

Chapter 4

Transparency

on transparency for the European Union Project of the ABA Section of Administrative Law and Regulatory Practice. We encourage your comments. Comments are due by **September 1, 2006**.

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TRANSPARENCY

DRAFT of 6/30/06

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EXECUTIVE SUMMARY

THE POWER OF THE TRANSPARENCY IDEAL & INFORMATION ABOUT AND PARTICIPATION IN GOVERNMENT PROCESSES AT THE COMMUNITY LEVEL

“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 it lacks in the U.S. and which often conflicts with attaining transparency.

The World Wide Web is central to the EU’s transparency efforts. *Europa.eu* is the gateway for institutional websites for the Commission, the European Parliament and the Council that 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 Community institutions.

Some of these websites have advanced enormously in content and functionality in even the two years since this ABA project started. In particular *Europarl* (Parliament’s site) and sections of *EC* (the Commission’s site) make sophisticated use of the internet’s unique capacity to present vast amounts of complex material in accessible ways to the uninitiated. Given the byzantine complexity of the EU institutional structure, the myriad forms of its governance processes, and its ever-expanding geographical boundaries, the Web is the *only* way that, as a practical matter, the EU will enable citizens to understand its processes and participate in them. Therefore the key to this aspect of transparency – and the legitimacy perceived to be attendant on it – is increased attention to the content and functionality of the institutional websites.

Specifically, considerable information about the details of institutional structure and procedure and some significant participation opportunities are offered through techniques such as: 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 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 Europarl’s dual series of explanation screens that allow the user to select whether she wants an overview or more

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.

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 of this is vastly superior to most of what is offered on official U.S. government sites. There is, however, room for needed 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 to the others. Given the pivotal importance of the Council, this is a significant transparency problem. Even the other institutions can 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://www.iue.it/EC/Archives/pdf/1049EN.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 US 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 US 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 US 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 US 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. (L201) 37.

²⁵ Commission Regulation 45/2001, 2000 O.J. (L8) 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 US 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 US 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:

- a simpler and more comprehensible structure for the EU itself, including new names for the various EU institutions that would clarify their functions in popular understanding by paralleling (at least for Europeans) the names of existing national government bodies;³
- comprehensible and integrated fundamental documents (i.e., treaties and constitutions)
- legislation that is consolidated, coordinated and readily accessible⁴
- legislation and other official communications written in jargon-free, understandable prose⁵

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://www.europa.eu/comm/secretariat_general/sgc/acc_doc/docs/1049EN.pdf [hereinafter “Access Regulation”].

³ See, e.g., <http://www.euractive.com/cgint.exe/2035284-65?714&1015=3&1014=eurogoal1> (visited July 13, 2004) (“Eurogoal would like to suggest that the biggest transparency problem is simply that citizens do not understand what the EU institutions are and do. The current names are at best obscure, and at worst misleading.”).

⁴ 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”].

⁵ 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).

- 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 state⁶
- understandable and accessible information about the policy objectives of EU decision making⁷
- understandable and accessible information about the decision making processes of EU institutions at all levels⁸
- increased attention by EU institutions during the policymaking process to opinions of different stakeholders⁹
 - greater role for lobbying groups
 - information about the identity of lobbyists
- codes of conduct for both staff and Members of the Commission¹⁰
- understandable and accessible information about the outcomes of EU decision making¹¹
 - prompt communication of outcomes
- use of the most modern communication technologies, and in particular the Internet¹²
 - better managed official websites
- access to decision making processes, including demands for open meetings akin to the provisions of U.S. “sunshine” laws
 - televised meetings
 - public minutes of meetings
- greater information from ministries and the Commission to Parliament
- in general, a simplified and improved regulatory environment¹³

⁶ E.g., White Paper on Governance, supra note 4, at 11. Article 21 of the Treaty Establishing the European Community [TEC], 2002 O.J. (C 325); Code of Good Administrative Behavior: Relations with the Public § 4 (adopted Sept. 13, 2000), available at http://www.europa.eu/comm/secretariat_general/code/index_en.htm [hereinafter “Code of Good Admin. Behavior”].

⁷ E.g., White Paper on Governance, supra note 4, at 28.

⁸ E.g., Id. at 4, 15-16.

⁹ 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 (Dec. 11, 2002) available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0704en01.pdf. [hereinafter “Minimum Standards for Consultation”].

¹⁰ 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 6; Minimum Standards for Consultation, supra note 9.

¹¹ E.g., Code of Good Admin. Behavior. §§ 3, 4, supra note 6.

¹² E.g., White Paper on Governance, supra note 4, 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.

¹³ 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.

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 U.S., would be governed by the Government in the Sunshine Act,¹⁴ the Federal Advisory Committee Act,¹⁵ and portions of Administrative Procedure Act.¹⁶

At present, the EU does not have overarching, legally-binding regimes comparable to these US statutes. It relies instead on the “soft law” of internally enforced codes of conduct, guidelines and standards. However, the recently concluded Aarhus Convention¹⁷ (which aims at granting judicially enforceable procedural and substantive access and participation rights with respect to legislation, plans and policies involving environmental issues) may be the harbinger of eventual conversion to broader, externally enforceable transparency duties.

Specifically, this Section 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 ** and party status and intervention in adjudication is covered in Chapter **.
- Provide information about decisional outcomes
- Respond to queries from the public

¹⁴ 5 U.S.C. §552b.

¹⁵ 5 U.S.C. App.

¹⁶ 5 U.S.C. §§ 551 et. seq.

¹⁷ 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. (L124/4), available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_124/l_12420050517en00010003.pdf. The co-decision process on a Regulation to implement the Convention at the Community level has just entered its final stages with Parliament’s third reading expected in the July 2006 sessions.

Section III: Access to Documents. This section discusses the EU analog to the U.S. Freedom of Information Act¹⁸: Regulation No.1049/2001 (the Access Regulation).¹⁹ 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 enforceable by the Ombudsman). This access right is rooted in Article 255 of the Treaty on European Union.²⁰

Specifically, this Section 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

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, this Section discusses:

- Directive 95/46,²¹ the general regulatory framework for member states and Directive 58/2002,²² specifically addressing the electronic communications sector
- Extraterritorial application, including safe harbor and the special issue of airline passenger data
- Regulation No. 45/2001,²³ the comparable framework for Community institutions, which functions like a significantly enhanced US Privacy Act²⁴
- Impact on transparency, which is addressed throughout

¹⁸ 5 U.S.C. § 552.

¹⁹ 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. (L145), available at http://europa.eu/eur-lex/pri/en/oj/dat/2001/l_145/l_14520010531en00430048.pdf.

²⁰ Treaty on European Union, 2002 O.J. (C 325), available at http://eur-lex.europa.eu/en/treaties/dat/12002M/pdf/12002M_EN.pdf.

²¹ Council Directive 95/46, 1995 O.J. (L281) 37.

²² Council Directive 2002/58/EC, 2002 O.J. (L201) 37.

²³ Commission Regulation 45/2001, 2000 O.J. (L8) 1.

²⁴ 5 U.S.C. §552a.

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

A. The Formal Framework: “Soft Law” and 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 are not legally binding. Rather, they are “obligations” imposed by the issuing EU institution on itself; accordingly, they are self-enforced.

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) Code of Good Administrative Behavior²⁵
 - 2) General Principles and Minimum Standards for Consultation of Interested Parties by the Commission²⁶
 - 3) Rules of Procedure²⁷
- For the Council:
 - 1) Rules of Procedure²⁸
 - 2) Code of Good Administrative Behavior²⁹

²⁵ Code of Good Administrative Behavior: Relations with the Public § 4 (adopted Sept. 13, 2000), available at http://www.europa.eu/comm/secretariat_general/code/index_en.htm.

²⁶ 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 (Dec. 12, 2002). The Communication form was chosen deliberately because it was non-binding. See § 2.02*, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0704en01.pdf.

²⁷ Commission Decision of 5 December 2001 amending its rules of procedure, 2001 O.J. (L 345) 31, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_122/l_12220010503en00310032.pdf [hereinafter “Commission Rule of Procedure Amendments”].

²⁸ Council Decision of 29 November 2001 amending the Council’s Rules of Procedure, 2001 O.J. (L 313) 67, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_109/l_10920010419en00670067.pdf.

²⁹ 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.

- For the European Parliament:
 - 1) Rules of Procedure³⁰
 - 2) Code of Conduct³¹

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

The first is access to documents, discussed on Section III below. *This* aspect of transparency is controlled by an instrument, the Access Regulation,³² that creates inter-institutional, mandatory duties enforceable by both the judiciary and the Ombudsman.

The second is the Aarhus Convention. The Convention, addressing the particular substantive area of environmental matters, contemplates legally binding rights to information and participation (as well as substantive justice) running to individuals and non-government organizations.³³ Two directives implementing these rights within members States have been adopted and a third is pending.³⁴ A Regulation that will apply the Convention to the Community institutions themselves when they act in other than a legislative or judicial capacity is in the last stages of the co-decision procedure.³⁵ The Explanatory Memorandum justifying the original version of the proposed Regulation expressly notes: “Accession to the Aarhus Convention will only be possible

³⁰ Amendment to the Rules of Procedure: Access to European Parliament documents, 2002 O.J. (C 140 E) 116 available at <http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/ce140/ce14020020613en01160119.pdf>. The European Parliament additionally adopted 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/.

³¹ Guide to the obligations of officials and other servants of the European Parliament, PV BUR 3/11/2002/

³² Supra note 2.

³³ See 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. (L124) 1, available at: http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_124/l_12420050517en00010003.pdf.

³⁴ 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 OJ (L 156) 17, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_156/l_15620030625en00170024.pdf.

³⁵ See <http://www.europarl.europa.eu/oeil/file.jsp?id=237362>; Common Position adopted by the Council with a view to the adoption of 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 Community institutions and bodies, 2005 O.J. (C 264E) 18, available at <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/ce264/ce26420051025en00180027.pdf>; III Report on the Joint Text approved by the Conciliation Committee, June 27, 2006, available at <http://www.europarl.europa.eu/omk/sipade3?PUBREF=-//EP//NONSGML+REPORT+A6-2006-0230+0+DOC+PDF+V0//EN&L=EN&LEVEL=1&NAV=S&LSTDOC=Y>.

once there are legally binding measures that apply to the European Community,³⁶ and later explicitly declares 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.³⁷

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. As contemplated in the Commission’s Rules of Procedure,³⁸ a searcher interested in information about its meetings can learn that 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.³⁹ The meetings are not public and all discussions are confidential. Agendas are available, as are concise minutes within about a week of the meeting.⁴⁰ Both are published in French and English. Items not on the agenda may be discussed if this is approved by majority vote. Although a vote may be requested by any member, decisions are typically not made during the meetings.⁴¹ Rather, a draft is circulated for comments and/or amendments within a certain time; if none are suggested, the proposal is adopted.⁴² Decision is by simple majority, with the President breaking a tie if necessary. More details about meeting procedure

³⁶ COM (2003) 622, 3-4 622 final, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2003/com2003_0622en01.pdf.

³⁷ Id. at 5.

³⁸ Commission Decision of 5 December 2001 amending its rules of procedure, 2001 O.J. (L 345) 31, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_122/l_12220010503en00310032.pdf.

³⁹ http://ec.europa.eu/atwork/collegemeetings/index_en.htm.

⁴⁰ The most recent set is available directly through a link on http://ec.europa.eu/comm/atwork/collegemeetings/index_en.htm. Prior ones have to be searched out in the Register of Commission Documents by date, which is not difficult but instructions are lacking. Go to http://ec.europa.eu/comm/secretariat_general/regdoc/recherche.cfm?CL=en, specify “minutes” or “agenda” under “type,” and use a range of dates if you are unsure of the exact time of meeting.

⁴¹ See http://ec.europa.eu/atwork/basicfacts/index_en.htm#meet; http://ec.europa.eu/atwork/collegemeetings/index_en.htm.

⁴² 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. There are 26 directors-general and 9 heads of service, who lead the principal departments (“directorates” and “services”) into which the Commission is divided. Id. See http://ec.europa.eu/dgs_en.htm.

can be found in the Rules of Procedure, which are also available directly through a link on the meeting description webpage.⁴³

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 identify[y] legislative initiatives, executive and other acts that the Commission intends to adopt for the realisation of these priorities."⁴⁴ The 2006 programme, for example, centers around four "strategic objectives": prosperity, solidarity, security and external responsibility.⁴⁵ Recent years' work programmes are available directly through a link on the work programme description page.⁴⁶ (Earlier years' can be found by using the search function in the Commission's Historical Archives.⁴⁷) The necessary policy detail to implement the work programme is found in the "forward programming document" and the "execution report." The former is a series of charts showing, inter alia, the title, legal authority, estimated adoption date, "political motivation/brief description," and budgetary implications of planned legislation proposals and major non-legislative acts for the upcoming year. The latter is the complementary series of measures actually adopted. Both are updated monthly, and can be seen via direct links on the work programme page.⁴⁸

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.⁴⁹

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. 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. 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 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 submits an "annual activity report" documenting how successful the directorate was in achieving its plan. All of these directorate reports are, in turn, combined into a single "synthesis report" on management achievements and

⁴³ http://ec.europa.eu/atwork/collegemeetings/index_en.htm.

⁴⁴ http://ec.europa.eu/atwork/programmes/index_en.htm.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ http://ec.europa.eu/historical_archives/index_en.htm.

⁴⁸ http://ec.europa.eu/atwork/programmes/index_en.htm.

⁴⁹ 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.

performance of the previous year, in which the Commission also decides any measures necessary to correct major management weaknesses. The Commission prepares a comparable synthesis report on policy achievements of the previous year.⁵⁰

All these documents are available via direct links on the European Commission At Work/The Process in Detail webpage.⁵¹

White Papers are major issue documents, typically occurring one or two per year, 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 a Union-wide public consultation process.⁵² Both are available on through direct links on the Commission's site.⁵³ When a White Paper is favorably received by the Council, it can become the action program for the Union in the area concerned.⁵⁴

c. Information About the Co-Decision Procedure (and Other Commission Inter-Institutional Communications)⁵⁵. 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 used.⁵⁶ In this process, the Commission both proposes the legislation and “plays the role of mediator” as the proposal is considered by the Council and the European Parliament, jointly having “the role of EU legislator.”⁵⁷ The European Economic and Social Committee and the Committee of the Regions may also weigh in as the process proceeds.⁵⁸ Co-decision can involve up to three readings in Parliament and in the Council, and require a Conciliation Committee (composed equally of Council and Parliament representatives) in the

⁵⁰ Both of these are communicated to the European Parliament, the Council, the European Social and Economic Committee and the Committee of the Regions.

⁵¹ http://ec.europa.eu/atwork/synthesis/index_en.htm#synthesis.

⁵² See Section IIC1b.

⁵³ http://ec.europa.eu/comm/off/white/index_en.htm (white); http://ec.europa.eu/comm/off/green/index_en.htm (green).

⁵⁴ http://europa.eu/scadplus/glossary/white_paper_en.htm.

⁵⁵ Budget dossiers, international agreements, and Communications from the Commission. See text accompanying *infra* note 61.

⁵⁶ http://ec.europa.eu/atwork/basicfacts/index_en.htm#meet. For more details, there is a lovely mini-treatise feature embedded in *PreLex* that you access by clicking on “Description of the database” in the left-hand menu column. It will open a separate window in the upper left corner. You may then select from an extensive list that provides concise descriptions of various aspects of the legislative process and using the database. The window is stable and so can be maintained on top, if you wish to consult it during your research. See also the pages introduced at http://ec.europa.eu/codecision/procedure/index_en.htm.

⁵⁷ *Id.*

⁵⁸ The European Economic and Social Committee consists of “representatives of the various economic and social components of organised civil society,” while the Committee of the Regions contains “representatives of regional and local bodies.” 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.

event of continued disagreement.⁵⁹ The Commission is involved throughout and takes the initiative.

Fortunately, the Commission's website offers an excellent service – *PreLex* – that: (i) explains the steps of the co-decision process; (ii) provides a complete timeline, in several formats; (iii) indicates the stage the matter (“dossier”) has reached, with names of relevant institutions and officials; and (iv) provides immediate links to at least the principal documents.⁶⁰ (Information about budget dossiers, international agreements, and Communications can also be tracked through PreLex.⁶¹).

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 -- exercise oversight of the implementation program to ensure that it remains within the authorizing text.⁶²

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 a pair of Council decisions.⁶³ A large group of committees (between 240 and 300) represents major policy areas; each is chaired by a representative of the relevant service and contains representatives of each of the Member States. After a binding text is adopted, the relevant service will draft proposed implementing measures. These are submitted to the comitology committee for its opinion. What happens next depends on which procedure has been invoked in the text calling for implementing measures:⁶⁴

- *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

⁵⁹ The process is graphed in 28 detailed steps at http://ec.europa.eu/codecision/images/diagram_en.gif. On the Conciliation Committee, see Section IIB2*ai*.

⁶⁰ <http://ec.europa.eu/prelex/apcnet.cfm?CL=en> Parliament has an at least equally excellent comparable system, *OEIL*. See Section IIB2*bi*.

⁶¹ See <http://ec.europa.eu/prelex/apcnet.cfm?CL=en>.

⁶² http://europa.eu/scadplus/glossary/comitology_en.htm. For a more Commission-centric explanation, see http://ec.europa.eu/comm/secretariat_general/regcomito/aide.cfm?page=faq&CL=en.

⁶³ Council Decision of 13 July 1987, 1987 O.J. (L 197) 33; 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.

⁶⁴ http://ec.europa.eu/comm/secretariat_general/regcomito/aide.cfm?page=faq&CL=en.

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.⁶⁵

The comitology committees operate under a common set of procedures.⁶⁶ 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.⁶⁷ 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. 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.⁶⁸ The Commission's website is quite candid that some of its services have a more liberal practice of transmitting documents than others.⁶⁹ At a minimum, the agendas, summary records, voting results of all meetings, and the draft implementing measures of matters adopted through the co-decision procedure should be available 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.⁷⁰ 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.⁷¹

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.

⁶⁵ 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, 11/10/2005.

⁶⁶ Standard Rules of Procedure, adopted by the Commission on 31 January 2001, O.J. C 38/3 of 02/06/2001.

⁶⁷ http://ec.europa.eu/comm/secretariat_general/regcomito/registre.cfm?CL=en. The Register can be searched by year, title of committee, title of document or type of document.

⁶⁸ http://ec.europa.eu/comm/secretariat_general/regcomito/aide.cfm?page=faq&CL=en.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ See Report from the Commission on the working of committees during 2004 at 4, COM (2005) 554 final (Nov. 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.⁷² 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.

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.⁷³ 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.⁷⁴ The Register will list the category (e.g, scientists, academics, practitioners, industry, NGOs), though not the name, of group participants⁷⁵ and identify: the lead service involved; 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); provide contact information; where available, identify the authorizing instrument; and supply a direct link to the *website* of those services who 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.

Unlike FACA in the U.S., there is no overarching EU requirement that the meetings of such groups be open to the public, and outside the area of environmental matters -- where the impending adoption of a Regulation applying the Aarhus Convention to Community institutions may well change this⁷⁶ -- the Commission requires only publication of the information listed above. It authorizes, but does not mandate, the services to publish summaries, conclusions or other working documents produced by the group.⁷⁷

f. Miscellaneous Documents About the Commission's Processes Available on its Site.

Someone seeking documents authored by the Commission will find little reason not to use the

⁷² See http://www.europa.eu.int/comm/secretariat_general/regexp/index.cfm?lang=EN.

⁷³ http://ec.europa.eu/secretariat_general/regexp/faq/faq.cfm?aide=2.

⁷⁴ Id.

⁷⁵ 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.

⁷⁶ See supra notes 33-36 and accompanying text.

⁷⁷ http://ec.europa.eu/secretariat_general/regexp/faq/faq.cfm?aide=2.

general EU legal document search site, *Eur-lex*.⁷⁸ The Commission's Register of Internal and Preparatory Documents⁷⁹ goes back only to January 1, 2001 and, according to its own most recent reports on compliance with the Access Regulation,⁸⁰ the Register still does not provide direct links to even all documents in the Official Journal.

Nevertheless, the Register is useful to someone wishing to monitor the Commission's processes and request a copy of one of the following types of documents, should it turn up in a search of the Register, even if it is not directly available through a link:

- preparatory documents submitted to the Commission for a proposal for an act of the Council, or the Council and the European Parliament, after the act has been adopted;⁸¹
- preparatory documents submitted to the Commission for a proposed act, communication, report, or working document of the Commission, after the proposed action has been taken.⁸²
- other documents originating from third parties that the author has already disclosed, or consented to have disclosed⁸³
- other documents already disclosed via the Access Regulation⁸⁴
- a miscellaneous and fairly small group, denominated "Study," that appear to be documents submitted by academic, NGO, industrial and other authors on a variety of topics.⁸⁵

⁷⁸ <http://eur-lex.europa.eu/en/index.htm>. These documents fall into several categories identified by letters:

- COM: proposed legislation and other Commission communications to the Council and/or the other institutions, and their preparatory papers
- C : legal acts adopted by the Commission in the exercise of its own or delegated powers
- SEC: internal documents associated with the decision-making process and the general operation of Commission departments

⁷⁹ http://ec.europa.eu/comm/secretariat_general/regdoc/registre.cfm?CL=en.

⁸⁰ 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)[hereinafter "2005 Access Report"], 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); Report from the Commission on the application in 2003 of Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents, COM(2004) 347 final, at 7 (Apr. 30, .2004)[hereinafter "April 30, 2004 Access Report"], available at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2004/com2004_0347en01.pdf.

⁸¹ Commission Rule of Procedure Amendments, *supra* note 27, at 4. Availability is subject to the caveats that "they do not reflect opinions or individual positions," *id.*, and do not fall within any of the exceptions to disclosure provided in the Access Regulation. See Section IIIC.

⁸² The same caveats as the previous category apply.

⁸³ Commission Rule of Procedure Amendments, *supra* note 27, at 4-5.

⁸⁴ *Id.*

⁸⁵ The Register describes this group as "References of studies entrusted by the Commission to external experts," http://ec.europa.eu/comm/secretariat_general/regdoc/aidtypesdoc.cfm?CL=en, but the documents appear to

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 about Commission procedures:

- “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.”⁸⁶
- “[M]easures notified to an interest 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 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...”⁸⁷

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.”⁸⁸

2. The European Parliament

Even more than the Commission’s, the *Europarl* website of the European Parliament⁸⁹ has become an excellent source for clear and concise information about the institution and its members. It is at least as good, if not better, for direct access to documents.

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.⁹⁰ With the name, the searcher gets ready access to a treasure trove of information. The member’s website provides:

originate with the outside entities and be submitted to the Commission. It’s not clear from the Commission’s website what criteria determine when such a document is placed in the register.

⁸⁶ Code of Good Admin. Behavior, supra note 6, § 2.

⁸⁷ Id. § 3.

⁸⁸ Id.

⁸⁹ <http://www.europarl.europa.eu>. See Bureau Decision on Public Access to European Parliament Documents, 2001 O.J. (C 374) 1.

⁹⁰ <http://www.europarl.europa.eu/members.do?language=EN>.

- photo
- political party affiliation⁹¹
- 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,⁹² each with links to the delegation chair and all members and a tab top the delegation calendar of meetings
- a list of his/her activities in plenary sessions, including
 - Questions posed,⁹³ with a link to the actual questions and answers and a notion 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 and 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 1st parliamentary term.⁹⁴

In addition, the site provides various data about the Members collectively. A searcher can find a chart of Members by state and political group.⁹⁵ She/he 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.⁹⁶

ii) Committees and Other Internal Structure. The searcher wishing information about Parliament's 20 standing committees, who draft legislative proposals and reports for the plenary

⁹¹ See next subsection.

⁹² See id.

⁹³ See id.

⁹⁴ <http://www.europarl.europa.eu/members/archive.do?language=EN>.

⁹⁵ <http://www.europarl.europa.eu/members/expert.do?language=EN>.

⁹⁶ <http://www.europarl.europa.eu/members/expert/searchForm.do?language=EN>.

sessions,⁹⁷ can start with a list which, as is typical with this website, provides a gateway to a great deal of readily accessible information.⁹⁸ From the list itself, the searcher can access either a summary committee webpage or a window that lists publicly available documents from committee meetings, organized by date and accessible via links on that page.⁹⁹ The summary committee webpage, in turn, summarizes the committee's substantive responsibilities, provides links to the webpages of the chair and vice-chairs, and tabs to the current calendar of meetings, and to 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 – 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 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 goodies such as briefing materials, posters, etc.
- important reports – direct links to miscellaneous 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. They may make recommendations on the agendas for 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).¹⁰⁰

The crucial power of agenda setting is held by the *Conference of Presidents*, comprising the President of Parliament and the chairs of the seven *political groups* currently represented in Parliament.¹⁰¹ In addition to drawing up the timetable and agenda for the plenary debates, the

⁹⁷ <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=45&pageRank=5&language=EN>.

⁹⁸ <http://www.europarl.europa.eu/activities/expert/committees.do?language=EN>. Temporary committees may also be created as needed, and appear last on the list of committees. See Rules of Procedure 175, 179, 181. At the time of this report, there is one Temporary Committee: On the alleged use of European countries by the CIA for the transport and illegal detention of prisoners. See Work in Progress – by parliamentary committee, 06/19/2006, available at http://www.europarl.europa.eu/comparl/cpc/wip_en.pdf. For a list of former temporary committees, see http://www.europarl.europa.eu/committees/home_temp_en.htm.

⁹⁹ See next subsection.

¹⁰⁰ <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=53&pageRank=9&language=EN>.

¹⁰¹ 19 Members, representing at least 5 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. Rule of Procedure 23.

Conference formulates the legislative program, allocates seats in the Chamber, and determines the composition of the committees and delegations (see next paragraph) and sets their assignments.¹⁰² More generally, it directs the course of Parliament's relations with other EU institutions as well as the parliaments of the Member States and other countries.¹⁰³

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.¹⁰⁴ A searcher seeking information on the delegations would proceed much as with committees. The list of delegations¹⁰⁵ 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.¹⁰⁶

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.¹⁰⁷ 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 main page. Five *Quaestors* are responsible for providing infrastructure (general services, equipment, working conditions, etc.) to the Members.¹⁰⁸ Their names, with webpage links, and the calendar of their meetings,¹⁰⁹ can be found readily on the website.¹¹⁰ With the *President of the Parliament* and his/her 14 Vice-Presidents, the Quaestors comprise the *Bureau*¹¹¹ which

¹⁰² Rule of Procedure 24;

<http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=45&pageRank=7&language=EN>.

¹⁰³ <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=53&pageRank=2&language=EN>.

¹⁰⁴ Rule of Procedure 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>.

¹⁰⁵ <http://www.europarl.europa.eu/activities/expert/delegations.do?language=EN>.

¹⁰⁶ Rule of Procedure 27;

<http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=53&pageRank=10&language=EN>.

¹⁰⁷ <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.

¹⁰⁸ Rule of Procedure 25;

<http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=53&pageRank=6&language=EN>.

¹⁰⁹

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

¹¹⁰ <http://www.europarl.europa.eu/members/expert/otherBodies/search.do?body=1303&language=EN>.

¹¹¹ For the current list of members, see

<http://www.europarl.europa.eu/members/expert/otherBodies/search.do?body=1511&language=EN>.

determines the internal operations of Parliament, prepares its draft budget, and decides all administrative, staff and organizational matters.¹¹²

iii) Parliamentary Sessions and Other Meetings. Parliament meets each year for 12 part-session plenary debates in Strasbourg and six in Brussels.¹¹³ 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.¹¹⁴ A searcher can access Parliament's annual calendar showing these weeks for the entire year.¹¹⁵

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.¹¹⁶ 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 procedure¹¹⁷ or in the OEIL procedure file¹¹⁸ 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 webpages¹¹⁹ and in the Archives.¹²⁰ The same is true for debates;¹²¹ motions for resolution;¹²² reports given in plenary;¹²³ resolutions and other texts adopted in plenary;¹²⁴ questions posed by Members to the Commission or the Council, or to Parliament's own officials (the Quaestors, the Conference of Presidents or the Bureau¹²⁵);¹²⁶ hearings;¹²⁷ and

¹¹² <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=53&pageRank=4&language=EN>.

¹¹³ <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=45&pageRank=2&language=EN>; <http://www.europarl.europa.eu/activities/public/staticDisplay.do?language=EN&id=102>.

¹¹⁴ <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=45&pageRank=3&language=EN>; <http://www.europarl.europa.eu/activities/public/staticDisplay.do?language=EN&id=102>.

¹¹⁵ <http://www.europarl.europa.eu/pdf/general/cal2006.pdf>.

¹¹⁶ <http://www.europarl.europa.eu/activities/public/plenSession.do?language=EN>.

¹¹⁷ See Section IIB1c (Commission) and Section IIB2bii (Parliament).

¹¹⁸ See Section IIB2bi.

¹¹⁹ Starting at <http://www.europarl.europa.eu/activities/expert/agenda.do?language=EN>.

¹²⁰ <http://www.europarl.europa.eu/activities/archive/agenda.do?language=EN>.

¹²¹ 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>.

¹²² 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>.

¹²³ 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>.

¹²⁴ 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>.

¹²⁵ Rule of Procedure 28

¹²⁶ Dedicated pages beginning at ; archives search at <http://www.europarl.europa.eu/activities/archive/gp.do?language=EN>. On Questions, see <http://www.europarl.europa.eu/OP-WEB/home.jsp?language=en>.

written declarations (texts of no more than 200 words used to launch or relaunch debate on an issue¹²⁸).¹²⁹ 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,¹³⁰ where it is possible to watch the sitting via live webcast.

The upcoming set of committee meetings can be accessed on a series of pages¹³¹ which show, at a minimum, date, time, and location of the meeting. Some committees also list events such as the name of scheduled hearings, while others provide links, at that location, to a draft agenda (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.¹³² The Register includes agendas and sometimes draft agendas, as well as final minutes and some draft ("provisional") versions, notices to members, reports and some draft versions, amendments to draft reports, opinions and some draft versions, working documents, and notices to members. Most, but not all, of these are available directly through web links; the rest must be requested in hard copy.¹³³

The other entities within Parliament are less transparent. The Conference of Presidents meets twice a month,¹³⁴ and a searcher can readily find when and where.¹³⁵ It makes decisions by consensus, or by vote weighted by the number of Members in each political group.¹³⁶ Meetings are not open to the public and, although the Rules of Procedure¹³⁷ state that minutes will be publicly available unless portions are determined to fall within confidentiality exceptions of the

¹²⁷ Dedicated page http://www.europarl.europa.eu/hearings/default_en.htm.

¹²⁸ <http://www.europarl.europa.eu/activities/expert/writtenDecl.do?language=EN>.

¹²⁹ Dedicated pages beginning at id.

¹³⁰ http://www.europarl.europa.eu/sce/server/internet/home_page/sce_home_page_01.jsp.

¹³¹ 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=>

¹³² See the list at <http://www.europarl.europa.eu/registre/recherche/ListeDocuments.cfm#>.

¹³³ The types of documents to be directly accessible via the web 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 [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 3 categories: documents generated by Parliament itself; formal communications from other Community institutions; third parties documents that the author would have reason to know would be subject to disclosure.

¹³⁴ <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=53&pageRank=3&language=EN>.

¹³⁵ http://www.europarl.europa.eu/activities/expert/meetCal/calSearch.do?actionType=search&date=&genericBody=OD&body=BCPR&term=LONG_TERM&place=A_X&refreshCache=yes&language=EN.

¹³⁶ Rule of Procedure 23; <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=53&pageRank=2&language=EN>.

¹³⁷ Rule 28(1).

Access Regulation,¹³⁸ the Conference does not have a website, there are no links to minutes on any of the pages describing the Conference or its members, and a search of the Register for minutes of the Conference, in English and French, yielded no hits. There is a single webpage containing what is described as verbatim reports of 11 whole or partial meetings of the Conference between 1999 and 2004, with no explanation of why these particular proceedings were transcribed and made public.¹³⁹ The meeting times, procedures, and general lack of transparency of the Bureau track those of the Conference of Presidents.¹⁴⁰

Members can pose questions to the Conference, the Bureau and the Questors about their work,¹⁴¹ and the answers must be published in the Bulletin of Parliament, which is publicly available through the website.¹⁴²

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 officially consulted, or on which it has decided to draw up an own-initiative report. The Legislative Observatory (OEIL)¹⁴³ 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 June 2006, 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.¹⁴⁴

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

¹³⁸ See Section IIIC.

¹³⁹ http://www.europarl.europa.eu/organs/confpres/verbatim_en.htm.

¹⁴⁰ Rule of Procedure 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=OD&body=BUR&term=LONG_TERM&place=AX&refreshCache=yes&language=EN.

¹⁴¹ <http://www.europarl.europa.eu/activities/expert/staticDisplay.do?language=EN&id=119>..

¹⁴² http://www.europarl.europa.eu/references/bull/default_en.htm.

¹⁴³ <http://www.europarl.europa.eu/oeil/index.jsp?language=en>.

¹⁴⁴ See <http://www.europarl.europa.eu/oeil/> FAQ # 3"Content of the Legislative Observatory Database."

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.¹⁴⁵

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 pages¹⁴⁶ 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 such as transmission, receipt, etc.); 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. Probably the optimal strategy for the searcher needing comprehensive information is to work between the two databases.¹⁴⁷

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:¹⁴⁸

Codecision & Conciliation. As the co-decision page¹⁴⁹ 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* which 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

¹⁴⁵ See id. last FAQ.

¹⁴⁶ Beginning at <http://www.europarl.europa.eu/oeil/search.jsp>.

¹⁴⁷ To make your own comparison, here are the links to the Regulation proposed to implement the Aarhus Convention. 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.

¹⁴⁸ Beginning at <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?language=EN&id=55>.

¹⁴⁹ <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=55&pageRank=3&language=EN>.

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).¹⁵⁰ 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 25 Members of Parliament and an equal number of Council representatives.¹⁵¹ The political groups appoint the parliamentary members, in proportion to their representation within Parliament. 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.¹⁵² The searcher can find joint texts on a dedicated web page¹⁵³ 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 published by the three current vice-presidents,¹⁵⁴ as well as to an entire area of the *Europarl* website devoted to the Conciliation and codecision process.¹⁵⁵ 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;¹⁵⁶ a calendar of all meetings relevant to codecision;¹⁵⁷ a page on "Ongoing procedures" which provides links to dossiers under first and second reading;¹⁵⁸ a page on Conciliations, with comparable links to dossiers in that process;¹⁵⁹ a page on Concluded Procedures, with links to those dossiers;¹⁶⁰ and finally, General Information¹⁶¹ and Photo¹⁶² pages with a variety of useful

¹⁵⁰ <http://www.europarl.europa.eu/activities/expert/doclegcons.do?language=EN>.

¹⁵¹ 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&TXTLST=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.

¹⁵² Id.

¹⁵³ <http://www.europarl.europa.eu/activities/expert/jointText.do?language=EN>.

¹⁵⁴ http://www.europarl.europa.eu/code/information/guide_en.pdf.

¹⁵⁵ http://www.europarl.europa.eu/code/about/default_en.htm.

¹⁵⁶ http://www.europarl.europa.eu/code/newsletter/default_en.htm.

¹⁵⁷ http://www.europarl.europa.eu/code/calendar/default_en.htm.

¹⁵⁸ http://www.europarl.europa.eu/code/ongoing_procedures/default_en.htm.

¹⁵⁹ http://www.europarl.europa.eu/code/ongoing/default_en.htm.

¹⁶⁰ http://www.europarl.europa.eu/code/concluded_procedures/default_en.htm.

¹⁶¹ http://www.europarl.europa.eu/code/information/default_en.htm.

links and data.

Consultation. Depending upon the subject of the proposed legislation, consultation with Parliament may be either required or optional.¹⁶³ If required, the proposal can become law only if Parliament gives its opinion. Although the Council is not required to accept that 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. The searcher can find these opinions through the dedicated "Texts Adopted" page¹⁶⁴ or by using *OEIL*'s "Procedure Tracking" search function and searching under "Consultation procedure (CNS)."¹⁶⁵

Assent. In this procedure – used in a limited group of particularly important matters¹⁶⁶ -- Parliament must either accept or reject, in whole, the proposal put forward; it cannot offer amendments. In this circumstance, the process used to build consensus is that the relevant parliamentary committee will present an "interim report" containing a motion for a resolution putting forward recommendations for amendment or implementation of the proposal. If Parliament adopts the resolution in whole or part, its President will ask for further discussion with the Council. Based on the outcome of discussion, the relevant committee makes a final recommendation to Parliament.¹⁶⁷ 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)."¹⁶⁸

c. Miscellaneous Documents Available. Finally, the searcher monitoring Parliament's work is entitled, under Parliament's Rules of Procedure,¹⁶⁹ 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.

- The Register of Members' assistants (i.e., staff)¹⁷⁰

¹⁶² http://www.europarl.europa.eu/code/photo_gallery/album1/default_en.htm.

¹⁶³ <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=55&pageRank=4&language=EN>.

¹⁶⁴ <http://www.europarl.europa.eu/activities/expert/ta.do?language=EN>.

¹⁶⁵ <http://www.europarl.europa.eu/oeil/search.jsp?form=/procstage/familyandtype>.

¹⁶⁶ See <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=55&pageRank=8&language=EN>

¹⁶⁷ <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?id=55&pageRank=9&language=EN>.

¹⁶⁸ <http://www.europarl.europa.eu/oeil/search.jsp?form=/procstage/familyandtype>.

¹⁶⁹ 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/.

¹⁷⁰ See <http://www.europarl.europa.eu/members/expert/staticDisplay.do?language=EN&id=148> and associated links.

- Press documents¹⁷¹
- Studies and publications produced by Parliament: Research and Fact Sheets¹⁷²
- Mail incoming to, and outgoing from, Parliament and its President¹⁷³

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*¹⁷⁴ 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 many U.S. government sites....)

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:¹⁷⁵

- *General Affairs & External Relations Council (GAERC)*¹⁷⁶ – 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)*¹⁷⁷ – Economic and Finance Ministers of Member States; deals with economic and finance dossiers and prepares draft budget; meets once a month
- *Competitiveness Council*¹⁷⁸ -- European Affairs Ministers, Industry Ministers, Research Ministers, etc of Member States; deals with policies and dossiers in various areas with horizontal and sectoral competitiveness implications; meets 5-6 times annually

¹⁷¹ See <http://www.europarl.europa.eu/registre/recherche/ListeDocuments.cfm#> and expand the press document bullet under item # 2.

¹⁷² See id. and expand the Studies and publications produced by the European Parliament bullet under item #2.

¹⁷³ <http://www.europarl.eu.int/registre/recherche/ListeDocuments.cfm#> and expand item # 4.

¹⁷⁴ <http://www.consilium.europa.eu/>.

¹⁷⁵ The number of configurations has varied over time. The current list is Annex 1 to the Council's rules of procedure. Council Decision of 22 March 2004 adopting the Council's Rules of Procedure, 2004 O.J. (L 106) 22, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_106/l_10620040415en00220045.pdf.

¹⁷⁶ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=388&lang=en&mode=g.

¹⁷⁷ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=250&lang=en&mode=g.

¹⁷⁸ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=412&lang=en&mode=g.

- *Justice and Home Affairs (JHA)*¹⁷⁹ – Justice and Interior Ministers of Member States; deals with dossiers in these areas and with Shengen issues (freedom of movement of persons without being controlled at internal borders); meets every other month
- *Employment, Social Policy, Health and Consumer Affairs Council (EPSCO)*¹⁸⁰ -- 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)*¹⁸¹ -- 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*¹⁸² -- 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*¹⁸³ -- Environment Ministers of Member States; matters implicating sustainable development, natural resources, climate change; meets about four times a year
- *Education, Youth, Culture Council*¹⁸⁴ -- 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 make up any of the configurations. The only principal official named on the site is the President (who is not only identified but also has his/her own webpage.)¹⁸⁵ The minutes refer simply to the Member States by name, or to their “delegation.” She or he could, after the fact of a meeting, go to the photographic library of the site¹⁸⁶ 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.¹⁸⁷ There *is* a location on the site to find this

¹⁷⁹ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=249&lang=en&mode=g.

¹⁸⁰ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=411&lang=en&mode=g.

¹⁸¹ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=413&lang=en&mode=g.

¹⁸² http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=414&lang=en&mode=g.

¹⁸³ 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.

¹⁸⁴ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=416&lang=en&mode=g.

¹⁸⁵ 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>.

¹⁸⁶

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

¹⁸⁷ The canny searcher might 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

information, but the average searcher would discover it only fortuitously: Press releases issued after each configuration meeting list the attending ministers.¹⁸⁸

ii) Coreper, committees and working parties. Given the importance of *Coreper* (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"¹⁸⁹ who prepares and coordinates the Council's work.¹⁹⁰ The Council's Rules of Procedure tell her or him that Coreper is responsible for "ensuring 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.¹⁹¹ 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 committees and working groups consisting of delegates from the member states,"¹⁹² and the Rules of Procedure would tell her or him that these are set up by Coreper or with its approval.¹⁹³

If the searcher happens to know about the main *Europa* Glossary,¹⁹⁴ or notices the link to it which appears as the last item on the "Information to the Public" page¹⁹⁵ of the Contacts tab, she or he would learn more specifically that Coreper consists of

- Coreper II: the Member States' Ambassadors to the EU, who are the "Permanent Representatives" and
- Coreper I: the Deputy Permanent Representatives.

A forum for dialogue among the Permanent Representatives (and between them and their respective national governments) about impending Community legislation and policy matters, 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,¹⁹⁶ 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

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.

¹⁸⁸ Section IIB3aⁱⁱⁱ.

¹⁸⁹ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=427&lang=en&mode=g.

¹⁹⁰ See EC Treaty, art. 207.

¹⁹¹ Rule of Procedure art. 19 ¶ 1.

¹⁹² http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=427&lang=EN&mode=g.

¹⁹³ Rule of Procedure art. 19, ¶ 3.

¹⁹⁴ http://www.europa.eu/scadplus/glossary/coreper_en.htm.

¹⁹⁵ http://www.consilium.europa.eu/cms3_applications/showPage.asp?id=820&lang=en&mode=g.

¹⁹⁶ http://www.europa.eu/scadplus/glossary/experts_committees_en.htm.

follow up on actions taken. Working parties do parallel preparatory work and technical studies for Coreper. Some are temporary, set up to deal with particular proposals, while about a hundred groups cover a given sector and meet regularly.¹⁹⁷

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;
- 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. Given the Council's central role in Community law making and the contemporary political connection between transparency and the perceived legitimacy of Community institutions, it would appear essential that *Consilium* attain the same standard of effectiveness in educating and informing searchers about the Council as has been achieved for the Commission and Parliament.

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.¹⁹⁸ Although these items can also be accessed through the Documents tab, this route usually requires more screens, and it is not intuitive to seek calendar information, for example, under a Documents tab.

The Calendar page¹⁹⁹ will list all meetings occurring on the date clicked, with time and room. (The list appears to be always in French, regardless of the language selected for the surrounding page.) A Public Debates/ Council Deliberations page²⁰⁰ – which is also accessible through the Contacts tab – leads to a list of Council deliberations under the co-decision procedure²⁰¹ that

¹⁹⁷ Id.

¹⁹⁸ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=340&lang=en&mode=g.

¹⁹⁹

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.

²⁰⁰ http://www.consilium.europa.eu/cms3_fo/showPage.ASP?id=313&lang=en&mode=g.

²⁰¹ See Sections IIB1c; IIB2bi.

open to the public, with dates and brief descriptions of the issue, as well as to a list of Public Debates of the Council, again with dates and brief description of the topic.

Agendas, background notes, and briefing materials for the nine configurations of the Council are ostensibly available from the page with that name.²⁰² However, clicking on the desired configuration repeatedly produced the response “No document found,” whether the search was specified in English or French. Unless/until that link is fixed, the Agenda page²⁰³ reached via the Document tab 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 configuration²⁰⁴-- which appear to go back as far as January 1999;
- Coreper I agendas,²⁰⁵ apparently beginning with the 1858th meeting of Coreper I in October 2000;
- Coreper II agendas,²⁰⁶ apparently beginning with the 1858th meeting of Coreper II in November 2000
- Agendas for other preparatory bodies such as working parties,²⁰⁷ of which there are almost 9400, the earliest dated January 2002;
- Agendas for certain other groups²⁰⁸

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

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

204

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.

205

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/CRP1&cmsid=645.

206

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.

207

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|C|M&cmsid=649.

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

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

Through a webpage denominated “The Presidency Calendar”²⁰⁹ 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 at least one week before beginning its term;²¹⁰ 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.²¹¹) 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 Council without debate because agreement has already been reached within Coreper.²¹² 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 heading²¹³ or under the Contacts tab → Information to the Public → Press Related Information: Latest Press Releases²¹⁴ 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.²¹⁵

- 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

²⁰⁹

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

²¹⁰ Rule of Procedure art.2, ¶ 6.

²¹¹ Coreper II takes institutional matters and preparation of Council meetings for General Affairs, Ecofin, JHA, Development and Budget. Coreper I takes the balance.

²¹² Rule of Procedure art. 3, ¶ 6.

²¹³ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=339&lang=EN&mode=g.

²¹⁴ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=820&lang=EN&mode=g.

²¹⁵ http://www.consilium.europa.eu/cms3_applications/showPage.ASP?id=552&lang=en&mode=g.

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).²¹⁶

- 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 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,²¹⁷ via direct links back through 1999, are the Monthly Summaries of Council Acts, which provide a summary table of title, document number, voting rule,²¹⁸ 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.

iii) Document Access in General: The Council's Register of Documents. Through the Register,²¹⁹ the searcher can learn about the existence of a large number of documents, a subset of which are publicly accessible (it is possible to limit one's search to those.²²⁰) Of the public documents, a subset are available directly via links on the site, while others can be requested in writing (either literally, or electronically by a form that can be filled out and submitted online.²²¹)

The Council has committed²²² to make the following documents available:

²¹⁶ Rule of Procedure art. 7.

²¹⁷ http://www.consilium.europa.eu/cms3_applications/showPage.asp?id=551&lang=en.

²¹⁸ 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.

²¹⁹ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=549&lang=EN&mode=g.

²²⁰ Both the "simple search" and "advanced search" pages have a box "public documents only" that can be checked as a search criterion.

²²¹ See <http://register.consilium.europa.eu/servlet/jsp/MailAccessForm.jsp?lang=EN&cmsid=928>.

²²² Council Rules of Procedure, 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 2004 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." Council Annual report on access to documents – 2004 at 8 (May 2005), available at <http://ue.eu.int/uedocs/cmsUpload/new08896.en05INT.pdf>.

- 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 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.²²³

In the Information Sheet accompanying the most recent Council statement on transparency,²²⁴ the General Secretariat of the Council states, “[M]ost of [the Council’s] official documents are accessible to the public.”

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

Unlike the Access Regulation with respect to documents,²²⁵ there is no overarching legal norm that provides public access to meetings of the EU governing institutions or that affords participation rights in Community policymaking processes. (The impending Regulation to implement the Aarhus Convention will create a far-reaching, but still 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.²²⁶)

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

²²³ Id. art 11 § 4.

²²⁴ Presidency Conclusions 15/16 June 2006, available as Attachment 1 at http://www.consilium.europa.eu/uedocs/cmsUpload/060616REV_en.pdf.

²²⁵ See Section III.

²²⁶ See Common Position adopted by the Council with a view to the adoption of 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 Community institutions and bodies, 2005 O.J. (C 264E) 18, available at <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/ce264/ce26420051025en00180027.pdf>.

sittings, are not public, and its discussions are confidential.²²⁷ Meeting minutes, available within about a week, can be accessed on the Commission’s website.²²⁸

b. Participation, including Consultation.²²⁹ For initiatives that are likely to

- result in substantial economic, environmental²³⁰ and/or social impact on a specific sector, and whether the proposal will 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, or the general public, for the shaping of policy prior to its decision.²³¹ “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.”²³² Consultations are often launched with publication of a *Green Paper*.

The principle medium through which this process is accomplished is *Your Voice in Europe*,²³³ 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).

From the Consultations page²³⁴ 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:

²²⁷ Commission Rules of Procedure, *supra* note 27, art. 9.

²²⁸ The most recent set is available directly through a webpage link. http://ec.europa.eu/comm/atwork/collegemeetings/index_en.htm. Prior ones have to be searched in the Register of Commission Documents by date, which is not difficult but instructions are lacking. Go to http://ec.europa.eu/comm/secretariat_general/regdoc/recherche.cfm?CL=en, specify “minutes” or “agenda” under “type” and use a range of dates if you are unsure of the exact time of meeting.

²²⁹ For detailed discussion of this process, see the Chapter on Rulemaking.

²³⁰ For initiatives with significant environmental impact, the Regulation implementing the Aarhus Convention will govern participation rights. See text accompanying *supra* note 226.

²³¹ Minimum Standards for Consultation, *supra* note 9.

²³² *Id.*

²³³ http://ec.europa.eu/yourvoice/index_en.htm.

²³⁴ http://ec.europa.eu/yourvoice/consultations/index_en.htm.

- 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,²³⁵ open through August 2006, offers 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, consultation on the European Transparency Initiative is occurring, via a dedicated website.²³⁶ The initiative has three aspects:

- Transparency and Interest Representation: on lobbying activities in the EU
- The Commission's minimum standards for consultation: a structured framework for feedback on application of the standards
- Publication of Data on Beneficiaries of EU Funds: on the 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 Paper²³⁷ launching this initiative is directly accessible via the website, which also makes available comments submitted in the consultation process.²³⁸

2. The European Parliament

a. Access to Meetings. Debates in Parliament are public. A webstreaming link²³⁹ 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."²⁴⁰ 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

²³⁵ http://ec.europa.eu/environment/chemicals/lab_animals/ia_info_en.htm#1.

²³⁶ <http://ec.europa.eu/comm/eti/index.htm>. This consultation can also be accessed via *Your Voice in Europe*.

²³⁷ European Transparency Initiative, COM(2006) 194, 5/3/2006.

²³⁸ <http://ec.europa.eu/comm/eti/contributions.htm>.

²³⁹ http://www.europarl.eu.int/eplive/public/default_en.htm?language=EN.

²⁴⁰ Parliament Rules of Procedures, available at <http://www.europarl.europa.eu/omk/sipade3?PROG=RULES-EP&L=EN&REF=TOC>, Rule 160; Rule 159.

request.²⁴¹

Meetings of committees and delegations are also, normally, open to the public.²⁴²

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,²⁴³ although do not appear routinely to be transcribed. Large scale parliamentary conferences²⁴⁴ also occur 3-5 times a year. The entire area of lobbying is outside the scope of this Chapter.²⁴⁵ Constituency petitions are discussed in Section IID2b.

In addition, the *Europarl* website offers an electronic mailbox²⁴⁶ for “questions, requests for information and proposals to the European Parliament.”²⁴⁷ Responses are prepared by its Correspondence with Citizens Unit.

3. The Council

a. Access to Meetings and Debates. The Council has been moving swiftly towards greater public access to its meetings. On June 16, 2006 it announced that the following will be public:²⁴⁸

- *all* deliberations involving legislative acts subject to the co-decision process;
 - however, 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 Presidency may decide that subsequent deliberations should also be open, but the Council or Coreper may overrule.²⁴⁹

These deliberations are to be “videostreamed” and a recorded version is to remain available for at least a month on the website.²⁵⁰ Currently, the website directs the searcher interested in seeing

²⁴¹ Id. Rule 162.

²⁴² 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.

²⁴³ http://www.europarl.europa.eu/hearings/default_en.htm.

²⁴⁴ http://www.europarl.europa.eu/conferences/default_en.htm.

²⁴⁵ For an introduction to the area, see <http://www.europarl.europa.eu/parliament/expert/staticDisplay.do?language=EN&id=65>.

²⁴⁶ <http://www.europarl.europa.eu/registre/portail/CourrierCitoyen.cfm?langue=EN>.

²⁴⁷ <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?language=EN&id=48>.

²⁴⁸ FACTSHEET - An overall policy on transparency, 16 June 2006, available at http://www.consilium.europa.eu/uedocs/cmsUpload/060616REV_en.pdf.

²⁴⁹ Id., Attachment 1, Presidency Conclusions 15/16 June 2006.

²⁵⁰ Id.

Council deliberations open to the public in the framework of the co-decision procedure to “see the Internet site of the Press Service of the Council General Secretariat immediately before the relevant Council meeting.”²⁵¹ (Unfortunately, there is no link provided to this page, and it is not clear precisely where it is on the larger website.)

The new transparency policy commits the Council to holding public debates on important issues “regularly.”²⁵² Until now, 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,²⁵³ and “at least one” on important new legislative proposals other than those adopted through the co-decision procedure.²⁵⁴ Accessibility to the debates is, as a practical matter, limited. The website explains that those held in Brussels can be watched in the Council building’s Press Conference Room, while those in Luxembourg can be viewed at the European Conference Center.²⁵⁵

b. Participation. There appears to be no Council process for soliciting or permitting public input or participation as part of its deliberations. The proposed Regulations implementing the Aarhus Convention as to Community institutions, currently in the final stages of the co-decision process, will doubtless cause some degree of change to the extent that the Council is acting in a non-legislative capacity on matters having a significant environmental effect.²⁵⁶

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

²⁵¹ http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=313&lang=en&mode=g.

²⁵² FACTSHEET - An overall policy on transparency, 16 June 2006, Attachment 1, Presidency Conclusions 15/16 June 2006.

²⁵³ Council Decision of 29 November 2001 amending the Council’s Rules of Procedure, 2001 O.J. (L 313) 67, art. 8, ¶ 2, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_109/l_10920010419en00670067.pdf. On the Commission’s annual work programme, see Section IIB1b.

²⁵⁴ Id. art. 8, ¶ 3.

²⁵⁵ http://www.consilium.europa.eu/cms3_fo/showPage.ASP?id=313&lang=en&mode=g.

²⁵⁶ See supra note 226 and accompanying text.

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.²⁵⁷

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

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 Procedure 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.

b. The Right of Petition. 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.²⁵⁸

Parliament's Rules of Procedure direct²⁵⁹ that petitions are to be entered in a register and forwarded by its President to the Committee on Petitions. 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;

²⁵⁷ Code of Good Administrative Behavior, *supra* note 6, § 3.

²⁵⁸ See also Parliament Rules of Procedure, *supra* note 240, Rule 191, § 1.

²⁵⁹ *Id.*, Rules 191-193.

- 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.²⁶⁰

Committee meetings are public, and petitioners are able to attend when their petition is discussed.²⁶¹ The petitioner must be informed of the decision on the petition, and the reasons.²⁶²

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.²⁶³ 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.²⁶⁴

The *Europarl* website provides clear, easy-to-locate, and comprehensible help to a would-be petitioner – as well as the opportunity for online submission.²⁶⁵ The petitioner will learn that the petition may present an individual request, a complaint, or an observation concerning the application of EU law,²⁶⁶ or an appeal to the European Parliament to adopt a position on a specific matter.²⁶⁷ 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.²⁶⁸ (Presumably, it will be dealt with by the Correspondence with Citizens Unit,²⁶⁹ 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.²⁷⁰ 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.

²⁶⁰ 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>.

²⁶¹ <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=49&pageRank=5&language=EN>.

²⁶² *Id.*; Parliament Code of Procedure, supra note , Rule 192 § 7.

²⁶³ <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=49&pageRank=4&language=EN>.

²⁶⁴ Parliament Code of Procedure, supra note , Rule 192 § 6.

²⁶⁵ <http://www.europarl.europa.eu/parliament/public/petition/submit.do?language=EN>.

²⁶⁶ “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>.

²⁶⁷ *Id.*

²⁶⁸ <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=49&pageRank=2&language=EN>.

²⁶⁹ See Section IIC2b.

²⁷⁰ <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?id=49&pageRank=2&language=EN>.

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).²⁷¹

The explanations required by Article 207 are published as addenda to the draft minutes.²⁷² Monthly summaries published by the General Secretariat list the Council’s legislative and non-legislative acts,²⁷³ and its minutes are similarly categorized. Press releases issued by the General Secretariat after each Council meeting²⁷⁴ are an additional source of information. The Council is moving towards a more transparent regime, although there appears to be little movement yet outside the sphere of “legislative” acts.²⁷⁵

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.”²⁷⁶

²⁷¹ Council Code of Procedure, *supra* note 253, art. 7.

²⁷² http://ue.eu.int/cms3_applications/showPage.asp?id=552&lang=en.

²⁷³ http://www.consilium.europa.eu/cms3_applications/showPage.asp?id=551&lang=en.

²⁷⁴ http://ue.eu.int/cms3_fo/showPage.asp?id=552&lang=EN&mode=g.

²⁷⁵ The latest statement on transparency, the Information Sheet of the General Secretariat with the attached Presidency Conclusions – 15/16 June 2006, available at http://www.consilium.europa.eu/cms3_applications/showPage.asp?id=551&lang=en does not make appear to make significant new commitments in the area of non-legislative acts. Again, this is an area likely to be affected – as to matters having significant environmental effects -- by the proposed Regulations implementing the Aarhus Convention. See *supra* note 226 and accompanying text.

²⁷⁶ Code of Good Administrative Behavior, *supra* note 6, at § 4.

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.”²⁷⁷ In addition to the substantive response, “[t]h reply should identify the person responsible for the matter and state how he or she may be contacted.”²⁷⁸

Telephone inquiries are to be answered “as promptly as possible.”²⁷⁹ 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.”²⁸⁰

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.²⁸¹

Response to requests for documents must generally occur in 15 days.²⁸²

b. Complaints. The Secretariat General’s website provides direct access to the text of the Code of Good Administrative Procedure, as well as instructions and an online system for filing citizen complaints.²⁸³ A special form is available there,²⁸⁴ although the site is also clear that an ordinary letter is sufficient.

The explanation page²⁸⁵ 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 her or him the right to file the complaint with the Ombudsman as well.

²⁷⁷ Id.

²⁷⁸ Id.

²⁷⁹ Id. Staff are directed to identify themselves or their department when answering the telephone. Id.

²⁸⁰ 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.

²⁸¹ Id.

²⁸² See Section IIIB5.

²⁸³ http://ec.europa.eu/civil_society/code/index_en.htm#.

²⁸⁴ http://ec.europa.eu/civil_society/code/complaint_form_en.htm.

²⁸⁵ http://ec.europa.eu/civil_society/code/index_en.htm#.

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.”²⁸⁶ An electronic acknowledgment is triggered by successful submission. According to the site, “Answers will be sent within a reasonable period.”²⁸⁷ 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.”²⁸⁸

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.²⁸⁹ In dealing with both telephone and written inquiries, staff are to identify themselves and their service.²⁹⁰

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.²⁹¹

Replies to written requests are to be in the language of the initial letter, and normally within 15 working days of receipt.²⁹² 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 member considers the appropriate recipient to be another institution entirely, she or he should notify the sender of this, as well as forward it to the institution.²⁹³

²⁸⁶ <http://www.europarl.eu.int/parliament/public/staticDisplay.do?id=48&language=EN>.

²⁸⁷ Id.

²⁸⁸ Id.

²⁸⁹ 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, Annex art.5, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_189/c_18920010705en00010004.pdf.

²⁹⁰ Id. arts 8, 9.

²⁹¹ Id. art.6.

²⁹² Id. ars. 7,9.

²⁹³ Id. art 9.

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 legal status of that Code was somewhat ambiguous.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 and thus

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). 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* (Nov. 2004) [hereinafter *Transparency in Europe II*].

⁴ See § A.3 (a) *infra* and text accompanying notes 36-38.

⁵ 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. This right-of-access language is identical to Article 42 of the Charter of fundamental rights of the European Union. O.J. (C 364) 18.12.2000, p. 1. That Charter was, according to Advocate General Léger, "intended to constitute a 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

“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 Whereas clauses 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.

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

Rights in the European Union and its Member States in 2002 at 236 n.15 (3.31.03), *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) at 14.

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>.

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

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 *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

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 Nov. 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 European Ombudsman, Annual Report 1998, 1998 O.J. (C 300), 97, ¶2.2.

¹³ European Ombudsman, Annual Report 2001, 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).

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 its discretion to permit “its Research and Documentation Service to publish on the Court’s

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 (article 1(a)).

Internet website those notes which have been prepared in respect of cases which have finally 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. However, Member States are given an absolute veto right over disclosure of their documents by EU institutions, and the Access Regulation is not available for obtaining information in the possession of Member States. Application for access to documents prepared by Member States governed by article 4(5), is discussed below.²³ Article 5 provides the corollary to this provision.

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 under Article 5 retain some ability “to decide on the release of EU documents under their own national access rules”²⁵ Since Article 5 leaves “little discretion to Member States to deviate from the opinion of the institution,” it amounts “to a regression from the former system, which left Member States free to decide requests for access to EU documents (classified or not) under their own rules on access to documents.”²⁶

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, Sweden, and the

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 & m.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 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 (2003) at 340-41, citing (at note 68) 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).

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 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 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.

27 See generally Achim Berge, *Improved Rules on Public Access to Documents?* nn.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 Dec. 1993, 1993 O.J. (L 304) 1 (adopting Council Rules of procedure).

³¹ Code of Conduct 93/730/EC of 6 Dec. 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 (Nov. 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, 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* (Sept. 30, 2002), available at <http://www.statewatch.org/secret/freeinfo/index.html>; Curtin, *supra* note 6.

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”).

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

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 (Apr. 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 Tesauro 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, Feb. 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 note 42.

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 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 adopted their own rules to implement the Access Regulation.⁴²

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"⁴³:

- 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.

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* (Feb. 24, 2000); see Jacob Söderman, "The Early Years of the European Ombudsman," in *The European Ombudsman—Origin, Establishment, Evolution* 83, 97 (2005).

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 (Oct. 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 *Supra* note 10.

⁴³ 2004 Implementation Report at ¶¶7-8.

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

Chapters 2-4 explore the provisions of the Access Regulation in detail.⁴⁴

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.⁴⁵ 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.⁴⁶ The Parliament has extended this right “where possible,”⁴⁷ but it apparently in practice does not refuse to respond to requests from citizens in non-EU countries who do not reside in the EU.⁴⁸

While the Access Regulation does not apply to requests for documents made by Member States and Community institutions and bodies,⁴⁹ individual Members of the Parliament may use the

⁴⁴ 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 Sept. 2005), *available at* <http://reform.house.gov/UploadedFiles/FOIA%20Report.pdf>.

⁴⁵ Article 255(1) of the Treaty, quoted in text accompanying note 5 *supra*; Access Regulation art. 2(1).

⁴⁶ 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.

⁴⁷ Rule 97.1.2 of the European Parliament Rules of Procedure.

⁴⁸ 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.*

⁴⁹ The Regulation is “without prejudice to existing rights of access to documents for Member States,” Whereas cl. 16, and “the principle of loyal cooperation” continues to govern relations between the institutions and Member States, *id.* cl. 15.

Regulation to obtain documents from the Council and Commission,⁵⁰ just as Members of Congress in their individual capacity may use the FOIA to obtain documents from federal agencies. In fact,

The 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.⁵¹

Under Art. 6.1, as under the FOIA (and under the Code of Conduct, note ⁵²), the Access Regulation requires no statement of reasons on the part of a person requesting disclosure of documents. 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 (under the Code of Conduct).⁵³

⁵⁰ 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).

⁵¹ 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.

⁵² 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.

⁵³ 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]).

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.”

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.⁵⁴

Access to sound recordings and data bases has proved challenging to the institutions. As to sound recordings, the burden of reviewing, making decisions on partial release, and copying has led the Parliament to require that citizens “justify such applications, especially in the case of repetitive applications.”⁵⁵ The Commission, which has received fewer applications for recordings, requests the applicant to listen to them in Commission offices.⁵⁶ 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 data bases has proved problematic in both the EU and U.S. The Commission regards “as a document any report extracted from such [data base] systems which corresponds to normal use of them.”⁵⁷ Apparently the Commission does not treat the data base 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 data bases as records subject to disclosure under FOIA.⁵⁸

⁵⁴ See the characterization of these changes as a controversial compromise in Bjurulf & Elgström, *supra* note 40.

⁵⁵ 2004 Implementation Report § 2.3.4. There appears to be no legal basis for this requirement, which is imposed only by the EP.

⁵⁶ *Id.*

⁵⁷ 2004 Implementation Report § 2.3.5.

⁵⁸ 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).

Like the FOIA, the Access Regulation imposes no obligation for an institution to create a document in response to a request for access;⁵⁹ the Regulation authorizes access only to documents already in existence when the request is made.⁶⁰

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.⁶¹ 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, Parliaments’ 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.⁶²

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.⁶³ 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

⁵⁹ 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>.

⁶⁰ 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 European Parliament on the same matter (11 December 2001), available at <http://www.euro-ombudsman.eu.int/decision/en/980713.htm>.

⁶¹ Dept. of Justice v. Tax Analysts, 492 U.S. 136 (1989).

⁶² European Parliament, Rules of Procedure 16th ed., July 2004, 2005 O.J. (L 44) 1.

⁶³ Id. at ¶¶2.3.3 & 3.5.2. See discussion of access to Member State documents *infra* § 2.12.

departments.”⁶⁴ Also, documents drafted by committees that assist the Commission in the performance of its duties are considered Commission documents.⁶⁵

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-mail are all accepted,⁶⁶ and according to data collected, e-mail is the most widely used medium for making applications.⁶⁷

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.⁶⁸) 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.⁶⁹

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 sufficient solution.⁷⁰ The only defenses an

⁶⁴ 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.

⁶⁵ *Rothmans*, 1999 E.C.R. II-2463, ¶62.

⁶⁶ E.g., Commission Access Rules art. 2; EP Access Decision art. 8.

⁶⁷ 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).

⁶⁸ 5 U.S.C. § 552(a)(3)(A).

⁶⁹ 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”).

⁷⁰ 2004 Implementation Report § 4.3.

institution has against 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.

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 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 Court of First Instance, considering a challenge to that failure, recognized 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.⁷¹

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.⁷²

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.⁷³

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"⁷⁴ 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"⁷⁵ has no basis in the

⁷¹ Verein für Konsumenteninformation v. Commission, Case 2/03, 2005 E.C.R. II-13, at ¶101.

⁷² Id. at ¶114.

⁷³ Id. at ¶131.

⁷⁴ 2004 Implementation Report § 4.3.

⁷⁵ Commission Access Rules art. 2, ¶2 (extending the time for "complex or bulky applications").

Regulation.⁷⁶ The Parliament likewise proposes to find a fair solution where there have been “repeated” or “successive” applications. This provision has 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.”⁷⁷

⁷⁶ Tony Bunyan, Secrecy and Openness in the European Union (posted Sept. 30, 2002), *available at* <http://www.freedominfo.org/case/eustudy/>.

⁷⁷ 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>.

5. Time Limits

Under Art. 7.1, an initial application must be answered in 15 working days.⁷⁸ 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.”⁷⁹

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.⁸⁰

By contrast, the Council reported that in 2004, “the average time for processing initial applications was 9 working days.”⁸¹

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.⁸² “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.”⁸³

⁷⁸ "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>.

⁷⁹ Commission Access Rules art. 2 &3.

⁸⁰ 2004 Implementation Report § 4.2.

⁸¹ 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 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/>.

⁸² Id. art. 7, & 3.

⁸³ 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)

7. Response To Initial Applications

Under the Access Regulation⁸⁴ and the rules of the institutions,⁸⁵ 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.⁸⁶ The responding institution may offer brief reasons if more detailed disclosure could reveal the contents of the documents sought.⁸⁷

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.⁸⁸

8. Disclosure Of Segregable Portions Of Documents

Under Article 4.6, as under the FOIA,⁸⁹ segregable portions of documents must be disclosed upon request. This language codifies the holdings in the *Hautala* cases,⁹⁰ 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.⁹¹ These decisions were confirmed by the Court of Justice in *Mattila v. Council*,⁹² which held that the Council and Commission must in every instance

⁸⁴ Access Regulation art. 6.1.

⁸⁵ E.g., Commission Access Rules art. 3 ¶1; EP Access Decision art. 9.

⁸⁶ Access Regulation art. 7.1.

⁸⁷ *Jose Maria Sison v. Council*, Case 405/03, 2003 E.C.R. II- 02047, at ¶¶ 60-63. See the additional discussion of Reasons for Refusal infra § B.9.

⁸⁸ *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.

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

⁹⁰ *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.

⁹¹ 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.

⁹² *Olli Mattila v. Council of the European Union and Commission*, Case C-353/01 P, 2004 E.C.R. I-01073, ¶¶30-32.

consider whether to make a partial release and that the courts have authority to enforce that requirement.⁹³

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.”⁹⁴ 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...or, conversely, manifestly accessible in their entirety, or finally, had already been subject of a concrete individual assessment...in similar circumstances.”⁹⁵

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.⁹⁶

The Council has, consistent with the partial disclosure requirement, instituted a practice of deleting delegation identification in preparatory documents.⁹⁷

9. Reasons For Refusal

Just as the FOIA requires agencies to give reasons for any denial of access,⁹⁸ so also must an EU institution proffer reasons for refusing access to documents under the Access Regulation.⁹⁹ The institution “must demonstrate in each individual case, on the basis of the information at its

⁹³ 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).

⁹⁴ *Verein für Konsumenteninformation*, Case 2/03, 2005 E.C.R. II-13, ¶72.

⁹⁵ *Id.*, ¶75.

⁹⁶ M. Schauss, “L’accès du citoyen aux documents de institutions communautaires,” *J.T.D.E.*, 2003, p. 1, here p. 3 (as 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).

⁹⁷ Council Annual Report on Access to Documents 2004, *supra* note 67, at ¶23.

⁹⁸ 5 U.S.C. § 552(a)(6)(A)(i).

⁹⁹ Art. 7.1 (“the institution shall either grant access . . . [or] state the reasons for the total or partial refusal”).

disposal, that the documents to which access is sought do indeed fall within the exceptions listed ...”¹⁰⁰ 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.¹⁰¹

The duty to give reasons finds grounding beyond the Access Regulation and directly in Article 190 of the EC Treaty.¹⁰² “The duty to give reasons for a decisions 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....”¹⁰³ In applying the Access Regulation, then, the institution must consider whether for “each document... disclosure is in fact likely to undermine on of the facets of public interest protected by the first category of exceptions.”¹⁰⁴ The failure of an institution to give reasons for denying access to every document withheld thus results in judicial annulment of that failure.¹⁰⁵

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,¹⁰⁶ and the Member State itself need not give reasons for its decisions.¹⁰⁷

¹⁰⁰ Jose Maria Sison v. Council of the European Union, 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.

¹⁰¹ Id. at ¶61. “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.

¹⁰² Vesterdorf, *supra* note 93, 903-906.

¹⁰³ Kuijter v. Council, Case 188/98, 2000 E.C.R. II-01959 at ¶36.

¹⁰⁴ Id. at ¶37 (citing the Svenseka Journalisförbundet case and applying the Code of Conduct).

¹⁰⁵ 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).

¹⁰⁵ IFAW Internationaler Tierschutz-Fonds gGmbH v. Commission, Case 168/02, 2004 WL 2709130.

¹⁰⁷ Isabella Scippacercola v. Commission, Case 187/03, 2005 WL 887116 at ¶58.

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.¹⁰⁸

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.¹⁰⁹ The power to take decisions on confirmatory applications is delegated to the Secretary-General (except OLAF activities).¹¹⁰

c. Parliament. The European Parliament's Access Decision (as amended 111) 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 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.¹¹² The politics of the controversy have been described thusly:

¹⁰⁸ See Martin Bauer, “Transparency in the Council,” in Martin Westlake & David Galloway, *The Council of the European Union*, 366, 384 (3d ed. 2004).

¹⁰⁹ Commission Decision of 5 December 2001 amending rules of procedure, 2001/937/EC, ECSC, Euratom, OJ L 345/94 (29.12.2001), Annex containing 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 Document, art. 2, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_345/l_34520011229en00940098.pdf.

¹¹⁰ *Id.* at art. 4.

¹¹¹ Rules Governing Public Access to European Parliament Documents, 2005 O.J. (C 289), 6, arts. 12 & 15.

¹¹² 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 *Interpore 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.*

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.¹¹³

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 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 12600.¹¹⁴

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.¹¹⁵ 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.¹¹⁶

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."¹¹⁷ The Commission may also give access to a document "against the explicit opinion of the author."¹¹⁸ 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.¹¹⁹ "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."¹²⁰

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.

¹¹³ Bjurulf & Elgström, *supra* note 40.

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

¹¹⁵ Council Decision 2004/338/EC, *supra* note 11, Annex II, art. 2.2; Commission Access Rules art. 5.2-3.

¹¹⁶ 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).

¹¹⁷ Bauer, *supra* note 14.

¹¹⁸ Commission Access Rules art. 5.6.

¹¹⁹ Commission Access Rules art. 5.6; Council Decision 2004/338/EC, *supra* note 11, Annex II, art. 2.4.

¹²⁰ 2004 Implementation Report § 3.5.1.

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.¹²¹ 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.¹²²

Where sensitive documents are involved under Article 9 of the Access Regulation, the institutions are required to adhere to the decision of a third-party originator.¹²³

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.¹²⁴

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." 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."¹²⁵ 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.¹²⁶ Additionally, the

¹²¹ Decision of the European Ombudsman, *supra* note 77.

¹²² 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-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).

¹²³ 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 constitute a b(3) statute exempting such information from disclosure under the FOIA. *ACLU v. Dept. of Defense*, 04 Civ. 4151 (AKH), S.D.N.Y. (Sept. 29, 2005).

¹²⁴ Council Annual Report on Access to Documents 2002 (April 2003) at 14.

¹²⁵ 2004 Implementation Report § 3.5.2.

¹²⁶ 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

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 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.”¹²⁷ 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.”¹²⁸

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.¹²⁹ Also, Commission reliance on those data for decision-making does not alter application of the rule.¹³⁰

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 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.¹³¹

Although the courts consistently uphold Member State vetoes of disclosure of documents originating from them,¹³² challenges to and complaints against withholding by the Commission

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.

¹²⁷ *Scippacercola*, 2005 WL 87116, at ¶¶58, 68, 77; *IFAW Internationaler*, 2004 WL 2709130 at ¶¶59, 71 (applying the Code of Conduct).

¹²⁸ Bart Driessen, “The Council, Member States, and access to documents,” *in* *Transparency in Europe II*, at 107, 110.

¹²⁹ *Co-Frutta*, 2003 E.C.R. II-04441 at ¶47 (applying the Code of Conduct).

¹³⁰ *Id.* ¶¶57-63.

¹³¹ 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 (Nov. 2004).

¹³² E.g., *Messina*, 2003 E.C.R. II-03203.

of documents whose disclosure was opposed by originating Member States have been filed with the courts and the Ombudsman.¹³³

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, and only where an unwarranted invasion of personal privacy is implicated is a balancing required 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. This section provides an overview of the exemptions, which are addressed more fully in C. below.

Exception 1 (article 4, first paragraph) subjects 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,
- 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.
- unless there is an overriding public interest in disclosure.

Exemption 3 (article 4, third paragraph) protects internal deliberations and 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 use as part of deliberations under certain circumstances.

¹³³ *IFAW Internationaler Tierschutz-Fonds*, 2004 WL 2709130; *Nuova Agricast srl v. Commission*, 139/03 and 151/03 (unpublished); *S.I.M.S.A. srl v. Commission*, 287/03 (unpublished); complaint to the European Ombudsman 1753/2002/GG.

As is the case under the FOIA,¹³⁴ all of 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.¹³⁵ Likewise, as under the FOIA,¹³⁶ the 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. . . .”¹³⁷

¹³⁴ Dep’t of Air Force v. Rose, 425 U.S. 352, 366 (1976).

¹³⁵ *WWF UK*, 1997 E.C.R. II-313, ¶56.

¹³⁶ 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*, 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.

¹³⁷ Curtin, *supra* note 6, at 15.

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 rooms) and instituted by the E-FOIA Amendments (relating to dissemination of information through agency websites). 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.”¹³⁸

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,¹³⁹ notwithstanding potential conflict with exceptions contained in the Access Regulation.

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*¹⁴⁰ 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 another case¹⁴¹ 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

¹³⁸ 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 (Apr. 29, 2003), available at http://europa.eu.int/eur-lex/en/com/rpt/2003/com2003_0216en01.pdf at 8.

¹³⁹ E.g., UN/EC Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), adopted 25 June 1998, available at <http://www.unece.org/leginstr/cvenvi.htm>. See generally Jens Hamer, The Aarhus Convention, available at <http://www.eel.nl/documents/aarhus.pdf>.

¹⁴⁰ *Interproc Im – und Export GmbH v. Commission*, Case 92/98, 1999 ECR II-3521, ¶¶44-45.

¹⁴¹ *JT’s Corporation*, 2000 E.C.R. II-3269.

other statutes, in contrast to the operation of exemption 3 of the FOIA.¹⁴² However, this conclusion appears not to have been adopted in practice by the Commission.

b. *Historical Archives.* Article 18.2 requires the Commission to examine the conformity of the regulation governing historical archives¹⁴³ 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 off the exceptions set out in Article 4 and the provisions relating to sensitive documents in Article 9.”¹⁴⁴

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.¹⁴⁵

¹⁴² 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.

¹⁴³ 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).

¹⁴⁴ COM (2003) 216 final, supra note 138, at 7. On 9 Aug. 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.

¹⁴⁵ E.g., COM (2003) 216 final, id.; Council Annual Report on Access to Documents, supra note 67. Annual reporting by each agency of FOIA implementation data has been required since 1974. 5 U.S.C. §552(g).

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.¹⁴⁶ The Committee did not meet, however, in 2003 or 2004.¹⁴⁷

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.¹⁴⁸

C. Exceptions

1. Generally

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 Regulations – like the Code of Conduct before it¹⁴⁹ (and the FOIA¹⁵⁰) – must be narrowly interpreted and applied.¹⁵¹ As explained in the Exception Overview section above—

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:

¹⁴⁶ 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.

¹⁴⁷ Id.

¹⁴⁸ COM (2003) 216 final, supra note 138, at 11.

¹⁴⁹ E.g., *World Wildlife Fund v. Commission*, 1997 E.C.R. II-313 at ¶56; *Van der Wal v. Commission*, Case 83/96, 1998 E.C.R. [1998] 545, at ¶27.

¹⁵⁰ See e.g., *John Doe Agency v. John Doe Corp.*, 492 U.S. 146, 152 (1989).

¹⁵¹ 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.

a. *the public interest as regards*

- public security,¹⁵²
- 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 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, while others 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.”¹⁵³ Both are mandatory however; an institution has no discretion to disclose excepted documents, nor to withhold where no exception applies. This stands in marked contrast to the FOIA, under which – in the absence of an independent statutory or regulatory directive to the contrary¹⁵⁴ -- an agency retaining the discretion may disclose information covered by one of the statute’s exemptions.¹⁵⁵

¹⁵² According to Maes, *supra* note 24, at 201, 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.”

¹⁵³ de Leeuw, *supra* note 26, at 332. Under the Code of Conduct, all exceptions were “absolute” except that relating to the deliberative process.

¹⁵⁴ 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).

¹⁵⁵ 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”).

The Ombudsman has observed that the burden is on the requester to demonstrate an overriding public interest, unless it is manifest.¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸

2. Public Interests

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.

a. Security. The concept of security covers both internal security of a Member State and external security, including law enforcement.¹⁵⁹

b. 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 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.¹⁶⁰ For example, access to a document that “contains formulations and expressions which might cause tensions with non-member countries,”¹⁶¹ or that “could compromise the European Union’s position in current or future negotiations with third countries,”¹⁶² can be denied under the “international relations” exception. Access may not be denied, however, if the document comprises descriptions and factual findings,

¹⁵⁶ Ombudsman’s decision on Complaint 412/2003/GG against the Commission, available at <http://www.euro-ombudsman.eu.int/decision/en/030412.htm>.

¹⁵⁷ 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>.

¹⁵⁸ 2004 Implementation Report, 3.4.5.

¹⁵⁹ *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).

¹⁶⁰ *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.

¹⁶¹ *Hautala*, 1999 E.C.R. II-2489, ¶73.

¹⁶² *Mattila*, 2001 E.C.R. II-02265, ¶65.

particularly when already in the public domain, or where other factors remove any risk of negative repercussions on relations with the countries concerned.¹⁶³

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.¹⁶⁴

c. Defence And Military Matters. The “defence and military matters” exception is new in the Access Regulation, but it has seldom been invoked.

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.”¹⁶⁵ 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 FOIA¹⁶⁶ and as there is as to other interests protected under Articles 4.2 and 4.3 of the Access Regulation.

A separate Data Protection regulation was adopted in 2001,¹⁶⁷ implementing Article 286 of the EC Treaty and putting in place rules governing protection of individuals regarding the processing of personal data by community institutions. This set the stage for the need to reconcile possible simultaneous application of two potentially competing regulations.

The result is tension in the EU, as there is in the US, between access to government information and protection of personal privacy. For example, in his 2001 report on “Openness and data protection,” the European Ombudsman criticized the Commission’s position “which implies that any document containing the names of an individual is covered by the data protection rules. Since most documents contain somebody’s name, the Commission’s view means that access to documents would, in practice, be decided by applying the data protection rules, not the public access Regulation.”¹⁶⁸ The Ombudsman urged the Parliament to clarify that “data protection rules are concerned with the protection of private and family life This would make clear

¹⁶³ Judgment, Aldo Kuijter v. Council of the European Union, Case 211/00, 2002 E.C.R. II-488, ¶¶60-68.

¹⁶⁴ Peers, *supra* note 159, at 218.

¹⁶⁵ See generally part III, Data Protection.

¹⁶⁶ 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 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).

¹⁶⁷ Regulation 45/2001 of European Parliament and Council.

¹⁶⁸ Comments of the European Ombudsman on Openness and Data Protection (14 Nov. 2001), at ¶2, <http://www.euro-ombudsman.eu.int/letters/en/20011114-1.htm>.

that the purpose of data protection is not to restrict the information available to citizens about public activities.”¹⁶⁹

Some observers believe that the Ombudsman’s reports unduly tilts in favor of the right of access. For example, The Network of Experts in Fundamental Rights conclude that “it is necessary . . . to balance the interests of the applicant with those of the person affected . . . while taking into account the possibility of granting only partial access to certain documents.” “[I]t is essential that the Community institution does not grant right of access to documents when the interests of the applicant do not have any reasonable relationship of proportionality with the resulting violation of the right of the person concerned to protect his privacy”¹⁷⁰ The European Data Protection Supervisor (EDPS) in 2005 set out principles intended to guide institutions in simultaneously applying both the Data Protection and the Access Regulations.¹⁷¹ The EDPS identified the principles of “balancing” and “proportionality” as keys to determining the fate of requested records implicating personal privacy.¹⁷² Significantly, the EDPS recognized that “the mere fact that a document contains personal data does not mean that a person’s privacy is involved.”¹⁷³ A three-step analysis is still required:¹⁷⁴

1. The privacy of the data subject must be at stake.
2. Public access must substantially affect the data subject.
3. Public access is not allowed by the data protection legislation.

In one case decided under the Code of Conduct, the Court overturned the Commission's refusal to grant access to minutes of a committee meeting to a party seeking the identities of delegations attending the meeting; the issue of disclosure of names of individuals was not addressed.¹⁷⁵

4. Court Proceedings

¹⁶⁹ Comments of the European Ombudsman on Openness and Data Protection (14 Nov. 2001), at ¶6, <http://www.euro-ombudsman.eu.int/letters/en/20011114-1.htm>. The Ombudsman initially explored the relationship between access and data protection during an inquiry into a complaint against the Commission, resulting in a special report that in turn led the Parliament to adopt a Resolution on the subject. These actions are discussed in Ian Harden, “The European Ombudsman’s Efforts to Increase Openness in the Union,” in Veerle Deckmyn, *Increasing Transparency in the European Union?* 123, 142 (2002).

¹⁷⁰ 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, 236-37. See the discussion in footnote 24 of this Report on the methodology followed by the Court of Justice to achieve such a balance, *Adidas*, Case 223/98, 1999 E.C. R. I-7081, and also on the Portuguese compromise relating to this subject.

¹⁷¹ Supra note 51, chap. 4.

¹⁷² Id. at ¶33.

¹⁷³ Id. at ¶¶33-36.

¹⁷⁴ Id. at ¶36. This analysis is applied to specific examples in the EDPS report.

¹⁷⁵ *British American Tobacco (Investments) Ltd. v. Commission*, Case 111/00, 2001 E.C.R. II-3000. In a complaint before the Ombudsman, the names of applicants for an employment position were held protected from disclosure, but the Ombudsman held nonetheless that the Parliament should have asked the applicants whether they would agree to disclosure requested by a fellow applicant, European Ombudsman, Draft recommendation to the European Parliament in complaint 1919/2005/GG, available at <http://www.ombudsman.europa.eu/recommen/en/051919.htm>.

The court-proceedings exception applies both to Community courts and to national courts.¹⁷⁶ However, the exception covers only documents prepared for specific court proceedings, including not only pleadings and documents lodged, but also internal documents and correspondence concerning the case.¹⁷⁷ “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.”¹⁷⁸

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....”¹⁷⁹ 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,¹⁸⁰ though not the pleadings of the other party.¹⁸¹

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 4.3.¹⁸² 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.¹⁸³ The question is the subject of a pending case before the European Court of Justice; the Court of First Instance

¹⁷⁶ *Netherlands*, 2000 ECR I-1.

¹⁷⁷ *Interporc Im- und Export GmbH v. Commission*, 2003 E.C.R. I-2125, ¶¶41-42.

¹⁷⁸ 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).

¹⁷⁹ *Netherlands*, 2000 ECR I-1 at ¶28.

¹⁸⁰ Order of 3 April 2000, *Germany v. Parliament and Council*, Case 376/98, 2000 ECR-I-2247, at ¶10.

¹⁸¹ *Svenska Journalistförbundet*, 1998 E.C.R. II-2289, ¶¶135-139.

¹⁸² 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>.

¹⁸³ *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.

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.”¹⁸⁴

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 commercial information exemption to the FOIA has generated considerable controversy and litigation in the U.S.,¹⁸⁵ but – while likely to be implicated in public procurement activities – has not yet seen widespread application by the EU institutions.

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 case law.¹⁸⁶ According to one observer, this exception, although not explicitly stated, “mainly refers to infringement proceedings under Articles 226 to 228” of the EC Treaty¹⁸⁷ and has practically no importance for the Council. The exception is relevant, in particular, for OLAF inspections¹⁸⁸ 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.¹⁸⁹

¹⁸⁴ *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.

¹⁸⁵ 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).

¹⁸⁶ *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.

¹⁸⁷ 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.”

¹⁸⁸ See generally John Burke, “Furthering Transparency with OLAF,” *in* Veerle Deckmyn, *Increasing Transparency in the European Union* 233 (2002).

¹⁸⁹ Commission notice 1997 O.J. (C23) 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).

The European Court of First Instance in *Verein für Konsumenteninformation v. Commission*,¹⁹⁰ 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.¹⁹¹ 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.¹⁹²

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.¹⁹³ 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.¹⁹⁴

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 FOIA¹⁹⁵ – 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

¹⁹⁰ *Verein für Konsumenteninformation*, 2005 E.C.R. II-13.

¹⁹¹ *Denavit 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).

¹⁹² 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>.

¹⁹³ 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.

¹⁹⁴ See *British American Tobacco International (Investments) Ltd. v. Commission*, Case 111/00, 2001 E.C.R. II-3000, ¶¶42-43.

¹⁹⁵ 5 U.S.C. § 552(b)(5)

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.¹⁹⁶

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.¹⁹⁷ 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.¹⁹⁸

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.¹⁹⁹

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

¹⁹⁶ European Data Protection Supervisor, *supra* note 51, at ¶11.

¹⁹⁷ See Council’s opinion in complaint to the European Ombudsman 1641/2003/OV made by Ms. Buitenweg, MEP, available at www.ombudsman.europa.eu/decision/en/031641.htm.

A pending case raises this issue. *Turco v. Council*, Case 84/03, 2003 E.C.R II-24.

¹⁹⁸ 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.

¹⁹⁹ Brinkhorst, *supra* note 28, at S130.

classified as “TRES SECRET/TOP SECRET,” “SECRET,” OR “CONFIDENTIEL.”²⁰⁰ 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 sensitive documents only be considered by security-vetted personnel.²⁰¹ It also excluded sensitive documents from listing in the Council’s Register.²⁰²

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.²⁰³

The definition does not cover documents classified “RESTREINT UE.” While the Commission has opined that this divergence may constitute “a potential source of incoherence,”²⁰⁴ the Council considers that this exclusion does not pose any problem in practice.²⁰⁵ In fact, a “classified” document that is not “sensitive” can only be withheld if an exception applies; if no exception applies, then the document must be declassified and disclosed.²⁰⁶

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.”²⁰⁷

²⁰⁰ 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).

²⁰¹ See generally de Leeuw, *supra* note 26, at 328; Bunyan, *supra* note 76.

²⁰² 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.

²⁰³ Council Decision, 2001/264/EC, 19 March 2001, 2001 O.J. (L 101) (adopting Council security regulations); Commission Decision 2001/844/EC, 29 Nov. 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).

²⁰⁴ 2004 Implementation Report, 3.3.

²⁰⁵ 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.

²⁰⁶ Commission Decision 2001/973, 29 Dec. 2001, 2001 O.J. (L 345) 94, at art. 6.

²⁰⁷ 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.

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,²⁰⁸ 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."²⁰⁹

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.²¹⁰

D. Review Of Decisions To Deny Access

1. Administrative Review (Confirmatory Applications)

Confirmatory applications under Article 7.2 may be filed by an applicant 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.²¹¹

The decision on the confirmatory application shall be notified to the applicant in writing, 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.²¹²

²⁰⁸ 5 U.S.C. § 552(b)(1).

²⁰⁹ 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.

²¹⁰ 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 Sept. 2003, 2003 O.J. (L 243) 1 (amending Regulation 354/83).

²¹¹ 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).

²¹² *Kuijjer v. Council*, Case 188/98, 2000 E.C.R. II-01959, ¶ 49.

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 2 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.²¹³

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*,²¹⁴ 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.²¹⁵

The Court, in reviewing a denial, may examine the requested document in camera, as is provided under the FOIA.²¹⁶ 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.²¹⁷ 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.”²¹⁸

Judicial review is available only to challenge (annul) a final decision capable of producing legal effects; hence, as under the FOIA,²¹⁹ an applicant must pursue a confirmatory application under Article 8 to exhaust administrative remedies before proceeding to court.²²⁰ 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

²¹³ 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#>.

²¹⁴ *Hautala*, 1999 E.C.R. II-2489.

²¹⁵ See Curtin, *supra* note 6.

²¹⁶ 552 U.S.C. § (a)(4)(B).

²¹⁷ Rules of Procedure of the Court of First Instance, art. 67(3) (effective 1 Feb. 2001). 2000 O.J. (L 322) 1, 4.

²¹⁸ Bauer, *supra* note 14, citing *Kuijer*, 2002 E.C.R. II-488, at ¶69.

²¹⁹ See, e.g., *Oglsby v. U.S. Dep’t of Army*, 920 F.2d 57, 61-61 (D.C. Cir. 1990).

²²⁰ See *Co-Frutta, v. Commission*, 2003 E.C.R. II-04441 at ¶¶29-33.

the case because the applicant had not utilized the procedure for requesting access under the Code of Conduct.²²¹

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.²²² Costs of the legal proceeding and attorneys fees may be assessed against the losing party.

3. Complaint To European Ombudsman

Complaining to the Ombudsman regarding denial of access to information is an alternative to judicial review²²³ (except where the applicant does not reside or have a registered office in a Member State²²⁴); the US has no counterpart to this institution, nor is there any other alternative to judicial review of denials of access under FOIA.²²⁵ The Ombudsman may not entertain an inquiry if there are parallel proceedings before the courts.²²⁶ 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.²²⁷

The Ombudsman begins an investigation by providing a copy of the complaint (which ordinarily is *not* treated as confidential²²⁸) 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

²²¹ 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.

²²² Athanasios Pitsiorlas v. Council and Banque Centrale Europeenee, Case 193/01 P, 2003 E.C.R. I-04837.

²²³ 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).

²²⁴ Treaty Establishing the European Community Art. 194.

²²⁵ Legislation introduced in 2005 would create an Office of Government Information to perform functions comparable to the European Ombudsman as regards access to government information. S. 394, 109th Congress, 1st Session.

²²⁶ 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 (Feb. 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).

²²⁷ Decision of the European Ombudsman on complaint 322/2003/IP, *available at* www.ombudsman.europe.eu/decision/en/030322.htm.

²²⁸ 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.*

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.²²⁹

If the Ombudsman finds that there has been maladministration²³⁰ by the institution by virtue of its failure to disclose the requested information or to follow required procedures, he will attempt 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.²³¹ 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 Report²³² 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.”²³³

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

²²⁹ 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>.

²³⁰ 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.

²³¹ 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.

²³² European Ombudsman Annual Report 1995, available at <http://www.euro-ombudsman.eu.int/report95/en/default.htm>.

²³³ Ian Harden, *supra* note 169, at 125. Harden summarizes Ombudsman complaints and decisions arising under the Code of Conduct, *id.* at 132-34.

‘maladministration,’ he may be unable to afford the complainant any relief.”²³⁴ 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 stigmatize maladministration²³⁵ and to pursue a compromise solution – both may be successful tools for wresting documents out of a bureaucracy.²³⁶

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.²³⁷

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.²³⁸

E. Dissemination Of Information Via The Register, Internet, Official Journal

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 1998,²³⁹ this was made available on the Internet after January 1, 1999.²⁴⁰ Initially,

²³⁴ 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 Gjerloff Bonnor, *The European Ombudsman: A Novel Source of Soft Law in the European Union*, 25 *Eur L. Rev.* 39, 53-54 (2000).

²³⁵ “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>.

²³⁶ 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.

²³⁷ 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.

²³⁸ See Roy Perry, “Special Reports Submitted by the European Ombudsman to the European Parliament,” in *The European Ombudsman—Origin, Establishment, Evolution* 186 (2005).

²³⁹ 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.

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,²⁴¹ Council,²⁴² and Parliament²⁴³ 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.²⁴⁴ 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.²⁴⁵

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.²⁴⁶

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

A under a March 1998 Decision, the Register of documents would contain unclassified Council documents. Public register of documents, *supra* note 202.

²⁴⁰ 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 Internet through the public register, without any application. Effective 3 Dec. 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.

²⁴¹ Register of documents of the European Commission:
http://europa.eu.int/comm/secretariat_general/sgc/acc_doc/index_en.htm.

²⁴² Register of documents of the Council: <http://register.consilium.eu.int/utfregister/frames/introfsEN.htm>.

²⁴³ Register of documents of the European Parliament:
<http://www4.europarl.eu.int/registre/recherche/Menu.cfm?langue=EN>.

²⁴⁴ 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).

²⁴⁵ 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."

²⁴⁶ *Kuijer*, 2002 E.C.R. II-488, ¶69.

Commission's response, which essentially accepted but attempted to explain the situation, did not justify the Register's shortcomings.²⁴⁷

The Parliament has also established a register of references to documents "drawn up or received by The European Parliament."²⁴⁸ In January 2006, the Parliament and Council established a Pollutant Release and Transfer Register to increase public access to environmental information.²⁴⁹

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.²⁵⁰ 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."²⁵¹ 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."²⁵² Commission rules list documents to be "automatically provided on request and, as far as possible, made directly accessible by electronic means."²⁵³ The Commission has established "Europe Direct" to answer questions and direct an inquiry "around the mass of information available."²⁵⁴

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.

²⁴⁷ Ombudsman Case 1764/2003/ELB, decision of 12 January 2006, discussed in Nikiforos Diamandouros, FOI: a European Perspective, *supra* note 235.

²⁴⁸ EP Rules Governing Public Access to European Parliament Documents, 2005 O.J. (C 289), 6.

²⁴⁹ Regulation (EC) No. 166/2006 of the EP and Council, 18 Jan. 2006, 2006 O.J. (L 33), 1.

²⁵⁰ http://europa.eu.int/comm/secretariat_general/sgc/acc_doc/index_en.htm.

²⁵¹ 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).

²⁵² *Id.* at 11.

²⁵³ 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).

²⁵⁴ See the portal at http://europa.eu.int/europedirect/index_en.htm.

3. Official Journal

The Official Journal (OJ) of the European Communities is available on paper or electronic form in the EU's 20 official languages.²⁵⁵ 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.

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.

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."²⁵⁶ The European Parliament has also given attention to amendments needed to strengthen the Access Regulation.²⁵⁷ 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.

²⁵⁵ See the portal at <http://europa.eu/languages/en/home>.

²⁵⁶ 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.

²⁵⁷ Motion for a European Parliament Resolution with recommendations to the Commission on access to the institutions' texts, 2004/2125(INI) (Provisional) 7.10.2005, PE 360.242v01-00, with amendments proposed 12.1.2006, PE 367.699v01-00.

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, data protection legislation in the US is limited to only some sectors, such as education records, consumer credit reports, and health care provider records.¹ Moreover, EU requirements are generally more stringent than US 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.”² 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.³

This section examines the protection of personal data in the EU. The discussion focuses on the regulatory processes used to protect personal data and the institutions that implement these protections. The chapter also considers three developments which 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.⁴ In addition, the effort to protect personal data has also come into conflict with promoting transparency in EU and member state institutions when data access would reveal personal data about EU residents. Finally, efforts protect personal data have conflicted with international trade because the EU seeks to ensure that personal data relating to EU residents which is transferred out of the EU receives an adequate level of protection.

¹ Family Education Rights and Privacy Act (1974) (codified at 20 U.S.C. §1232g); Fair Credit Reporting Act (1970) (codified at 15 U.S.C. §1681 et. seq.); Right to Financial Privacy Act (1978) (codified at 12 U.S.C. 3401 et. seq.); Health Insurance Portability and Accountability Act (2002) (codified at 42 U.S.C. §210).

² ECHR art. 8(1), available at <http://www.hri.org/docs/ECHR50.html#C.Art8>.

³ 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).

⁴ 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).

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.⁵ Directive 95/46⁶ 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 the previous directive for purposes of addressing the processing of personal data in the electronic communications sector.⁷

1. Directive 95/46

Directive 95/46 applies to the “processing” of “personal data” by “controllers.” The Directive has a broad definition for each of these elements

a. Personal Data. Personal data is “any information relating to an identified or identifiable natural person,” known as a “data subject.” The term “personal data” includes all information about a person, not only information about the person’s private life, such as economic and professional information.⁸ 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.”⁹ 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”¹⁰ Thus, the Directive protects any set of data, which if taken together, would make it possible to match personal data to a particular individual or to make it easier to identify that person.¹¹

Despite the broad definition of “personal data,” member states have disagreed how to determine when data “identifies” a person entitling that person to the protections mandated by the

⁵ 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.

⁶ 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>.

⁷ Council Directive 2002/58/EC, 2002 O.J. (L201) 37. available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_201/l_20120020731en00370047.pdf.

⁸ *Id.* at 50.

⁹ Council Directive 95/46, *supra* n. 6, at art. 2(a).

¹⁰ *Id.* at recital 26.

¹¹ CHRISTOPHER KUNER, EUROPEAN DATA PRIVACY LAW & ONLINE BUSINESS 5 (2003)

Directive.¹² These disagreements focus on how probable it must be that someone can determine a person's identity from the information in question. Should, for example, the issue be resolved by considering the data itself, the data and other information in possession of the data user, or by considering whether there is any possibility that the information in question can be traced back to the data subject?¹³

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.”¹⁴ 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”¹⁵ Since both governmental and private entities are “controllers” which “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* case¹⁶ confirms and illustrates the broad manner in 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 web site 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.¹⁷ Second, controllers are obligated to ensure the accuracy and completeness of such records, destroy personal data after it is no longer needed for a legitimate purpose,¹⁸ and implement appropriate technical and organizational measures to protect personal data against unlawful destruction or accidental loss, alteration, [and] unauthorized disclosure or access¹⁹ Controllers are also required to notify the member state

¹² 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.

¹³ *See id.* (describing differences among member states).

¹⁴ Council Directive 95/46, *supra* note 6, at art. 2(b).

¹⁵ *Id.* at art. 2(d).

¹⁶ Case C-101/01, Criminal Proceedings Against Bodil Lindqvist, 2003 ECR I-12971.

¹⁷ *Id.* at art. 6.

¹⁸ *Id.* at art. 6.

¹⁹ *Id.* at art. 17.

prior to the processing of certain types of personal data,²⁰ but member states can simplify or eliminate this requirement under several conditions,²¹ including when the controller appoints a “personal data protection official” responsible for ensuring compliance with the laws and regulations of the national authority.²² The member states have taken advantage of this exception, producing variation from country to country concerning when notification is not necessary.²³ Finally, controllers must provide data subjects with detailed information about what personal data they have about an individual,²⁴ and data subjects have the right to see such data, rectify errors or erase or block erroneous information,²⁵ seek judicial review of the breach of any rights, and receive compensation for any damages.²⁶

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.²⁷ Since “processing” includes the disclosure of personal data,²⁸ 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.²⁹ To process other types of information the controller must obtain the “unambiguous” consent of the data subject.³⁰ In order to “consent,” the data subject’s agreement to the processing of data relating to him or her must “freely given,” “specific” and “informed.”³¹ Because consent must at least be “unambiguous,” the Directive restricts the use

²⁰ *Id.* at art. 18-19.

²¹ *Id.* at art. 18.2-18.5

²² *Id.* at art. 18.2.

²³ 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.

²⁴ *Id.* at art. 10-11.

²⁵ *Id.* at art. 12.

²⁶ *Id.* at art. 22-23.

²⁷ *Id.* at art. 7.

²⁸ *See* note 14 & accompanying text.

²⁹ Directive 95/46, *supra* note 6, at art. 8.2(a).

³⁰ *Id.* at art. 7(a).

³¹ *Id.* at art. 2(h).

of long, complicated, and non-transparent consent forms,³² such as clicking “yes” on a Web site where the standard terms and conditions of the person is accepting are located somewhere else on the site under several layers of hyperlinks.³³

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,³⁴ and national laws and regulations differ. For example, countries have adopted different requirements concerning what constitutes adequate consent in the employment context,³⁵ and the Commission is considering whether an additional directive concerning employment information may be necessary to harmonize the regulatory approach to this issue.³⁶ 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.³⁷

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.³⁸ A controller can also process such information if it is “necessary” to comply with a legal obligation of the controller, protect the vital interests of the data subject, perform a task carried out in the public interest, or if it is “necessary” for the purposes of other legitimate interests except where such interests are overridden by the interest of the data subject in personal privacy.³⁹ 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.⁴⁰

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

³² 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. 134 (2005).

³³ KUNER, *supra* n.11, at 68.

³⁴ *Id.*

³⁵ Rehder & Collins, *supra* n. 32, at 158-59.

³⁶ See Commission Second State 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.

³⁷ KUNER, *supra* n. 11, at 68; Rehder & Collins, *supra* note 32, at 136.

³⁸ *Id.* at art. 7(b).

³⁹ *Id.* at art. 7(c)-(f).

⁴⁰ See Rehder & Collins, *supra* n. 32, at 134-36 (providing examples).

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.”⁴¹ In the *Lindquist* case, discussed earlier, the ECJ held that the establishment of the church website containing personal data did not qualify for the latter exception because the church bulletin revealed information about persons other than the author of the bulletin.⁴²

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.”⁴³ In *Lindquist*, the controller had argued that the creation of the church website was protected by general principles of freedom 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.⁴⁴ 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.⁴⁵

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.⁴⁶ Besides this general edict, the Directive takes three additional steps. First, it obligates a member state to establish a “supervisory authority,” which has the power to conduct investigations, to order the blocking, erasure or destruction of illegal data processing, and the authority to engage in legal proceedings to effectuate its orders.⁴⁷ This national privacy authority, which must “act with complete independence in exercising its functions,”⁴⁸ is also obligated to receive complaints alleging the breach of privacy rights from individuals or associations that represent such

⁴¹ Council Directive 95/46, *supra* n. 6, at art. 3.

⁴² *Lindquist*, note 16 *supra*.

⁴³ Council Directive 95/46, *supra* n. 6, at art. 9.

⁴⁴ *Lindquist*, *supra* n. 16, at ¶90.

⁴⁵ KUNER, *supra* n. 11, 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 (Feb. 25, 1997), available at http://europa.eu.int/comm/justice_home/fsj/privacy/docs/wpdocs/1997/wp1_en.pdf.

⁴⁶ Council Directive 95/46, *supra* n. 6, at art. 24.

⁴⁷ *Id.* at art. 28.1.

⁴⁸ *Id.*

individuals.⁴⁹ 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.⁵⁰

Third, Article 29 of the directive establishes an advisory “Working Party on the Protection of Individuals with Regard to the Processing of Data.”⁵¹ 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 which can be influential since they are often used by national courts and national data privacy authorities.⁵² Nevertheless, the working papers are not legally binding since the role of the Working Party is only advisory.⁵³ Despite its potential influence, meetings of the Working Party are closed, and it does not publish its agenda.⁵⁴

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 58/2002⁵⁵ 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.”⁵⁶ 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 in order to facilitate the investigation, detection, and prosecution of serious crime including terrorism.⁵⁷

Directive 58/2002 takes precedence over Directive 95/46 whenever one of its mandates is applicable,⁵⁸ although how the two directives interact concerning some issues is not yet clear.⁵⁹

⁴⁹ *Id.* at art. 28.4.

⁵⁰ *Id.* at art. 22-23.

⁵¹ *Id.* at art. 28.

⁵² KUNER, *supra* n. 11, at 10.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Council Directive 2000/58, *supra* n. 7.

⁵⁶ *Id.* at art. 3(1).

⁵⁷ 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. (L105) 54, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_105/l_10520060413en00540063.pdf.

⁵⁸ KUNER, *supra* n. 11, at 23-24.

⁵⁹ See Frederic Debussère, *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).

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.⁶⁰ The directive also regulates unsolicited communications, which are only permitted with opt-in consent,⁶¹ except that businesses can send unsolicited communications to their existing customers on an opt-out basis.⁶² 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.⁶³

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.⁶⁴ In addition, the Commission has a series of reports on data protection which contain a description of legislative and regulatory developments in each member state during the time period covered by the report.⁶⁵ This information reveals that member states have different policy positions on some data protection issues, and that member states have adopted different procedural protections.⁶⁶

⁶⁰ *Id.* at art. 4.

⁶¹ *Id.* at art. 13(1).

⁶² *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).

⁶³ *Id.* at art. 5(3).

⁶⁴ 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.

⁶⁵ *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/workinggroup/wpdocs/2005_en.htm; 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.

⁶⁶ Bignami, *supra* n. 4, at 827; see KUNER, *supra* n. 11, at 12-16 (describing differences in procedural protections among the Member States).

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.⁶⁷

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,⁶⁸ the varying enforcement activities of member states,⁶⁹ and varying approaches to regulating the processing of personal data in employment contexts.⁷⁰

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 information that includes personal data. The second conflict arises when an individual seeks information under a data access law 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.”⁷¹ 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.

⁶⁷ KUNER, *supra* n. 11, at 41.

⁶⁸ See note 23 & accompanying text.

⁶⁹ Article 29 Data Working Party, Declaration of the Article 29 Working Party on Enforcement adopted on 25th of November 2004, 1206704/EN WP 101, available at http://www.datenschutz-berlin.de/doc/eu/gruppe29/wp101/wp101_en.pdf.

⁷⁰ 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.

⁷¹ Directive 95/46, *supra* n. 6, at Art. 7(c).

a. Published Information. In the *Österreichischer Rundfunk and Others* case,⁷² the ECJ considered the application of Article 7(c) 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. After finding the information was “personal data” within the scope of Directive 95/96,⁷³ 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,”⁷⁴ both of which were issues to be determined by the German courts.⁷⁵ The ECJ also found that if the national courts concluded that disclosure of such data did not satisfy the previous tests, it could not satisfy Article 7(c) of Directive 95/96.⁷⁶

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 member state is still required to comply with Directive 95/46.⁷⁷ 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 95/46.⁷⁸

According to the Working Party, Article 7(f) confirms the previous interpretation.⁷⁹ 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).”⁸⁰ 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.”⁸¹

⁷² 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, Jul 19, 2003.

⁷³ This aspect of the case is discussed later in the chapter. See *infra* notes 209-210 & accompanying text.

⁷⁴ *Österreichischer Rundfunk and Others*, *supra* n. 72, at ¶88.

⁷⁵ *Id.* at ¶90.

⁷⁶ *Id.* at ¶91.

⁷⁷ 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), available at

http://europa.eu.int/comm/justice_home/fsj/privacy/docs/wpdocs/2001/wp46en.pdf

⁷⁸ *Id.* at 5.

⁷⁹ *Id.* at 6.

⁸⁰ Council Directive 95/46, *supra* note 6, at art. 7(f)..

⁸¹ *Id.* at art. 1(1).

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.”⁸² The Working Group warns, however, that member states should be aware that sensitive types of personal data are the subject of heightened protection under the Directive and are therefore entitled to enhanced protection under a balancing approach.⁸³

⁸² Data Protection Working Party, Opinion 5/2001, *supra* note 77, at 5.

⁸³ *Id.*

B. Extra-territorial application

The previous development concern 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. 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 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.

Directive 95/46 has extra-territorial application between 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.⁸⁴ The EU has determined that only a few countries meet this test, and that the United States is not one of them. This section discusses the extra-territorial application of Directive 95/46, and how personal data can be transferred between the EU and the US pursuant to its requirements.

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, a national authority must block information transfers to that country.⁸⁵ A member state can also determine adequacy on an *ad hoc* basis by approving a particular data transfer.⁸⁶ The data privacy authority is also obligated to report any finding that a country lacks adequate protections to the Commission,⁸⁷ 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 initiative action to block data transfers from all member states.⁸⁸ In taking any of these actions, the Commission must consult a comitology committee of Member State representatives⁸⁹ and seek the opinion of the Working

⁸⁴ Council Directive 95/46, *supra* note 6, at art. 25.

⁸⁵ 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.

⁸⁶ KONER, *supra* note 11, at 134.

⁸⁷ *Id.* at 25.3.

⁸⁸ *Id.* at art. 25.4-6.

⁸⁹ *Id.* at art. 26.3-4.

Party,⁹⁰ which as noted earlier, is made up of representatives from the member state privacy authorities.⁹¹

Despite these procedures, the Commission has been largely responsible for making adequacy determinations. No member state has decided on its own to block a data transfer,⁹² apparently because of the potential political ramifications.⁹³ At the same time, no member state has approved a country's laws as being adequate either.⁹⁴ Instead, the Commission has on its own approved some countries as having an adequate level of data protection (Argentina, Canada, Isle of Man Guernsey, and Switzerland),⁹⁵ has considered other countries for approval, and has engaged in bi-lateral negotiations with other countries to obtain additional safeguards.⁹⁶

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.⁹⁷ If there is no consent, a data transfer is still possible if it necessary to perform a contract between the data subject or to 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, necessary in order to protect the vital interests of the data subject, or the transfer is from a data base to which the public in the member state has access according to national laws on data access.⁹⁸

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.⁹⁹ If a national

⁹⁰ *Id.* at art. 30.1(b).

⁹¹ See note 51 & accompanying text.

⁹² See Bignami, *supra* note 4, at 832.

⁹³ KONER, *supra* note 11, at 133.

⁹⁴ *Id.*

⁹⁵ 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.

⁹⁶ Bignami, *supra* note 4, at 831.

⁹⁷ Council Directive 95/46, *supra* note 6, at art. 26.1.

⁹⁸ *Id.*

⁹⁹ *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. at art. 26.2.

privacy authority approves the transfer of personal data pursuant to this exception, it must notify the Commission and other member states of its approval.¹⁰⁰ If the Commission or a member state objects to the transfer, the Commission will make a final decision whether to approve the data transfer.¹⁰¹ Before taking this decision, the Commission must consult the comitology committee¹⁰² and seek to opinion of the Working Party,¹⁰³ as it is required to do concerning member state actions that block the transfer of personal data.

3. Implementation

EU officials have expressed concern about the lax enforcement of the ban on transferring personal data to third countries which 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.”¹⁰⁴ 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.”¹⁰⁵ 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.”¹⁰⁶

The limited number of notifications may 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 found that member states have adopted significantly differing interpretations of Article 26(1), which has enabled controllers to engage in “forum shopping among Member States, depending on how loosely these provisions are being interpreted.”¹⁰⁷ The Committee has responded by recommending that national authorities should

¹⁰⁰ *Id.* at art. 26.3.

¹⁰¹ *Id.* at art. 26.3.

¹⁰² *Id.* at art. 26.3-4.

¹⁰³ *Id.* at art. 30.1(b).

¹⁰⁴ 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.

¹⁰⁵ Bignami, *supra* note 4, at 834.

¹⁰⁶ Rehder & Collins, *supra* note 32, at 157.

¹⁰⁷ 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.

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.¹⁰⁸

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 US¹⁰⁹ and the EU¹¹⁰ have taken advantage of this provision to reach a Safe Harbor agreement which establishes a process for United States companies to qualify for the transfer of personal data from the EU. Firms in the United States which 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 long and protracted negotiations, the Commission adopted the agreement despite a 279 to 259 vote in the EU Parliament which endorsed a report of a consumer rights committee critical of the adequacy of remedies in the agreement.¹¹¹ The Commission was not bound by the vote because 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.¹¹²

The details of the safe harbor process are found in the safe harbor principles,¹¹³ a set of frequently asked questions (FAQs) and responses,¹¹⁴ the Commission decision approving the agreement,¹¹⁵ and various other documents relating to the agreement.¹¹⁶ The FAQ's, according to the Department of Commerce, are intended to serve as "authoritative guidance" concerning implementation of the principles.¹¹⁷

¹⁰⁸ *Id.* at 17.

¹⁰⁹ Department of Commerce, Issuance of Safe Harbor Principles and Transmissions to the European Commission, 65 Fed. Reg. 45666 (2000).

¹¹⁰ Commission Decision 2000/520, 20000 O.J. (L21) 5, available at [http://personuvernd.is/tolvunefnd.nsf/Files/2000_520_EC/\\$file/2000_520_EC.pdf](http://personuvernd.is/tolvunefnd.nsf/Files/2000_520_EC/$file/2000_520_EC.pdf).

¹¹¹ 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).

¹¹² *Id.* at 448.

¹¹³ Safe Harbor Privacy Principles, available at http://www.export.gov/safeharbor/sh_documents.html.

¹¹⁴ *Id.*

¹¹⁵ Commission Decision 2000/520, *supra* note 110.

¹¹⁶ 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.

¹¹⁷ Department Commerce, *supra* note 109, at 45,666.

An organization can indicate its intent to comply with the principles in three ways.¹¹⁸ It can join a self-regulatory privacy program that adheres to the principles, develop its own self-regulatory privacy policies which conform to the principles, or it can 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.¹¹⁹ To be eligible for the safe harbor presumption, organizations must self-certify to the Department of Commerce its adherence to the principles.¹²⁰

The Principles, which are similar to the mandates in Directive 95/46, establish seven obligations.¹²¹

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 which is incompatible with the purpose for which it was originally collected, and the use of personal data for purposes which 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.¹²² 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 the agent 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.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ FAQ 6 - Self-Certification, available at <http://www.export.gov/safeharbor/FAQ6SelfCertFINAL.htm>.

¹²¹ Safe Harbor Principles, *supra* note 113.

¹²² FAQ 1 - Sensitive Data, available at <http://www.export.gov/safeharbor/FAQ1sensitivedataFINAL.htm>.

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 it has been collected or in ways that data subject has authorized. An organization must also 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 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.¹²³ 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 US, it must agree to cooperate with EU data protection officials if a violation occurs.¹²⁴ This requirement ensures that European employees do not have to seek a remedy in the US for violation of the Principles.¹²⁵

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 Principle, including sanctions which 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 to audit.¹²⁶

Finally, an organization that certifies that it will adhere to the Principles may be able to avoid compliance in three circumstances.¹²⁷ First, it can alter compliance as necessary to meet national

¹²³ 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.

¹²⁴ FAQ 9 - Human Resources, available at <http://www.export.gov/safeharbor/FAQ9HumanResFINAL.htm>.

¹²⁵ Rehder & Collins, *supra* note 32, at 148.

¹²⁶ FAQ 7 – Verification, available at <http://www.export.gov/safeharbor/Faq7verifFINAL.htm>.

¹²⁷ *Id.*

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. 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 such exceptions or derogations are applied in comparable contexts.

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.¹²⁸ By the time of a 2004 staff report, there had been 400 self-certifications, which was still “lower” than the Commission initially had anticipated.¹²⁹ There are currently over 950 currently registered participants.¹³⁰ The 2004 report also reviewed the information privacy policies of companies which were self-certified and which 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.¹³¹ In light of these compliance problems, the report was critical of the FTC for its lack of effort to ensure compliance with the principles.¹³²

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.¹³³ Other voices are not as sanguine. Some data authorities and legislators believe the Safe Harbor process does not offer sufficient protection for personal data.¹³⁴ The Working Party also appears to be

¹²⁸ 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 US 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.

¹²⁹ 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 US 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>.

¹³⁰ Department of Commerce, Safe Harbor List, available at <http://web.ita.doc.gov/safeharbor/shlist.nsf/webPages/safe+harbor+list!OpenDocument&Start=958>.

¹³¹ *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.

¹³² 2004 Safe Harbor Working Paper, *supra* note 129, at 10-11.

¹³³ *Id.* at 13-14.

¹³⁴ KUNER, *supra* note 11, at 146.

skeptical of significant aspects of the process.¹³⁵ Professor Reidenberg doubts the FTC has jurisdiction to enforce the provisions of the Safe Harbor Agreement in light of case law holding the agency does not have statutory authority to protect American business interests or foreign consumers.¹³⁶

Because of the economic importance of data transfers to the US, 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.”¹³⁷

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 inadequate data protection if the controller furnishes adequate safeguards using contractual clauses or other means. Based on this clause, the US and the Commission also negotiated an agreement addressing the transfer of airline passenger data from the EU to the US.¹³⁸ 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 US.¹³⁹

There was considerable opposition to the agreement on the ground it did not sufficient protect personal privacy.¹⁴⁰ During the negotiations for a final agreement, the Article 29 Working Party

¹³⁵ 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.

¹³⁶ Joel R. Reidenberg, *E-Commerce and Trans-Atlantic Privacy*, 38 HOUS. L. REV. 717, 741 (2001).

¹³⁷ KUNER, *supra* note 11, at 146.

¹³⁸ 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 US 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.dhs.gov/interweb/assetlibrary/CBP-DHS_PNRUndertakings5-25-04.pdf.

¹³⁹ 49 U.S.C. §44909(c); see also 19 C.F.R. §122.49a (implementing regulations).

¹⁴⁰ Objections included that the US 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 4, at 864.

expressed a number of reservations about the scope, nature, and use of the information that the US proposed to collect,¹⁴¹ as did data privacy officials in the member states,¹⁴² and the EU Parliament passed two resolutions criticizing the Commission's conduct of the negotiations.¹⁴³ After the Parliament approved a resolution condemning the Commission's decision to approve the agreement,¹⁴⁴ it challenged the agreement in the ECJ.¹⁴⁵ The ECJ permitted European Data Supervisor to intervene in the law suit to support Parliament's position.¹⁴⁶

In June 2006, the ECJ annulled the agreement.¹⁴⁷ Following the recommendation of the Advocate General,¹⁴⁸ the court determined that the Commission lacked authority to negotiate the agreement pursuant to Directive 95/46 because it was primarily concerned with safeguarding public security and law-enforcement. By comparison, Directive 95/46 addresses the protection of personal privacy in the context of commercial transactions in the EU and elsewhere. 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."¹⁴⁹ There had been no response to the decision by the Commission at the time this chapter was written.

¹⁴¹ 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.

¹⁴² 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).

¹⁴³ 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>.

¹⁴⁴ 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 US 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>.

¹⁴⁵ 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.

¹⁴⁶ Order of the Court, *European Parliament v. Council of the European Union*, Case C-317/04 (March 17, 2005).

¹⁴⁷ 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 I-1117, available at <http://curia.eu.int/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>.

¹⁴⁸ 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>.

¹⁴⁹ Cases C-317/04 & C-318/04, *supra* note 147, at ¶57.

7. Contract Clauses

The Safe Harbor and aviation agreements legalized data transfers to the US because these agreements furnish 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.¹⁵⁰ 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.¹⁵¹ 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.¹⁵² 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.¹⁵³ The second type of transfer is more problematic because the original controller loses control of the personal data when it is transferred to another controller.¹⁵⁴ 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.¹⁵⁵ In 2005, the Commission responded by approving standard controller-to-controller contract clauses proposed by seven business associations.¹⁵⁶

The standard contract provisions expressly authorize data subjects to enforce their rights as third-party beneficiaries for specific breaches of the contract clauses.¹⁵⁷ This gives employees the capacity to obtain compensation as a result of a breach of a contract clause by either the data exporter or importer.¹⁵⁸

¹⁵⁰ See note 99 & accompanying text.

¹⁵¹ 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.

¹⁵² 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

¹⁵³ Rehder & Collins, *supra* note 32, at 140.

¹⁵⁴ *Id.*

¹⁵⁵ See KUNER, *supra* note 11, at 150-52; Huie, Larabee & Hogan, *supra* n. 3, at 451.

¹⁵⁶ 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.

¹⁵⁷ Commission Decision 2001/497/EC, *supra* n. 151, at Clause 3; Commission Decision 2002/16/EC, *supra* n. 152, at Clause 3.

¹⁵⁸ Rehder & Collins, *supra* note 32, at 141.

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.¹⁵⁹ 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.”¹⁶⁰ 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.¹⁶¹ 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.¹⁶²

In addition to making the Code binding, data subjects must have a remedy under the Code for its breach.¹⁶³ A company can do this by making data subjects a third-party beneficiary of the Code,¹⁶⁴ as in standard contract remedies.¹⁶⁵ Whatever the source of the remedy, it should at least match the rights set forth in the Controller-to-Controller standard contractual clauses.¹⁶⁶

Codes of conduct are subject to the approval of the data protection authority in the member state in which the transfer of data originates.¹⁶⁷ Moreover, the approval of one member state is not binding on other member states,¹⁶⁸ although the EU is seeking to promote the cooperation of various member state data authorities.¹⁶⁹

¹⁵⁹ See note 99 & accompanying text.

¹⁶⁰ 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.

¹⁶¹ Rehder & Collins, *supra* n. 32, at 152.

¹⁶² *Id.*

¹⁶³ Working Party On Binding Corporate Rules, *supra* n. 160, at 11.

¹⁶⁴ Rehder & Collins, *supra* n. 32, at 153.

¹⁶⁵ See notes 157-158& accompanying text.

¹⁶⁶ Working Party On Binding Corporate Rules, *supra* n. 160, at 12.

¹⁶⁷ See note 100 & accompanying text.

¹⁶⁸ Rehder & Collins, *supra* n. 32, at 155.

¹⁶⁹ Working Party On Binding Corporate Rules, *supra* n. 160, at 20.

C. Regulation 45/2001

Directive 95/46 establishes the requirements and framework for the protection of personal data in the member states. Regulation 45/2001¹⁷⁰ serves the same function for personal data in the possession of EU institutions. While the US has no counterpart to Directive 95/46, the Privacy Act¹⁷¹ in the United States operates much like Regulation 45/2001. 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 afforded 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”¹⁷² Both “personal data”¹⁷³ and “processing”¹⁷⁴ are defined in the same way as they are in Directive 95/46. 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.¹⁷⁵ Furthermore, the regulation prohibits the processing personal data without the “unambiguous” consent of an individual or unless the processing fits within a list of other exceptions.¹⁷⁶ If, however, the processing concerning 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.¹⁷⁷ The reader will recall that in order to obtain “explicit”

¹⁷⁰ Commission Regulation 45/2001, 2000 O.J. (L8) 1; available at http://147.67.4.5/eur-lex/pri/en/oj/dat/2001/l_008/l_00820010112en00010022.pdf.

¹⁷¹ 5 U.S.C. §552a.

¹⁷² Commission Regulation 45/2001, *supra* note 170, at art. 2(d).

¹⁷³ *Id.* at art. 2(a); *see* note 9 & accompanying text (definition of “personal data” in Directive 45/2001).

¹⁷⁴ Commission Regulation 45/2001, *supra* note 170, at art; *see* note 14 & accompanying text (definition of “processing” in Directive 45/2001).

¹⁷⁵ Commission Regulation 45/2001, *supra* note 170, at art. 4-6.

¹⁷⁶ *Id.* at art. 5.

¹⁷⁷ *Id.* at art 10.

consent, a controller must use an “opt-in” method of obtaining consent.¹⁷⁸ EU institutions are prohibited from transferring data to other recipients which are not subject to Directive 95/46 or which do not provide an adequate level of protection,¹⁷⁹ thereby giving the Regulation extra-territorial application. Some limited types of disclosures, however, are exempted from some of the prior requirements.¹⁸⁰

2. Remedies

In order 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.¹⁸¹ Second, an individual has the right to block the processing of information in certain circumstances,¹⁸² 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.¹⁸³ Third, the European Court of Justice has jurisdiction to hear all disputes relating to compliance including claims for damages.¹⁸⁴ Finally, an individual can bring a complaint to the European Data Supervisor, which is discussed in the following section.

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.¹⁸⁵ 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.¹⁸⁶ The Supervisor has the power to order the rectification, blocking, erasure, or destruction of data processed in breach of

¹⁷⁸ See *infra* notes 29-37 & accompanying text (discussing the distinction between “unambiguous” and “explicit” consent”).

¹⁷⁹ *Id.* at art 9.

¹⁸⁰ *Id.* at art 20.

¹⁸¹ *Id.* at art 11-12.

¹⁸² Commission Regulation 45/2001, *supra* note 170, at art 15.

¹⁸³ *Id.* at art 16.

¹⁸⁴ *Id.* at art. 32.

¹⁸⁵ *Id.* at art. 41-42.

¹⁸⁶ *Id.* at art 46.

the regulation, impose temporary or permanent bans on the processing of specific information, refers disputes to the European Court of Justice, and intervene in disputes filed by other persons or entities in the ECJ.¹⁸⁷

A data subject can file a complaint with the Data Protection Supervisor without prejudicing any right to a judicial remedy.¹⁸⁸ 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. The European Court of Justice has jurisdiction to hear all disputes relating to compliance, including claims for damages.¹⁸⁹

Second, each community institution must appoint a “Data Protection Officer” who has the responsibility of ensuring the institution’s compliance with the regulation.¹⁹⁰ 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.”¹⁹¹ 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 the Regulation 45/2001.¹⁹² The institution must also notify the Officer prior to the processing of personal data and give detailed information about the planned operation.¹⁹³ 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.¹⁹⁴

4. Transparency

The EU has established a significant regulatory regime to protect personal data in the possession of EU entities which 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 governmental 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

¹⁸⁷ *Id.* at art. 47.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at art. 32.

¹⁹⁰ *Id.* at art. 24.

¹⁹¹ *Id.* at art. 24.

¹⁹² *Id.* at 24.

¹⁹³ *Id.* at art 25.

¹⁹⁴ *Id.* at art 27.

Communities or other legal instruments adopted on the basis thereof”¹⁹⁵ If, therefore, the data access regulation requires the disclosure of personal data, Regulation 45/2001 permits such a disclosure. The data 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.”¹⁹⁶

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.”¹⁹⁷ Moreover, in contrast with other disclosure exceptions, the privacy exception is not subject to an overriding public interest in disclosure.¹⁹⁸ 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.¹⁹⁹

These characteristics distinguishes Article 4.1 from the privacy exception of the Freedom of Information Act (FOIA), which permits the disclosure of personal information unless it would “constitute a clearly unwarranted invasion of personal privacy.”²⁰⁰ Understandably, courts in the United States regard this language as favoring disclosure over the protection of privacy.²⁰¹

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 a narrower interpretation of Article 4.1, which 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.

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.

¹⁹⁵ *Id.* at art 5(a).

¹⁹⁶ Commission Regulation 1049/2001, art. 4, 2001 O.J. (L. 145), 43.

¹⁹⁷ *Id.* (emphasis added).

¹⁹⁸ 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.

¹⁹⁹ See European Data Protection Supervisor, Public Access to Documents and Data Protection §2.4.3 (July 2005), available at http://www.edps.eu.int/publications/policy_papers/Public_access_data_protection_EN.pdf.

²⁰⁰ 5 U.S.C. 552(6).

²⁰¹ See, e.g., *Kurzon v. HHS*, 649 F.2d 65, 67 (1st Cir. 1981) (the case in which “the calculus unequivocally supports withholding is rare because Congress has weighted the balance so heavily in favor of disclosure”)

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 apply, 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. The beer company sought access to the names of the persons who attended the meeting, which the Commission denied on the grounds that Directive 45//2001 prevented it from disclosing the identities of the persons concerned without their express permission.²⁰² 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.²⁰³

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 that relate 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,²⁰⁴ which reads: "Everyone has the right to respect for his or her private and family life, home, and communications."²⁰⁵ 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."²⁰⁶

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

²⁰² Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the European Commission in complaint 713/98/IJH (Nov. 23, 2000), at 1-4, available at <http://www.euro-ombudsman.eu.int/special/pdf/en/980713.pdf>.

²⁰³ 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>.

²⁰⁴ Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the European Commission in complaint 713/98/IJH (Nov. 23, 2000), available at <http://www.euro-ombudsman.eu.int/special/pdf/en/980713.pdf>.

²⁰⁵ European Convention on Human Rights, art. 8.1, available at <http://www.hri.org/docs/ECHR50.html#C.Art8>.

²⁰⁶ Special Report from the European Ombudsman, *supra* note 204, at ¶ 2.7.

capacity, while they are taking part in public decision making on their own initiative or while they try to influence such decision making.”²⁰⁷

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 relating that arise in a governmental or business context may be protected by the language in the data access regulation.²⁰⁸ He bases this interpretation on a decision of the ECJ involving Directive 95/46.

In *Österreichischer Rundfunk and Others* case,²⁰⁹ 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,²¹⁰ 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 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*,²¹¹ 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.”²¹² 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.”²¹³ *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

²⁰⁷ Parliament's resolution supporting Ombudsman on access to public information overriding the secrecy of personal data in EU institutions' hands (Dec. 12, 2001), available at <http://www.publicinfo.net/forprint.php?allvars=180204128755000000202001-12-140i>.

²⁰⁸ European Data Protection Supervisor, Public Access to Documents and Data Protection (July 2005), at §4.3.3, available at http://www.edps.eu.int/publications/policy_papers/Public_access_data_protection_EN.pdf.

²⁰⁹ Case C-465/00, Rechnungshof v. Österreichischer Rundfunk and Others, 2003 ECR I-4989.

²¹⁰ See notes 73 & accompanying text.

²¹¹ (2000) 30 E.H.R.R. 843.

²¹² European Convention on Human Rights, art. 8.1, available at <http://www.hri.org/docs/ECHR50.html#C.Art8>.

²¹³ *Id.* at art. 8.2

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.²¹⁴

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,²¹⁵ he also maintains that disclosure of certain types of information in public records do involve a person’s privacy. Specifically, personal data falls within the scope of the privacy exception of the public 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 which a person normally treats as confidential.²¹⁶ Moreover, because of proportionality, an institution can only withhold those portions of the document that undermine the privacy interest.²¹⁷

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. Moreover, since the EU gives extra-territorial application to Directive 95/46, the transmission of personal information from the EU to the US 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

²¹⁴ *Amann*, *supra* note 211, at 845, ¶ 2(a).

²¹⁵ European Data Protection Supervisor, *supra* note 208, at §4.3.1.

²¹⁶ *Id.* at §4.3.3.

²¹⁷ *Id.* at §4.2.2-4.3.3.

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 US because of the stronger commitment to protecting personal data. In the US, 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 US 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 US. 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 US 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.

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 similar range of documents to those available from the US government, although this is generally done as a matter of policy rather than legal obligation in the EU. 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 US.

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 US counterpart. Member states and private entities, however, are subject to a Data Protection Directive which has no US 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 disclose 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 “codes of conduct” to spell out disclosure and open-government requirements. While disclosure practices in the EU and US 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 US courts of maintaining public dockets. The disclosure practices of the EU institutions vary, and those who seek information need to consult the codes of procedure of each institution and their respective websites.

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 US 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 US has no comparable legislation to the Data Protection Directive. Data protection legislation in the US is limited to only some types of industries, and the EU protection requirements are generally more stringent than US 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 US, 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 US, the precise contours of these exceptions have not yet been definitively established.