

TRANSPARENCY

DRAFT of 6/30/06

CHAPTER OUTLINE

I. INTRODUCTION: OVERVIEW OF TOPIC AND SCOPE OF THIS CHAPTER..... 11

- A. “Transparency:” The Promise of All Good Things11
- B. Scope of this Chapter14

II. INFORMATION ABOUT, AND PARTICIPATION IN GOVERNMENT PROCESSES AT THE COMMUNITY LEVEL . 16

A. The Formal Framework: “Soft Law” and the General Absence of External enforceability Outside the Area of Environmental Matters16

B. Information About How The Institutions Work18

- 1. The Commission18
 - a. Meetings18
 - b. Monitoring the Commission’s Policy Program19
 - c. Information About the Co-Decision Procedure (and Other Commission Inter-Institutional Communications)20
 - d. Information About the Comitology Procedure21
 - e. Information About the Process of Obtaining External Expert Advice22
 - f. Miscellaneous Documents About the Commission’s Processes Available on its Site23
 - g. General Duty To Provide Information About Commission Procedures and Appeals25
- 2. The European Parliament25
 - a. Information About Organization and Operation25
 - b. Following Parliament’s Process Through Its Principal Legislative Procedures31
 - c. Miscellaneous Documents Available34
- 3. The Council35
 - a. Structure and Membership35
 - b. Meetings & Process38

C. Obligations to Allow to Access to, or Participation in, Institutional Processes42

- 1. The Commission42
 - a. Access to Meetings42
 - b. Participation, including Consultation43
- 2. The European Parliament44
 - a. Access to Meetings44
 - b. Participation45
- 3. The Council45
 - a. Access to Meetings and Debates45

| | |
|---|-----------|
| b. Participation | 46 |
| D. Obtaining Information about Decisional Outcomes | 46 |
| 1. The Commission | 46 |
| 2. The European Parliament..... | 47 |
| a. Explanation of Votes | 47 |
| b. The Right of Petition..... | 47 |
| 3. The Council | 49 |
| E. General Obligations to Respond to Queries from the Public | 49 |
| 1. The Commission | 49 |
| a. Inquiries Generally..... | 49 |
| b. Complaints | 50 |
| 2. The European Parliament..... | 51 |
| 3. The Council | 51 |
| | |
| III. ACCESS TO DOCUMENTS..... | 52 |
| | |
| A. Public Access To Documents: Regulation (EC) No 1049/2001..... | 52 |
| 1. Access To Documents Generally | 52 |
| 2. Application To Parliament, Council, Commission, And Other Entities | 53 |
| a. Parliament, Council, and Commission..... | 53 |
| b. Other EU Entities..... | 55 |
| c. Courts..... | 55 |
| d. Member States..... | 56 |
| 3. Brief History Of Adoption..... | 56 |
| a. Code of Conduct On Public Access. | 56 |

| | |
|--|-----------|
| b. Adoption of Access Regulation | 59 |
| 4. Overview And Basic Principles | 59 |
| B. Administrative Provisions Governing Access..... | 60 |
| 1. Who May Obtain Access | 60 |
| 2. Documents Covered..... | 62 |
| 3. Procedures For Obtaining Access | 64 |
| 4. Repetitive Or Burdensome Requests | 64 |
| 5. Time Limits | 67 |
| 6. Charges Or Fees..... | 67 |
| 7. Response To Initial Applications..... | 68 |
| 8. Disclosure Of Segregable Portions Of Documents..... | 68 |
| 9. Reasons For Refusal | 69 |
| 10. Administration Of The Regulation | 71 |
| a. Council..... | 71 |
| b. Commission..... | 71 |
| c. Parliament..... | 71 |
| 12. Applicability To Documents From Other Institutions Or Member States..... | 73 |
| 13. Exceptions – Generally | 75 |
| a. the public interest as regards:..... | 75 |
| b. privacy and integrity of the individual..... | 75 |
| 14. Other Provisions..... | 77 |
| a. Conformity of Other Access Rules..... | 77 |
| b. Historical Archives..... | 78 |
| c. Annual Reports..... | 78 |

| | |
|--|-----------|
| d. Interinstitutional Committee | 79 |
| e. Training | 79 |
| C. Exceptions..... | 79 |
| 1. Generally..... | 79 |
| a. the public interest as regards | 80 |
| b. privacy and integrity of the individual, in particular in accordance with community | 80 |
| 2. Public Interests..... | 81 |
| a. Security. | 81 |
| b. International Relations. | 81 |
| c. Defence And Military Matters..... | 82 |
| 3. Privacy Interests..... | 82 |
| 4. Court Proceedings..... | 83 |
| 5. Legal Advice..... | 84 |
| 6. Commercial Interests | 85 |
| 7. Inspections, Investigations And Audits | 85 |
| 8. Internal Use Documents..... | 86 |
| 9. Classified Or Sensitive Documents..... | 87 |
| 10. Time Limit Applied To Exempt Documents | 89 |
| D. Review Of Decisions To Deny Access..... | 89 |
| 1. Administrative Review (Confirmatory Applications)..... | 89 |
| 2. Judicial Review..... | 90 |
| 3. Complaint To European Ombudsman..... | 91 |
| E. Dissemination Of Information Via The Register, Internet, Official Journal..... | 93 |
| 1. Public Registers Of Council and Parliament Documents..... | 93 |
| 2. Internet Access..... | 95 |
| 3. Official Journal | 96 |
| F. Conclusion..... | 96 |

| | |
|---|------------|
| IV. DATA PROTECTION | 97 |
| A. Directives | 98 |
| 1. Directive 95/46 | 98 |
| a. Personal Data | 98 |
| b. Data Processing | 99 |
| c. Acquisition, Maintenance, and Accuracy | 99 |
| 2. Consent | 100 |
| 3. Exceptions | 101 |
| 4. Regulatory Institutions | 102 |
| 5. Directive 58/2002 | 103 |
| 6. Member States | 104 |
| 7. Transparency | 105 |
| a. Published Information | 106 |
| b. <i>Data Access Laws</i> | 106 |
| B. Extra-territorial application | 108 |
| 1. Adequate Level of Protection | 108 |
| 2. Exceptions | 109 |
| 3. Implementation | 110 |
| 4. Safe Harbor Agreement | 111 |
| 5. Safe Harbor Implementation | 114 |
| 6. Aviation Passenger Data | 115 |
| 7. Contract Clauses | 117 |
| 8. Codes of Conduct | 118 |
| C. Regulation 45/2001 | 119 |
| 1. Requirements | 119 |
| 2. Remedies | 120 |
| 3. Regulatory Institutions | 120 |
| 4. Transparency | 121 |
| a. Commission Decisions | 122 |
| b. Ombudsman's Interpretation | 123 |
| c. Data Protection Supervisor | 124 |
| D. Conclusion | 125 |
| V. CHAPTER CONCLUSION | 127 |

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; IIB2b.

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*aii*.

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."

