report also reviewed the information privacy policies of companies that were self-certified and that had made their policies publicly available. This review indicated that many of the published policies did not conform to all of the Safe Harbor Principles, which caused the authors of the report to conclude that there were compliance problems the EU must overcome.¹³⁸ In light of these compliance problems, the report was critical of the FTC for its lack of effort to ensure compliance with the Principles.¹³⁹

Despite these concerns, the Commission has indicated its intent to allow the Safe Harbor process to continue, although it made a number of recommendations for improvement.¹⁴⁰ Other voices are not as sanguine. Some data authorities and legislators believe the Safe Harbor process does not offer sufficient protection for personal data.¹⁴¹ The Working Party also appears to be skeptical of significant aspects of the process.¹⁴² Professor Reidenberg doubts the FTC has jurisdiction to enforce the provisions of the Safe Harbor Agreement in light of case law holding

¹³⁵ Commission Staff Working Paper: The application of Commission Decision 20/2000/EC of 26 July 2000 pursuant to Directive 95/46 of the European Parliament and of the Council on the adequate protection of personal data provided by the Safe Harbour Privacy Principles and related Frequently Asked Questions issued by the U.S. Department of Commerce, Feb. 13, 2002, SEC (2002) 196, at 5, available at http://europa.eu.int/comm/justice_home/fsj/privacy/docs/adequacy/sec-2002-196/sec-2002-196_en.pdf.

¹³⁶ Commission Staff Working Paper: The Implementation of Commission Decision 20/2000/EC on the adequate protection of personal data provided by the Safe Harbour Privacy Principles and related Frequently Asked Questions issued by the U.S. Department of Commerce, November 17, 2004, SEC (2004) 1323, at 5, 13, available at <http://register.consilium.eu.int/pdf/en/04/st14/st14849.en04.pdf>.

¹³⁷ Department of Commerce, Safe Harbor List, available at <http://web.ita.doc.gov/safeharbor/shlist.nsf/webPages/safe+harbor+list>.

¹³⁸ Id. at 8. This conclusion was based on a consultant’s report that surveyed such policies. See Safe Harbor Implementation Study (April 19, 2004), at 13-14, available at http://europa.eu.int/comm/justice_home/fsj/privacy/docs/studies/safe-harbour-2004_en.pdf.

¹³⁹ 2004 Safe Harbor Working Paper, *supra* note 136, at 10-11.

¹⁴⁰ Id. at 13-14.

¹⁴¹ KUNER, *supra* note 12, at 146.

¹⁴² Art. 29 Working Party, Working Document on the Functioning of the Safe Harbor Agreement, July 2, 2002, available at http://www.datenschutz-berlin.de/doc/eu/gruppe29/wp62/wp62_en.pdf.

the agency does not have statutory authority to protect American business interests or foreign consumers.¹⁴³

Because of the economic importance of data transfers to the U.S., the Commission appears to be proceeding cautiously despite the not insignificant problems with the Safe Harbor process. Nevertheless, the political situation may change. As Christopher Kuner has observed, if the Safe Harbor process “continues to gain companies and complaint resolution proceedings work well,” the process is likely to remain “part of the data protection landscape,” but if a “major scandal were to erupt involving the use of data by a Safe Harbor company, then political pressure in Europe to scuttle the Safe Harbor system might put its viability in jeopardy.”¹⁴⁴

6. Aviation Passenger Data

The Safe Harbor Agreement was based on the clause in Directive 95/46 that permits the transfer of data to a third country with inadequate data protection if the controller furnishes adequate safeguards using contractual clauses or other means. Based on this clause, the U.S. and the Commission also negotiated an agreement addressing the transfer of airline passenger data from the EU to the U.S.¹⁴⁵ The agreement was a response to Aviation and Transportation Security Act (ATSA), which requires airlines to give the United States Bureau of Customs and Border Protection (CBP) passenger name records for any aircraft leaving or entering the U.S.¹⁴⁶

There was considerable opposition to the agreement on the ground it did not sufficiently protect personal privacy.¹⁴⁷ During the negotiations for a final agreement, the Article 29 Working Party expressed a number of reservations about the scope, nature, and use of the information that the U.S. proposed to collect,¹⁴⁸ as did data privacy officials in the Member States,¹⁴⁹ and the EU

¹⁴³ Joel R. Reidenberg, *E-Commerce and Trans-Atlantic Privacy*, 38 HOUS. L. REV. 717, 741 (2001).

¹⁴⁴ KUNER, *supra* note 12, at 146.

¹⁴⁵ Commission Decision 2004/535/EC of 14 May 2004 on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States’ Bureau of Customs and Border Protection, 2004 O.J. (L 235) 11, available at <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:32004D0535:EN:HTML>. The agreement limited type of information an airline must transfer regarding a passenger, established a three and one-half year limit on storing such information, committed the Chief Privacy Officer of the Department of Homeland Security to reviewing complaints about the processing of data in an expedited fashion, and established yearly meetings between the CBP and the Commission to review how the U.S. has implemented the agreement. Undertakings of the United States Bureau of Customs and Border Protection and the United States Transportation Security Administration, available at <http://www.quintessenz.at/doqs/000100002639/US%20Undertakings%20on%20EU%20passenger%20name%20records.pdf>

¹⁴⁶ 49 U.S.C. §44909(c); see also 19 C.F.R. §122.49a (implementing regulations).

¹⁴⁷ Objections included that the U.S. was permitted to collect information that was not related to protection against terrorism, the time limit on storing personal data was too long, and that the Chief Privacy Officer of the Department of Homeland Security did not have the necessary independence to enforce effectively the data protection rights of EU residents. Bignami, *supra* note 5, at 864.

¹⁴⁸ Opinion 4/2003 of the Working Party on the Level of Protection ensured in the U.S. for the Transfer of Passengers Data, 11070/03/EN, WP 78 (June 13, 2003), available at http://europa.eu.int/comm/justice_home/fsj/privacy/docs/wpdocs/2003/wp78_en.pdf.

Parliament passed two resolutions criticizing the Commission's conduct of the negotiations.¹⁵⁰ After the Parliament approved a resolution condemning the Commission's decision to approve the agreement,¹⁵¹ it challenged the agreement in the ECJ.¹⁵² The ECJ permitted European Data Supervisor to intervene in the law suit to support Parliament's position.¹⁵³

In June 2006, the ECJ annulled the agreement.¹⁵⁴ Following the recommendation of the Advocate General,¹⁵⁵ the court determined that Directive 95/46 had not authorized the EU to negotiate the airline passenger data agreement with the United States. As noted earlier, the Directive permits the transfer of personal data to a third party country with inadequate data protections if the controller furnishes adequate safeguards. This exception, however, only addressed the protection of personal privacy in the context of commercial transactions in the EU and elsewhere. By comparison, the aviation passenger agreement was primarily concerned with safeguarding public security and law-enforcement. The court conceded that the personal data was initially collected by airlines in the course of a commercial activity, but the actual transfer of the data "concern[ed] not data processing necessary for a supply of services, but data processing regarded as necessary for safeguarding public security and for law-enforcement purposes."¹⁵⁶

¹⁴⁹ See Arnulf S. Gubitza, *The U.S. Aviation and Transportation Security Act of 2001 in Conflict With the E.U. Data Protection Laws: How Much Access to Airline Passenger Data Does the United States Need To Combat Terrorism?*, 39 NEW ENG. L. REV. 431, 465-66 (2005) (describing views of Member State data protection officials).

¹⁵⁰ European Parliament resolution on transfer of personal data by airlines in the case of transatlantic flights (P5_TA(2003)0097) (March 13, 2003), available at <http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/ce061/ce06120040310en03810384.pdf>; European Parliament resolution on transfer of personal data by airlines in the case of transatlantic flights: state of negotiations with the USA (October 9, 2003), 2004 O.J. (C 81 E) 105, available at <http://www.epic.org/privacy/airtravel/profiling/epresolution.html>.

¹⁵¹ European Parliament resolution on the draft Commission decision noting the adequate level of protection provided for personal data contained in the Passenger Name Records (PNRs) transferred to the U.S. Bureau of Customs and Border Protection, (P5_TA-PROV(2004)0245) (March 31, 2004), available at <http://www.cfp2004.org/program/materials/c14-pv2.html>.

¹⁵² Request for an Opinion submitted by the European Parliament under Article 300(6) of the EC Treaty, 2004 O.J. (C 118) 1, available at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2004/c_118/c_11820040430en00010002.pdf.

¹⁵³ Order of the Court, European Parliament v. Council of the European Union, Case C-317/04 (March 17, 2005).

¹⁵⁴ Cases C-317/04 & C-318/04, Protection of individuals with regard to the processing of personal data – Air transport – Decision 2004/496/EC, 2006 ECR _____, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&umaff=C-317%2F04&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>.

¹⁵⁵ Opinion of Advocate General Léger delivered on 22 November 2005, Protection of individuals with regard to the processing of personal data – Action for annulment – Council Decision 2004/496/EC, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004C0317:EN:HTML>.

¹⁵⁶ Cases C-317/04 & C-318/04, *supra* note 154, at ¶ 57.

At the time this chapter was written the United States and the EU were pursuing negotiations over a new passenger data agreement. In the meantime, they established a temporary agreement that will expire in July of 2007.¹⁵⁷

7. Contract Clauses

The Safe Harbor and aviation agreements legalized data transfers to the U.S. because these agreements furnished adequate privacy safeguards according to the Commission. Directive 95/46 also permits third country transfers if a data controller furnishes adequate safeguards through appropriate contractual clauses.¹⁵⁸ In 2001 and 2002, the Commission approved two sets of standard clauses that could be used to satisfy this exception. One applies to a “controller-to-controller” transfer or the transfer of personal data from a controller in the EU to a controller in a third country.¹⁵⁹ A company in the United States, for example, can use these contract provisions to qualify for the transfer of employment data from an EU-subsiary to an American subsidiary. The other contract provisions apply to a “controller-to-processor” transfer or the transfer for data from a controller in the EU to a processor of data in a third country.¹⁶⁰ An EU company, for example, can use these contract provisions to transfer data to a third country for outsourcing purposes. There are two different contract provisions because the Commission concluded controller-to-processor transfers did not require the same level of safeguards as controller to controller transfers.¹⁶¹ The first type of transfer is more problematic because the original controller loses control of the personal data when it is transferred to another controller.¹⁶² Although the Commission intended that these contract provisions would facilitate the transfer of data, the controller-to-controller provisions were criticized for being too inflexible and burdensome to be commercially realistic.¹⁶³ In 2005, the Commission responded by approving standard controller-to-controller contract clauses proposed by seven business associations.¹⁶⁴

The standard contract provisions expressly authorize data subjects to enforce their rights as third-party beneficiaries for specific breaches of the contract clauses.¹⁶⁵ This gives employees the

¹⁵⁷ Agreement between the European Union and the United States on the processing and transfer of passenger name cord (PNR) data by air carries to the United States Department of Homeland Security, available at <http://www.eurunion.org/newsweb/HotTopics/PNRAGreemntOct06.pdf>.

¹⁵⁸ See note 106 & accompanying text.

¹⁵⁹ Commission Decision 2001/497/EC, 2001 O.J. (L 181) 19, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_181/l_18120010704en00190031.pdf.

¹⁶⁰ Commission Decision 2002/16/EC, 2002 O.J. (L 6) 52, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_006/l_00620020110en00520062.pdf.

¹⁶¹ Rehder & Collins, *supra* note 33, at 140.

¹⁶² *Id.*

¹⁶³ See KUNER, *supra* note 12, at 150-52; Huie, Larabee & Hogan, *supra* n. 4, at 451.

¹⁶⁴ Commission Decision 2004/915/EC, 2004 O.J. (L 385) 74, available at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2004/l_385/l_38520041229en00740084.pdf.

¹⁶⁵ Commission Decision 2001/497/EC, *supra* n. 159, at Clause 3; Commission Decision 2002/16/EC, *supra* n. 160, at Clause 3.

capacity to obtain compensation as a result of a breach of a contract clause by either the data exporter or importer.¹⁶⁶ The data subject has a choice concerning which forum to assert this right.¹⁶⁷ A dispute can be referred to mediation by an independent person or by a data protection authority if the data exporter is located in a Member State where such a referral is possible under Member State law. The dispute can also be referred to an arbitration body if the body is in a country that is a party to the New York Convention on the enforcement of arbitration awards. Finally, the data subject can seek a remedy in the courts of the Member State in which the data exporter is located.

8. Codes of Conduct

Finally, although Directive 95/46 specifically authorizes the use contract provisions, it also contemplates that there may be other methods of providing the necessary protection.¹⁶⁸ Using this authority, national data authorities can approve third country transfers of personal data if a company adopts an adequate code of conduct. According to the Article 29 Working Party, a code of conduct consists of “binding corporate rules for international data transfers” or “legally enforceable corporate rules for international data transfers.”¹⁶⁹ At a minimum, a code must be approved by a company’s board of directors, or a comparable body of the group’s parent company, and be binding on all company employees.¹⁷⁰ Since a Code of Conduct only applies to transfers of data to members within the same corporate group, it must forbid the transfer of personal data to non-EU based third parties because they are not subject to the provisions of the Code or to the EU privacy legislation. To transfer data to such third parties a company must base the transfer on other approved measures, such as the Safe Harbor Agreement or EU-approved standard contract clauses.¹⁷¹

In addition to making the Code binding, data subjects must have a remedy under the Code for its breach. A data subject therefore must become a third party beneficiary of the commitment by a data processor to follow a code.¹⁷² If the unilateral commitment by a data processor to a code does not create as third party beneficiary right for data subjects under Member State law, a code must obligate data processors to enter into contractual arrangements that establish such third party beneficiary rights. Whatever the source of the remedy, it should at least match the rights

¹⁶⁶ Commission Decision 2001/497/EC, supra n. 159, at Clause 6; Commission Decision 2002/16/EC, supra n. 160, at Clause 6

¹⁶⁷ Commission Decision 2001/497/EC, supra n. 159, at Clause 7; Commission Decision 2002/16/EC, supra n. 160, at Clause 7.

¹⁶⁸ See note 106 & accompanying text.

¹⁶⁹ Article 29-Data Protection Working Document: Transfers of Personal Data to Third Countries: Applying Article 26(2) of the EU Data Protection Directive to Binding Corporate Rules for International Data Transfer, June 3, 2003, 11639/02/EN WP 74, at 8, available at http://europa.eu.int/comm/justice_home/fsj/privacy/docs/wpdocs/2003/wp74_en.pdf.

¹⁷⁰ Rehder & Collins, supra n. 33, at 152.

¹⁷¹ Id.

¹⁷² Working Party on Binding Corporate Rules, supra n. 169, at 11.

set forth in the Controller-to-Controller standard contractual clauses.¹⁷³ The creation of third party beneficiary rights must be enforceable under private law in all Member States.¹⁷⁴

Codes of Conduct are subject to the approval of the data protection authority in the Member State in which the transfer of data originates.¹⁷⁵ Moreover, the approval of one Member State is not binding on other Member States,¹⁷⁶ although the EU is seeking to promote the cooperation of various Member State data authorities.¹⁷⁷

C. Regulation 45/2001

Directive 95/46 establishes the requirements and framework for the protection of personal data in the Member States. Regulation 45/2001¹⁷⁸ serves the same function for personal data in the possession of EU institutions. While the U.S. has no counterpart to Directive 95/46, the Privacy Act¹⁷⁹ in the United States operates much like Regulation 45/2001.¹⁸⁰ Regulation 45/2001, however, provides additional protections and remedies that are not available under the Privacy Act, which reflects the greater importance attached to protecting privacy in Europe.

The protections afford by Regulation 45/2001 closely resemble those provided in the Directive 95/46. As with Directive 95/46, there have been conflicts between data protection and data access when the disclosure of personal data is involved. This section describes the scope of Directive 95/46, the regulatory institutions used to implement it, and the tension between the data protection regulation and the data access regulation.

1. Requirements

Like Directive 95/46, Regulation 45/2001 applies to the “processing” of “personal data” by a “controller.” In this context, a “controller” is any “Community institution or body, the Directorate-General, the unit or any other organizational entity which alone or jointly with others determines the purposes and means of the processing of personal data”¹⁸¹ Both “personal data”¹⁸² and “processing”¹⁸³ are defined in the same way as they are in Directive 95/46.

¹⁷³ Id. at 12.

¹⁷⁴ Id.

¹⁷⁵ See note 107 & accompanying text.

¹⁷⁶ Rehder & Collins, supra n. 33, at 155.

¹⁷⁷ Working Party on Binding Corporate Rules, supra n. 169, at 20.

¹⁷⁸ Commission Regulation 45/2001, 2000 O.J. (L 8) 1; available at http://147.67.4.5/eur-lex/pri/en/oj/dat/2001/l_008/l_00820010112en00010022.pdf.

¹⁷⁹ 5 U.S.C. §552a.

¹⁸⁰ Some states also have legislation similar to the federal privacy act although state legislation may offer less protection. See Privacy Laws By States, supra n. 2.

¹⁸¹ Commission Regulation 45/2001, supra note 178, at art. 2(d).

¹⁸² Id. at art. 2(a); see note 10 & accompanying text (definition of “personal data” in Directive 45/2001).

Regulation 45/2001 prohibits an EU institution from “processing” any “personal data” except as necessary to carry out administrative obligations, requires it to ensure the accuracy and completeness of such data, and prohibits it from maintaining personal data any longer than it is needed for a legitimate purpose.¹⁸⁴ Furthermore, the regulation prohibits the processing of personal data without the “unambiguous” consent of an individual or unless the processing fits within a list of other exceptions.¹⁸⁵ If, however, the processing concerns racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, health or sex life, the controller must have the “explicit” consent of the individual or the processing must satisfy three other narrow exceptions.¹⁸⁶ The reader will recall that to obtain “explicit” consent, a controller must use an “opt-in” method of obtaining consent.¹⁸⁷ EU institutions are prohibited from transferring data to other recipients that are not subject to Directive 95/46 or which do not provide an adequate level of protection,¹⁸⁸ thereby giving the Regulation extra-territorial application. Some limited types of disclosures, however, are exempted from some of these requirements.¹⁸⁹

2. Remedies

To enforce the previous requirements, Regulation 45/2001 establishes a system of remedies for data subjects for the illegal acquisition, maintenance, or processing of personal data. First, each institution has an affirmative obligation to provide a data subject with detailed information about information collected about that individual.¹⁹⁰ Second, an individual has the right to block the processing of information in certain circumstances,¹⁹¹ such as during the period when there is an unresolved dispute over the accuracy of the data, and to have information erased when information has been obtained or maintained in violation of the Regulation.¹⁹² Third, the European Court of Justice has jurisdiction to hear all disputes relating to compliance including claims for damages.¹⁹³ Finally, an individual can bring a complaint to the European Data Supervisor, which is discussed in the next section.

¹⁸³ Commission Regulation 45/2001, *supra* note 178, at art; *see* note 15 & accompanying text (definition of “processing” in Directive 45/2001).

¹⁸⁴ Commission Regulation 45/2001, *supra* note 178, at art. 4-6.

¹⁸⁵ *Id.* at art. 5.

¹⁸⁶ *Id.* at art. 10.

¹⁸⁷ *See infra* notes 30-38 & accompanying text (discussing the distinction between “unambiguous” and “explicit” consent”).

¹⁸⁸ *Id.* at art. 9.

¹⁸⁹ *Id.* at art. 20.

¹⁹⁰ *Id.* at arts. 11-12.

¹⁹¹ Commission Regulation 45/2001, *supra* note 178, at art. 15.

¹⁹² *Id.* at art. 16.

¹⁹³ *Id.* at art. 32.

3. Regulatory Institutions

To help implement the previous protections, Regulation 45/2001 establishes two institutions. First, the EU has established an administrative position, the European Data Protection Supervisor, with responsibility for compliance with the Regulation. The Supervisor is appointed by the European Parliament and the Council for a term of five years from a list of candidates drawn up by the Commission.¹⁹⁴ The duties of the Supervisor include monitoring compliance with the Regulation, giving an opinion on the legality of processing operations likely to present specific risks to the rights and freedoms of data subjects, hearing and investigating complaints, and offer general advice about the implementation of the Regulation.¹⁹⁵ The Supervisor has the power to order the rectification, blocking, erasure, or destruction of data processed in breach of the Regulation, to impose temporary or permanent bans on the processing of specific information, to refer disputes to the European Court of Justice, and to intervene in disputes filed by other persons or entities in the ECJ.¹⁹⁶

A data subject can file a complaint with the Data Protection Supervisor without prejudicing any right to a judicial remedy.¹⁹⁷ As noted, the Supervisor has the authority to order the rectification, blocking, erasure, or destruction of data that has been processed in violation of the Regulation.

Second, each community institution must appoint a “Data Protection Officer” who has the responsibility of ensuring the institution’s compliance with the Regulation.¹⁹⁸ Although the officer is appointed by each institution for a term of two to five years, the person may be dismissed only with the permission of the Supervisor and only if the person “no longer fulfills the conditions required for the performance or his or her duties.”¹⁹⁹ An institution is prohibited from assigning other duties to an Officer if the assignment would result in a conflict of interest with the Officer’s implementation of Regulation 45/2001.²⁰⁰ The institution must also notify the Officer prior to the processing of personal data and give detailed information about the planned operation.²⁰¹ It must also consult with the Officer prior to the use of information that presents specific risks to the data subject by virtue of the nature, scope, or purpose of information processing.²⁰²

¹⁹⁴ Id. at arts. 41-42.

¹⁹⁵ Id. at art. 46.

¹⁹⁶ Id. at art. 47.

¹⁹⁷ Id.

¹⁹⁸ Id. at art. 24.

¹⁹⁹ Id. at art. 24.

²⁰⁰ Id. at 24.

²⁰¹ Id. at art. 25.

²⁰² Id. at art. 27.

4. Transparency

The EU has established a significant regulatory regime to protect personal data in the possession of EU entities that matches the level of protection that the Member States must provide according to the privacy directives. As with Directive 95/46, the broad protection of privacy must be reconciled with transparency requirements. This section considers the relationship of the data protection and data access regulations, and the impact of this relationship on government transparency.

Regulation 45/2001 permits the disclosure of personal data as “necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities *or other legal instruments adopted on the basis thereof . . .*”²⁰³ If, therefore, the Access Regulation requires the disclosure of personal data,²⁰⁴ Regulation 45/2001 permits such a disclosure. The Access Regulation requires the disclosure of all data unless an exemption applies, and there is an exemption for to protect personal privacy and integrity. Article 4.1 of the Access Regulation prohibits disclosure if it “would undermine the protection of . . . (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.”²⁰⁵

There are two noteworthy aspects of Article 4.1. First, the exception uses compulsory and absolute language. According to the exception, “institutions *shall* refuse access to a document where disclosure would undermine the protection of . . . the privacy and the integrity of the individual.”²⁰⁶ Moreover, in contrast with other disclosure exceptions, the privacy exception is not subject to an overriding public interest in disclosure.²⁰⁷ This absence of this qualification and the absolute nature of the language both suggest that information falling within the scope of the privacy exception must be protected, and the right to protection is not to be balanced against the public’s interest in seeing the information.²⁰⁸

These characteristics distinguish Article 4.1 from the privacy exceptions of the Freedom of Information Act. The FOIA has an exemption for “personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”²⁰⁹ It also has an exemption for establishing an exemption for “records or information compiled for

²⁰³ Id. at art. 5(a).

²⁰⁴ See the discussion of the Access Regulation in PART III of this volume.

²⁰⁵ Commission Regulation 1049/2001, art. 4, 2001 O.J. (L 145), 43.

²⁰⁶ Id. (emphasis added).

²⁰⁷ For example, another exception provides that institutions “shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, . . . *unless there is an overriding public interest in disclosure.*” Id. at art. 4.1.

²⁰⁸ See European Data Protection Supervisor, Public Access to Documents and Data Protection §2.4.3 (July 2005), available at http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/BackgroundP/05-07_BP_accesstodocuments_EN.pdf.

²⁰⁹ 5 U.S.C. §552(b)(6).

law enforcement purposes” when disclosure of such documents “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”²¹⁰ The requirement of an “unwarranted” invasion of personal privacy requires courts to balance the public interest in disclosure of information and the privacy interest in maintaining confidentiality.²¹¹

Second, while Article 4.1 protects personal privacy, the scope of protection is not clear. Some early decisions of the Commission interpret Article 4.1 as protecting personal data anytime such data would be protected by Regulation 45/2001. The Ombudsman has offered an interpretation of Article 4.1 that limits its scope to private and family concerns, and this interpretation has been endorsed by the EU Parliament. The Data Protection Supervisor, however, disagrees with the Ombudsman’s position based on case law in the ECJ. The Supervisor interprets Article 4.1 to protect some information that relates to persons acting in a public capacity.

a. Commission Decisions. Since Article 4.1 prohibits the disclosure of data “in accordance with Community legislation regarding the protection of personal data,” the Commission early on interpreted it to forbid disclosure unless disclosure is permitted by the privacy Regulation itself. Under this interpretation, personal data cannot be disclosed under the Data Access Regulation unless disclosure is permitted according to one of the exceptions found in Regulation 45/2001. If none of those exceptions applied, disclosure would be forbidden under the Data Access Regulation as well as the privacy regulation.

The Commission took this position, for example, after a German beer company, Bavarian Lager, filed a complaint with the Commission alleging the United Kingdom was discriminating against foreign beers. There was a meeting between the Commission, UK trade authorities, and a trade association to discuss the issue, and the beer company sought access to the names of the persons who attended the meeting. The Commission denied access on the ground that Directive 45/2001 prevented it from disclosing the identities of the persons concerned without their express permission.²¹² In another example, a newspaper applied for public access under Regulation 1049/2001 to see a public register of approvals given for external activities of Commission officials. The Commission supplied the register, but deleted all the names of the officials concerned, contending that the Data Protection Regulation gives these persons the right to remain anonymous.²¹³

²¹⁰ 5 U.S.C. §552(b)(7)(C).

²¹¹ See U.S. Department of Justice, Freedom of Information Act Guide: Exemption 6 (May, 2004), available at <http://www.usdoj.gov/oip/exemption6.htm#initial>; U.S. Department of Justice, Freedom of Information Act Guide: Exemption 7(c) (May, 2004), available at <http://www.usdoj.gov/oip/exemption7c.htm>.

²¹² Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the European Commission in complaint 713/98/IJH (November 23, 2000), at 1-4, available at <http://www.euro-ombudsman.eu.int/special/pdf/en/980713.pdf>. The beer company has appealed the Commission’s refusal to reveal the identity of the persons who attended the meeting, and the case is currently pending before the Court of First Instance. Case T-194/04, Bavarian Lager Company v. Commission, O.J. (C201), 07.08.2004, p.21.

²¹³ The European Ombudsman Letters and Notes, The Misuse of Data Protection Rules in the European Union, available at <http://www.euro-ombudsman.eu.int/letters/en/20020925-1.htm>.

b. Ombudsman's Interpretation. The Ombudsman objected to the Commission decisions as constituting a substantial roadblock to transparency. He proposed that Article 4.1 of the Access Regulation only protects information that relates to private and family concerns and not to information that relates to persons acting in a public capacity. The Ombudsman based this interpretation on Article 8.1 of the Charter of Fundamental Rights of the European Union,²¹⁴ which reads: "Everyone has the right to respect for his or her private and family life, home, and communications."²¹⁵ Accordingly, the Ombudsman argues "the right to privacy with respect to the processing of personal data under the Data Protection Directive does not require the Commission to treat as secret views or information which have been submitted to it concerning the exercise of its functions, nor the names of the persons who submitted the views or information."²¹⁶

In December 2001, the European Parliament adopted the Ombudsman's position. Parliament indicated that the "aim of data protection is primarily to protect the private life and sensitive information," and data protection was therefore inapplicable to persons "acting in a public capacity, while they are taking part in public decision making on their own initiative or while they try to influence such decision making."²¹⁷

c. Data Protection Supervisor. The European Data Protection Supervisor has sought to clarify the scope of the privacy exception to the Data Access Regulation in light of the Ombudsman's recommendation. The Supervisor believes that some types of personal information that arise in a governmental or business context may be protected by the language in the Data Access Regulation.²¹⁸ He bases this interpretation on a decision of the ECJ involving Directive 95/46.

In *Österreichischer Rundfunk and Others* case,²¹⁹ the ECJ considered the application of the Data Protection Directive to a German law which required a large number of governmental bodies to disclose publicly the salaries and pensions of officials earning more than a certain amount of money. As mentioned earlier,²²⁰ the Court found that the salary information was "personal data" within the scope of Directive 95/46, although the court also held that the Directive permitted the publication of the data if the national court determined it was necessary and appropriate for its

²¹⁴ Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the European Commission in complaint 713/98/IJH (November 23, 2000), available at <http://www.euro-ombudsman.eu.int/special/pdf/en/980713.pdf>.

²¹⁵ Note 3 supra.

²¹⁶ Special Report from the European Ombudsman, supra note 214, at ¶ 2.7.

²¹⁷ Parliament's resolution supporting Ombudsman on access to public information overriding the secrecy of personal data in EU institutions' hands (December 12, 2001).

²¹⁸ European Data Protection Supervisor, Public Access to Documents and Data Protection (July 2005), at §4.3.3, available at http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Papers/BackgroundP/05-07_BP_accesstodocuments_EN.pdf.

²¹⁹ Note 76 supra.

²²⁰ See notes 77 & accompanying text.

intended purposes. The ECJ found that the compensation information was “personal data” within the scope of the Directive 95/46 on the basis of a decision the European Court of Human Rights.

In *Amann v. Switzerland*,²²¹ the European Court of Human Rights interpreted Article 8 of the Convention of Human Rights. Article 8.1 of the Convention, as noted earlier, establishes a person has “the right to respect for his private and family life, his home and his correspondence.”²²² Article 8.2 forbids “interference by a public authority with the exercise of this right” except when it is necessary for the interests of national security, public safety and similar justifications, and except as it is “in accordance with the law.”²²³ *Amann* held the government of Switzerland had violated Article 8 when it intercepted a phone call received by a government employee and made a record of the call because the action violated the employee’s right to privacy and it was not authorized by law. Concerning the first conclusion, the Court noted:

The term “private life” must not be interpreted restrictively. In particular, respect for private life comprises the right to establish and develop relationships with other human beings. There appears, furthermore, to be no reason why this understanding of the notion of “private life” should be taken to exclude activities of a professional or business nature.²²⁴

In light of *Amann*, the Supervisor recommends that data relating to a person’s business or governmental capacity may be protected by the privacy exception of the Data Access Regulation. Although he acknowledges that the mere fact that a public record contains personal data does not mean privacy is involved,²²⁵ he also maintains that disclosure of certain types of information in public records does involve a person’s privacy. Specifically, the Supervisor proposes that personal data falls within the scope of the privacy exception of the Access Regulation if disclosure involves the sensitive data, embarrassing data, data that reflects on a person’s honor and reputation, data that places a person in a false light, or personal information a person normally treats as confidential.²²⁶

²²¹ (2000) 30 E.H.R.R. 843.

²²² Note 3 *supra*.

²²³ *Id.* at art. 8.2

²²⁴ *Amann*, *supra* note 221, at 845, ¶ 2(a). A recent decision by the European Court of Human Rights, Case of Copeland v. The United Kingdom, (3 April 2007), available at <http://www.thegovernmentsays.com/cache/90069.html>, held that the collection and storage of personal information relating to an employee’s phone calls and email and internet usage, without her knowledge, was an interference with the employee’s right to respect for her private life and correspondence within the meaning of Article 8 of the Convention on Human Rights.

²²⁵ European Data Protection Supervisor, *supra* note 218, at §4.3.1.

²²⁶ *Id.* at §4.3.3.

Because of proportionality, the Supervisor also notes an institution can only withhold those portions of the document that undermine the privacy interest.²²⁷ The courts will therefore require redaction unless it would result in an unreasonable amount of administrative work.²²⁸ Redaction may not be required, however, when reference to personal data is the heart of the document.²²⁹

The precise scope of Article 4.1 remains uncertain. Several cases pending before the Court of First Instance may provide some clarification of this issue.²³⁰ The resolution of this issue is important in terms of defining the relationship between the right to privacy and the right of data access in the EU. The position taken by community institutions that prohibits the disclosure of any private data denies the importance of public transparency concerning government operations. The Ombudsman has sought to increase transparency by limiting Article 4.1 to information relating to private and family concerns, but this limitation fails to protect some information that may be personal in nature despite its relationship with a person's public employment.

D. Conclusion

The Europeans take personal privacy seriously. There is an elaborate and extensive regulatory framework that protects personal privacy in the EU, and the EU has sought to protect the privacy of its residents when personal data is transferred to countries outside of the EU. Although the United States has legislation protecting personal privacy in some sectors, there is no comparable overall regulatory framework in this country.

The EU has directed the Member States to regulate personal data in the possession of private and public entities in Directive 95/46, which establishes a general regulatory framework, and Directive 2002/58, which applies to personal data in the electronic communications sector. Member States have established data protection authorities in response to the Directive to implement protective regulation. Regulation 45/2001 protects personal data in the possession of EU institutions. While it is similar to the Privacy Act in the United States, it provides more protection and remedies. The regulation established the EU Data Protection Supervisor to ensure compliance with the regulation.

The protection of personal data in the EU has two ramifications for Americans. For persons doing business in the EU, they are subject to privacy regulation in the Member States.

²²⁷ Id. at §4.2.2-4.3.3.

²²⁸ Judgment of the Court, Council of the European Union v Heidi Hautala, C-353/99 P, ECR [2001], available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61999J0353&lg=en#11.

²²⁹ European Data Protection Supervisor, *supra* note 218, at §4.2.3.

²³⁰ Case T-194/04, *Bavarian Lager Company v. Commission*, O.J. (C 201), 07.08.2004, p. 21 (refusal to reveal the names of persons who attended a meeting between representatives of the Commission, the United Kingdom government, and breweries); Case T-161/04, *Valero Jordana v. Commission*, O.J. (C 168), 06.06.2004, p. 12 (access to the reserve list for general competition and to individual decisions appointing officials); Case T-170/03, *BAT v. Commission*, O.J. (C 171), 19.07.2003, p. 39 (refusal to grant access to the attendance lists of meeting of committees that met to determine the classification of tobacco for customs and excise duty purposes).

Moreover, since the EU gives extra-territorial application to Directive 95/46, the transmission of personal information from the EU to the U.S. is regulated.

The EU's efforts to protect personal data have been impacted by three developments. First, since Member States have some discretion under Directive 95/46 to develop their own implementation and enforcement policies, they have diverged in their implementation of Directive 95/46. This development has created problems for effective implementation and the maintenance of an integrated market. While there are efforts by the EU to harmonize the approaches used in the Member States, these efforts confront the reality that Member States have somewhat different policy views concerning the details of how personal privacy is protected.

The protection of personal data has also been impacted by data access requirements. Member States and EU institutions are in the process of reconciling the protection of personal data with data access mandates. This conflict is more of a problem in the EU than it is in the U.S. because of the stronger commitment to protecting personal data. In the U.S., conflicts between data protection and data access are generally resolved in favor of access. In the EU, however, both data protection and government transparency are considered of fundamental importance, and the reconciliation of these goals is therefore more difficult.

Finally, the EU's efforts to protect personal data when it is transmitted outside of the EU have created conflicts with maintaining and enhancing international trade. The EU does not permit the transfer of personal data unless the recipient country offers an adequate level of protection for such data, or unless there are other arrangements in place that will offer a level of protection comparable to that in the EU. Since the EU does not regard the United States as meeting the first option, the EU and the U.S. have negotiated a Safe Harbor Agreement and an agreement on Aviation Passenger Data under the second option. Critics, including a majority of the EU Parliament, believe that the Commission has signed the agreements despite the fact that they offer inadequate protection in order to maintain trade with the U.S. The European Court of Justice has annulled the second agreement. The tension between interest in facilitating trade and protecting personal data is not likely to abate as long as commercial and governmental interests in the U.S. and other non-EU countries seek to avoid providing comparable privacy protections in order to reduce their costs.

Despite these difficulties, Europeans have a level of protection for personal privacy that is considerably greater than in the United States. This result reflects differences in the historical, cultural and political characteristics of the EU and the U.S. It also means that the EU is not likely to reduce significantly the regulatory protections that it has established.

V. CHAPTER CONCLUSION

The administrative process in the EU concerning transparency and data access will seem relatively familiar to American lawyers. EU institutions routinely make available to the public a range of documents about their processes at least as great as those available from the U.S. government, although this is generally done as a matter of policy rather than legal obligation in the EU. Moreover, much of this material can be accessed immediately online. The Data Access Regulation of the EU likewise operates in similar manner to the Freedom of Information Act. There are, however, some significant differences concerning exceptions to disclosure and enforcement which strengthen data access in the EU as compared to the U.S.

The administrative process in the EU concerning privacy regulation, by comparison, will be less familiar to American lawyers. The Data Protection Regulation, which applies to EU institutions, does operate in a similar manner to the Privacy Act, although it provides broader protections than its U.S. counterpart. Member States and private entities, however, are subject to a Data Protection Directive which has no U.S. analog of comparable strength and breadth. Another important difference is that the Data Protection Directive has extra-territorial application. As a result, EU entities are prohibited from transmitting personal data to the United States except in accordance with the provisions of the Directive.

The concept of “transparency” has been invoked in the EU to demand a wide variety of accountability and open-government procedures. This chapter has explained the obligation of EU institutions to disclosure information, either routinely or in response to requests, concerning day-to-day operations and decision-making. As noted, the most striking feature of these practices is that many of them occur as a matter of policy rather than legal obligation. This is because the EU relies heavily on rules of procedure and codes of conduct to spell out disclosure and open-government requirements. While disclosure practices in the EU and U.S. are similar, there are salient differences. There is no automatic right of access for third parties to case-files in the courts, for example, in contrast to the practice of the U.S. courts of maintaining public dockets. The disclosure practices of the EU institutions vary, and those who seek information need to consult the institutional rules of each entity and their respective websites. Fortunately, the information available online tends to be quite good about the institutions and their practices.

The right of the public to access governmental documents originated as a code of conduct, but it has been codified in the Data Access Regulation. Like FOIA, the Access Regulation establishes a legally enforceable right of access to documents, spells out procedures governing the exercise of that right, delineates exemptions from required disclosure, and authorizes the judicial to review decisions to deny access. The Access Regulation, however, has broadened the right of access in several ways as compared to FOIA that may be important to persons seeking access to data. For example, certain exceptions are subject to a public interest counter-balance. If there is an overriding public interest in disclosure, a document will be released even if an exception applies. In addition, a petition to the Ombudsman regarding denial of access to information is an alternative to judicial review. The U.S. has no counterpart to this institution, nor is there any significant alternative to judicial review of denials of access under FOIA.

The broader protection of personal privacy in the EU reflects a long tradition of protection personal privacy in Europe. The Data Protection Regulation operates much like the Privacy Act

in the United States, but it provides additional protection and remedies that are not available under the Privacy Act. For example, while both the Privacy Regulation and the Privacy Act empower individuals to seek judicial review of potential violations, the EU also has independent agency, the European Data Protection Supervisor, which is responsible for compliance with the regulation. As noted, the U.S. has no comparable legislation to the Data Protection Directive. Data protection legislation in the U.S. is limited to only some types of industries, and the EU protection requirements are generally more stringent than U.S. requirements regarding the same types of information in these sectors. American lawyers representing entities which receive personal data from entities in the EU need to become familiar with these requirements because the Data Protection Directive has extra-territorial application. In order to transfer personal data to the U.S., an EU entity must comply with one of several procedures that seek to ensure an appropriate level of protection for the data when it is in the possession of an American entity.

The potential exists for conflicts between data access and data protection in the EU. EU institutions and Member States are required under certain circumstances to withhold data if its disclosure would reveal personal information. There is, however, no balancing of the public interest in disclosure where personal privacy is at stake, as there is under the privacy exception in FOIA. Although this makes data protection a more significant limit on data access in the EU than the U.S., the precise contours of these exceptions have not yet been definitively established.

APPENDIX A

TRACKING THE PROGRESS OF THE REGULATION IMPLEMENTING THE ARHUS CONVENTION: A COMPARISON OF OEIL AND PRELEX

Appendix A consists of 2 sets of screenshots, each set comprising 3 printed pages because of the length of the particular webpage.

These pages will print in landscape format and should be printed in color in order to be fully comprehensible.

Set 1 (pages 1-3) comes from OEIL, at the European Parliament site.

Set 2 (pages 4-6) come from PreLex, at the European Commission site.

Procedure file

The information here reflects the current status of the procedure

- Printable PDF version
- Observatory tracker

Identification	
Reference	COD/2003/0242
Title	Environment: access to information and justice, public participation, application of the Aarhus Convention
Legal Basis	CE 175-p1
Dossier of the committee	CODE/6/33582
Subject(s)	3.70.16 law and environment, liability
Stage reached	Procedure ended and published in the Official Journal

Stages		Documents: references				Dates	
Stages		Source reference	Equivalent references	Votes and amendments	Joint resolution	of document	of publication in Official Journal
Commission/Council: initial legislative document		EC	COM(2003)0622	C5-0505/2003		24/10/2003	
EP: decision of the committee responsible, 1st reading/single reading						16/03/2004	
EP: tabled legislative report, 1st reading or single reading		EP	A5-0190/2004			16/03/2004	
EP: draft report by the committee responsible		EP	PE337.072/DEF			23/03/2004	
EP: position, 1st reading or single reading		EP	T5-0238/2004			31/03/2004	C 103 29.04.2004, p. 0450-0612 E
Economic and Social Committee: opinion, report		ESC	CES0666/2004			28/04/2004	C 117 30.04.2004, p. 0052-0054
Council: statement on common position		CSL	10896/2005			07/07/2005	
Council: common position		CSL	06273/2/2005	C6-0297/2005		18/07/2005	C 264 25.10.2005, p. 0018-0027 E
Commission: communication on the common position		EC	COM(2005)0410			31/08/2005	
EP: decision of the committee responsible, 2nd reading						21/11/2005	
EP: draft report by the committee responsible		EP	PE362.691			30/11/2005	
EP: tabled legislative report, 2nd reading		EP	A6-0381/2005			30/11/2005	
EP: position, 2nd reading		EP	T6-0016/2006			18/01/2006	

EP: position, 2nd reading	EP	T6-0016/2006			18/01/2006	
Commission: opinion on the EP position at second reading	EC	COM(2006)0081			17/02/2006	
EP/Council: Conciliation committee, results					02/05/2006	
EP/Council: joint text	CSL/EP	03614/2006	C6-0156/2006		19/06/2006	
EP: draft report by the committee responsible	EP	PE374.051			27/06/2006	
EP: tabled legislative report, 3rd reading	EP	A6-0230/2006			27/06/2006	
EP: legislative resolution, 3rd reading	EP	T6-0283/2006			04/07/2006	
Final legislative act	EU	32006R1367			06/09/2006	L 264 25.09.2006, p. 0013-0019

Agents

European Parliament			
Committee	Rapporteur / Co-rapporteurs	Political group	Appointed
EP Delegation to Conciliation Committee (responsible)	Korhola Eija-Riitta	PPE-DE	24/01/2006

European Commission and Council of the Union		European Commission: PreLex	
European Commission DG	Environment	Transmission date: 24/10/2003	
Council of the Union	Agriculture and Fisheries	meeting: 2745	of: 18/07/2006

06/09/2006 - Final legislative act

PURPOSE: to apply the provisions of the Aarhus Convention to Community institutions and Community bodies.

LEGISLATIVE ACT: Regulation 1367/2006/EC of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters **to Community institutions and bodies.**

CONTENT: the Council agreed to adopt this Regulation following a meeting with the European Parliament in the Conciliation Committee. The Belgian delegation abstained.

The Regulation's objective is to implement the provisions set out in the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, otherwise referred to as the Aarhus Convention, and to apply them specifically to Community institutions and bodies.

The EU institutions or bodies will apply the requirements of the Aarhus Convention, by:

- guaranteeing the right of public access to environmental information received or produced and held by them;
- ensuring that environmental information is progressively made available and disseminated to the public in order to achieve its widest possible systematic availability and dissemination;
- taking account of public participation when deciding on a plan or programme relating to the environment and informing the public about it;

- granting access to justice in environmental matters at EU level under the conditions laid down by the Regulation;
- including information on steps taken in proceedings for infringement of Community law in databases or registers.

In applying the provisions of this Regulation, the Community institutions and bodies will provide guidance to the public on access to information, how they can participate in the decision-making process and how they can access justice on environmental matters.

When applying for access to environmental information held by the Community, the rules set out in Regulation 1049/2001/EC on public access to documents of the European Parliament, the Council and the Commission and all its exemptions, will apply. (For a summary of Regulation 1049/2001/EC refer to COD/2000/0032).

In other provisions, the Community institutions or bodies must organise environmental information in an electronic format – be it computer telecommunications or other electronic means. Information obtained by the Community before the Regulation enters into force need not be stored electronically. The Community, however, will be obliged to indicate where the information can be sourced from. Further, the Community is obliged to insure that any information compiled by them is up-to-date, accurate and comparable.

The Regulation, in follow-up to Council concerns, also lists a number of exemptions based on Regulation 1049/2001/EC. Exemptions include: emissions into the environment and the breeding sites of rare species. These exemption can not, however, be applied to investigations nor can they be applied to infringements of Community law. Refusing information must be done restrictively and must take account of the public interest served by disclosure.

On the matter of public participation, the Community must provide early and effective opportunities for the public to participate during the preparation, modification or review of plans or programmes relating to the environment. Non-governmental organisations will be allowed to seek internal reviews on administrative acts adopted under environmental law or in case of an alleged administrative omission. They will also be allowed to institute proceedings before the Court of Justice. Strict criteria are set out as to what constitutes a non-governmental organisation.

ENTRY INTO FORCE: 28 September 2006.

APPLICATION: 28 June 2007.

List of summaries

	06/09/2006	Final legislative act
	04/07/2006	EP: legislative resolution, 3rd reading
	02/05/2006	EP/Council: Conciliation committee, results
	25/04/2006	Council's activities
	17/02/2006	Commission: opinion on the EP position at second reading
	18/01/2006	EP: position, 2nd reading
	21/11/2005	EP: decision of the committee responsible, 2nd reading
	31/08/2005	Commission: communication on the common position
	18/07/2005	Council: common position
	31/03/2004	EP: position, 1st reading or single reading
	16/03/2004	EP: decision of the committee responsible, 1st reading/single reading
	24/10/2003	Commission/Council: initial legislative document

Detail

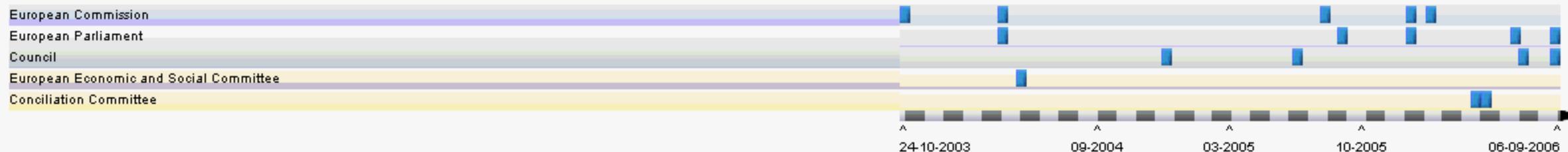
Print

COM (2003) 622

2003/0242/COD

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies

Community legislation in force [32006R1367](#)



Events:

- [Adoption by Commission](#)
24-10-2003
- [Transmission to Council](#)
24-10-2003
- [Transmission to EP](#)
24-10-2003
- [EP opinion 1st rdg](#)
31-03-2004
- [Commission position on EP amendments on 1st reading](#)
31-03-2004
- [EESC opinion](#)
29-04-2004
- [Pol. agreement common position](#)
20-12-2004
- [Adoption common position](#)
18-07-2005
- [Adopt. declaration comn posit.](#)
31-08-2005
- [Trans. Council decl. cmn posn](#)
31-08-2005
- [Trans. EP decl. cmn posn](#)
31-08-2005
- [EP receipt of common position](#)
29-09-2005
- [EP opinion 2nd rdg](#)
18-01-2006
- [Commission position on EP amendments on 2nd reading](#)
18-01-2006
- [Adoption of Commission opinion](#)
17-02-2006
- [Trans. Council Comm. opinion](#)
17-02-2006
- [Transm. EP Comm. opinion](#)
17-02-2006
- [Convening Conciliation Comm.](#)
02-05-2006
- [Conciliation Comm. decision](#)
02-05-2006

Fields of activity:	Environment Justice and Home Affairs
Legal basis:	Commission : Traité/CE/art 175 par 1
Procedures:	Commission : Codecision procedure Council : Codecision procedure
Type of file:	Commission : Proposal for a Regulation Council : Regulation
24-10-2003	Adoption by Commission
Decision mode:	Written procedure
Primarily responsible	DG Environment
Mandatory consultation	Committee of the Regions; European Eco. & Soc. Committee
Addressee for formal act	Council; European Parliament
Responsible	Margot WALLSTRÖM
Documents:	COM/2003/622/FINAL CS/2003/14152/ C5/2003/505/ Bulletin /2003/10/ 1.4.45 OJ C/2004/96/ 22
Procedures:	Codecision procedure
Type of file:	Proposal for a Regulation
Legal basis:	Traité/CE/art 175 par 1
NUMERO CELEX	52003PC0622
24-10-2003	Transmission to Council
24-10-2003	Transmission to EP
31-03-2004	EP opinion 1st rdg
Decision :	Approval with amendments
Responsible	Margot WALLSTRÖM
Rapporteur	Eija-Riitta Annala KORHONEN

[02-05-2006](#)
[EP decision on 3rd rdg](#)
[04-07-2006](#)
[Council decision at 3rd rdg](#)
[18-07-2006](#)
[Signature by EP and Council](#)
[06-09-2006](#)

[Activities of the institutions:](#)

[OEIL](#)

Rapporteur	Eija-Riitta Anneli KORHOLA
Taking over	Margot WALLSTRÖM
Documents:	A5/2004/190/ Bulletin /2004/3/ 1.4.55
31-03-2004	Commission position on EP amendments on 1st reading
Decision :	Partial agreement
29-04-2004	EESC opinion
Decision mode:	Majority
Rapporteur	María Candelas SANCHEZ MIGUEL
Documents:	EESC/2004/666/ Bulletin /2004/4/ 1.4.81 OJ C/2004/117/ 52
NUMERO CELEX	52004AE0666
20-12-2004	Pol. agreement common position
Documents:	PRES/2004/357/ CS/2005/5172/ CS/2004/16275/ Bulletin /2004/12/ 1.4.54
OJ CONSEIL	ITEM "B" ON COUNCIL AGENDA
SESSION CONSEIL	2632
SUJET	ENVIRONMENT
18-07-2005	Adoption common position
Documents:	C6/2005/297/ CS/2005/6273/ PRES/2005/179/ CS/2005/11175/ Bulletin /2005/7/8 1.4.31 OJ C E/2005/264/ 18
OJ CONSEIL	ITEM "A" ON COUNCIL AGENDA
SESSION CONSEIL	2676
NUMERO CELEX	52005AG0031
SUJET	AGRICULTURE/FISHERIES
31-08-2005	Adopt. declaration comn posit.
Decision mode:	Written procedure
Documents:	CS/2005/11936/ COM/2005/410/FINAL
NUMERO CELEX	52005PC0410
31-08-2005	Trans. Council decl. omn posn
31-08-2005	Trans. EP decl. omn posn
29-09-2005	EP receipt of common position
Documents:	OJ C E/2006/227/ 525
18-01-2006	EP opinion 2nd rdg
Decision :	Approval with amendments
Responsible	Stavros DIMAS
Rapporteur	Eija-Riitta KORHOLA
Taking over	Stavros DIMAS

Taking over	Stavros DIMAS
Documents:	A6/2005/381/ TA/2006/16/ Bulletin /2006/1/2 1.20.22
18-01-2006	Commission position on EP amendments on 2nd reading
Decision :	Partial agreement
Remarks:	Undertaking respected
17-02-2006	Adoption of Commission opinion
Decision :	Amending opinion
Decision mode:	Empowerment procedure
Documents:	CS/2006/8672/ COM/2006/81/FINAL
NUMERO CELEX	52006PC0081
Remarks:	Follow-up EP opin.2nd rdg
17-02-2006	Trans. Council Comm. opinion
17-02-2006	Transm. EP Commiss. opinion
02-05-2006	Convening Conciliation Comm.
02-05-2006	Conciliation Comm. decision
Decision :	Agreement on joint text
04-07-2006	EP decision on 3rd rdg
Decision :	Approv. of Con.Cte joint text
Responsible	Stavros DIMAS
Rapporteur	Eija-Riitta KORHOLA
Taking over	Stavros DIMAS
Documents:	TA/2006/283/ A6/2006/230/ Bulletin /2006/7/8 1.21.15
18-07-2006	Council decision at 3rd rdg
Decision :	Approv. of Con.Cte joint text
Documents:	PRES/2006/217/ CS/2006/11591/
Procedures:	Codecision procedure
Type of file:	Regulation
OJ CONSEIL	ITEM "A" ON COUNCIL AGENDA
SESSION CONSEIL	2745
SUJET	AGRICULTURE/FISHERIES
06-09-2006	Signature by EP and Council
Documents:	OJ L/2006/264/ 13 PE-CONS/2006/3614/ Bulletin /2006/9/ 1.21.19
Procedures:	Codecision procedure
Type of file:	Regulation
NUMERO CELEX	32006R1367