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**Rights and Remedies for Public Access to  
Documents as an Aspect of Multidimensional  
Transparency within the European Union.**

**Roy William Davis**

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**Thesis submitted for the degree of  
Doctor of Philosophy.**

**University of Durham  
2002.**



14 JUN 2002

**Roy William Davis: *Rights and Remedies for Public Access to Documents as an Aspect of Multidimensional Transparency within the European Union.***

**Thesis submitted for the degree of Doctor of Philosophy, University of Durham, 2002.**

**Abstract.**

For some time, academics, politicians and officials within the European Union have been debating the Union's legitimacy. Broadly speaking, legitimacy concerns the (lack of) esteem in which citizens of the Union hold the Union's laws, policies and institutions. In order to legitimate the Union, 'to bring Europe closer to its citizens', and to democratise the Union's law- and policy-making processes, so that ordinary Europeans will more willingly agree to further integration and more readily obey Union laws, transparency has been called for.

This thesis first seeks to define transparency. If legitimacy is to be achieved by means of an increase in transparency, the concept of transparency must be multidimensional, including a right of the public to scrutinise and to participate in decision-making processes. Various claims concerning transparency-related issues are considered, including the claim that the right of public access to government-held documents is a fundamental human right. The thesis then asks whether the institutions and Member States are actively seeking to provide an appropriate level of transparency, and, if not, whether transparency as officially defined by the institutions and Member States – i.e. transparency as a right of public access to documents held by the institutions - is capable of providing legitimacy. The substantive rules governing public access to such documents are examined, and the thesis evaluates the effectiveness of the remedies available to persons to whom such access is denied. The creation of a new institution is recommended, to ensure the effectiveness of the Union's transparency policy, with a view to legitimating and democratising the Union. This new institution could facilitate a change in the Union's culture, from a culture of secrecy to a culture of openness and willingness to permit public scrutiny of, and public participation within, the Union's decision-making processes.

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### **Declaration.**

No part of this thesis has previously been submitted for the award of a degree in the University of Durham or any other university. The thesis is based solely upon the author's research.

### **Statement of Copyright.**

The copyright of this thesis rests with the author. No quotation from it should be published without his prior written consent and information derived from it should be acknowledged.

### **List of Abbreviations.**

CMLRev	Common Market Law Review
EHRLR	European Human Rights Law Review
ELRev	European Law Review
ICLQ	International and Comparative Law Quarterly
JBL	Journal of Business Law
JCMS	Journal of Common Market Studies
MLR	Modern Law Review
OJ	Official Journal of the European Communities
OJLS	Oxford Journal of Legal Studies

## Table of Legislation.

### EC Legislation.

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Protocol on Subsidiarity and Proportionality, OJ 1997 C 340/105

#### *Regulations*

Regulation No. 17, OJ Sp. Ed. 1962, 204/62

Council Regulation (EEC) No. 2423/88, OJ 1998 L 209/1

Council Regulation (EC) No. 381/2001, OJ 2001 L 57/5

Council and European Parliament Regulation (EC) No. 1049/2001, OJ 2001 L 145/43

#### *Directives*

Council Directive 79/409/EEC, OJ 1979 L 103/1

Council Directive 85/337/EEC, OJ 1985 L 175/40, as amended by Council Directive 97/11/EC, OJ 1997 L 73/5

Council Directive 90/313/EEC, OJ 1990 L 158/56

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Commission and Council Decision 93/730/EC, OJ 1993 L 340/41

Council Decision 93/731 EC, OJ 1993 L 340/43, amended by Council Decision 96/705 Euratom, ECSC, EC, OJ 1996 L 325/19

Commission Decision 94/90/ECSC, EC, Euratom, OJ 1994 L 46/58

Commission Decision 94/815/EC of 30 November 1994, OJ 1994 L 343/1

Council Act of 26 July 1995 drawing up the Convention on the establishment of a European Police Office (Europol), OJ 1995 C 316

European Court of Auditors Decision 18/97, OJ 1998 C 295/1

Committee of the Regions Decision 397D0165(01), OJ 1997 L 351/70

Council Decision 2000/527/EC, OJ 2000 L 212/9

Council Decision 2000/23/EC, OJ 2000 L 9/22

Council Decision 2001/320/EC, OJ 2001 L 111/29

**United Kingdom Legislation.**

Police and Criminal Evidence Act 1984

Freedom of Information Act 2000

**Other Legislation.**

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Case 32/62, *Alvis v Council* [1963] ECR 49

Case 4/73, *Nold v Commission* [1974] ECR 491

Case 17/74, *Transocean Marine Paint v Commission* [1974] ECR 1063

Case 85/76, *Hoffman-La Roche & Co. AG v Commission* [1979] ECR-461

Case 60/81, *International Business Machines Corporation v Commission* [1981] ECR 2639

Case 322/81, *NV Nederlandsche Banden-Industrie Michelin v Commission* [1983] ECR-3461

Case 294/83, *Parti ecologiste 'Les Verts' v European Parliament* [1986] ECR 1045

Case 222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651

Case C-2/88, *Zwartveld* [1990] ECR I-4405

Case C-69/89, *Nakajima v Council* [1991] ECR-I 2069

Case C-170/89, *Bureau Européen des Unions de Consommateurs v Commission* [1991] ECR I-5709

Case C-51/92 P, *Hercules Chemicals NV v Commission* [1999] ECR I-4235

Case C-137/92 P, *Commission v BASF and others* [1994] ECR I-2555

Case C-431/92, *Commission v Germany* [1995] ECR I-2189

Case C-58/94, *Netherlands v Council* [1996] ECR I-2169

Case C-84/94, *United Kingdom v Council* [1996] ECR I-5793

Case C-233/94, *Germany v Parliament and Council* [1997] ECR I-2441

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Case C-217/97, *Commission v Germany* [1999] ECR I-5087

Joined Cases C-174/98 P and C-189/98 P, *Netherlands and van der Wal v Commission*, judgment of January 11, 2000

Case C-377/98, *Netherlands v Parliament and Council* [2001] 3 CMLR 49

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Case T-194/94, *John Carvel and Guardian Newspapers Ltd v Council* [1995] ECR II-2767

Case T-229/94, *Deutsche Bahn AG v Commission* [1999] ECR II-859

Joined Cases T-25-26, 30-32, 34-39, 42-46, 48, 50-65, 68-71, 87-88, and 103-104/95, *Cimenteries CBR SA et al. v Commission* [2000] 5 CMLR 204

Case T-105/95, *World Wide Fund for Nature (WWF) UK v Commission* [1997] ECR II-313

Case T-174/95, *Svenska Journalistförbundet v Council* [1998] ECR II-2289

Joined Cases T-213/95 and T-18/96, *Stichting Certificatie Kraanverhuurbedrijf & Federatie van Nederlandse Kraanverhuurbedrijven v Commission* [1997] ECR II-1739

Case T-221/95, *Endemol Entertainment Holding BV v Commission* [1999] ECR II-1299

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## INTRODUCTION.

### Transparency: the historical background.

Prior to the establishment of the European Union, questions had been asked regarding the democratic legitimacy<sup>1</sup> of the Communities. The concept of a 'democratic deficit' in Community law-making had arisen. As will be discussed in detail in Chapter Two *infra*, nobody seems to have precisely defined the democratic deficit or to have identified its exact cause. However, the following basic facts appear to have contributed most to the development of this concept. Firstly, the Member States were, and remain, sovereign liberal democratic states. Secondly, the Communities had not been established according to the traditional model of a liberal democratic state: decisions were adopted by the secretive Council of Ministers, representing the governments of the Member States. Thirdly, the only directly elected institution representing ordinary citizens, the European Parliament, had a weak consultative role in the development of Community legislation. Nevertheless, fourthly, it was by this time well established that Community legislation took precedence over national law. At the time of the establishment of the EU, a critical question was that of whether the institutions and procedures of the new Union had sufficient democratic legitimacy to confer upon the institutions the right to legislate, given that, *inter alia*, the TEU increased the scope of Community law-making.<sup>2</sup>

During the Maastricht Intergovernmental Conference (IGC), the Member States apparently sought to respond to the existing concerns regarding the Union's legitimacy, by ensuring that the text of the TEU included provisions concerning

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<sup>1</sup> The concept of legitimacy will be defined and discussed further in Chapter Two *infra*.

<sup>2</sup> For example, new titles IX (Culture), X (Public Health), XI (Consumer Protection), XII (Trans-European Networks), and XIII (Industry) were added to the amended Part Three of the EC Treaty.

citizenship,<sup>3</sup> democratisation,<sup>4</sup> subsidiarity,<sup>5</sup> and transparency.<sup>6</sup> Writing before the adoption of the Treaty of Amsterdam, Gráinne de Búrca explained that these four “overlapping and interrelated” concepts are almost universally deemed to be crucial to the legitimacy of the Union, although “the particular conceptions of each diverge widely. Closer examination of their usage reveals the very different and disputed meanings being attributed to the same terms under discussion”.<sup>7</sup> Perhaps because these four concepts are poorly defined, the Member States’ efforts to enhance the legitimacy of the Union by referring to them in the new and amended Treaties did not seem to have the desired effect. De Búrca also observes that “it is largely *since* the Maastricht process that the debate on the European Union has been cast in terms of a ‘*crisis*’ of legitimacy”.<sup>8</sup> The TEU itself was unexpectedly opposed within Denmark and only narrowly ratified by France, which “focused attention sharply on the existence of a substantial level of public opposition”<sup>9</sup> to further European integration and/or to the continuing governance of the institutions.

During the Amsterdam IGC, the Member States adhered to the “four themes”<sup>10</sup> of citizenship, democracy, subsidiarity and transparency in a further bid to overcome this perceived legitimacy crisis. They clarified the meaning of Union citizenship in response to the concerns of Denmark,<sup>11</sup> extended the power of the European

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<sup>3</sup> A new Part Two of the EC Treaty established Citizenship of the Union (Articles 8-8e (now 17-22) EC).

<sup>4</sup> Articles 189b and 189c (now 251 and 252) EC enhanced the role of the European Parliament in decision-making, particularly Article 189b.

<sup>5</sup> Article 3b, paragraph 2 (now Article 5, paragraph 2) EC.

<sup>6</sup> Declaration No. 17, annexed to the Final Act of Maastricht: “The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.”

<sup>7</sup> ‘The Quest for Legitimacy in the European Union’ (1996) 59 MLR 349, at 350.

<sup>8</sup> *Ibid.*, at 349 (emphasis added).

<sup>9</sup> *Ibid.*, at 350.

<sup>10</sup> *Ibid.*

<sup>11</sup> Article 8(1) (now 17(1)) EC was amended to emphasise the fact that Union citizenship complements and does not replace national citizenship.

Parliament to act as co-legislator,<sup>12</sup> adopted a new Protocol concerning the application of the principles of subsidiarity and proportionality, and made two important Treaty amendments concerning transparency. Article 1 (ex A) TEU was amended to emphasise the need for decisions to be taken ‘as openly as possible’, and Article 191a (now 255) EC was introduced, according to which the Council and European Parliament were to develop a right of public access to documents held by the Commission, Council and European Parliament. Meanwhile, in 1993, the Commission and Council had adopted a Code of Conduct governing public access to documents in their possession.<sup>13</sup> As will be seen in Part One of this thesis, the right of public access to official documents is an important component of the concept of transparency: in fact, the Member States and institutions seem to have equated transparency with this right. This Code of Conduct has now been superseded by legislation based upon Article 255 EC, as will be discussed further in Chapter Five *infra*. However, it has recently emerged that the Union’s perceived legitimacy crisis has, if anything, intensified.<sup>14</sup>

### **Structure and aims of this thesis.**

Having regard to this historical background, this thesis sets out to discuss one of de Búrca’s four interrelated themes discussed above in more depth: that of transparency. Part One is concerned with the meaning and importance of this concept, initially in the abstract. Chapter One argues that transparency in the abstract is a complex, multidimensional concept, of which the concept of a right of public access to official documents is only one facet, or dimension. Also in Chapter One, the claim that public access to documents is a ‘fundamental human right’,<sup>15</sup> absolutely essential to democracy, will be evaluated. Chapter Two places multidimensional transparency in the context of the European Union, and seeks to

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<sup>12</sup> E.g. Article 175 (ex 130s) EC now involves the use of the Article 251 (ex 189b) EC ‘co-decision’ procedure instead of the Article 189c (now 252) EC ‘co-operation’ procedure.

<sup>13</sup> Decision 93/730/EC; OJ 1993 L 340/41.

<sup>14</sup> See the Commission’s White Paper on European Governance, COM(2001) 428, 25 July 2001, at p.3, discussed in Chapter Two *infra* at note 1.

<sup>15</sup> A concept that will also be discussed in more detail in Chapter One, section 1.3 *infra*.

explore further the question of whether multidimensional transparency might legitimate the Union. Chapter Three asks whether, by focussing upon the concept of transparency as public access to documents, the Member States and EU institutions are taking the multidimensional concept of transparency seriously: is a right of public access to documents alone sufficient to help to legitimate the Union?

In Part Two, the fact that the Member States and institutions have apparently elected to focus upon transparency as a right of public access to documents, as seen from Declaration No. 17,<sup>16</sup> inspires a critical examination of the applicable rules governing this right. If transparency as public access to documents is being taken seriously, and if the Member States and institutions genuinely aim to enhance the democracy of the Union by the provision of such a right, then, for reasons that will be discussed during Part One, those rules should be aimed at encouraging the widest possible public access to information held by the institutions. Chapter Four briefly examines the right of access to the file, which is not intended to improve the Union's democracy or legitimacy but which is necessary in order to maintain the rule of law. The narrow, 'specialised' right of access to information concerning the environment and the right of the public to participate in the making of decisions affecting the environment is also considered in Chapter Four. This discussion, for comparative purposes, will facilitate the critical discussion, in Chapter Five, of the EU's provisions governing public access to all types of information: it will also facilitate a critical discussion in Chapter Six of the approach of the Community Courts to the right of public access to documents.

Chapter Five, as indicated, examines the substantive law governing public access to documents held by the institutions. It will be argued that these rules are not as liberal as they might be: they certainly fall short of the standard to be expected of a regime committed to multidimensional transparency in governance. This, in turn,

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<sup>16</sup>Note 6 *supra*.

inspires an examination of the remedies available for natural and legal persons to whom access to a given document has been refused. One of the questions that must be addressed before deciding whether the Member States and institutions are taking transparency seriously concerns the extent to which they have made provision for ordinary people to challenge decisions refusing public access to documents, and the extent to which it is possible to challenge the implementation of any less-than-liberal public access rules by at least insisting that these be interpreted in a liberal manner: that is to say, applied with a view to granting access as opposed to maintaining secrecy.

Part Three of this thesis is devoted to an examination of the available remedies. As also indicated above, Part Three opens with a discussion of judicial review by the Community Courts in Chapter Six. The role of the European Ombudsman is critically examined in Chapter Seven. In the final Chapter, an alternative and far more powerful remedy is considered, that would also be far more than just a remedy for citizens aggrieved by an institution's refusal to grant access to documents in its possession: it might be capable of effecting a change to the whole culture of the EU and its institutions. This thesis argues that the adoption of the multidimensional concept of transparency in governance has potential to alleviate the Union's ongoing legitimacy crisis. Enforcing a change in the approach to the implementation of the rules governing public access to documents held by the institutions, and encouraging a change in the approach to the very adoption of such rules in the first place, might help to make the institutions and the Member States more receptive to the idea of adopting a multidimensionally-transparent system of governance for the EU.

This thesis is based upon the law as at 31 December 2001. Unless otherwise stated, all Internet sites to which reference is made in the text were available as at 03 February 2002.

## **PART ONE: THE CONCEPT OF TRANSPARENCY.**

### **CHAPTER ONE.**

#### **Transparency in the abstract.**

##### **1.1. Introduction.**

This Chapter considers the meaning of transparency, which, as illustrated in section 1.2, is a multidimensional concept. Chapter One also explores two claims concerning transparency. Section 1.3 evaluates the claim that the right of public access to government-held documents, a component dimension of multidimensional transparency, is a 'fundamental human right'. Transparency is also described as essential to democracy: this claim is evaluated in section 1.4. Section 1.5 considers the potential importance of the theory of noted German philosopher Jürgen Habermas in understanding the connection between multidimensional transparency and the particular model(s) of democracy in which transparency is, indeed, essential.

A third claim, that transparency is essential to the legitimacy of government, is at least partially based upon the two claims analysed in this Chapter. Therefore, it seems appropriate to discuss this third claim in Chapter Two, in which the relationship between transparency and the legitimacy of the European Union will also be explored.

##### **1.2. Multidimensional Transparency.**

Transparency, as indicated, encompasses several concepts. Janet Mather has identified three conceptually distinct dimensions of transparency:<sup>1</sup>

- 1) the comprehensibility and availability of information;
- 2) access to the thinking behind decisions; and
- 3) opening-up the decision-making process to non-governmental participation.

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<sup>1</sup> 'Transparency in the European Union – an open and shut case', 'Commentary', *European Access* (1997) no. 1, at p.9.

The European Ombudsman ('the Ombudsman'), Mr Jacob Söderman, has also identified three dimensions:<sup>2</sup>

- 1) the processes through which public bodies make decisions should be understandable and open;
- 2) the decisions themselves should be reasoned; and
- 3) as far as possible, the information on which the decisions are based should be available to the public.

Edouard Chiti has isolated four elements:<sup>3</sup>

- 1) the simplifying and consolidation of legislation;
- 2) openness (as in the visibility of the activities of the institutions);
- 3) access to information; and
- 4) subsidiarity<sup>4</sup> and proportionality.

Multidimensional transparency is, evidently, neither simply freedom of information (FOI), nor open government, nor even the ability of citizens and civil society<sup>5</sup> to participate in government. It exists when there is not only freedom to access government-held information as of right, but also when legislative and policy-making processes, in which well-informed citizens and representatives of civil society may also participate, are open to public scrutiny. Decision-makers, on Chiti's analysis, should also respect the principles of proportionality<sup>6</sup> and subsidiarity.<sup>7</sup> Carol Harlow justifiably describes

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<sup>2</sup> 'Transparency as a Fundamental Principle of the European Union', Berlin, 19 June 2001, <http://www.euro-ombudsman.eu.int/speeches/en/2001-06-19.htm>. See further Chapter Seven *infra*, section 7.2, regarding the Ombudsman and multidimensional transparency.

<sup>3</sup> 'The Right of Access to Community Information under the Code of Practice: the implications for Administrative Development' (1996) 2 *European Public Law* 363, at 370. Chiti's inclusion of subsidiarity and proportionality as elements of transparency will be further considered in Chapter Two. (N.B. the four elements are not listed here in the same order in which Chiti lists them).

<sup>4</sup> On subsidiarity, see e.g. A. Toth, 'The Principle of Subsidiarity in the Maastricht Treaty' (1992) 29 *CMLRev* 1079.

<sup>5</sup> See further Chapter Three, *infra*, section 3.2.1.

<sup>6</sup> Various formulations of this principle exist: see, e.g. P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* 2<sup>nd</sup> Edition, Oxford University Press, Oxford, 1998, at p.350.

<sup>7</sup> See further Chapter Two, *infra*, sub-section 2.2.3.2.

transparency as “a complex concept, encapsulating several different kinds of right...”<sup>8</sup>

Non-governmental ‘watchdog’ organisations, especially *Statewatch*,<sup>9</sup> in calling for greater transparency at EU level, are implicitly calling for multidimensional transparency. They are not only requesting a right of public access to documents, but also a right to participate in decision-making processes: at the very least, the right to be consulted regarding proposed laws and policies.<sup>10</sup> It will shortly be argued that public participation in government decision-making is the most important dimension of multidimensional transparency, although its importance is rarely unequivocally stated or emphasised: of the commentators quoted above, for example, only Mather expressly identified public participation as a dimension of transparency.

Although multidimensional transparency raises questions concerning the cost of providing information, the maintenance of archives, and the adequacy of human and financial resources devoted to the retrieval and supply of information, such non-legal concerns might be addressed by the application of suitable technologies, and/or by the employment of extra personnel, and/or by the provision of additional funding. Basically, any regime desiring transparency must allocate sufficient resources to the provision thereof. The major components of multidimensional transparency, with which this thesis is concerned, may be summarised as follows:

- government-held information must be *comprehensible*: it must, *inter alia*, include an explanation of the government’s decision-making processes (*cf.* Mather, item 1, Söderman, item 1, Chiti, items 1 and 3);

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<sup>8</sup> ‘Freedom of Information and Transparency as Administrative and Constitutional Rights’ (1999) 2 *Cambridge Yearbook of European Legal Studies* 285, at 285.

<sup>9</sup> <http://www.statewatch.org/>

<sup>10</sup> See, e.g., *Statewatch* editor T. Bunyan, ‘Access to Documents ‘could fuel public discussion’’ in ‘Essays for An Open Europe’, <http://www.statewatch.org/secret/essays2.htm>. The right of public access to documents “would allow EU citizens and those outside the EU who are affected by its policies and practices...to take part in decision-making and to monitor ongoing practices.” With respect, the right of public access to documents could not secure a right for ordinary people to participate in decision-making: decision-making processes must also be designed to incorporate such participation. Otherwise, the right of public access to documents will not be particularly useful: see further section 1.3 *infra*.

- government-held information must be *available* (and, presumably, there must be an *adequate quantity* of information, i.e. the whole truth, as opposed to half-truths) (*cf.* Mather, item 1, Söderman, item 3, Chiti, item 3);
- government-held information must *refer to the reasoning behind decisions* as well as to the decisions themselves (*cf.* Mather, item 2, Söderman, items 2 and 3, Chiti, item 2);
- governmental decision-making processes must be *open to public scrutiny* (*cf.* Mather, item 3, Söderman, item 1, Chiti, item 2);
- wherever possible, governmental decision-making processes must also be *open to public participation* (*cf.* Mather, item 3, Chiti, item 2);
- governmental decisions, especially decisions to withhold information, must be *amenable to judicial review* (*cf.* Chiti, item 4<sup>11</sup>): this concerns *access to justice*.<sup>12</sup>

Mather acknowledges that public participation in governmental decision-making is more accurately described as a *function* of transparency, but observes that it nevertheless seems appropriate “to regard popular empowerment as an integral part of a transparency package”.<sup>13</sup> Bunyan might well agree.<sup>14</sup> Public participation in government may be regarded as the most important dimension of multidimensional transparency, because there is something resembling a logical ‘hierarchy of norms’ among the dimensions listed above. The idea that information should be comprehensible does not imply that there should also be public participation in government. However, a call for public participation in government implies that the public should have access to adequate quantities of comprehensible information, in order to facilitate such participation. A regime intending to provide comprehensible public information need not provide as many other dimensions of multidimensional transparency as one intending to offer a range of opportunities for public participation in decision-making. Therefore, the

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<sup>11</sup> Judicial review being a means of determining that a decision is proportionate.

<sup>12</sup> Access to justice as a component of multidimensional transparency frequently seems to be overlooked, or taken for granted: see further Chapter Two, *infra*, sub-section 2.2.3.3.

<sup>13</sup> Note 1 *supra*, at p.9.

<sup>14</sup> Note 10 *supra*.

‘public participation dimension’ is more nearly equivalent to multidimensional transparency in its entirety than the ‘comprehensible information dimension’. Comprehensible decision-making processes, public scrutiny thereof, and public participation therein, could be described as dimensions of ‘openness’, a term occasionally used instead of transparency. To equate openness with multidimensional transparency, however, is erroneous: openness/open government is an aspect of multidimensional transparency.

Furthermore, if people were granted a right of public access to government-held information (hereinafter, ‘public access’), that right would not, by itself, impose any duty upon the government to also allow the public to participate in governmental decision-making, nor would it require the government’s decision-making processes to be open to public scrutiny. A right of access to justice would be required, as a means of enforcing the right of public access, but it would be wrong to equate multidimensional transparency with the latter right: the grant of a right of public access would not logically entail a need to provide as many other dimensions of multidimensional transparency as would the grant of a right to participate in government decision-making.

It must also be remembered, in light of the above analysis, that not all academic, NGO or EU publications actually refer to multidimensional transparency: it remains necessary to examine references to ‘transparency’ carefully. The concept might not be regarded as multidimensional by a given author, but might be equated with the one-dimensional provision of information, or with the right of public access. For that reason, Mather describes transparency as a ‘Humpty-Dumpty word’, meaning whatever its user intends it to mean.<sup>15</sup> This caveat particularly applies to official EU publications, as will be seen in Chapter Three, *infra*.

Other major issues concerning multidimensional transparency include the critical question of the extent to which government-held information may legitimately be withheld from the public, which generates the equally important

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<sup>15</sup> Note 1 *supra* (from Lewis Carroll’s children’s story, *Through the Looking Glass*).

question of who should determine, and on what grounds, the legitimacy of any refusal to supply such information.<sup>16</sup> There is also a question of whether transparency is intrinsically or instrumentally valuable, which has arisen in connection with one particular dimension of multidimensional transparency: the right of public access, controversially described as a fundamental human right.

### **1.3. Public access to government-held documents: a fundamental human right?**

#### *1.3.1. An “emerging fundamental right...”*

Most Member States<sup>17</sup> and EU institutions/bodies<sup>18</sup> have adopted internal measures providing for public access. Meanwhile, Article 255 (ex 191A) EC provides the legal basis for a right of public access to European Parliament, Council and Commission documents,<sup>19</sup> and the inclusion of that right in the Charter of Fundamental Rights of the European Union (Article 46) suggests that public access to the documents of the three main legislative institutions is, perhaps, becoming a general principle of Community law.<sup>20</sup> At least, in light of these recent developments, the Ombudsman has spoken of “an emerging

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<sup>16</sup> See further Chapters Five and Eight, *infra*.

<sup>17</sup> Public access to information is a constitutional right in: Belgium, Finland, Italy, the Netherlands, Portugal, Spain and Sweden. It is a legislative right, with a constitutional basis, in Austria and Greece. It is a legislative right in Denmark, France, Ireland and the UK. Arguably, the UK legislation is of a constitutional nature (N.B: the UK Freedom of Information Act 2000 has not yet been fully implemented). On the terms ‘constitutional right’ and ‘legislative right’, see further section 1.3.2 *infra*.

<sup>18</sup> The Ombudsman’s own-initiative inquiry into public access to documents within the EU (<http://www.euro-ombudsman.eu.int/recommen/en/317764.htm>) indicates that most institutions had adopted rules on public access to documents by October 1996.

<sup>19</sup> This right, and other issues arising therefrom, will be considered in detail in Chapters Five, Six and Seven *infra*.

<sup>20</sup> With regard to the legal status of the Charter (2000 OJ C 364/01), K. Lenaerts and E. de Smijter (‘A “Bill of Rights” for the European Union’ (2001) 38 *CMLRev* 273, at 290, 298-9) conclude that it is a solemn declaration of the rights currently protected by the Community Courts (ECJ and CFI) as general principles of Community law: however, because those rights are so protected, the Charter is nevertheless an effective part of the *acquis communautaire*. This conclusion is strongly supported by the Opinion of Advocate General Tizzano in Case C-173/99, *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v Secretary of State for Trade and Industry*, Opinion of 8 February 2001 (paragraphs 27-28), [2001] 3 *CMLR* 7. The apparent status of public access, as a general principle of Community law, is further discussed in Chapter Five *infra*, section 5.2.

fundamental right of public access [to documents held by EU institutions] as a general principle of Community law.”<sup>21</sup>

### 1.3.2. *A problem of terminology.*

That there is a right of public access cannot be doubted. Furthermore, within this thesis, it will not be argued that public access is unimportant. Public access has, however, become controversial, at least partly because of the terminology used to describe the right. Of various terms used in connection with rights, a citizen’s right is understood, in this thesis, to mean a human right that may only be exercised, within any state, by citizens of that state. A constitutional right is, not surprisingly, a right conferred by a state’s constitution: such rights need not necessarily be widely accepted as human rights by the international community.<sup>22</sup> Likewise, a legislative right will have been conferred by legislation. In the UK, which has no codified constitutional document, legislative rights might be regarded as constitutional, human or fundamental.<sup>23</sup> It remains to clearly establish the definition of a human right, for the purposes of further discussion, and to consider the possible meaning of the term ‘fundamental human right’.

A human right is, or should be, available to all humans simply because they are human.<sup>24</sup> This definition distinguishes citizens’ rights from other human rights: citizens’ rights are counted among human rights on the grounds that all states should guarantee them for their own citizens, yet no state is obliged to

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<sup>21</sup> Speech cited at note 2 *supra*. This contrasts with an earlier speech following the Ombudsman’s receipt of approximately eleven complaints concerning public access, in which J. Söderman observed that he had received only two or three complaints concerning ‘human rights issues’ (‘The European Ombudsman and Human Rights’, Vienna, 9 October 1998, <http://www.euro-ombudsman.eu.int/speeches/en/vienna1.htm>).

<sup>22</sup> E.g. the constitutional right of citizens of the United States of America to bear arms (Amendment II).

<sup>23</sup> E.g. the right to legal advice upon arrest and detention: s.58, Police and Criminal Evidence Act 1984. Harlow (note 8 *supra*) employs additional terms, such as ‘administrative law right’ (*ibid.*, at 286-291, esp. at 287). Rights associated with openness and access to information are ‘collective constitutional rights’ (*ibid.*, at 294) and ‘democratic rights’ (*ibid.*, at 295).

<sup>24</sup> A. Gewirth, *Human Rights: Essays on Justification and Applications*, University of Chicago Press, Chicago and London, 1982, at p.1. The terms ‘human right’ and ‘fundamental right’ are used interchangeably in Community law: see, e.g. Craig and de Búrca, note 6 *supra*, at p.33 and p.1146.

guarantee citizens' rights for non-citizens.<sup>25</sup> Having regard to the Charter of Fundamental Rights of the European Union, as indicated,<sup>26</sup> this is a non-binding, solemn declaration of certain rights which are protected as general principles of Community law. Not all such rights are widely accepted human rights, such as the general principle of good administration, which, interestingly, is also presented in the Charter as a citizens' right.<sup>27</sup> Moreover, the right of public access in both the EC Treaty<sup>28</sup> and the Charter<sup>29</sup> may be exercised by EU citizens and any natural/legal person residing or having its registered office in a Member State. The fact that non-citizens may exercise the right argues against it being a true citizens' right, but if it is to be characterised as a human right instead, it should be exercisable by everyone, everywhere.<sup>30</sup> In light of this, notwithstanding the positivist view that any state can declare a right to be a human right if it so desires, with or without giving reasons, it is useful to have some philosophical justification for describing a right as a human right.<sup>31</sup> Possible reasons for so describing public access will be explored in section 1.3.3. *infra*.

Having regard to the definition of a fundamental human right, *per* Joseph Raz, a right may be regarded as 'morally fundamental'

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<sup>25</sup> Veit Michael Bader, 'Citizenship of the Union: Human Rights, Rights of Citizens of the Union and of Member States' (1999) 12 *Ratio Juris* 153, at 161.

<sup>26</sup> Note 20 *supra*.

<sup>27</sup> Article 41.

<sup>28</sup> Article 255 (ex 191a) EC.

<sup>29</sup> Article 46.

<sup>30</sup> *Cf.* the form of words used in Article 2 of the EU Charter: "Everyone has the right to life..."

The fact that the right of public access in the Treaty and the Charter is not likewise available to 'everyone' was commented upon in paragraph 60, Sixteenth Report of the House of Lords Select Committee on the European Communities, Session 1999-2000, <http://www.publications.parliament.uk/pa/ld199900/ldselect/ldcom/102/10204.htm>.

Their Lordships noted that "[i]n practice there may be little, if any, practical significance in the omission of [citizens and residents of the applicant States and parties outside who trade in the Union] because an applicant does not have to give reasons when applying for a document. Moreover, as the Ombudsman says, requirements of good administration may demand non-citizens/other persons to be treated equally with EU citizens...", but maintained that the right ought to be characterised as a right for all. That insistence, interestingly enough, does not appear to be an insistence upon treating the right as a human right because it is a human right, but upon the belief that providing a right of public access to documents for all would make the institutions act more openly, and the further belief that "the [Community's] objectives could be better achieved by the institutions acting more openly" (*ibid.*).

<sup>31</sup> R. Davis, 'Public access to community documents: a fundamental human right?' *European Integration online Papers* vol. 3 (1999) no. 8, <http://eiop.or.at/eiop/texte/1999-008a.htm>.

“if it is justified on the ground that it serves the right-holder’s interest in having that right inasmuch as that interest is considered to be of ultimate value, i.e. inasmuch as the value of that interest does not derive from some other interest of the right-holder or of other persons.”<sup>32</sup>

Applying this reasoning to human rights, if the value of a person’s interest in having a particular human right does not derive from any of his/her other interests or from the interests of others, that particular human right will also be morally fundamental.<sup>33</sup> To Raz, however, “the protection of many of the most cherished...rights in liberal democracies is justified by the fact that they serve the common or general good.”<sup>34</sup> The human right to freedom of expression “serves the interest of all those who have an interest in acquiring information from others.”<sup>35</sup> Public access, of course, also serves this interest. Raz describes FOI as one of the “foundation-stones of all political democracies.”<sup>36</sup> Nevertheless, to Raz, the value of the right to freedom of expression derives from its “contribution to a common liberal culture...[which] serves the interests of members of the community,”<sup>37</sup> and not simply from its value to the individual right-holder, to whom freedom of expression *per se* may actually be of comparatively little worth.<sup>38</sup> Freedom of expression is regarded as being instrumentally valuable to the development of a morally worthy political culture, not as being intrinsically valuable to the individual right-holder. Therefore, although Raz maintains that freedom of expression is valuable and important, it does not appear to be a morally fundamental human right, according to his definition of that term.

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<sup>32</sup> *The Morality of Freedom*, Clarendon Press, Oxford, 1988, at p.192.

<sup>33</sup> That which is ‘of ultimate value’ is ‘intrinsically valuable’, independent of its instrumental value, although Raz does not regard all intrinsically valuable interests as ultimately valuable (*ibid.*, at p.177). It would appear, however, that a person’s well-being is an interest of ultimate value (*ibid.*, at p.178). Arguably, a person’s interest in his/her own well-being does not derive from the interests of other persons. Being tortured is obviously not conducive to well-being, therefore that interest would be served by a right to freedom from torture. The right to freedom from torture would therefore seem to qualify as a morally fundamental right.

<sup>34</sup> J. Raz, ‘Rights and Individual Well-Being’ in *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Clarendon Press, Oxford, 1994, at p.37.

<sup>35</sup> *Ibid.*, at p.39.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, at p.40.

<sup>38</sup> See further J. Raz, ‘Free Expression and Personal Identification’ in *Ethics in the Public Domain*, cited at note 34 *supra*, at pp.131-2.

Similarly, if it is in the interest of the community to have an open government that may be held to public account and/or influenced with the assistance of government-held information, the value of public access would not only derive from the fact that it serves the interests of the individual right-holder. Furthermore, if the value of an individual's interest in government-held information actually derives from his/her interest in using that information to hold the government to account, or from his/her interest in using the information in order to try to influence government decision-making, then public access would also not, on Raz's reasoning, be regarded as morally fundamental, notwithstanding the fact that it, too, would remain a valuable right.

Alternatively, in terms of positive international law, a fundamental human right could be regarded as one from which no derogations are permitted even in times of emergency. Fundamental human rights, on this understanding, could be regarded as a special sub-set of human rights.<sup>39</sup> Public access does not fall into the category of rights from which there can be no derogations: as with the right to freedom of expression itself, circumstances exist in which public access may be denied. These will be further discussed in Chapter Five *infra*. Section 1.3.3. will further explore the controversy surrounding the status of public access, however: certain arguments used to justify the claim that public access merits the status of a fundamental human right remain to be addressed.

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<sup>39</sup> E.g. Articles 6, 7, 8(1), 8(2), 11, 15, 16 and 18 International Covenant on Civil and Political Rights (ICCPR) might be the ICCPR's fundamental human rights: per Article 4(2) ICCPR, the rights to life, freedom from torture, freedom from slavery, freedom from imprisonment for breach of contract, *nulla poena sine lege*, and the right to recognition everywhere as a person before the law, may not be derogated from. Likewise, the fundamental human rights of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) would be, per Article 15(2), Articles 2, 3, 4(1) and 7: the right to life, to freedom from torture, to freedom from slavery, and *nulla poena sine lege* have been described as "the most fundamental rights in the Convention" (B. Dickson, *Human Rights and the European Convention: the effects of the Convention on the United Kingdom and Ireland*, ed. B. Dickson, Sweet and Maxwell, London, 1997, at p.49). Perhaps only the fundamental rights common to both instruments, including the right to freedom from torture and the right to freedom from slavery, might be truly fundamental human rights, however: they are evidently the most universal, and they are intrinsically valuable to human beings.

### 1.3.3. *The controversy surrounding the status of public access.*

Certain commentators, notably Bunyan<sup>40</sup> and Ulf Öberg,<sup>41</sup> apparently take the status of public access for granted. According to their arguments, that which is often described as ‘the people’s right to know’ is obviously, unquestionably, a fundamental human right: absolutely crucial to democracy and essential to the legitimacy of any regime.

When challenged to justify the claim that public access should be protected as a fundamental human right,<sup>42</sup> Öberg responded by reiterating his initial argument, dubiously based upon the philosophy of Sir Karl Popper.

“Amongst other philosophical justifications [*N.B.:* none were mentioned], Sir Karl Popper has provided a theoretical framework...He has raised the question as to whether we should prepare for the worst leaders, and hope for the best...[this] forces us to replace the...question “Who should rule” by the new question: “How can we so organise political institutions that bad or incompetent rulers can be prevented from doing too much damage?”<sup>43</sup> Popper’s idea is that we are all, to a certain degree, responsible [for] our government, even if we do not participate in the exercise of power. *The exercise of this responsibility requires freedom of expression [and] freedom of access to information...*”<sup>44</sup>

With respect, it remains legitimate to ask why people require public access in order to organise their political institutions so as to minimise the possibility of ‘bad government’. The organisation of political institutions must be addressed by the authors of a regime’s constitution, and, once such institutions are established, their output in terms of information and documents might not necessarily indicate the way(s) in which they might be re-organised so as to

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<sup>40</sup> Note 10 *supra*.

<sup>41</sup> ‘Public Access to Documents after the entry into force of the Amsterdam Treaty: Much Ado About Nothing?’ *European Integration online Papers* Vol. 2 (1998) N° 8, <http://eiop.or.at/eiop/texte/1998-008a.htm>.

<sup>42</sup> Davis, note 31 *supra*.

<sup>43</sup> K. Popper, *The Open Society and its Enemies*, Routledge & Kegan Paul Ltd, London, 1966, at p.121.

<sup>44</sup> ‘EU Citizens’ Right to Know: The Improbable Adoption of a European Freedom of Information Act’ (1999) 2 *The Cambridge Yearbook of European Legal Studies* 303, at 303-4 (emphasis added).

function more effectively, or more democratically,<sup>45</sup> depending on the meaning of the rather vague 'bad government' to which Öberg implicitly refers.

Moreover, Popper was primarily concerned with proving that human beings are the makers of their own fates,<sup>46</sup> not specifically with proving that freedom of expression and information alone can produce 'good government'. He does indeed say that:

"...I think that it is reasonable to adopt, in politics, the principle of preparing for the worst, as well as we can, though we should, of course, at the same time try to obtain the best."<sup>47</sup>

but he is clearly concerned with the inconsistencies of democracy at this point. Any but the majority rule should be opposed, therefore, if the majority demands a tyrant, the tyranny should be rejected, but at the same time, any decision adopted by the majority should be accepted. This is clearly paradoxical. In Popper's view, all sovereignty theories are paradoxical. He invites us to imagine that the chosen ruler is either 'the wisest', or 'the best'. The wisest may find that not he but the best should rule, whilst the best may find that not he but the majority should rule. According to Popper, the theory of sovereignty should not be adopted without careful consideration of other possibilities.<sup>48</sup> He reasons as follows (emphasis added):

"[We should] create, develop and protect political institutions *for the avoidance of tyranny*...[This does not imply] that we can ever develop institutions which are

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<sup>45</sup> Effective government cannot be equated automatically with democratic government: see, e.g., S. Andersen and K. Eliassen, 'Dilemmas, Contradictions and the Future of European Democracy' in *The European Union: How Democratic Is It?*, eds. S. Andersen and K. Eliassen, Sage Publications, London, 1996, at p.10. A government might be 'bad' if it is undemocratic, but it might be equally 'bad' if it is ineffective. See also M. Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in *Human Rights Approaches to Environmental Protection*, eds. A. Boyle and M. Anderson, Clarendon Press, Oxford, 1998, at p.9: even citizens of "a participatory and accountable polity" may think only of their "short-term affluence", with potentially dire consequences in the long-term, implying that all governments must occasionally impose certain measures upon an initially wary, or even unwilling, public, in order to secure long-term benefits that may not appear obvious to the average citizen.

<sup>46</sup> Note 43 *supra*, at pp.1-5 (introduction).

<sup>47</sup> *Ibid.*, at p.122.

<sup>48</sup> *Ibid.*, at p.124.

faultless or foolproof, or which ensure that the policies adopted by a democratic government will be right or good or wise – or even necessarily better or wiser than the policies adopted by a *benevolent tyrant*<sup>49</sup>... What may be said, however, to be implied in the adoption of the democratic principle is the conviction that *the acceptance of even a bad policy in a democracy* (as long as we can work for a peaceful change) *is preferable to the submission to a tyranny*, however wise or benevolent. Seen in this light, the theory of democracy is not based upon the principle that the majority should rule; rather, the various equalitarian [*sic*] methods of democratic control, such as general elections and representative government, are to be considered as no more than well-trying and, in the presence of a widespread traditional distrust of tyranny, reasonably effective safeguards against tyranny, always open to improvement, and even providing methods for their own improvement.”<sup>50</sup>

Popper has been quoted at some length here because he casts doubt upon the validity of Öberg’s argument, in several respects. First, again, this passage demonstrates that Popper’s concern is the avoidance of tyranny, referring back to the contention that people should be free to make their own destinies: under a tyrant, they would not necessarily be able to do so. More importantly, however, Popper clearly acknowledges the concept of a benevolent tyrant, whose rule may be good and wise: if such a tyranny is conceivable, this does not help to prove that democracy is necessary for good government, to say nothing of public access. Admittedly, Popper deplores the idea of a benevolent tyranny, but he clearly states that even bad democracy is preferable to benevolent tyranny. This does not help to prove that his aim is to avoid bad government: bad democracy may not be good government.

Popper supports the idea of people managing their own destinies: even if people produce bad policies, at least they will have been free to do so, which freedom they would lack under a benevolent tyranny. Freedom of expression certainly fits into this matrix, as people must be able to express their political opinions within a democracy, yet it is not immediately apparent from Sir Karl Popper’s opinion that public access is expressly required in order to allow people to exercise their freedom of expression.

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<sup>49</sup> It is the avoidance of such assertions that avoids the paradox of democracy, in Popper’s view.

<sup>50</sup> Note 43 *supra*, at p.125.

Other commentators besides this author have doubted the status of public access as a fundamental and/or human right.<sup>51</sup> Verhoeven believes that it is fundamental, as in ‘important’, within the specific context of the EU, largely because it contributes to democracy (see section 1.4, *infra*) and is a citizens’ right in the EU’s Charter of Fundamental Rights (Article 46). Nevertheless, he doubts its status as a fundamental *human* right, “i.e. a right for all humans, wherever in the world”,<sup>52</sup> because “the drafters of the ECHR would have actively resisted attempts by the Swedes to link public access to the right of expression [Article 10 ECHR]”; moreover, the European Court of Human Rights (ECtHR) has explicitly ruled that a refusal to grant access to a file did not contravene Article 10;<sup>53</sup> and “international law instruments do not, in [Verhoeven’s] knowledge, recognise a specific right of access to documents detained by the government.” Verhoeven acknowledges that such a right may possibly emerge in future, within the EU.<sup>54</sup> However, even if public access were to be granted the status of a human right by an act of international law on the part of European Council member states, this would not guarantee its universal recognition as a human right, and would not, moreover, prove that it should be recognised as such.

Another way for public access to be recognised as a human right would be through judicial interpretation of an existing human rights instrument. At least some justification for claiming public access as a human right would then be forthcoming, in the judgment ‘discovering’, on the basis of what could be quite a creative interpretation of an existing right, that public access is required by that existing right. There is one caveat, however. If public access were to be derived from an existing human right, it would remain difficult to regard the

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<sup>51</sup> As also noted by A. Verhoeven, ‘The Right to Information: A Fundamental Right?’, lecture, EIPA (Maastricht), May 29, 2000, [http://eipa-nl.com/public/public\\_publications/current-books/WorkingPapers/ConferenceProceedings/Amaryllis.pdf](http://eipa-nl.com/public/public_publications/current-books/WorkingPapers/ConferenceProceedings/Amaryllis.pdf), at p.7: “For some time, European academic opinion has been divided over the question whether or not transparency and in particular access to public documents [*sic*] constitutes a fundamental right.”

<sup>52</sup> Note 51 *supra*, at p.11.

<sup>53</sup> Reference to *Leander v Sweden*, Series A no.116, [1987] 9 EHRR 433 and to *Gaskin v UK*, Series A no.160, [1990] 12 EHRR 36. Both cases are discussed *infra*.

<sup>54</sup> Note 51 *supra*, at pp.11-12.

derived right of public access as the fundamental human right. The fundamental human right in that instance, using an ordinary meaning of ‘fundamental’, would be the right from which public access had been derived. Eric Barendt accepts freedom of expression (Article 10 ECHR) as a fundamental right, but asks how FOI, which includes public access, relates to this:

“The paradox of the argument that [FOI] is implicit in, or an essential condition for, freedom of speech, is that recognition might compel government or some other institution to speak, when it does not want to...[this] could be...an interference with that body’s right of silence...”<sup>55</sup>

This argument is, apparently, ignored by organisations such as *Article 19*.<sup>56</sup> *Article 19*’s reasoning implies that the freedom to receive information that governments wish to keep secret unquestionably follows from granting either the freedom to seek information or the freedom to receive information. However, the existence of a positive duty, on the part of a state, to disclose any information that is sought, may be doubted. To refrain from interfering with a person’s right to request information held by the state would protect his/her freedom to seek such information, notwithstanding the possibility that the request might not be granted. Meanwhile, the ECtHR was invited to derive a right to public access from the freedom to receive information, as protected by Article 10 ECHR, in *Leander and Gaskin*.<sup>57</sup>

*Leander v Sweden* concerned the Swedish authorities’ refusal to grant Mr Leander access to the secret service file concerning him, following his failure

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<sup>55</sup> ‘Fundamental Freedoms’, in *Information Law Towards the 21<sup>st</sup> Century*, eds. W. Korthals Altes, E. Dommering, P.B. Hugenholtz and J. Kabel, Kluwer, Deventer, Boston, 1992, at p.21.

<sup>56</sup> An NGO concerned with the promotion of freedom of expression: <http://www.article19.org/>. Article 19 of the Universal Declaration of Human Rights presents the right to seek information as an inherent component of the right to freedom of expression, as does Article 19 of the ICCPR. A reference to the right to seek information is, however, missing from the otherwise corresponding Article 10 ECHR. *Article 19* insists that the right to freedom of expression within the Universal Declaration and ICCPR includes a right of access to government-held information (see, e.g. ‘The Public’s Right to Know: Principles on Freedom of Information Legislation’, ISBN 1 902598 10 5, *Article 19*, London, 1999, available online via <http://www.article19.org/>).

<sup>57</sup> Both cases *op. cit.*, note 53 *supra*.

to obtain a job in the Naval Museum on the grounds that he was, allegedly, a security risk. He submitted, *inter alia*, that this refusal constituted a breach of Article 10 ECHR. The ECtHR noted that:<sup>58</sup>

“...the right to freedom to receive information...prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart...Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.”

*Gaskin v UK* concerned the failure of Liverpool City Council to disclose documents to a young man who claimed to have been mistreated whilst in the care of foster parents, this care having being arranged by the City Council. When Mr Gaskin challenged the council’s refusal to disclose all relevant documentation, submitting that this constituted a breach of Article 10 ECHR, the ECtHR merely reiterated its findings in the *Leander* case.<sup>59</sup>

Barendt, having concluded that *Leander* and *Gaskin* show that the Article 10 right to receive information applies only to information willingly imparted, also suggests that the interpretation of Article 10 to include a right to acquire information from a government reluctant to provide it could increase the scope of that Article far beyond its authors’ intentions.<sup>60</sup> As Verhoeven notes, the potential for Article 10 ECHR to include public access “remains...hotly debated”.<sup>61</sup> The possibility that the right of public access to documents might not be regarded as part of Article 10 is further suggested by two documents, cited by the Ombudsman:

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<sup>58</sup> Paragraph 74, at 456.

<sup>59</sup> Paragraph 52, at p.51.

<sup>60</sup> Note 55 *supra*.

<sup>61</sup> Note 51 *supra*., at p.11.

“There are...Council of Europe recommendations on the subject [of public access to official information] and a working group of specialists on access to official information is currently drafting a further instrument.”<sup>62</sup>

The recommendations in question are over twenty years old, although the reference to a current working group indicates that the inclusion of a right to public access within the ECHR remains possible. However, it remains unclear, given the reference to a ‘further instrument’, that such a right would be protected under Article 10. Both previous Council of Europe recommendations imply that the right of access to government information should be independently formulated within a new protocol to the ECHR, not incorporated within Article 10. Barendt’s aforementioned comment concerning the countervailing right to silence would not provide an obstacle to the granting of such a right, since there are already conflicting human rights which must occasionally be balanced against each other: most notably Article 8 ECHR (the right to privacy) and Article 10 (freedom of expression).

Perhaps ironically, in view of the last-mentioned observation, Barendt also examined the potential of Article 8 ECHR as the source of a right of public access, but concluded that Article 8 might only provide a limited right for individuals to ensure that any government-held information concerning them personally was accurate.<sup>63</sup> Such an interest could not justify a general public right to access all government-held files: moreover, the limited right in question does not concern FOI *per se*, but data protection. Ton Beers’s analysis of access to information implies that Mr Leander should have invoked Article 8 ECHR, not Article 10, as his grievance related to the accuracy of government-held information concerning him personally.<sup>64</sup>

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<sup>62</sup> Speech cited at note 2 *supra*: reference to Recommendation No. 854 (1979) of the Assembly (1 February 1979) and Recommendation No. R (81) 19 of the Committee of Ministers (25 November 1981), on access to information held by public authorities.

<sup>63</sup> Note 55 *supra*, at pp.21-2.

<sup>64</sup> ‘Public Access to Government Information Towards the 21<sup>st</sup> Century’ in *Information Law Towards the 21<sup>st</sup> Century* (cited above, note 55 *supra*), at p.178. Beers’ analysis will be further discussed in Chapter Four *infra*.

With regard to the desirability, or the necessity, of claiming public access as a human right, on the grounds that it is instrumentally valuable in securing ‘good government’, pro-transparency academics making that argument do not appear to be adequately addressing the concerns of their opponents in the public access debate, and *vice versa*. For example, Patrick Birkinshaw has suggested that FOI raises “the spectre of the file behind the file, the meeting behind the meeting, the state behind the state”.<sup>65</sup> In other words, a dislike, mistrust or fear of public scrutiny might encourage decision-makers in a hitherto secretive regime to adopt decisions in corridors, or over the telephone. Therefore, the outcome of any debates, if debates must be held in public under FOI legislation, might have been pre-arranged. The contents of a file or document disclosed to a member of the public under FOI legislation might also have been censored by an official prior to its disclosure: moreover, the person granted access to it might be, and might remain, completely unaware of that fact. Evidence to suggest that such problems are likely to arise in an FOI regime is, however, lacking.<sup>66</sup> Pro-transparency supporters, in response to these concerns, maintain that open government is better and more effective<sup>67</sup> than the democratic system of governance that operated in, for example, the post-war United Kingdom, which lacked any legislative right of public access prior to the Freedom of Information Act 2000.<sup>68</sup> That response, however, seems to be based upon a mere assumption that government officials accustomed to high levels of secrecy will readily adopt a culture of openness, and will neither

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<sup>65</sup> *Freedom of Information – The Law, the Practice and the Ideal*, 2nd Edition, Butterworths, London, 1996, at p.49.

<sup>66</sup> Some support for the proposition that information may unjustifiably be withheld even in a liberal FOI regime might be derived from events following *Leander v Sweden* (note 53 *supra*). In 1996, Sweden’s public access laws were amended, and the government’s decision to classify Mr Leander as a security risk was seen to have been unjustified (article in *The Guardian* newspaper, 30 December 1997, at p.9). This suggests that there had also been no national security issue(s) at stake that could have justified the government’s original refusal to disclose his file.

<sup>67</sup> See, e.g., D. Eliasson, “Openness and Transparency: The Experiences of a New Member State” in *Openness and Transparency: Meaningful or Meaningless? - Access to information on the European Union*, European Information Association Conference Papers, 1997, at p.34; Öberg (note 41 *supra*, at p.6); Verhoeven (note 51 *supra*, at pp.1-2); and J. Söderman, ‘Access to documents of the EU institutions: the key to a more democratic and efficient Union’ Brussels, 18 September 2000, <http://www.euro-ombudsman.eu.int/speeches/en/crc180900.htm> and ‘The struggle for openness in the European Union’, 21 March 2001, <http://www.euro-ombudsman.eu.int/speeches/en/2001-03-21.htm>.

<sup>68</sup> The 2000 Act was preceded by a voluntary code of conduct concerning public access.

attempt to avoid public scrutiny by conducting secret meetings nor seek to withhold information from the public. Evidence demonstrating that such problems are actually highly unlikely to arise under FOI legislation is also lacking.<sup>69</sup> There appears, therefore, to be a stalemate, involving some speculation on both sides regarding the possible effects of FOI legislation upon decision-makers who are accustomed to secrecy.

Within a democratic polity, the public interest in obtaining access to information concerning the government's deliberations is the interest, common to all members of such a polity, in securing and maintaining the democratic accountability of their government.<sup>70</sup> This 'collective public interest analysis' of Curtin and Meijers<sup>71</sup> clearly emphasises the importance of public access to governmental deliberations in a democracy, but, interestingly, that analysis also suggests that the importance of public access may be understated if public access is conceptualised as a human right, in the sense of 'a right of individual human beings', instead of being conceptualised as 'a right, the value of which derives from a collective public interest'. Conceptualising public access as a right of individuals could encourage the framing of exceptions to that right in order to protect a given set of collective public interests. Such interests might always outweigh the individual interest inherent in an individual right, but they would not necessarily always outweigh another collective public interest.<sup>72</sup>

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<sup>69</sup> Some support for the proposition that increased public scrutiny of the ideas and comments of UK ministers and civil servants did not actually undermine the effectiveness of the UK's government is provided by I. Leigh and L. Lustgarten, 'Five Volumes in Search of Accountability: The Scott Report' (1996) 59 *MLR* 695, at 714-5.

<sup>70</sup> D. Curtin and H. Meijers, 'The Principle of Open Government in Schengen and the European Union: Democratic Retrogression?' (1995) 35 *CMLRev* 390, at 392: *cf.* Raz's appraisal of the value of the right to freedom of expression (notes 37-38 *supra* and text). Verhoeven (note 51 *supra*, pp.1-5) suggests that there are in fact three potential interests in exercising the right of public access: the public interest in the prevention of corruption in government; the public interest in securing rational, effective policies; and the public interest in maintaining democracy.

<sup>71</sup> Note 70 *supra*.

<sup>72</sup> This argument is also based upon Harlow, note 8 *supra*, at 291-5, and upon the manner in which exceptions to human rights protected by the ECHR are framed: Article 10(2), for example, permits the restriction of the individual right to freedom of expression to the extent that this is 'necessary in a democratic society' and in order to protect specified collective public interests, e.g. 'the protection of health or morals'. The need to protect public morality within a democratic society, however, might not, perhaps, outweigh the need to protect public health, or the need to preserve the very nature of the society itself, as a democracy. The public interest in public access will be discussed further in connection with the public interest in secrecy, in Chapter Five *infra*.

Finally, even if public access were to be explicitly protected by the ECHR, it would be unlike many existing human rights currently protected thereby. International human rights instruments may oblige states to respect and/or protect and/or fulfil human rights.<sup>73</sup> A well-established human right, e.g. the right to freedom of expression, may be respected, if a state does not interfere with the exercise thereof. It may be protected, if the state ensures that other individuals do not interfere with a person's exercise thereof. Finally, it may be fulfilled, if the state actively facilitates the exercise thereof by, e.g., allocating radio/television frequencies for public use. Clearly, the lowest level of obligation upon a state is the obligation to respect a right: in order to fulfil this, a state need not do anything. The obligations to protect and to fulfil a right, however, impose positive duties upon the state, requiring action.

Public access, however, cannot be respected by the state simply taking no action. The right of public access cannot actually be exercised unless the state also acts in order to fulfil it, by granting access to the document(s) requested. Furthermore, public access can only be effectively protected if the state provides a means of policing/addressing the actions of its own officials, thereby ensuring that exceptions to the right are not abused by the only entity capable of directly interfering with the exercise thereof: the state itself. In short, it is not immediately obvious that public access can be regarded as conceptually similar to, for example, the right to freedom of expression, or the right to privacy.<sup>74</sup> The latter rights do not necessarily require action on the part of the state in order to be respected by the state. Furthermore, both require protection against interference from private citizens as well as state officials.

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<sup>73</sup> See, e.g., *Implementing the Convention of the Rights of the Child: Resource Mobilisation in Low-Income Countries*, ed. J. Himes, Martinus Nijhoff Publishers, The Hague/London/Boston, 1995, at p.15.

<sup>74</sup> See further C. Warbrick, 'The Structure of Article 8' [1998] *EHRLR* 32, at 34-35: the obligation upon a state to respect the subject-matter of the right laid down by Article 8 ECHR, namely a person's private and family life, home and correspondence, can be either positive or negative in character. By contrast, as indicated, public access imposes a positive obligation.

#### 1.3.4. Conclusions.

Public access as a right is now recognised and protected within the European Union: it is conferred by legislation based upon a Treaty Article (255 (ex 191a) EC) and, as will be discussed further in Chapter Five, section 5.2 *infra*, public access to Commission, Council and Parliament documents could be regarded as a general principle of Community law. Public access may in the near future achieve explicit formal recognition as a human right in international law: it is already a right common to all but two Member States.<sup>75</sup> Even so, it is not, and is unlikely ever to become, a (morally) fundamental human right. The term 'fundamental human right' should not be used to describe every single right that might be regarded as important<sup>76</sup> in a certain type of democratic society. The importance attached to such rights might not be justified by their intrinsic value, but by the fact that they are instrumentally valuable.<sup>77</sup> It is to the claim that public access is instrumentally valuable within a democracy that attention will now turn.

### **1.4. Transparency: essential to democracy?**

#### 1.4.1. What is 'democracy'?

##### 1.4.1.1. Democracy and human rights.

Before considering the possible meaning of democracy, it is worth noting that, regardless of the definition adopted,<sup>78</sup> Susan Marks has unequivocally suggested a negative definition: democracy is not and should not be claimed as the subject-matter of a human right. In her view,

“[there is a] danger that a right to democratic governance might...serve to *reduce* the scope of [other] universally recognised rights, by reinforcing pressures to detach, on

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<sup>75</sup> Germany and Luxembourg.

<sup>76</sup> Cf. E. Mackaay, 'The Public's Right to Information', in *Information Law Towards the 21<sup>st</sup> Century* (cited above, note 55 *supra*), at p.175: "Rights should not be claimed gratuitously."

<sup>77</sup> Cf. Raz, note 34 *supra*, at pp.37-38.

<sup>78</sup> See further sub-section 1.4.1.2. *infra*.

the one hand, civil and political rights from economic, social, cultural and group-based rights and, on the other, legal relationships within nation-states from legal relationships which stretch across national boundaries...synthetic rights carry a serious risk of diminishing, rather than enhancing, their constituent elements. Rights to rights seem best avoided.”<sup>79</sup>

This conclusion is apparently based upon the danger of identifying democracy

“with the holding of multiparty elections, the protection of civil rights and the establishment of the rule of law.”<sup>80</sup>

Recognising such a norm of democratic governance might “countervail moves to secure the development of social and pluralist democracy”, whereas the endorsement of “‘actually existing democracy’...tends to eclipse awareness of the enduring – and in some respects increasing – deficits of liberal states”: furthermore, this approach will not encourage the development of global, participatory democracy as a means of holding international institutions to account.<sup>81</sup>

In other words, the proposed human right to democratic governance might be satisfied by the provision of a formal, but basic, model of democracy, which would almost certainly in Marks’ view perpetuate a non-self-critical government, incapable of developing a more effective model of democracy, and which might also ignore social inequalities and social exclusion.<sup>82</sup> Such a model of minimal democracy, moreover, would neither require multidimensional transparency nor public access in order to ensure regular multiparty elections, to establish the rule of law, and to protect rights recognised within the ECHR. For proof of the capacity of a regime to accomplish those three tasks reasonably well without public access, one need only consider the post-war United Kingdom.

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<sup>79</sup> *The Riddle of All Constitutions*, Oxford University Press, Oxford, 2000, at p.110 (emphasis in original).

<sup>80</sup> *Ibid.*, at pp.74-5.

<sup>81</sup> *Ibid.*

<sup>82</sup> Such problems are extant in all the liberal democratic EU Member States: see, e.g. H. Cullen, ‘The Subsidiary Woman’ [1994] *Journal of social welfare and family law*, 407.

Marks' warnings about the dangers of conflating and confusing liberalism and the rule of law with democracy,<sup>83</sup> which warn in turn of the need to exercise caution in defining democracy if claiming a right to democratic governance,<sup>84</sup> are important in light of the implicit suggestion, in the writings of Öberg *et al.*, that public access is a fundamental human right, because it is deemed indispensable to democracy. It certainly cannot be argued that democracy is not important, particularly to the Member States of the EU. Article 6(1) TEU as amended (ex Article F) provides as follows:

“The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.”

It must be emphasised, however, that the government of the UK would have met all the criteria of a democracy according to the proposed international norm critiqued by Marks, although there was no hint whatsoever of a right of public access within the UK for many years. This did not preclude the UK's accession to the Union 'founded on the principle of democracy.' Therefore, if public access, and indeed multidimensional transparency, is deemed to be indispensable to democracy, this can only be because a particular model of democracy is contemplated by the person making such a claim, which model clearly cannot correspond to that of the post-war UK. In every claim to the effect that public access and/or multidimensional transparency is essential to any hitherto secretive lawmaking regime, there seems to be an implicit desire to alter that regime's legislative processes, in order to create the conditions in which public access/multidimensional transparency would, indeed, be theoretically indispensable to those processes.<sup>85</sup>

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<sup>83</sup> See H. Cullen and K. Morrow, 'International civil society in international law: The growth of NGO participation' (2001) 1 *Non-state Actors and International Law* 7, at 11-12, and footnote no. 30.

<sup>84</sup> Cf. Birkinshaw, note 65 *supra*, at 24: "The claims for...a right to know, a democratic right...are easily made, but more difficult to justify if one has not established what theory of democracy one accepts."

<sup>85</sup> Harlow (note 8 *supra*, at 292) notes that in D. Curtin, 'Democracy, Transparency and Political Participation' (in *Openness and Transparency in the European Union*, eds. V. Deckmyn and I. Thomson, EIPA, Maastricht, 1998), at p.110, active participation in government, which requires multidimensional transparency, is expressly linked to a deliberative model of democracy, as opposed to the traditional liberal democratic model

Two questions arise from the above line of reasoning. Firstly, to which model(s) of democracy is public access/multidimensional transparency theoretically indispensable? Secondly, in light of the fact that improved public access and greater transparency are being demanded within the EU, is this *sui generis* legal regime actually adaptable to such (a) model(s) of democracy? The latter question is considered further in Chapter Two, *infra*. The former is considered in the following sub-section.

#### 1.4.1.2. Models of Democracy.

David Held has identified several models of democracy.<sup>86</sup> As well as examining the characteristics of various democratic regimes, ranging from ancient Greek democracy to (so-called) Soviet democracy and the more liberal democracies of the present, Held discusses purely theoretical models, such as Weber's 'competitive elitist democracy'.<sup>87</sup> The latter cannot be the model contemplated by proponents of multidimensional transparency: it functions when the electorate is "poorly informed and/or emotional."<sup>88</sup> Multidimensional transparency is supposed to create a well-informed electorate, composed of electors who are, moreover, sufficiently rational to participate in the legislative process, presumably by some means other than by

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obtaining within the Member States: such active participation is explicitly contrasted to the "intermittent and passive...participation of voting in elections" that forms "the key to democratic decision-making processes" within such States. This not only "emphasises the constitutional value of openness" within "deliberative theories of democracy" (Harlow, note 8 *supra*, at 292): it also suggests that reform of those familiar democratic processes is necessary in order to secure greater transparency.

<sup>86</sup> *Models of Democracy*, 2<sup>nd</sup> Edition, Polity Press, Cambridge, 1996.

<sup>87</sup> *Ibid.*, summarised at p.197: competitive elitism seeks to provide a mechanism for selecting a political elite to govern and a means of preventing political leadership from becoming excessive. It features a parliamentary government with a strong executive, dominated by party politics; competing political elites; central political leadership; an independent bureaucratic administration; and constitutional/practical limits upon the government's decision-making capacity. Conceived of as applicable to a tolerant, industrial society with a badly-informed and/or emotional electorate, competitive elitist democracy is heavily criticised for being in fact more like an oligopoly, led by an elite selected from a small choice of competing elite political groups, none of whom will respond as readily to the demands of the electors (seen as consumers in a political market-place) as they would have to in a truly free market: moreover, the competing political elites are able to influence and to some extent create demand for their policies among the badly-informed/emotional electorate (*ibid.*, pp.197-198).

<sup>88</sup> *Ibid.*, at p.197.

the periodic casting of a vote.<sup>89</sup> Such an electorate would undoubtedly be dissatisfied with a competitive elitist democracy, which democracy would not produce such an electorate.

Held identifies two models of liberal democracy. 'Protective democracy'<sup>90</sup> calls for "the development of a politically autonomous civil society", whereas 'developmental democracy'<sup>91</sup> requires greater citizen involvement in government: at least, at local level. This account certainly suggests that some dimension(s) of transparency is/are integral to a liberal democracy, particularly to the latter model, as participation in government is one of the dimensions of multidimensional transparency. Nevertheless, upon closer inspection, fully developed multidimensional transparency is not seen to be integral to liberal democracy. It would be sufficient, in a protective liberal democracy, to supply only the first two components of multidimensional transparency: adequate quantities of comprehensible information, sufficient to enable citizens to make a meaningful choice between alternative governments at election time. In a developmental liberal democracy, although it is acknowledged that citizens must be informed, the need for public access is not mentioned: moreover, the necessity for a right to participate in government above the local level, by some means other than via the ballot-box, is not made sufficiently clear. It could certainly be argued that multidimensional transparency would not be

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<sup>89</sup> Implicit in the calls for a participatory civil society/citizenry and decision-making procedures open to public participation, seems to be the idea that citizens will be able (and willing) to participate in legislative/policy-making procedures on an ongoing basis, in between elections as well as at election time itself.

<sup>90</sup> *Ibid.*, summarised at p.99. In the protective liberal democracy, citizens require protection from the government as well as each other. The features of the model are familiar: popular sovereignty, vested in representatives who are regularly elected by secret ballot; majority rule; separation of powers; constitutionally-guaranteed civil and political rights; competing political parties and interest groups. The model does not, however, call for a universal franchise: *cf.* note 91 *infra*.

<sup>91</sup> *Ibid.*, summarised at p.116. Developmental liberal democracy is similar to protective liberal democracy (note 90 *supra*) but calls for more citizen participation in political life than the latter, and specifies that there must be a universal franchise and proportional representation. Both the developmental and protective liberal democracies are apparently criticised by Held as being insufficiently clear regarding the definition of a legitimate citizen and of his/her role within the democracy. Furthermore, it seems that protective democracy in particular allows women to be subordinated to men (its major fault), whereas developmental democracy does not necessarily do enough to ensure equality between men and women (*ibid.*, p.119). The overall implication is that developmental democracy is insufficiently self-critical, adaptable and forward-thinking to cope with socio-economic changes: Held's summary indicates that although it emancipates women, it nevertheless preserves the traditional domestic division of labour (*ibid.*, p.116).

incompatible with a developmental liberal democracy, but it could not be said with equal certainty that such a democracy absolutely could not function without a right of public access, and a means of making use of information gained via the exercise of that right in order to influence decision-making at the national level.

The model of democracy labelled 'democratic autonomy',<sup>92</sup> however, expressly requires access to government-held information in order to facilitate informed decision-making, and the participation of citizens in the government: participation being a citizens' right, not a duty. Another model, 'cosmopolitan democracy',<sup>93</sup> is an attempt to entrench the principle of democratic autonomy, which is applicable to a nation-state, on the international plane. One condition for cosmopolitan democracy is the "enhanced entrenchment of democratic rights and obligations in the making and enforcement of national, regional and international law."<sup>94</sup> Held's principle of democratic autonomy and the model of cosmopolitan democracy demand close attention. Multidimensional transparency, as noted, contains the right of citizens to participate in decision-making. Bearing in mind that this will only be possible when decision-making processes actually accommodate such participation, it seems that multidimensional transparency is essential only to an appropriate model of democracy. Therefore, a call to adopt a model of democracy closely resembling Held's cosmopolitan democracy appears to be implicit in every call for greater transparency at EU level.<sup>95</sup>

#### 1.4.1.3. The principle of democratic autonomy and its international application: cosmopolitan democracy.

Held's primary concern is that traditional liberal democracy does not permit individual Member States to control globalised economic and transnational problems such as the environment. A further concern is the need to secure democratic values in a post-Cold War world tending towards right-wing

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<sup>92</sup> *Ibid.*, pp.324, 325-6.

<sup>93</sup> *Ibid.*, pp.353, 358-9.

<sup>94</sup> *Ibid.*, pp.358-9.

<sup>95</sup> See note 85 *supra* and text.

violence, racism and ethno-political separation. In light of the “rapid growth of complex interconnections and interrelations between states and societies – often referred to as the process of globalisation,” nation-states cannot remain at the centre of democratic thinking.<sup>96</sup> Democracy remains important because it “bestows an aura of legitimacy on modern political life: laws, rules and policies appear justifiable when they are ‘democratic’”.<sup>97</sup>

However, in the European Union, the securing of popular consent via the ballot-box, as a source of legitimacy, becomes problematic: in a sense, individual Member States no longer govern themselves and determine their own future. The globalisation of various issues only makes this problem more acute.<sup>98</sup> Supranationalisation and globalisation therefore have considerable implications for democracy and legitimacy, which Held sets out to address by ‘re-thinking’ democracy.

Autonomy is “the capacity of human beings to reason self-consciously, to be self-reflective and...self-determining.”<sup>99</sup> According to the principle of autonomy,

“...[P]ersons should enjoy equal rights and...obligations in the specification of the political framework which generates and limits the opportunities available to them...they should be free and equal in the determination of the conditions of their own lives, so long as they do not deploy this framework to negate the rights of others.”<sup>100</sup>

Held describes this principle as “the core of the modern liberal democratic project”<sup>101</sup> and “a principle of political legitimacy.”<sup>102</sup> Rights and obligations are required by the principle of autonomy in order to protect equality: the requirement that people should be free and equal to determine the conditions of

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<sup>96</sup> Preface to D. Held, *Democracy and the Global Order*, Stanford University Press, Stanford, California, 1995, at pp.viii-ix.

<sup>97</sup> *Ibid.*, at p.1.

<sup>98</sup> *Ibid.*, at pp.17-18.

<sup>99</sup> *Ibid.*, at p.146.

<sup>100</sup> *Ibid.*, at p.147.

<sup>101</sup> *Ibid.*, at p.149.

<sup>102</sup> *Ibid.*, at p.153.

their own lives demands that they should be freely and equally able to deliberate on matters of public concern. A legitimate decision regarding matters of public concern does not result

“...from the ‘will of all’, but rather...from ‘the deliberation of all’...The process of deliberation is, accordingly, compatible with voting at the decisive stage of collective decision-making and with the procedures and mechanisms of majority rule.”<sup>103</sup>

Held’s model is one of deliberative democracy:<sup>104</sup> it is the deliberative process which calls for multidimensional transparency at national level, since the citizens actively deliberating matters of public concern require a) knowledge of those matters (as obtainable via public access) and b) a right to participate in collective decision-making. Held next asks whether the rights inherent in a deliberative model of democracy, such as the model of democratic autonomy, can be conceptualised as universal, human rights:

“The acceleration of globalisation has led to pressures to entrench significant ‘citizenship rights’ [in Held’s terms, the rights demanded by the principle of democratic autonomy] within frameworks of international law. However, this process is very far from complete. In addition, the notion that ‘rights’ advance universal values and are, accordingly, human rights – *intrinsically* applicable to all – is open to doubt. It is clear, for example, that many nations and peoples do not necessarily choose or endorse the rights that are proclaimed often as universal...”<sup>105</sup>

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<sup>103</sup> *Ibid.*, at p.155.

<sup>104</sup> For further details of the pure deliberative theory of democracy, see J. Black, ‘Proceduralising Regulation: Part I’ (2000) 20 *OJLS* 597, and ‘Proceduralising Regulation: Part II’ (2001) 21 *OJLS* 33. There are, basically, a ‘thin’ concept of regulation, based upon liberal democracy, and a ‘thick’ concept, based upon deliberative democracy. Held’s model of cosmopolitan democracy is not explicitly described as being based upon deliberative democracy, but it emphasises popular participation in decision-making to such an extent that Marks (note 79 *supra*, at pp.109-110), approves of this model as exemplifying her ‘principle of democratic inclusion’, which “refers to the notion that democratic politics is less a matter of forms and events than an affair of relationships and processes, an open-ended and continually recontextualised agenda of enhancing control by citizens of decision-making which affects them and overcoming disparities in the distribution of citizenship rights and opportunities.” That seems compatible with the deliberative theory as considered by Black, which requires ‘thick’ democracy to involve “the mediation of deliberation: the mapping of differences and conflicts between deliberants, acting as translator, making deliberants aware of the inclusionary and exclusionary effects of problem definition, modes of discourse, discursive hegemony, and the adoption of strategies of dispute resolution” (Part II, *op. cit.*, at 57). See also note 85 *supra*.

<sup>105</sup> Note 96 *supra*, at p.223 (emphasis in original).

This conclusion supports the viewpoint espoused in section 1.3.3. *supra*. Held's solution to the problem of the non-universalisation of public access and other associated rights of multidimensional transparency is to advance the cause for cosmopolitan democracy:

"Empowering rights...are intrinsic to the democratic process...if one chooses to be a democrat, one must choose to enact these rights...[which] can be justified directly in relationship to democracy. *And they can be invoked independently of claims to universality.*"<sup>106</sup>

Held thus provides a theory of democracy which calls for multidimensional transparency at level of the EU and yet does *not* call for the associated rights to be labelled human rights, which designation implies, as stated, that they should be universally recognised. This theory shows that it is perfectly possible to call for democracy and transparency, and yet to reject the idea that public access is a fundamental and/or human right. Because of globalisation,

"[Democracy] within a political community requires democratic law in the international sphere. Democratic...law needs to be buttressed...by...‘cosmopolitan democratic law’...democratic public law entrenched within and across borders."<sup>107</sup>

In answer to the question posed by section 1.4.1., therefore, the ‘democracy’ of which pro-transparency commentators speak must be a model resembling cosmopolitan democracy, which has the following characteristics:<sup>108</sup>

- There is a global order of multiple, overlapping networks of power.
- All organisations, groups and associations have capacity for self-determination and can commit themselves to the principle of democratic autonomy.
- Legal principles set the standards for the treatment of all organisations, groups and associations, which no regime or organisation may violate.

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<sup>106</sup> *Ibid.*, at pp.223-4 (emphasis added).

<sup>107</sup> *Ibid.*, at p.227.

<sup>108</sup> From Held's summary, *ibid.*, at pp.271-272.

- Law-making and law enforcement occur at various locations and levels, monitored by courts.
- Democratic autonomy focuses upon the creation of conditions for equal membership in the public sphere.
- Social justice demands the democratic exploitation of resources and a common structure of political action.
- The use of force is reserved as a last resort in order to protect the cosmopolitan democratic order.
- People may participate, in various ways, in deliberations within those networks of power/political communities whose decisions affect them most significantly.
- In principle, citizenship is extended to all political communities, from local to global level.

As indicated, in order to facilitate the holding of decision-makers to account, and in order to facilitate effective public participation in deliberative decision-making, multidimensional transparency is essential to Held's model of democratic autonomy,<sup>109</sup> and is therefore also required by the cosmopolitan model of democracy which seeks to secure the principle of democratic autonomy on the international plane.

#### *1.4.2. Conclusions.*

The need for a minimum level of transparency in a liberal democracy may be readily conceded: this is supported by Held's accounts of liberal democracy.<sup>110</sup> However, because multidimensional transparency is also *maximum* transparency, it is not at all clear that multidimensional transparency is essential to democracy *per se*. Rather, any call for multidimensional transparency, involving the provision of rights, which have not always been provided within the United Kingdom, should be regarded as a call for the adoption of a model of democracy different to that of the UK. Held's model of democratic autonomy is a likely candidate, although at EU level, a slightly

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<sup>109</sup> Note 86 *supra*, at p.324.

<sup>110</sup> See notes 90-91 *supra*.

modified model of cosmopolitan democracy would clearly be called for: modified to take account of the fact that the EU is not a global order. The adoption of such a model of democracy is not inconsistent with the rejection of the notion that public access and the other associated rights of multidimensional transparency are human rights simply because they are essential to that model: Held proceeds from the notion that, if deliberative democracy is required, so are public access and a right to participate in decision-making: it is not even necessary to conceptualise these rights as human rights.

Moreover, although it is conceded that liberal democracy requires some transparency, this conclusion makes it unnecessary to attempt to determine precisely the level of transparency required. If multidimensional transparency is deemed absolutely essential to democracy, this is because the advocate of multidimensional transparency is simultaneously advocating a specific model of democracy that requires multidimensional transparency in order to function properly. There is only one problem with this conclusion, however, which is that it suggests circular reasoning: 'transparency is essential to the functioning of the desired model of democracy, because the desired model of democracy cannot function without transparency.'

### **1.5. Habermas and the avoidance of circular reasoning.**

Habermas provides an alternative perspective from which to consider the relationship between transparency and democracy, without resorting to circular reasoning as illustrated in section 1.4.2. *supra*. Habermas avoids such circular reasoning by simply suggesting that rights and democracy are co-original concepts.<sup>111</sup> Having stated that democracy may only be found at the centre of a system of rights,<sup>112</sup> and that this system is generated through the democratic

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<sup>111</sup> J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, The MIT Press, Cambridge, Massachusetts, 1996, at p.122.

<sup>112</sup> *Ibid.*, at p.121.

process,<sup>113</sup> he concludes that popular sovereignty and human rights mutually presuppose each other.<sup>114</sup>

“The addressees of law would not be able to understand themselves as its authors if the legislator were to discover human rights as pre-given [*sic*] moral facts that merely needed to be enacted as positive law. At the same time, this legislator, regardless of his autonomy, should not be able to adopt anything that violates human rights.”<sup>115</sup>

The idea that democracy and human rights are co-original, each presupposing the other, is compelling. Posit democracy, and simultaneously, the right to vote is, necessarily, also posited. Also, the right to a certain minimum level of transparency – not multidimensional – must also be posited, given that democracy cannot be meaningful unless electors are able to make an informed choice at the ballot-box.

This simplified account of Habermas’ theory suggests that all rights are products of the democratic process, and that, at the same time, rights restrict the democratic process, so that no product of this process may violate extant rights. However, the democratic process is in fact derived from Habermas’ discourse principle,<sup>116</sup> as discussed by Antje Gimmler:<sup>117</sup>

“One of the most famous phrases of the discourse ethics of Jürgen Habermas is: in discourse the unforced force of the better argument prevails...[the discourse principle involves] *equal participation* of all who are affected; the *postulate of unlimitedness*, i.e., the fundamental unboundedness and openness concerning time and persons; the *postulate of freedom from constraint* [*Zwanglosigkeit*], i.e., the freedom, in principle, of discourse from accidental and structural forms of power; and the *postulate of seriousness* or authenticity [*Ernsthaftigkeit*], i.e., the absence of deception and even illusion in expressing intentions and in performing speech acts.”

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<sup>113</sup> *Ibid.*, at p.122.

<sup>114</sup> *Ibid.*, at p.447 (see also pp.88-9: rights are said to presuppose collaboration between citizens who recognise each other as free and equal citizens: subjective individual rights are said to be co-original with objective law.)

<sup>115</sup> *Ibid.*, at p.457.

<sup>116</sup> *Ibid.*, at p.121.

<sup>117</sup> ‘The Discourse Ethics of Jürgen Habermas’, <http://caae.phil.cmu.edu/Cavalier/Forum/meta/background/agimmler.html> (emphasis in the original).

The discourse principle, essentially, enables people to exercise their political autonomy in order to reach a consensus.<sup>118</sup> To elaborate on the relationship between the discourse principle and democracy, and between democracy and rights, Habermas notes that the category of (human) rights resulting

“...from the politically autonomous elaboration of the right to the greatest possible measure of equal liberties<sup>119</sup> ...require the following as necessary corollaries: [b]asic rights that result from the politically autonomous elaboration of the status of a member in a voluntary association of consociates under law; [and] [b]asic rights that result immediately from the actionability of rights and from the politically autonomous elaboration of individual legal protection. These three categories of rights<sup>120</sup> result simply from the application of the discourse principle to...law...[T]hey...regulate the relationships among freely associated citizens prior to any legally organised state authority from whose encroachments citizens would have to protect themselves. In fact...[these] basic rights guarantee...the private autonomy of legal subjects only in the sense that these subjects reciprocally recognise each other in their role as addressees of laws and therewith grant one another a status on the basis of which they can claim rights and bring them to bear against one another. Only with the next step do legal subjects also become authors of their legal order...through...[b]asic rights<sup>121</sup> to equal opportunities to participate in the processes of opinion- and will-formation in which citizens exercise their political autonomy and through which they generate legitimate law.”<sup>122</sup>

Admittedly, as Habermas agrees, this approach implies that the “genesis of these rights comprises a circular *process*.”<sup>123</sup> Citizens cannot elaborate the first (Rawlsian) category of rights in a politically autonomous manner unless and until they are able to exercise the fourth category of (democratic) rights, which enable them to actually exercise their political autonomy. Nevertheless,

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<sup>118</sup> This is, admittedly, a simplistic view of the discourse principle. However, it suffices to note that Habermas is essentially concerned with consensus.

<sup>119</sup> This is a Rawlsian model of rights: see further J. Rawls, *A Theory of Justice* 2<sup>nd</sup> Edition, Oxford University Press, Oxford, 1999, at p.266: Rawls’ first principle of justice is that “[e]ach person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.”

<sup>120</sup> I.e., the Rawlsian rights ensuring the greatest possible measure of equal liberties (category 1); and the two categories of basic rights which Habermas describes as necessary corollaries to those Rawlsian rights.

<sup>121</sup> Habermas’ fourth category of rights. These may be described as ‘democratic rights’, being those rights essential for the operation of any democracy.

<sup>122</sup> Habermas, note 111 *supra*, pp.122-3, emphasis omitted.

<sup>123</sup> *Ibid.*, p.122, emphasis added.

Habermas' theory still avoids circular *reasoning*, because it not only assumes, as stated, that both democracy and rights are co-original concepts, but also because it regards these concepts as *mutually reinforcing*. Posit a democracy, allowing discourse to take place, and posit the need to develop human rights in order to ensure "the greatest possible measure of equal liberties." Democracy may be used in order to develop human rights for that purpose. The exercise of the rights developed thereby, however, may in turn reinforce democracy, by ensuring that all the participants in the democratic process remain equal.

Applying Habermas' approach to multidimensional transparency: firstly, multidimensional transparency might be characterised as a bundle of rights. These would be: the right to comprehensible information; the right to an explanation of governmental decision-making processes; the right of public access; the right to scrutinise governmental decision-making; the right to participate in such decision-making; and the right to obtain judicial review, both of government decisions (to ensure compliance with the principles of subsidiarity and proportionality) and of refusals to grant public access. Secondly, citizens would only become the authors of these rights if they were, indeed, able "to participate in the processes of opinion- and will-formation...[f]or political rights ground the status of free and equal *active* citizens. This status is self-referential insofar as it enables citizens *to change and expand their various rights and duties...*"<sup>124</sup> Thirdly, active citizens, seeking to expand their rights and duties, might well seek to adopt an appropriate model of democracy that would enable them to make full use of the expansive set of rights inherent in multidimensional transparency. Fourthly, such a model would require multidimensional (maximum) transparency *ab initio*. Both the rights of multidimensional transparency and the appropriate model of democracy, incorporating the discourse processes by which consensus may be achieved, which processes require multidimensional transparency, would necessarily be co-original concepts. Finally, the exercise of the rights inherent in multidimensional transparency would enhance the operation of such a model of democracy, whilst the establishment of such a

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<sup>124</sup> *Ibid.*, at p.123, emphasis added.

model of democracy could in turn encourage the usage and further development of the rights of multidimensional transparency.

### **1.6. Conclusion.**

Transparency is multidimensional, and consists of a bundle of ‘democratic rights’ necessary to the functioning of a specific model of democracy, including a right of public access. However, the latter right does not merit the status of a fundamental human right. It is not a fundamental human right, on Raz’s terms, given that it has instrumental value only: nor is it a fundamental human right in the sense of being vitally important among human rights, or even because it is essential to a particular model of democracy. Although a right of public access might soon be protected as a human right by the ECHR, it has been shown to be conceptually different from other, well-established human rights, insofar as it cannot be exercised unless it is actually fulfilled, and because it requires protection against interference by the state itself.

The call for multidimensional transparency at EU level actually seems to be a call for the EU to adopt a model of democracy allowing citizens to fully exercise the democratic rights comprising multidimensional transparency. Such a model might resemble Held’s cosmopolitan democracy. Following Habermas’ approach, it can even be argued that any call for multidimensional transparency must necessarily be regarded as a simultaneous call for the adoption of a model of democracy requiring multidimensional transparency. This approach avoids the appearance of the circular reasoning which otherwise seems to be present whenever it is claimed that multidimensional transparency, including public access/public participation in decision-making, is ‘necessary to democracy’.

In particular, it has been argued, with reference to Marks, that the public access/public participation in decision-making components of multidimensional transparency are not necessary in order to establish a formally democratic regime *per se*. Any call for greater democracy and transparency at EU level must therefore be regarded as a call to transform

European governance. It remains to be seen, in Chapter Two *infra*, whether the constitutional structure of the European Union actually could, or should, be revised in order to ensure that the Union conforms to the specifications of a model of democracy requiring multidimensional transparency.

## CHAPTER TWO.

### Transparency, legitimacy and the EU.

#### 2.1. Introduction.

Having considered multidimensional transparency in the abstract, it is necessary to discuss the theoretical compatibility of multidimensional transparency with the constitutional structure of the European Union. Also, as indicated in Chapter One *supra*, the third claim of pro-transparency commentators is that a high degree of transparency is essential to legitimacy. The perceived lack of legitimacy within the EU certainly remains an official cause for concern.<sup>1</sup> This Chapter will therefore also discuss the questions of whether, and to what extent, multidimensional transparency is capable of legitimating the Union.

Consideration will first be given to the meaning of legitimacy (section 2.2.1.) and to the nature of the EU's perceived legitimacy crisis (section 2.2.2.). The relationship between subsidiarity, proportionality and transparency will then be further discussed, in the search for connection(s) between the concepts of legitimacy and transparency (section 2.2.3.) Having argued in Chapter One *supra* that multidimensional transparency presupposes (a) particular model(s) of democracy, most likely a suitably modified version of David Held's cosmopolitan democracy (see further section 2.3.1), it is also important to determine the extent to which the EU conforms to such a model of democracy. If it does not, the extent to which it could, or should, be reconstituted in order to conform with such a model of democracy must also be determined (section 2.3.2.). The theoretical value of multidimensional transparency as a legitimating factor may then be finally assessed (section 2.4).

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<sup>1</sup> *Per* the Commission's White Paper on European Governance, COM(2001) 428, 25 July 2001, at p.3.

## 2.2. Legitimacy and the EU.

### 2.2.1. What is legitimacy?

Joseph Weiler<sup>2</sup> and Seymour Lipset<sup>3</sup> indicate that legitimacy is a two-dimensional concept: it may be *formal* or *social*. Formal legitimacy exists, *per* Weiler, whenever the constitution of any state establishes a basic liberal democratic government, having regular governmental elections held by secret ballot; a free press; a universal adult franchise; opposition parties; and the freedom of speech. Social legitimacy exists whenever the citizens of a given state freely accept that their government has the right to enact binding laws, which they as citizens have a duty to obey.<sup>4</sup> For example, the fact that most citizens of an EU Member State are willing to comply with national laws, even if they do not personally support the political party/parties responsible for enacting those laws, may be attributed to the social legitimacy of their government.

Formal legitimacy is the easiest dimension of legitimacy to describe. The precise factor(s) that generate social legitimacy, however, is/are at least partly subjective, and, unfortunately, indeterminate. Daniela Obradovic regards legitimacy as people's "political and moral conviction that the...constitutional establishment [of their government] is *right*."<sup>5</sup> This supports Weiler's definition of social legitimacy, but does not explain exactly what factor(s) induce people to believe that their government has a right to govern, and that they have a corresponding duty to obey its laws. Furthermore, there often seems to be an equally indeterminate degree of overlap between the concepts of formal and social legitimacy, at least within the Member States and other similar democracies. Held, for example, suggests that most people accustomed to a liberal democratic regime will only be prepared to accept an equally formally legitimate government as socially legitimate:

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<sup>2</sup> 'The Transformation of Europe' [1991] *Yale Law Journal* 2043, esp. at 2469-73.

<sup>3</sup> 'Social Conflict, Legitimacy and Democracy' in W. Connolly, ed., *Legitimacy and the State*, Blackwell Ltd., Oxford, 1994, at pp.91-2.

<sup>4</sup> Note 2 *supra*.

<sup>5</sup> 'Policy Legitimacy and the European Union' (1996) 34 *JCMS* 191, at 199-200 (emphasis in original).

“The principle of [democratic] autonomy seeks to articulate the basis on which public power can be justified...”<sup>6</sup>

The exercise of public, i.e. governmental, power is justified by the democratic nature of the government. The term ‘political legitimacy’ indicates that it is the exercise of public power, at least in the Member States, which demands a combination of formal and social legitimacy in order to be regarded as legitimate: people must accept the laws promulgated by their government as valid laws to be obeyed, even if they personally oppose the government’s policies. The legitimacy of any democratic government is sometimes referred to as ‘democratic legitimacy’, although that terminology might conceivably overlook the need for a regime to have both social and formal legitimacy.

Ultimately, *per* both Weiler and Lipset, social legitimacy is more important than formal legitimacy.<sup>7</sup> This conclusion has a certain intuitive appeal, having regard to two actual regimes. Present-day Kuwait was quite recently re-established as a monarchy, reserving a great deal of power to the Emir, notwithstanding the fact that the restoration of Kuwait’s independence at the end of the Gulf War might have presented Kuwaitis with an opportunity to adopt a more formally legitimate constitution. Kuwait’s generous welfare provisions and food/petroleum subsidies might explain the largely autocratic pre-war regime’s enduring post-war social legitimacy. Pro-democracy politicians have recently gained a majority in Kuwait’s National Assembly, however, indicating that the relative lack of formal legitimacy may not be tolerated for much longer after all.<sup>8</sup> The example of the former Weimar Republic might offer more compelling support for Weiler’s and Lipset’s conclusion. Hitler’s rise to the dictatorship of the Third Reich might have been

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<sup>6</sup> Chapter One *supra*, note 96, at p.153.

<sup>7</sup> References at notes 2 and 3 *supra*, respectively. See also G. Britz and M. Schmidt, ‘The Institutionalised Participation of Management and Labour in the Legislative Activities of the European Community: A Challenge to the Principle of Democracy under Community law’ (2000) 6 *European Law Journal* 45, at 67. There, social legitimacy, described as ‘substantive’ legitimacy, is a “*necessary supplement* to the democratic legitimation which must be attached to the exercise of state power”, said to require “that state measures realise the ‘real’ will of the people, in the sense that citizens recognise their own interests within legislative measures.

<sup>8</sup> Source: [http://www.arab.net/kuwait/kuwait\\_contents.html](http://www.arab.net/kuwait/kuwait_contents.html).

assisted by a lack of social legitimacy in the democratic Weimar Republic, which regime undoubtedly had formal legitimacy.<sup>9</sup>

In conclusion, a polity's legitimacy apparently depends both upon the extent to which it provides formal, democratic mechanisms in order to secure popular consent for laws and policies, and upon the extent to which ordinary people believe that its government has a moral right to make laws and policies. In the absence of social legitimacy, it seems that even a formally legitimate regime is unlikely to endure in the short term, but, as the example of Kuwait suggests, even a regime which appears to be socially legitimate may lose legitimacy in the long term unless its formal legitimacy is adequate.

### *2.2.2. The legitimacy crisis within the EU.*

#### 2.2.2.1. An historical perspective.

It was originally hoped that the European Communities would be legitimated by results. The peoples of Europe, reaping the considerable social and economic benefits expected to result from membership of the Communities, would in return support the Communities wholeheartedly. The relatively weak parliamentary Assembly established to supervise the High Authority of the ECSC, first of the European Communities, may have been proposed as a concession by the ECSC's 'founding father', Jean Monnet: Monnet apparently desired to entrust the achievement of a European Community entirely to an elite group of 'technocrats', being as free as possible from interference from politicians or the public.<sup>10</sup> This suggests that social legitimacy was indeed

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<sup>9</sup> The fall of the Weimar Republic has been attributed to a complex mixture of external and economic factors as well as inherent flaws in the Weimar Constitution (see, e.g., G. Rempel, 'Collapse of the Weimar Republic', [http://mars.acnet.wncc.edu/~grempe/courses/germany/lectures/23weimar\\_collapse.html](http://mars.acnet.wncc.edu/~grempe/courses/germany/lectures/23weimar_collapse.html). Intimidation of the German electorate would have made it difficult to determine the extent to which popular loyalty to the Third Reich was genuine, and not inspired by fear. However, it has been suggested that the Weimar Republic never enjoyed wholehearted popular support: M. Saji, 'The Fall of the Weimar Republic', <http://yosh.gimp.org/~saji/weimar.html>.

<sup>10</sup> K. Featherstone, 'Jean Monnet and the 'Democratic Deficit' in the European Union' (1994) 32 *JCMS* 149, at pp.160-162. Featherstone suggests, however, that at the time, the idea of achieving democratic control of the High Authority by the establishment of anything

originally believed to be sufficient to legitimate a regime in the relative absence of formal legitimacy, since formal legitimacy is seen to derive from a Member State-like democratic constitution. The constitutional arrangement of the Communities was, of course, quite different from that of the Member States, particularly prior to the strengthening of the European Parliament's position.<sup>11</sup>

However, the relative absence of formal legitimacy within the Communities did not pass unnoticed. General de Gaulle criticised the legitimacy of the EEC during the 1960's,<sup>12</sup> and, following the signing of the TEU, the 'democratic deficit' of the newly established EU was even more extensively debated than that of the former EEC.<sup>13</sup> Interestingly, however, there is little evidence of any consensus, within this debate, concerning the precise nature of the democratic deficit.

One commentator simply refused to acknowledge any democratic deficit.<sup>14</sup> Another welcomed the TEU's attempts to introduce more democracy, but

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remotely resembling a federal government might have been politically unacceptable to the Member States, and that leaving national governments to control the ECSC might have delayed the quest for European unity (*ibid.*).

<sup>11</sup> Cf. 'Justus Lipsius' (a pseudonym), 'The 1996 Intergovernmental Conference' (1995) 20 *ELRev* 235, esp. at 255: 'Lipsius' does not accept that the Communities ever lacked formal legitimacy and regards the Council, comprising domestically-elected representatives of the Member States, as "obviously democratic". However, cf. also Raworth, who concludes that the Council lacks legitimacy, having regard to its lack of accountability to the European electorate as a whole, and, importantly, to its lack of transparency (P. Raworth, 'A Timid Step Forwards: Maastricht and the Democratisation of the European Community' (1994) 19 *ELRev* 16, at 33).

<sup>12</sup> W. Wallace and J. Smith, 'Democracy or Technocracy? European Integration and the Problem of Popular Consent' (1995) 18 (no. 3, Special Issue) *West European Politics* 137, at 140. The 'empty chair crisis' of 1965 reflected de Gaulle's belief that majority voting in the Council of Ministers was not legitimate: only the unanimous agreement of the elected governments of the Member States could legitimate EEC law. This position, of course, led to the adoption of the 1966 'Luxembourg Compromise', by which agreement unanimous voting in the Council was resumed notwithstanding its illegality under the EEC Treaty (following the end of the original transitional period during which unanimous voting was permitted).

<sup>13</sup> Per J. Lodge ('Transparency and Democratic Legitimacy' (1994) 32 *JCMS* 343) the signing of the Single European Act apparently prompted discussions concerning the lack of formal legitimacy within the EEC. The democratic deficit was debated by the European Parliament (e.g. PE Doc A2-276/87) as well as academics. Lodge also observes (*op. cit.*, at 343) that during the ratification of the TEU, the "crisis of EC governance" was attributed to "a more pervasive democratic deficit than had hitherto been assumed."

<sup>14</sup> 'Lipsius', note 11 *supra*. Britz and Schmidt agree that the Council provides democratic accountability (note 7 *supra*, at 63).

remained concerned about the continuing lack of transparency, especially in the legislative processes.<sup>15</sup> Others stressed a link between transparency and democracy, citing the lack of transparency as the principal cause of the democratic deficit.<sup>16</sup> Still others implied that too much transparency might undermine the effectiveness of the EU,<sup>17</sup> which would be highly undesirable: a lack of effective governance might in turn undermine democracy.<sup>18</sup> Finally, there seems to have been no consensus regarding which of the major EU institutions were most lacking in formal legitimacy:<sup>19</sup> this makes the nature and scope of the alleged democratic deficit difficult to determine and hinders efforts to suggest a solution. Weiler's principal concern, meanwhile, in contrast to the debate about democracy, was the EU's apparent lack of social legitimacy.<sup>20</sup>

Only one point is clear. By the start of the 1996 IGC, the EU was undoubtedly believed, by the majority of interested commentators, to lack either formal or social legitimacy, or both. Wallace and Smith suggested that the Union might lack social legitimacy because its future remains uncertain: the EU having been "deliberately negotiated as a journey to an unknown destination."<sup>21</sup> The clearest independent proof of the fact that the Union was indeed experiencing a legitimacy crisis would appear to have been the result of the first Danish

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<sup>15</sup> J.-C. Piris, 'After Maastricht, are the Community Institutions More Efficacious, More Democratic and More Transparent?' (1994) 19 *ELRev* 449.

<sup>16</sup> E.g. Lodge, note 13 *supra*; E. Noël, 'A New Institutional Balance?' in R. Dehousse (ed.) *Europe after Maastricht – An Ever Closer Union?*, Law Books in Europe, Munich, 1994; and Curtin and Meijers, Chapter One *supra*, note 70.

<sup>17</sup> E.g. Raworth (note 11 *supra*, at 23), who observed that secrecy facilitates the work of the Council, thereby implying that transparency would obstruct the Council. Lodge, meanwhile, suggested that problems could arise if the Commission were required to invite too high a level of public participation: the most important dimension of multidimensional transparency (note 13 *supra*, at 364-5).

<sup>18</sup> Andersen and Eliassen, Chapter One *supra*, note 45.

<sup>19</sup> In addition to the conflicting opinions of 'Lipsius' and Raworth regarding the Council (note 11 *supra*), Featherstone was particularly concerned about the Commission's accountability (note 10 *supra*, at 150, 165-166) whereas Raworth suggested that this had improved (note 11 *supra*, at 33) and Lodge suggested that the Commission was, in any event, merely a scapegoat for the democratic deficit (note 13 *supra*, at 346).

<sup>20</sup> Note 2 *supra*.

<sup>21</sup> Note 12 *supra*, at 140. Further support for the notion that ordinary people are still concerned about the direction that the EU is taking was provided on July 16 2001 by the UK Foreign Secretary, Jack Straw, quoted as saying that "We have to provide much better reassurance about where this European Union project is going... We have not yet achieved [a balance between change and stability] inside the European Union and that leads to uncertainty and insecurity and a sense of detachment" (*The Daily Telegraph* newspaper, 17 July 2001, p.13, column 1).

referendum concerning the TEU. According to the then Commission President, Jacques Delors, the result was surprising: the idea that the ordinary people of Europe might reject the TEU had apparently not occurred to the Commission.<sup>22</sup>

However, some suggestion that a legitimacy crisis had been perceived by the Member States could be implicit in Declaration No. 17, annexed to the Final Act of Maastricht. This non-binding, political Declaration does not explicitly acknowledge the existence of any crisis, because it speaks of strengthening democracy and public confidence in the administration. It is possible to enhance and improve that which is already reasonably strong. Nevertheless, the Declaration could be regarded as showing awareness, on the part of the Member States, of a lack of legitimacy and public confidence in the newly established European Union:

“The Conference considers that openness of the decision-making process strengthens the democratic nature of the institutions and the public’s confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to information available to the institutions.”

As there was no right of public access to information that was not already intended for publication within the EU, however, it would be more accurate to read ‘provide’ for ‘improve’ in Declaration No. 17. The use of ‘improve’ and the call for an inquiry by the Commission creates the impression that, although the Member States considered the democratic credentials of the European Communities to be perfectly acceptable, it was prudent for them to be seen to be taking an interest, at least, in enhancing the institutions’ formal legitimacy: particularly, perhaps, in light of the new titles added to the newly re-named EC Treaty, which extended the scope of Community law.<sup>23</sup>

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<sup>22</sup> Speech of 9 March 1994 to the inaugural meeting of the Committee of the Regions, reported in the ‘Commentary’, *European Access* (1994) no. 3, at p.7.

<sup>23</sup> Including culture (Article 128 (now 151) EC), public health (Article 129 (now 152) EC) and consumer protection (Article 129a (now 153) EC).

Whether or not the existence of a legitimacy crisis was suspected prior to the first Danish referendum on the TEU, it was clear that afterwards, neither the institutions nor the Member States could deny that the EU's regime was, indeed, not always regarded as 'right' by all the ordinary people subject to Community law.<sup>24</sup> The question of how the institutions and the Member States should respond to this crisis has, as indicated earlier, largely been approached with a view to suggesting somewhat piecemeal institutional reforms of the Council and/or the Commission, instead of a root-and-branch reform of the entire institutional structure. Given the lack of consensus regarding exactly which institution(s) are most in need of reform, however, to say nothing of the lack of consensus regarding the exact nature and extent of the shortcomings of the present institutional arrangements, the most effective way to address the EU's legitimacy crisis could well be that suggested by Declaration No. 17. It seems desirable to consider (a) way(s) in which to maximise democracy, accountability and public confidence in the administration as a whole, focussing not upon the individual shortcomings of individual institutions, but upon the entire constitutional arrangement of the European Union, in order to make the Union as legitimate as possible.

In other words, given that the legitimacy crisis has been blamed upon a lack of transparency, it may be that the adoption of multidimensionally-transparent law- and policy-making processes at EU level would resolve the present crisis: the Council should not be singled out as the only institution in need of greater transparency, because the Council is not the only institution that has been criticised. Furthermore, as stated, the EU's crisis is one of both formal and social legitimacy. It is not entirely clear that democratising the Union by further Treaty amendments, in order to enhance only its formal legitimacy, will be sufficient to legitimate the polity. If Weiler, Lipset and Obradovic are correct, the concurrent need for social legitimacy cannot be overlooked. This

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<sup>24</sup> The recent rejection of the Treaty of Nice by the Irish in a referendum seems to indicate that the EU's legitimacy crisis is still ongoing (see p.3, 3<sup>rd</sup> paragraph, of the Commission White Paper, note 1 *supra*), although it is believed that the issue of Eire's neutrality figured prominently in that referendum, since Nice concerns the creation of a European armed force. Therefore, it is not entirely clear to what extent the Irish were expressing disapproval of the EU itself, as opposed to disapproval of the prospect of compromising Irish neutrality.

leads to the question of whether there is a logical connection between multidimensional transparency and two-dimensional legitimacy. Obviously, the adoption of a multidimensionally-transparent regime could not help to resolve the legitimacy crisis unless both formal and social legitimacy could, at least, be strengthened by the adoption of such a regime. However, the first question to address is that of whether the EU's legitimacy crisis has indeed been correctly analysed.

#### 2.2.2.2. An alternative perspective: legitimacy and the European 'myth'.

Lene Hansen and Michael Williams criticise the current academic debate concerning the Union's legitimacy.<sup>25</sup> First, they are sceptical about the nature of the legitimacy crisis: citing the 'remarkable progress' made by the EU in the 1990's, they suggest that ordinary Europeans are objecting to the rapid pace of integration, as opposed to institutional shortcomings.<sup>26</sup> Although the Autumn 2000 *Eurobarometer* survey suggested that most people surveyed actually want integration to proceed at a faster pace,<sup>27</sup> and although the Commission's White Paper indicates that there definitely is an EU legitimacy crisis,<sup>28</sup> Hansen and Williams strongly challenge the widely-held view that the EU is in crisis because it is insufficiently democratic, insufficiently representative of its citizens and insufficiently transparent. It is necessary to address their concerns because, as indicated in Chapter One *supra*, the call for multidimensional transparency is a call for greatly increased citizen participation in the Union's decision-making processes, and because, as suggested above, it may be that the adoption of a multidimensionally-transparent system, being a cosmopolitan-like model of democracy, might resolve the Union's legitimacy crisis, provided that there is a clear idea of the nature of that crisis upon which to base the necessary arguments.

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<sup>25</sup> 'The Myths of Europe: Legitimacy, Community and the 'Crisis' of the EU' (1999) 37 *JCMS* 233.

<sup>26</sup> *Ibid.*, at 234.

<sup>27</sup> 54<sup>th</sup> *Eurobarometer* report for November-December 2000, released April 2001, s.4.3, pp.52-3. The caveat attached to the statistics is that pro-EU Europeans do indeed support faster integration, but not all Europeans are pro-EU: active support for EU membership still stands at 50% (s.4.1, p.33).

<sup>28</sup> Note 1 *supra*.

Hansen and Williams rightly observe that it is frequently asserted that ordinary citizens are demanding “to exert democratic leverage” in the Union. The Autumn 2000 *Eurobarometer* registered public satisfaction with democracy in the Union at 40%,<sup>29</sup> indicating that most Union citizens would like the Union to be more democratic: however, does this necessarily mean that ordinary people desperately wish to take a more active part in EU-level decision-making? That particular concern can be accommodated by proceeding from the basis that Union citizens might, through the adoption of cosmopolitan democracy, be empowered to participate more extensively in EU decision-making should they wish to do so: they can also be encouraged to participate, but they would not be obliged to do so. Hansen’s and William’s principal concern, however, is that unless the cause of the EU’s legitimacy crisis has been correctly diagnosed, it will not be possible to propose a credible remedy for that crisis. They have identified two completely different accounts of the legitimacy crisis from the current debate, and are satisfied with neither.

Firstly, Hansen and Williams note that one account of the legitimacy crisis holds that the Union’s laws and policies are simply not legitimated in the same way as are the laws and policies of a liberal democratic Member State. The solution is perceived to be the continuing democratisation of the Union and the introduction of ‘Community-building’ policies such as Union citizenship, a uniform passport, etc.<sup>30</sup> This account may be referred to as the ‘no-democracy analysis’. The other account of the crisis, hereinafter designated the ‘no-myth analysis’, holds that there is no European *demos*, therefore the Union cannot actually be democratised *per se*: attempts to strengthen the European Parliament, for example, could meet with increasing nationalist resistance within the Member States which could ultimately tear the Union apart. The solution is perceived to be the finding of an existing common identity uniting the various peoples of Europe, and the identification of existing common aims and values which the Union can then legitimately pursue and uphold.<sup>31</sup> The

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<sup>29</sup> Note 27 *supra*, s.2.5, p.16.

<sup>30</sup> Note 25 *supra*, at 236-7.

<sup>31</sup> *Ibid.*, at 237-8.

problem, from Hansen's and Williams' perspective, is that neither account of the crisis takes cognisance of the EU's unique 'myth': "modernity as rationalisation".<sup>32</sup>

The 'myth', in this context, is the *raison d'être* of a polity. The social, political, cultural, historic, linguistic, economic and geographic factors that have combined to create, for example, modern France, also comprise the French myth, which seems to inspire a sense of patriotism in most French citizens.<sup>33</sup> A polity having a less successful myth could contain regions which are more or less determined to gain independence, e.g. the Basque region of Spain, and Scotland in the UK. In the no-democracy analysis, the EU has the capacity to generate a myth as integration proceeds, accompanied by democratisation.<sup>34</sup> In the no-myth analysis, however, the EU must identify an existing myth, because any attempt to generate a myth as integration proceeds might provoke an undesirable nationalist backlash.<sup>35</sup>

Hansen and Williams argue that, from the outset, the idea underlying the project of European integration relied upon certain myths – utilitarian, liberal and economic – all of which aimed to rationalise the project of integration and to present it as a non-political, functional venture. Such rationalisation of government is, they say, a modern myth. In contrast to national myths and the socio-political structures of the Member States, which represent the past, the EU represents the future: an open, creative process in which government can be reconstructed along rational lines, "as the natural extension of the processes of social and political rationalisation already well advanced in the historical evolution of modern states...".<sup>36</sup> The EU myth is already there: the Union's

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<sup>32</sup> *Ibid.*, at 235, 239-244.

<sup>33</sup> See further E. Renan, 'What is a nation?' (translated by M Thom) in *Nation and Narration*, ed. H. Bhabha, Routledge, London & New York, 1990, ch. 2, esp. p.19: "A nation is a soul, a spiritual principle" defined by "the possession in common of a rich legacy of memories" and "the desire to live together, the will to perpetuate the value of the heritage that one has received in an undivided form." Renan also suggests, however, at pp.10-12, that France is also united today because the conflicts and violence of her past have been forgotten: the collective forgetting of, e.g., the Midi massacres of the thirteenth century, must also therefore contribute to the French myth.

<sup>34</sup> Note 25 *supra*, at 243.

<sup>35</sup> *Ibid.*, at 238.

<sup>36</sup> *Ibid.*, at 243.

future is open, because that future can be constructed rationally.<sup>37</sup> The real problem is that the attempt to de-politicise integration failed: political legitimacy did not follow in the footsteps of integration as anticipated. Debating the need for public access to information about the EU, the need to bring the Union closer to the people and the need for a mythical European identity has overshadowed the real issue, which in Hansen's and Williams' opinion seems to be that of trust: there is a legitimacy crisis because people do not trust the European Union to provide rational governance, and/or regard it as a rational project. Hansen and Williams perceive a need to debate, as politically contentious issues, the scope, content and desirability of the Union.<sup>38</sup> The critical question is whether the Union can be trusted, not whether it is more-or-less formally legitimate, or whether there is an identifiable European *demos*.

#### 2.2.2.3. Some conclusions.

Interestingly, Hansen and Williams do not conclude their re-analysis of the EU's legitimacy crisis ('the Hansen-Williams analysis') with a confident prediction of its successful resolution. Instead, they say that the success of the Member States' collective decision to proceed with further integration remains to be seen, because if the no-myth analysis is correct, further integration could produce a counterproductive nationalist backlash, as discussed above.<sup>39</sup> This implies that the myth of modernity-as-rationalisation could not compete against national mythologies in the event that a combination of further democratisation and Community-building policies, together with heightened awareness of the EU myth of modernity-as-rationalisation, does not resolve the EU's legitimacy crisis. The myth that Hansen and Williams have identified is not, therefore, presented as a powerful and convincing source of legitimacy: moreover, they have arguably failed to rebut entirely either the no-democracy analysis or the no-myth analysis, despite their criticism of the legitimacy crisis debate.

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<sup>37</sup> *Ibid.*, at 243-4.

<sup>38</sup> *Ibid.*, at 245-7.

<sup>39</sup> *Ibid.*, at 247.

Nevertheless, the Hansen-Williams analysis is interesting, because it suggests that multidimensional transparency might help to resolve the legitimacy crisis. The no-democracy analysis focuses upon the Union's lack of formal legitimacy, implicitly acknowledging, perhaps, that social legitimacy depends to at least some extent upon formal legitimacy, in the minds of people accustomed to living in a liberal democratic Member State. The no-myth analysis emphasises the Union's lack of social legitimacy: the Union is seen as an 'unnatural', artificial construction, unlike the Member States, in which people mostly share a common identity. Perhaps there is an implicit acknowledgement of the need for formal legitimacy before Europeans, steeped as they are in liberal democratic tradition, will believe that a government is 'right'. The overall conclusion, however, seems to be that the legitimacy crisis has arisen from a lack of popular trust in the European Union.

The call for multidimensional transparency, meanwhile, suggests that decision-makers cannot actually be trusted unless decision-making processes are open to public scrutiny. Multidimensional transparency requires continual public scrutiny of EU-level decision-making: decision-makers must be accountable to the public; civil society participation is necessary in order to ensure that important decisions are thoroughly and effectively debated; and public access to documents available to the institutions is required in order to ensure that the facts upon which decisions are based are available for public scrutiny. Adopting multidimensionally-transparent decision-making processes as a means of injecting public trust into the outcome of those processes might therefore resolve the Union's legitimacy crisis, if the lack of popular trust in the Union is indeed the key issue. As Hansen and Williams are so cautious in their analysis, however, it remains necessary to seek further connections between formal and social legitimacy and multidimensional transparency, in case the legitimacy crisis is, after all, not due to a lack of trust, but due to a lack of formal and/or social legitimacy.

### 2.2.3. *Multidimensional transparency and two-dimensional legitimacy.*

#### 2.2.3.1. Transparency, legitimacy and democracy.

A link between transparency and legitimacy has apparently been taken for granted by commentators, including Lodge.<sup>40</sup> Apparently, transparency is regarded as so obviously necessary for democracy, and democracy is regarded as so obviously necessary for legitimacy, that no further explanation of the link between those three completely distinct concepts is required. Transparency, democracy and legitimacy may even have been conflated, just as there seems to have been a tendency to conflate legitimacy with the rule of law,<sup>41</sup> and a tendency to conflate liberalism and the rule of law with democracy.<sup>42</sup> Such conflation is not defensible, however. As argued in Chapter One *supra*, both multidimensional transparency and a model of democracy requiring such transparency should be regarded as co-original concepts, but they remain distinct. Formal legitimacy arises within the basic model of democracy criticised by Marks,<sup>43</sup> but this will not necessarily be socially legitimate, as discussed above. More importantly, not all models of democracy will necessarily be multidimensionally-transparent, as also concluded in Chapter One *supra*.

It may not be possible to logically connect both dimensions of legitimacy to each dimension of multidimensional transparency, but a link would nevertheless exist if only one dimension from each concept could be connected. The need for government-held information to be comprehensible could be linked to formal legitimacy on the grounds, noted in Chapter One *supra*, that liberal democracy requires a minimum level of transparency in order to function. If the electorate could not understand the information available to them, this would be as bad as, if not worse than, having no information at all. Clearly, there is also a need for adequate information to be

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<sup>40</sup> Note 13 *supra*.

<sup>41</sup> Obradovic, note 5 *supra*, at 197: adherence to the rule of law, itself a complex and multidimensional concept, is not, in her view, sufficient to convince people that their constitution is 'right'.

<sup>42</sup> Chapter One *supra*, notes 80-81 and text.

<sup>43</sup> Chapter One *supra*, notes 80-81 and text.

available, the second dimension of multidimensional transparency. Regular free and secret ballots would be pointless unless the voters could make an informed choice. A link, albeit limited, between multidimensional transparency and legitimacy is therefore established.

Access to the reasoning behind government decisions would enable people to decide whether those decisions were entirely based upon relevant considerations, and whether due attention had been paid to all possible relevant considerations. If such access were granted only after a decision had been adopted, people might be able to satisfy themselves that the decision was appropriate, which might increase their confidence in the government, which might help to improve the government's social legitimacy. However, this would not necessarily suffice to demonstrate that the government had the right to adopt such a decision in the first place. If, however, access to the reasoning behind a government proposal were granted prior to the formal adoption of a decision, and citizens were empowered to comment upon that proposal, this might enhance the government's social legitimacy to a greater extent. Ordinary citizens might be convinced of their government's desire to listen to them and to take account of their needs and opinions.<sup>44</sup>

Opening up governmental decision-making processes to public scrutiny and input could also enhance the democratic nature of those processes, thereby enhancing the government's formal legitimacy and providing a further potential link between transparency and legitimacy, which link appears to be quite strong so long as public participation in decision-making is permitted. A call for public participation in government also implicitly calls for almost all the other dimensions of multidimensional transparency.<sup>45</sup> However, the link between transparency and formal legitimacy remains quite weak if the reasoning behind decisions is only made available after those decisions have been adopted.

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<sup>44</sup> The Commission now seems to believe that it is essential to listen to ordinary people and to take heed of their needs and opinions: see further Chapter Three *infra*. See also Britz and Schmidt, note 7 *supra*, at 67, recalling the need for legislative measures to reflect people's interests and concerns.

<sup>45</sup> Section 1.2, Chapter One, *supra*.

### 2.2.3.2. Transparency, legitimacy, subsidiarity and proportionality.

As Charles Timmermans<sup>46</sup> observes, subsidiarity and transparency “are entirely different concepts”: the former being a constitutional principle protecting the powers of the Member States, and the latter being described as “more diffuse”,<sup>47</sup> possibly because it is multidimensional. Nevertheless, both concepts

“are twins in the continuing quest of the Framers of European integration to increase the legitimacy of Community decision-making *vis-à-vis* the citizens.”<sup>48</sup>

Overall, however, Timmermans does not regard the concepts as related: rather, he sees them as intertwined. In the course of trying to make Community legislation more comprehensible, the Commission is having regard to, *inter alia*, subsidiarity and proportionality. In the course of trying to ensure compliance with subsidiarity and proportionality, the Commission is having regard to transparency.<sup>49</sup> At least this implies that subsidiarity, proportionality, transparency, and legitimacy might be connected.

It must be remembered that observance of the principles of subsidiarity and proportionality is intended to justify EU legislation and policies. The need for EU-level action in the first place is justified by observation of the principle of subsidiarity: that action taken at Member State level will not be sufficiently effective to achieve a desired aim. Broadly speaking, the principle of proportionality ensures that the only action taken is that which is absolutely necessary to achieve that aim. Theoretically, since both principles are general principles of Community law relating to the application of the Treaties, any failure to comply with either principle might be challenged by way of an

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<sup>46</sup> Deputy Director-General of the Commission’s Legal Services.

<sup>47</sup> ‘Subsidiarity and Transparency’ (1999) 22 *Fordham International Law Journal* 106, at 106.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*, at 127.

application for the annulment of the Community act in question,<sup>50</sup> subject to two caveats, which will shortly be discussed.

The argument that transparency enhances the quality of decision-making, because decision-maker(s) will take greater care in order to avoid the prospect of their decisions being challenged by way of an application for judicial review, will also be recalled.<sup>51</sup> The counter-argument is that exposure to scrutiny encourages timidity in decision-making, and increases the tendency on the part of the public to challenge decisions, with both factors resulting in less efficient decision-making.<sup>52</sup> Neither argument seems to be supported by empirical evidence: however, the Protocol on Subsidiarity and Proportionality,<sup>53</sup> annexed to the EC Treaty by the ToA, supports the former argument to some extent. It expresses the Member States' desire for care to be taken to ensure the compliance of all proposed legislation with subsidiarity and proportionality.<sup>54</sup>

A regime, knowing that its legislation was vulnerable to annulment for non-compliance with the principles of proportionality and/or subsidiarity, might desire to publicise its compliance with both principles, by making both its legislation and the reasoning underlying that legislation as transparent as possible. Transparency could show that the legislation had been drafted strictly according to both constitutional principles. Public awareness of the need for EU-level action, and of the fact that the action taken did not exceed that which was necessary in order to achieve a desirable goal, might enhance public confidence in the Union: this, in turn, might enhance the Union's social legitimacy. The Commission's White Paper on European Governance refers explicitly to the need for EU-level decision-making to be seen to be compliant

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<sup>50</sup> Article 230 (ex 173 ) EC, paragraph 2.

<sup>51</sup> E.g. Eliasson, Chapter One *supra*, note 67, at 34.

<sup>52</sup> E.g. Birkinshaw, Chapter One *supra*, note 65, at p.49.

<sup>53</sup> OJ 1997 C 340/105.

<sup>54</sup> Paragraph 4 of the Protocol indicates that all proposed Community legislation shall justify the compliance of the proposal with both principles, qualitatively, and quantitatively if possible.

with proportionality and subsidiarity.<sup>55</sup> The Protocol, in Timmermans's opinion, strengthens the possibilities for legal review by the ECJ of the application of the principle of subsidiarity

“...particularly as to the procedural requirements imposed by the Protocol. It should be noted, however, that the...Protocol does not impose a specific obligation...to justify a Community act in terms of its compliance with...subsidiarity and proportionality. The requirements to state reasons are related to the proposed legislation, not to the final act.”<sup>56</sup>

The second observation in the above-quoted passage, however, leads Timmermans to examine the justiciability of subsidiarity. With reference to two cases,<sup>57</sup> he concludes that the ECJ is reluctant to substantively review compliance with this principle;<sup>58</sup> and that the ECJ tends to consider the duty to give reasons (Article 253 (ex 190) EC) in order to quickly dispose of any plea alleging a breach of subsidiarity, by noting that the legislation incorporates some explanation of the necessity for EU-level action, even if only by implication.<sup>59</sup> Therefore, one caveat, relating to the possibility of obtaining the annulment of Community legislation for non-compliance with subsidiarity, is that Council-approved legislation might be virtually immune from such a challenge. That knowledge would not have the desired effect of encouraging transparency in legislation as a means of reducing the risk of that legislation being challenged via judicial review. The second caveat is that ordinary citizens and civil society groups are unlikely to have *locus standi* to challenge Community legislation in the first place: see further sub-section 2.2.3.3. *infra*.

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<sup>55</sup> Note 1 *supra*, esp. at p.10 (the principles of good governance reinforce those of proportionality and subsidiarity) and p.29 (an annual report, detailing the Union's compliance with proportionality and subsidiarity, is to be made from 2002).

<sup>56</sup> Timmermans, note 47 *supra*, at 113-4.

<sup>57</sup> Case C-84/94, *United Kingdom v Council* [1996] ECR I-5793; Case C-233/94, *Germany v Parliament and Council* [1997] ECR I-2441.

<sup>58</sup> Note 47 *supra*, at 115.

<sup>59</sup> *Ibid.*, at 117. This is strongly supported by paragraph 33 of Case C-377/98, *Netherlands v Parliament and Council* [2001] 3 CMLR 49: “Compliance with the principle of subsidiarity is *necessarily implicit* in the fifth, sixth and seventh recitals of the preamble to the [contested] Directive...It thus appears that the Directive states sufficient reasons on that point.” (emphasis added).

In order to adopt decisions as closely as possible to the citizen, in accordance with Article 1 (ex A) TEU, it seems reasonable to reserve as many issues as possible for regional and local governments. That interpretation of subsidiarity could have two transparency-related effects: local and regional governments may be more visible to citizens than even their national government, and so, in that sense, may be more open; furthermore, it may be relatively easier for ordinary citizens to participate directly in their local or regional government, by attending meetings and/or lobbying local/regional government members directly, than it would be for those same citizens to participate directly in meetings of the Council of Ministers.<sup>60</sup> The possibility of adopting decisions at a local/regional level, addressing a strong, shared local/regional interest on the basis of a local/regional consensus, might also confer greater legitimacy upon the resulting decisions than would the adoption of decisions in which non-members of the local/regional community had participated, or the adoption of decisions in which no members of the local/regional community had participated.

It is not evident from the Protocol on Subsidiarity and Proportionality that the Member States had local and regional governments in mind.<sup>61</sup> Paragraph 9 states that any burden falling upon local authorities as a result of Community action should be minimised, but the Protocol does not oblige the Member States themselves to observe the principle of subsidiarity in apportioning responsibility for implementing Community law. Nevertheless, if well publicised, the fact of compliance with subsidiarity by both the Union and its Member States could enhance the legitimacy of EU decision-making processes, as the Commission's White Paper on Governance implicitly acknowledges, at p.12:

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<sup>60</sup> Cf. G. Chanan, *Active Citizenship and Community Involvement: Getting to the Roots*, European Foundation for the Improvement of Living and Working Conditions, Office for Official Publications of the European Communities, Luxembourg, 1997, pp.6-7: “[p]eople cannot take part directly in large and centralised systems...[they] can participate in party politics or social movements, and they can support independent public campaigns, and give effort and money to national and international charities and non-governmental organisations. However, to see the opportunities for direct and continuous participation by the mass of the population one must look to the local setting...”

<sup>61</sup> However, by Declaration No. 54 annexed to the Final Act of the ToA, Germany, Austria and Belgium indicated that subsidiarity, within those Member States, is assumed to involve sub-national governments having legislative powers under the national constitution.

“...[T]he way in which the Union currently works does not allow for adequate interaction in a multi-level partnership...in which national governments involve their regions and cities fully in European policy-making...The process of EU policy-making, in particular its timing, should allow Member States to listen to and learn from regional and local experiences.”

The idea of making more use of subsidiarity to legitimate EU decision-making would be strengthened, however, if subsidiarity were a more clearly justiciable principle, non-compliance with which would be more likely than it is at present to result in the annulment of EU legislation.

### 2.2.3.3. Transparency, legitimacy and access to justice.

If multidimensional transparency is conceptualised as a bundle of rights, including the right of public access, then it entails a further right of access to justice, as a means of enforcing those rights. Access to the reasoning behind a decision is also necessary for that decision to be judicially reviewed: therefore access to justice, via judicial review, is easily seen to require the minimum level of transparency provided by the statement of reasons accompanying a decision. As indicated in sub-section 2.2.3.2. *supra*, and as will be discussed further in Chapter Six *infra*, both Community Courts consistently enforce the duty to give reasons, in order to enable them to exercise their function of judicial review. Furthermore, as indicated in Chapter One *supra*, the need for decisions to be amenable to judicial review, and for access to justice, is implicit in Chiti’s account of transparency,<sup>62</sup> in order to enable decisions that do not appear to comply with the principles of proportionality and subsidiarity to be challenged before the courts.

However, as mentioned in sub-section 2.2.3.2. *supra*, irrespective of the difficulties surrounding the justiciability of subsidiarity, obtaining access to

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<sup>62</sup> Chapter One *supra*, note 3. In Chiti’s actual words (*ibid.*, at 370), “...the principle of transparency operates at the level of repartition of competences between Community and Member States and at the level of the ‘intensity’ of Community action, that is to say it involves the subsidiarity and proportionality principles.” This does not clearly explain the relationship between subsidiarity, proportionality and transparency, however.

judicial review depends upon *locus standi*, which is notoriously difficult for non-privileged applicants such as citizens and civil society organisations to obtain unless a decision is addressed to them, or is of direct and individual concern to them.<sup>63</sup> Increasing access to justice, by exposing EU legislation to public interest challenges, might improve the legitimacy of EU decision-making. Decision-makers could be encouraged to consult with any public interest groups likely to challenge their decisions, and the public might regard those decisions as legitimate if they meet with the approval of groups that claim to represent the public interest.

#### 2.2.4. Conclusions.

The links between multidimensional transparency and legitimacy are not straightforward: also, the many ‘ifs’, ‘coulds’ and ‘maybes’ in the foregoing arguments make the overall connection appear rather tenuous. Nevertheless, a link between transparency as participation in government, requiring transparency as access to documents, and the concept of formal legitimacy, seems plausible: as noted, transparency as participation might also enhance social legitimacy, because people may be less likely to resent decisions in the adoption of which they, or their fellow ordinary citizens, have played a part.

The link between transparency and legitimacy could be further strengthened by reference to Deirdre Curtin’s argument that legitimacy stems from the rule of law and the protection of individual rights.<sup>64</sup> The rule of law, in any event, has

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<sup>63</sup> From Article 230 (ex 173) EC, paragraph 4: see, e.g. Craig and de Búrca, Chapter One *supra*, note 6, pp.461-494, for a detailed treatment of *locus standi* in EU law. Gormley has argued for the addition of a further paragraph to Article 230 (ex 173) EC, in order to confer standing upon certain ‘approved’ public interest groups, as would be listed in a public register maintained by the ECJ, to bring actions for the annulment of Community measures (L. Gormley, ‘Public Interest Litigation in Community Law’ (2001) 7 *European Public Law* 51, at 58-9).

<sup>64</sup> ‘The Constitutional Structure of the Union: A Europe of Bits and Pieces’ (1993) 30 *CMLRev* 17, at 65 (cf., however, Obradovic, note 5 *supra*, at 197). Fuller’s account of how to make good law also indicates that there is a bare minimum level of transparency required in any regime which claims to respect the rule of law (cf. Article 6(1) TEU): that the law itself should be adequately publicised, i.e. comprehensible and available (L. Fuller, *The Morality of Law* Revised Edition, Yale University Press Ltd., London, 1969, at p.39). A regime that fails to provide this bare minimum level of transparency would, arguably, not be legitimate, in that it would not respect this vital rule of law. See also P. Craig, ‘Democracy and rulemaking within the EU: An empirical and normative assessment’ in

been said to include appropriate protection of both individual and collective rights.<sup>65</sup> It undoubtedly requires legal rights to be protected. As noted in Chapter One *supra*, the state itself is the only entity capable of directly interfering with the exercise of the right of public access to State-held information. Therefore, if a state provides an individual legal right to transparency as public access, the rule of law must also require the state to protect that right against interference from government officials. Whenever such officials withhold access to a given document, it is obvious that the right of access to that document cannot be exercised. If the officials cannot adequately justify withholding the document, also in accordance with the rule of law, by reference to at least one applicable exception to the right of public access, the legitimacy of the government they serve must be called into question: state officials must respect the rule of law if the state is to be perceived as legitimate.

Moreover, even if the state provides a remedy for the unjustifiable non-disclosure of a document, such as judicial review, and the original decision to withhold the document is annulled, resulting in the document's eventual disclosure to the applicant for public access, it will nevertheless be true to say that the government unlawfully withheld that document, causing the applicant to instigate legal proceedings, when s/he had been legally entitled to public access all along. That fact is hardly likely to encourage the individual applicant in question to have confidence in the government, or its officials, which suggests that the government's social legitimacy will diminish, at least in the perception of that particular individual.

Having established a connection between multidimensional transparency and two-dimensional legitimacy, even if the actual indispensability of multidimensional transparency to legitimacy has not been firmly established,<sup>66</sup>

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*Lawmaking in the European Union*, eds. P. Craig and C. Harlow, Kluwer Law International, London, 1998, at p.52: unless people understand the norms affecting their actions, the legitimacy of any political regime is called into question.

<sup>65</sup> See, e.g. D. Walker, *The Oxford Companion to Law*, Clarendon Press, Oxford, 1980, at p.1093.

<sup>66</sup> Given that the formally legitimate United Kingdom seems to have been regarded as socially legitimate by the majority of its citizens, *circa* 1950, notwithstanding the fact that, at that

it is now necessary to examine the question of whether the EU conforms with, or whether it could or should be adapted so as to conform with, a model of democracy requiring multidimensional transparency, before finally returning to the overarching question with which this Chapter is concerned: namely that of whether, and to what extent, the application of multidimensional transparency is capable of enhancing the legitimacy of the European Union.

### **2.3. Multidimensional transparency and the EU: how compatible are they?**

#### *2.3.1. Modified cosmopolitan democracy: a multidimensionally-transparent regime for the EU?*

As noted in Chapter One *supra*, a multidimensionally-transparent regime would have the characteristics of Held's model of democratic autonomy.<sup>67</sup> It will be recalled that the general conditions for this model are clearly related to multidimensional transparency: access to information, necessary for informed decision-making; new democratic mechanisms, to facilitate citizen participation in government; investment priorities to be set by the government "in discussion with public and private agencies"; the reduction to a minimum of unaccountable power-centres; and the maintenance of an institutional framework "receptive to experiments with organisational forms."<sup>68</sup> At the international level, democratic autonomy is provided by Held's model of cosmopolitan democracy:

"...the entrenchment of democratic autonomy on a cosmopolitan basis [provides] 'cosmopolitan democracy'...At issue would be strengthening the administrative capacity and accountability of regional<sup>[69]</sup> institutions like the EU...also the

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time, the idea of a right of public access was neither entertained by the UK government nor conspicuously sought after by UK citizens, it remains difficult to see how multidimensional transparency can be regarded as indispensable to two-dimensional legitimacy *per se*.

<sup>67</sup> Chapter One *supra*, note 86, at 325-6.

<sup>68</sup> *Ibid.* This requirement for flexibility is particularly important in light of Marks's belief that democracy should be self-critical and open to the possibility of change in order to increase its effectiveness and to eliminate social inequalities (see Chapter One *supra*, notes 81, 82 and text).

<sup>69</sup> From a global perspective, Europe is of course a region.

construction, in principle, of broad avenues of civic participation in decision-making at regional [e.g. at EU] and global level.”<sup>70</sup>

By substituting ‘Europe’ and ‘European’ for ‘region’ and ‘regional’, and substituting ‘supranational’ for ‘global’, in Held’s account of cosmopolitan democracy, cosmopolitan democracy might be adapted in order to fit within the territory of the EU. This scaled-down model of cosmopolitan democracy might be referred to as ‘supranational democracy’.

*2.3.2. Multidimensional transparency and the adaptability of the EU to conform to the model of supranational democracy.*

2.3.2.1. Could the Union be adapted to conform to the model of supranational democracy?

Held suggests that the Union could be adapted to provide multidimensional transparency via the introduction of supranational democracy. Supranational democracy would require the enhancement of the European Parliament’s role; the holding of general referendums “with constituencies defined according to the nature and scope of controversial transnational issues”; the opening-up of the EU institutions’ decision-making processes to public scrutiny; and possibly the creation of supervisory panels, partly elected and partly statistically representative of the population, to democratise other EU bodies. It would also call for rights, including economic and social rights, to be enshrined at Treaty level, “in order to provide shape and limits to democratic decision-making.”<sup>71</sup> The legislature in a cosmopolitan democracy, and therefore in the supranational model, is “conceived above all as a ‘standard-setting’ institution”: Held explicitly has in mind the EU’s current practice of issuing Directives requiring detailed implementation at Member State level.<sup>72</sup> Law could be enforced either by seconding State police to the supranational organisation, or by creating a permanent volunteer force at supranational level.<sup>73</sup>

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<sup>70</sup> Chapter One *supra*, note 86, at 353-4.

<sup>71</sup> *Ibid.*, at 354-5.

<sup>72</sup> *Ibid.*, at 356: footnote no. 8 refers to the EU’s range of legal instruments.

<sup>73</sup> *Ibid.*: footnote no. 9 refers to the possibility of creating a permanent volunteer force.

Moreover, the long-term aims of cosmopolitan democracy, and therefore of the supranational model, do not appear incompatible with the aim of establishing 'an ever-closer union' (Article 1 TEU). *Per* Held, cosmopolitan democracy aims to establish: a new charter of rights and obligations; a global parliament with revenue-raising powers, connected to regions, nations and localities; the separation of political and economic interests; public funding of deliberative assemblies and electoral processes; an interconnected legal system incorporating elements of both civil and criminal law; and the permanent shift of national coercive capacity to regional and global institutions.<sup>74</sup> After substituting 'European' for 'global', it can be seen that the EU has its new Charter of Fundamental Rights;<sup>75</sup> a Parliament which could be modified into a bicameral legislature,<sup>76</sup> which could be given revenue-raising powers,<sup>77</sup> and which is already 'connected' to the regions and nations of Europe through co-operation and consultation with national parliaments<sup>78</sup> and the Committee of the Regions; political and economic interests were separately discussed at Maastricht; a move in the direction of an interconnected legal system is represented by the *Corpus Juris*;<sup>79</sup> and a shifting of coercive capacity from

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<sup>74</sup> *Ibid.*, at 358.

<sup>75</sup> Although it is not legally binding, the Charter is nevertheless an effective part of the *acquis communautaire* insofar as the rights therein are protected as general principles of Community law by the Courts (see Lenaerts and de Smijter, Chapter One *supra*, note 20).

<sup>76</sup> Presumably the Council of Ministers would become the upper chamber, representing the Member States.

<sup>77</sup> It already has quite a high degree of theoretical control over the Community budget: Article 272(4) (ex 203(4)) EC gives it the power to amend the draft budget and Article 272(8) (ex 203(8)) EC gives it the power to reject the draft budget.

<sup>78</sup> See the Protocol on the role of national parliaments within the European Union, annexed to the TEU and EC Treaties by the ToA, part II, paragraphs 5 and 6: the Conference of European Affairs Committees may contribute to the legislative activities of the European Union.

<sup>79</sup> See, e.g. p.34, COM (2001) 715 final, [http://europa.eu.int/comm/anti\\_fraud/livre\\_vert/document/green\\_paper\\_en.pdf](http://europa.eu.int/comm/anti_fraud/livre_vert/document/green_paper_en.pdf): the authors of the *Corpus Juris* proposed a high level of harmonisation in criminal law, but the Commission considers that any such harmonisation must be both proportionate to the aim of preventing fraud in the Communities and variable in intensity, depending on the area of the Union concerned.

individual Member States to the EU could be represented by both the Europol<sup>80</sup> organisation and the European Rapid Reaction Force.<sup>81</sup>

Furthermore, Held implies that government should be based upon subsidiarity 'from the bottom-up': only such decisions as could not effectively be adopted at local, regional or national level should be adopted at a higher level. The aforementioned Protocol on the Application of the Principles of Subsidiarity and Proportionality makes it clear that Community action can only be justified if the proposed action cannot be adequately achieved by the Member States (paragraph 5), having regard to the transnational aspects of the issue concerned, and/or the requirements of the Treaty, and/or the fact that Community action would produce better results. In light of these considerations, it appears that the EU is theoretically compatible with a suitably modified, supranational model of cosmopolitan democracy.

#### 2.3.2.2. Should the Union be adapted to conform to the model of supranational democracy?

It will be recalled that Held's basic justification for cosmopolitan democracy is that, in the modern world, the control of certain issues is increasingly becoming a matter for states, as opposed to any one state. Issues which "escape the control of a nation state" include "aspects of monetary management, environmental questions, elements of security, [and] new forms of communication:"<sup>82</sup> issues with which the European Union is currently concerned.<sup>83</sup> In order to deal effectively with such transnational issues, the principle of democratic autonomy should be entrenched at international level,

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<sup>80</sup> Council Act of 26 July 1995 drawing up the Convention on the establishment of a European Police Office (Europol) OJ 1995 C 316, (see <http://europa.eu.int/scadplus/leg/en/lvb/l14005b.htm>).

<sup>81</sup> Council Regulation (EC) No. 381/2001 of 26 February 2001 creating a rapid-reaction mechanism, OJ 2001 L 57/5.

<sup>82</sup> Chapter One *supra*, note 86, at 354.

<sup>83</sup> The ordinary people of Europe are, apparently, currently most concerned with peace and security (88%); unemployment (88%); organised crime (87%); poverty and social exclusion (87%); the environment (86%); and consumer protection (81%) (54<sup>th</sup> *Eurobarometer* Report, s.5.2, p.68). These responses appear to have been influenced by the questions put to the people surveyed: the provision of information (70%) and EU enlargement (26%) also feature on the list of public concerns.

in Held's opinion, in a manner that would not only ensure that this highly-developed democratic system, designed with individual states in mind, would not be undermined by the presence of any supranational governance, whilst also ensuring that the existence of individual nation-states would be preserved. This also suggests, of course, that it is possible to adopt supranational democracy, because the Member States, which appear keen to preserve their individual identities, would be able to do so: in fact, supranational democracy might even be essential to preserve the nation-state within the larger Union, given that the transition from European Union to federal state is one conceivable end result of further integration.<sup>84</sup>

As noted in sub-section 2.3.2.1. *supra*, the aims of supranational democracy do not seem to be incompatible with the present aims of the EU. That observation, however, does not suggest that the EU should become a supranational democracy, but only that it could. The argument that no individual Member State can control all the issues faced by governments in the modern world demands some form of at least supranational governance, in the interests of taking effective action regarding issues of concern to ordinary people, such as the protection of the environment. If it is accepted, in light of the Hansen-Williams analysis of the EU's legitimacy crisis, that some form of supranational governance is both a necessary and a *rational* response to the globalisation of such issues, the logical conclusion is that the EU is here to stay: there can be no returning to government by individual Member States acting alone. If the EU is here to stay, and if the Hansen-Williams analysis is correct, the injection of multidimensional transparency in order to promote public trust in the Union would help to resolve that legitimacy crisis, which provides a powerful argument in favour of adopting multidimensional transparency. Even if the Hansen-Williams analysis is not correct, the fact that multidimensional transparency might enhance both the formal and social legitimacy of the Union suggests that multidimensional transparency should at least be tried: if the no-democracy analysis of the legitimacy crisis is correct, supranational democracy seems to be a perfectly acceptable solution; whilst if

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<sup>84</sup> See further section 2.4 *infra*.

the no-myth analysis is correct, it could be that increased public confidence in transparent EU-level decision-making, coupled with the knowledge that the EU is, in light of globalisation, here to stay, could boost the myth of modernity-as-rationalisation sufficiently in order to overcome any potential nationalist ‘backlash’ against the EU.

Rationality is a key concept: the fact that the EU set out to build upon the processes of social and political rationalisation already taking place within the Member States, as Hansen and Williams noted,<sup>85</sup> means that it would neither be rational nor logical to accept that the supranational governance called for by increasing globalisation should not be at least as committed to the principle of democratic autonomy, which is drawn from the liberal democratic traditions common to all Member States, as possible. If the EU is necessary, and democracy is desired, then supranational democracy should at least be tried.

#### **2.4. Would multidimensional transparency generate legitimacy in the European Union?**

From section 2.3.1. *supra*, it appears that both the formal and social legitimacy of the EU might be enhanced by maximising transparency within the Union’s decision-making processes. A major problem for the EU, highlighted by Hansen and Williams’ account of the no-myth analysis of the legitimacy crisis, is that nationalism within the Member States generates powerful anti-integrationist sentiment: sometimes, as with the UK general election of June 7, 2001, such sentiments are expressed by a mainstream political party, as with the Conservatives’ ‘Keep The Pound’ campaign, and the well-publicised intention to ensure that the UK was ‘in Europe, but not run by Europe’. Any idea that makes the EU seem ridiculous or petty,<sup>86</sup> and/or overbearing,<sup>87</sup> or a threat to civil liberties,<sup>88</sup> or corrupt,<sup>89</sup> potentially undermines the social

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<sup>85</sup> Note 36 *supra* and text.

<sup>86</sup> The UK media delights in noting, for example, that EC law regulates the size/shape of fruit intended for sale (report at [http://news.bbc.co.uk/1/hi/english/uk/scotland/newsid\\_1418000/1418949.stm](http://news.bbc.co.uk/1/hi/english/uk/scotland/newsid_1418000/1418949.stm)).

<sup>87</sup> E.g. the fact that it is now a criminal offence to sell goods using imperial weights.

<sup>88</sup> *Corpus Juris* is said to seriously undermine the presumption of innocence: see, e.g., the commentary by R. Maddocks, <http://www.quebecoislibre.org/990612-6.htm>: “Police will

legitimacy of the Union, both in terms of its popularity, and its citizens' belief in its right to govern.

Although the changes required to establish a supranational version of Held's model of cosmopolitan democracy within the EU, as discussed in section 2.3.2. *supra*, would preserve the identity of the Member States, they may initially require a degree of further European integration: the transfer of more powers from the Member States to the EU and to European regions, and some further harmonisation of national legal systems. The question is, how, if the very idea of further European integration is unpopular, i.e. socially illegitimate, could such changes be implemented in order to enhance the Union's social legitimacy?

If 'Euro-scepticism' results from a public perception of the EU as an unelected, illegitimate bureaucracy, cheerfully dictating its own future irrespective of the wishes of ordinary people, then the adoption of supranational democracy would seem to be an appropriate response. Marks describes cosmopolitan democracy as embracing "an ideal of popular self-rule and political equality... enhancing control by citizens of decision-making which affects them"<sup>90</sup> Furthermore, as indicated in sub-section 2.3.2.2. *supra*,

"Held refutes the notion that global democracy must await the demise of the states system...there exists ample scope for democratisation within the current structures of global politics... Democracy within nation-states and democracy in international affairs are mutually supportive developments, which must be pursued in tandem."<sup>91</sup>

The notion of 'popular self-rule' suggests that people would gain control over their own destinies under a model of supranational democracy,<sup>92</sup> whilst the idea

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be allowed to make arrests without evidence (a heavenly state of affairs for some) and the accused will be assumed to be guilty instead of innocent."

<sup>89</sup> Even vague references by UK politicians to the 'unelected bureaucrats of Brussels' convey an unwholesome image of sinister, potentially corrupt individuals (see, e.g. [http://ge97.co.uk/news\\_archive/mar\\_24/story107076s.html](http://ge97.co.uk/news_archive/mar_24/story107076s.html)).

<sup>90</sup> Chapter One *supra*, note 79, at pp.109-110.

<sup>91</sup> *Ibid.*, at p.84.

<sup>92</sup> As seen, one's control of one's own destiny is Popper's principal concern (Chapter One *supra*, text at note 46).

that national and supranational democracy are mutually supportive could perhaps satisfy all but the most extreme anti-integrationist nationalists that the Member States would not simply disappear. Indeed, the very essence of Held's model of cosmopolitan democracy is that it operates above the level of nation-states, without replacing them.

In light of this, as indicated, a possible solution to the EU's legitimacy crisis could be the adoption of a scaled-down model of cosmopolitan democracy. Provided that people could be satisfied of the need to adopt certain decisions and set certain standards at the supranational level, the adoption of a system under which they would have the greatest possible say in such decisions might be welcomed. Popular support, as expressed via democratic processes, would legitimate any decisions concerning the EU's future development, including decisions to proceed with further integration.

## **2.5. Conclusion.**

This Chapter has explored the possible logical connections between multidimensional transparency and two-dimensional legitimacy. Multidimensional transparency could enhance both the formal and social legitimacy of the European Union. A scaled-down, supranational model of Held's cosmopolitan democracy would provide multidimensional transparency within the Union. In such a model, due regard should, and would, be had to the principle of subsidiarity in particular: decisions should always be taken at the lowest possible level of governance, so as to be closer to the ordinary citizen and more likely to be regarded as socially legitimate.

In order to provide supranational democracy, the EU would require quite radical restructuring. That conclusion can hardly be surprising. Nevertheless, it does seem somewhat paradoxical to offer a solution to the problem of the perceived social illegitimacy of European integration that actually has further European integration as its long-term aim, as supranational democracy would have. The only way to avoid this apparent paradox would be to ensure that ordinary people were given a genuine opportunity to decide upon the future

direction of the Union, once a suitably modified cosmopolitan democracy had been established. There would be a world of difference, in terms of social legitimacy, between an elitist, 'Eurocratic' decision to proceed with further integration, as adopted by government leaders at an IGC, and a decision to proceed with further integration that has the support of a majority of ordinary Europeans, as expressed, perhaps, via a referendum conducted simultaneously in all the Member States.

Should the Member States seek to establish supranational democracy at EU level today,<sup>93</sup> with a view to realising those long-term aims of cosmopolitan democracy which seem to correspond quite closely to the present long-term aims of the Union,<sup>94</sup> it would be essential for them to convince the ordinary peoples of Europe of the desirability of doing so. The further development and strengthening of supranational democracy, once established, would depend upon the support of ordinary people, who, according to the Commission,<sup>95</sup> would almost certainly oppose any further integration if given an opportunity to express their views today. In order to overcome this problem, people would have to be persuaded that supranational government by the EU is the necessary, rational response to globalisation; that supranational democracy would not lead to the demise of the Member States in the long term; and that supranational democracy is as transparent and as democratic a system as it is possible to install. In short, unless the social legitimacy of supranational democracy itself were to be secured within the Member States, once and for all, the introduction of multidimensionally-transparent democracy might not secure the desired result of enhancing the social and political legitimacy of the European Union after all.

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<sup>93</sup> The initial adoption of cosmopolitan democracy would of course be dependent upon the Member States *qua* authors of the Treaties, and upon the ratification of the amended Treaties, by referendums as required by the constitutions of individual Member States.

<sup>94</sup> Insofar as the latter aims can be identified: see text at note 21 *supra*.

<sup>95</sup> Note 1 *supra*.

## CHAPTER THREE.

### The EU and its Member States: Taking Transparency Seriously?

#### 3.1. Introduction.

This Chapter concludes Part One of this thesis by examining the Member States' and EU institutions' concept of transparency, particularly in light of Declaration No. 17 annexed to the Final Act of Maastricht, which, as seen, charged the Commission to improve "public access to the information available to the institutions." Are the Member States, *qua* authors of the Treaties, in asking the Commission to concentrate upon public access to information, taking transparency sufficiently seriously? Moreover, has the Commission been taking the task imposed upon it by Declaration No. 17 sufficiently seriously? One approach to these questions is to consider the extent, if any, to which the Member States and Commission appear to be conceptualising transparency as multidimensional.

It will be recalled from Chapter One *supra* that the call for transparency in the EU, particularly by organisations such as *Statewatch UK*, but also by academic commentators insisting that the right of public access is essential to democracy, is a call for multidimensional transparency, requiring the participation of citizens and civil society in EU-level decision-making processes. Bearing this in mind, after briefly examining the concept and role of civil society in a democratic polity (section 3.2), this Chapter will ask (section 3.3) whether the Commission is seeking to enhance the transparency of EU decision-making processes in order to permit, facilitate and encourage the further participation therein of ordinary citizens and civil society, or whether it is exclusively focussing upon public access to information.

As also noted in Chapter One *supra*, public participation in decision-making is the most important dimension of multidimensional transparency. The right to participate in decision-making empowers citizens and civil society to actually make use of any information gained via the right of public access. Without a

right to participate in decision-making processes, the full potential utility of the right of public access cannot be realised. In Chapter Two *supra*, it was established that a scaled-down model of cosmopolitan democracy would provide multidimensional transparency; that the EU seems to be theoretically adaptable to such a model of ‘supranational democracy’; and that introducing supranational democracy might at least alleviate the Union’s legitimacy crisis. With this in mind, a further question arises from Declaration No. 17. Does the mere provision of a right of public access have any capacity to enhance the legitimacy of the Union? That issue will also be further considered in section 3.3.

Section 3.4 not only concludes this Chapter and Part One of this thesis, but also seeks to explain the seemingly disproportionate emphasis within this thesis upon the one-dimensional concept of transparency as public access to documents. In addition, this concluding section will outline the further questions requiring consideration in the remaining Chapters, concerning the extent to which the EU’s approach towards the right of public access is genuinely compatible with the approach to be expected of a regime seeking to legitimate itself, to the greatest possible extent, through the provision of transparency.

## **3.2. Multidimensional Transparency, Civil Society and Politically-Active Citizens.**

### *3.2.1. The concept of civil society.*

Civil society consists of “public organisations which are not state organisations”, including “the media, education institutions, religious bodies and voluntary associations.”<sup>1</sup>

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<sup>1</sup> Cullen and Morrow, Chapter One *supra*, note 83, at 8.

Civil society and a democratic state are distinct concepts:

“...[S]eparation’ of the state from civil society must be a central feature of any democratic political order. Models of democracy that depend on the assumption that ‘state’ could ever replace ‘civil society’ or *vice versa* must be treated with the utmost caution.”<sup>2</sup>

Civil society and democracy can be regarded as mutually reinforcing concepts: more precisely, on Philip Allott’s analysis, as summarised by Cullen and Morrow, democratisation within a state follows from the development of civil society, but the process of democratisation reinforces civil society within that state.<sup>3</sup> First, national societies began to conceive of themselves as structural unities, dependent upon an

“ultimate source of social self-ordering, the source of law in society. The idea of sovereignty was structurally necessary to turn amorphous national [civil] societies into more and more complex self-organising systems.”<sup>4</sup>

However,

“The new philosophy, of democratic constitutionalism...proved to be an excellent means of organising democratic power but it proved incapable by itself of *determining social purpose*, of deciding how the great power of the state-society would be used.”<sup>5</sup>

Civil society therefore developed “as a system for generating value”, particularly in the nineteenth century.<sup>6</sup> At the international level, civil society includes “international non-governmental organisations (NGOs),”<sup>7</sup> being:

“...more-or-less...independent:...economic groups, like labour unions, consumer unions or industrial associations; racial, gender and religious groups; issue-oriented

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<sup>2</sup> Held, Chapter One *supra*, note 86, at p.314.

<sup>3</sup> *Ibid.*, based upon P. Allott, *International Law and International Revolution: Reconceiving the World*, 1989 Josephine Onoh Memorial Lecture, Hull University, Hull University Press, 1989, p.8 and P. Allott, *Eunomia*, Oxford University Press, Oxford, 1990, chapter 13.

<sup>4</sup> Allott (1989 lecture) note 3 *supra*, at p.8.

<sup>5</sup> *Ibid.*, at p.9 (emphasis in original).

<sup>6</sup> *Ibid.*, at pp.9-10.

<sup>7</sup> Chapter One *supra*, note 83, at 9.

groups like education, environmental or animal welfare organisations; groups representing those with disabilities or the elderly or the young; public interest groups that are anti-corruption or pro-universal healthcare...”<sup>8</sup>

For example, *Statewatch*,<sup>9</sup> *Article 19*,<sup>10</sup> *Greenpeace*<sup>11</sup>, and the *World Wide Fund for Nature*<sup>12</sup> may be regarded as members of international civil society. Such NGOs, to which ordinary citizens may often subscribe, may either actively seek to participate in EU-level decision-making or to be consulted, usually by the Commission, regarding proposed legislation.

### 3.2.2. *The importance of civil society.*

Per John Keane, a “pluralistic and self-organising civil society independent of the state is an indispensable condition of democracy”.<sup>13</sup> Civil society is, on this analysis, a social obstacle to the development of despotism within a polity.<sup>14</sup> However, the importance of civil society to democracy depends upon the model of democracy that is contemplated. Held emphasises the importance of civil society to the model of democratic autonomy,<sup>15</sup> but observes that the Marxist model of democracy does not even recognise any distinction between civil society and the state.<sup>16</sup>

The model of cosmopolitan democracy depends not only upon the separation of the concepts of state and civil society, but also, in the long term, upon the “[c]reation of a diversity of self-regulating associations and groups in civil society.”<sup>17</sup> Since cosmopolitan democracy also depends upon multidimensional transparency and, suitably modified, has some potential to legitimate the EU, as noted in Chapter Two *supra*, it follows that both national

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<sup>8</sup> *Ibid.*, footnote no. 18.

<sup>9</sup> Chapter One *supra*, note 9.

<sup>10</sup> Chapter One *supra*, note 56.

<sup>11</sup> <http://www.greenpeace.org/>.

<sup>12</sup> <http://www.wwf.org>.

<sup>13</sup> ‘Despotism and Democracy: The Origins and Development of the Distinction Between Civil Society and the State 1750 – 1850’ in *Civil Society and the State*, ed. J. Keane, Verso, London and New York, 1988, at pp.61-2.

<sup>14</sup> *Ibid.*

<sup>15</sup> Note 2 *supra* and text.

<sup>16</sup> Chapter One *supra*, note 86, at pp.130-1.

<sup>17</sup> *Ibid.*, at 358.

and international civil society would have an important role to play in the re-development of the EU as a multidimensionally-transparent, legitimate polity conforming as closely as possible to the cosmopolitan model of democracy: this will be discussed further in section 3.2.5 *infra*. Furthermore, *per* Cullen and Morrow:

“A serious problem in contemporary international regulation...is that many important decisions are taken in conclave rather than in public fora. International NGOs form part, although only a part, of a necessary move towards transparency and accountability of these bodies...”<sup>18</sup>

As will be recalled from Chapter Two *supra*, the EU’s legitimacy crisis has been at least partly blamed upon a lack of transparency in the Council, and the Council’s lack of accountability to the European Parliament and national parliaments. International civil society NGOs could help to hold the Council to public account, complementing the efforts of MEPs and members of national parliaments to do likewise.<sup>19</sup>

### 3.2.3. *The transparency of civil society.*

If civil society NGOs are to play a role in making the EU multidimensionally-transparent and legitimate, however, they must themselves be transparent: adequately accountable to and representative of their ordinary citizen members.<sup>20</sup> This conclusion accords with that of the Commission in its White Paper on Governance.<sup>21</sup> The principles of good governance are discussed further in section 3.3 *infra*.

Cullen and Morrow suggest that adequately transparent international civil society NGOs can derive accountability and/or legitimacy via their expertise;

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<sup>18</sup> Chapter One *supra*, note 83, at 38.

<sup>19</sup> This is certainly the aim of *Statewatch UK*, which is particularly concerned with the Council’s activities under Title VI TEU, an area in which the European Parliament remains weak and over which no single national parliament can have control, although decisions made by the Council in the area of police and judicial co-operation can in theory profoundly affect civil liberties within the Member States.

<sup>20</sup> Cullen and Morrow, Chapter One *supra*, note 83, at 37, discussed further *infra*.

<sup>21</sup> Chapter Two *supra*, note 1, p.16.

their independence from the state and partisan politics; their contacts and networks at grassroots level; their ability to publicise the activities of international organisations and thereby to hold those organisations to public account; from their recognition by international state-related actors, e.g. the United Nations, and, in general, by their credibility.<sup>22</sup> The mooted of alternative models of accountability reflects the fact that, although international civil society NGOs require legitimacy, and can be criticised in terms of their democratic representativity,<sup>23</sup> the “[p]articipation of NGOs introduces new voices into international law, apart from those of states and international organisations established by states”, which “voices are to be welcomed.”<sup>24</sup> Cullen and Morrow agree that “legitimate concerns about accountability should be addressed”<sup>25</sup> in connection with civil society NGOs, concluding, however, that NGOs should still participate “in the development and implementation of international instruments”.<sup>26</sup> The legitimate concerns in question include the fact that an NGO might be internally dominated by an elite that does not fully share the values of its ordinary members, or externally handicapped by a lack of general education, which facilitates public participation.<sup>27</sup>

#### 3.2.4. *The current role of civil society in EU decision-making.*

From the Commission’s White Paper on Governance:

“Civil society increasingly sees Europe as offering a good platform to change policy orientations and society. This offers a real potential to broaden the debate on Europe’s role. It is a chance to get citizens more actively involved in achieving the Union’s objectives and to offer them a structured channel for feedback, criticism and protest. This already happens in fields such as trade and development, and has recently been proposed for fisheries... The Commission intends to establish, before

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<sup>22</sup> Chapter One *supra*, note 83, at 32-7, and 39.

<sup>23</sup> *Ibid.*, at 29-31.

<sup>24</sup> *Ibid.*, at 31. *Cf.* also Britz and Schmidt, Chapter Two *supra*, note 7, at 71, in connection with the participation of labour and management in the making of Community social policy legislation.

<sup>25</sup> Chapter One *supra*, note 83, at 31.

<sup>26</sup> *Ibid.*, at 37.

<sup>27</sup> *Ibid.*, with reference to Held, Chapter One *supra*, note 96, at pp.181-2.

the end of this year, a comprehensive on-line database with details of civil society organisations active at European level...<sup>28</sup>

Civil society NGOs are evidently active at EU level. The methods by which international civil society NGOs might influence EU decision-making processes are:

- via active lobbying, of the Commission, Council and European Parliament;
- via consultation, chiefly by the Commission; and, at least theoretically,
- as litigants.<sup>29</sup>

Certain civil society NGOs might actually determine Community legislation when acting as social partners.<sup>30</sup> A concern has been raised in connection with the Community's concept of social partnership, however, which could also apply to the consultation of civil society by the Commission: this will be discussed further in section 3.3 *infra*.

### 3.2.5. *The potential role of civil society in a supranational (modified cosmopolitan) democracy.*

It has been established that international civil society NGOs are important in the model of cosmopolitan democracy, both as channels for the communication of public interests and concerns to international decision-makers (states) and as an additional means of holding international decision-makers to public account, particularly when traditional representative democracy is 'diluted', as will shortly be discussed, and when the most direct form of democracy – the

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<sup>28</sup> Chapter Two *supra*, note 1, at p.15.

<sup>29</sup> If Gormley's proposed reform of Article 230 (ex 173) EC were adopted (Chapter Two *supra*, note 63), certain civil society organisations would be able to seek, more easily than at present, the annulment of decisions adversely affecting their interests, but not actually addressed to them.

<sup>30</sup> Articles 138 and 139 (ex 118a and 118b) EC. The social partners are representatives of management (e.g. *UNICE*, the *Union des Confédérations de l'Industrie et des Employeurs d'Europe*) and labour (e.g. *ETUC*, the European Trade Union Confederation, and *CEEP*, the European Centre of Public Enterprises), who, by virtue of Articles 138 and 139, may participate directly in the adoption of Community social policy law. See further Britz and Schmidt, Chapter Two *supra*, note 7, and section 3.3.4. *infra*.



referendum – is impractical, given the size of the population and the volume of legislative/policy proposals originating at the international level.<sup>31</sup>

Within the EU, representative democracy is ‘diluted’ by the following factors:<sup>32</sup>

- although the Council of Ministers provides indirect representative democracy, as its members represent elected governments, no government in any multi-party democracy represents the political opinions of its entire electorate;<sup>33</sup>
- qualified majority voting is increasingly becoming the rule for the adoption of EC legislation,<sup>34</sup> undermining the ability of the Member States to present EC legislation as the product of a unanimous agreement between them, which level of agreement constituted an important potential source of social legitimacy;<sup>35</sup>
- the European Parliament’s capacity to represent Union citizens is limited by its weak potential to influence ‘Second’ and ‘Third Pillar’ issues (Titles V and VI TEU): also, the number of MEPs is limited, suggesting that, particularly in an enlarged EU, individual MEPs will

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<sup>31</sup> Cf. J. Lodge, ‘EC Policymaking: institutional considerations’ in *The European Community and the Challenge of the Future*, ed. J. Lodge, Pinter Publishers Ltd, London, 1989, at p.31. See also Britz and Schmidt, Chapter Two *supra*, note 7, at 60.

<sup>32</sup> This list of the factors weakening representative democracy within the EU is not exhaustive: other problems, however, arise in all representative democracies, such as the fact that final policy outcomes might not reflect the policy desires of individual electors (see, e.g., S. Hix, ‘Parties at the European Level and the Legitimacy of EU Socio-Economic Policy’ (1995) 33 *JCMS* 527, at 528).

<sup>33</sup> Cf. J. Lodge, ‘EC Policymaking: institutional dynamics’ in *The European Community and the Challenge of the Future 2<sup>nd</sup> Edition*, ed. J. Lodge, Pinter Publishers Ltd, London, 1993, at p.1.

<sup>34</sup> See, e.g. S. Boyron, ‘Current Developments in European Community Law: Constitutional Aspects’ (2001) 50 *International and Comparative Law Quarterly* 683, at 687: although the Treaty of Nice seems to be moribund in the wake of the recent Irish referendum rejecting it, any replacement Treaty is likely to extend qualified majority voting in the interests of keeping decision-making practicable in an enlarged EU.

<sup>35</sup> Recalling, e.g., General de Gaulle’s reaction to the introduction of majority voting in the Council for the first time, which precipitated the ‘Empty Chair Crisis’ and the Luxembourg Compromise, restoring unanimous voting whenever issues of particular concern to individual Member States were perceived to be at stake.

have larger constituencies, making their task of representation inherently more difficult.<sup>36</sup>

The Committee of the Regions, comprising representatives of local/regional governments, the majority of whom were directly elected to those governments, was supposed to have supplemented representative democracy, as a channel of communication between the EU and local/regional governments, enabling ordinary people to voice their concerns more easily at EU level and communicating to them the benefits of EU membership.<sup>37</sup> The latest *Eurobarometer* survey<sup>38</sup> indicates that only 29% of Europeans surveyed are aware of the Committee's existence,<sup>39</sup> indicating that it is not fulfilling that task.

In Held's model of cosmopolitan democracy, the European Parliament would have to be reinvented as "a 'standard-setting' institution":<sup>40</sup> moreover, there would have to be some possibility of arranging EU-wide referendums.<sup>41</sup> Certain factors currently weakening representative democracy within the Union would have to be addressed by institutional reforms, as required by the adoption of a 'supranational' model of democracy: the directly-elected Parliament would be required to set policies instead of the Council, which remains, as a body, unaccountable, as only individual members may be replaced following national elections. However, as noted, cosmopolitan democracy also calls for a well-developed international civil society. In addition to the role that civil society NGOs might play in holding EU-level decision-makers to public account, they could also have a supervisory function. Held anticipates that:

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<sup>36</sup> However, Boyron observes that the new limit of 732 MEPs that would have been introduced by the Treaty of Nice has already been recognised as insufficient (note 34 *supra*, at 686).

<sup>37</sup> Former Commission President Jacques Delors, addressing the inaugural meeting of the Committee of the Regions (Articles 263-265 (ex 198a-198c) EC) on March 9, 1994, told the Committee that it was "designed to draw every individual citizen into [the EU]" and that its task was "nothing less than to enhance the democratic legitimacy of [the EU]" ('Commentary', *European Access* (1994) no. 3, at p.7).

<sup>38</sup> Chapter Two *supra*, note 27.

<sup>39</sup> *Ibid.*, s.3.4, p.27.

<sup>40</sup> Chapter One *supra*, note 86, at 356.

<sup>41</sup> *Ibid.*, at 355.

“the democratisation of international ‘functional’ bodies (on the basis perhaps of the creation of elected supervisory boards which are in part statistically representative of their constituencies)...”<sup>42</sup>

Candidates for election to such supervisory positions could conceivably be provided, not by political parties, but by independent international civil society NGOs, which, being “motivated by common values”<sup>43</sup> which are nevertheless “contextually construed by reference to the needs, actual circumstances and cultural outlook”<sup>44</sup> of the people involved therein, may already be “seen as *representing the interests of their constituencies* rather than imposing a conception of universal values.”<sup>45</sup> In other words, an international civil society NGO could represent, as a constituency, a particular public interest group or groups, as opposed to the traditional demographic constituency of an MEP, and could therefore contribute, as stated, to the democratic supervision of any international bodies established in order to carry out a particular function. A supervisory board composed entirely of MEPs could conceivably suffer from a lack of expertise, whereas the addition of at least some independent public interest group representatives, potentially having constituents in all the Member States, could not only provide expertise but also some reassurance that genuinely pan-European concerns were being addressed, given that current MEPs can only claim to represent constituents from one Member State.

Cosmopolitan democracy also calls for “groups and individuals [to have] an effective means of suing political authorities for the enactment and enforcement of key rights...”<sup>46</sup> The theoretical capacity for civil society NGOs to bring litigation in the public interest would have to be realised: never again would it be possible for an organisation such as *Greenpeace* to lack standing to challenge the EU’s funding of a nuclear power station,<sup>47</sup> for example. The development of public interest litigation at EU level might even provide civil

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<sup>42</sup> *Ibid.*

<sup>43</sup> Cullen and Morrow, Chapter One *supra*, note 83, at 9.

<sup>44</sup> *Ibid.*, quoting R. Falk, *On Humane Governance: Toward a New Global Politics*, Polity Press, Cambridge, 1995, at p.113.

<sup>45</sup> Cullen and Morrow, Chapter One *supra*, note 83, at 9, emphasis added.

<sup>46</sup> Held, Chapter One *supra*, note 86, at 355.

<sup>47</sup> Case C-321/95 P, *Stichting Greenpeace Council (Greenpeace International) and Others v Commission* [1998] ECR I-1651.

society NGOs with their most important potential role, given the extent to which the institutional changes required by the model of cosmopolitan democracy would address the need for public participation in decision-making, and the current lack of transparency.

### 3.2.6. *Politically-Active Citizens.*

Cosmopolitan democracy aims to provide ordinary citizens with opportunities to participate in decision-making at all levels of governance, should they so desire, and encourages them to do so, in order to make all decision-making processes as open and democratic as possible. Multidimensional transparency would also ensure that citizens are kept informed. As part of the model of democratic autonomy upon which cosmopolitan democracy is based, Held anticipates the “[i]ntroduction of new democratic mechanisms from ‘citizen juries’ to ‘voter feedback’ to enhance the process of enlightened participation” in decision-making.<sup>48</sup> If, therefore, the EU were to adopt a suitably modified, ‘supranational’ form of cosmopolitan democracy, this would entail the development not only of a thriving, diverse civil society, but also of politically aware, and potentially politically active, citizens.

Ordinary persons holding the nationality of a Member State are ‘Citizens of the Union’.<sup>49</sup> A vast literature has accumulated concerning Union citizenship.<sup>50</sup> It is beyond the scope of this thesis to dwell at length upon this concept and all the various critiques thereof: however, an overarching question is that of the role of the concept of citizenship within the Union. Erika Szyszczak justifiably regards Union citizenship as a bundle of rights for individuals, the enjoyment

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<sup>48</sup> Chapter One *supra*, note 86, at 324.

<sup>49</sup> Article 17 (ex 8) EC.

<sup>50</sup> See, e.g., C. Closa, ‘The Concept of Citizenship in the Treaty on European Union’ (1992) 29 *CMLRev* 1137, and ‘Citizenship of the Union and Nationality of Member States’ (1995) 32 *CMLRev* 487; H. Lardy, ‘The Political Rights of Union Citizenship’ (1996) 2 *European Public Law* 611, and ‘Citizenship and the Right to Vote’ (1997) 17 *OJLS* 75; Bader, Chapter One *supra*, note 25; J. Shaw, ‘Citizenship of the Union: Towards Post-National Membership?’ (1998) vol. 6 *Collected courses of the Academy of European Law* 245; S. Fries and J. Shaw, ‘Citizenship of the Union: First Steps in the European Court of Justice’ (1998) 4 *European Public Law* 533, and P. Lehning, *European Citizenship: Towards A European Identity?* (2001) 20 *Law and Philosophy* 239.

of which could ‘make Europe more relevant to its citizens’,<sup>51</sup> adding greater legitimacy to the polity, in line with at least part of the rationale for introducing Union citizenship in the first place.<sup>52</sup> Furthermore, by tradition, citizenship defines the relationship between citizens and the polity in which they live, not just as a relationship based upon rights and duties: citizenship is based upon membership of a community, and membership of a community involves *participation* in that community.<sup>53</sup> The idea that Union citizenship should somehow involve the participation by citizens in the shaping of the Union, and in Union decision-making processes, is clearly present in several critiques of Union citizenship<sup>54</sup> and is endemic in the body of literature concerning the Union’s formal, or democratic, legitimacy:<sup>55</sup> moreover, the idea that one should be able to participate in the political life of the community of which one is a citizen is evidently at the core of the modern concept of citizenship, as derived from the liberal democratic traditions of the Member States.<sup>56</sup>

Clearly, there is a firm belief that citizens should participate in political decision-making, particularly in a cosmopolitan model of democracy.<sup>57</sup>

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<sup>51</sup> ‘Making Europe More Relevant To Its Citizens: Effective Judicial Process’ (1996) 21 *ELRev* 351.

<sup>52</sup> C. Closa, ‘The creation of the citizenship of the Union during the IGC on Political Union’ (Typescript dated March 1992, University of Hull, Department of Politics) at p.2: the Belgian idea of a ‘People’s Europe’ linked the concept of Union citizenship to the Union’s quest for democratic legitimacy (Closa cites in support of this EU Doc. no. 1608, dated 29 March 1990).

<sup>53</sup> Shaw (1998) note 50 *supra*, at 255, quoting D. Held, ‘Between State and Civil Society: Citizenship’ in *Citizenship*, ed. G. Andrews, Lawrence and Wishart Ltd, London, 1991, at p.20

<sup>54</sup> E.g. Shaw, note 50 *supra*, esp. at 249: “Popular and political comment upon the development of the EU has also concentrated on the question of the role of the citizen in the government of ‘Europe’” and at 256: “Participation raises the relationship between citizenship and questions of democracy and government. The EU, as is well known, has a number of acute difficulties in the sphere of democracy and the so-called democratic deficit, and a variety of possible solutions...have been suggested, some of which include the enhancement of the status of citizenship”; see also A. Wiener and V. Della Sala, ‘Constitution-making and Citizenship Practice – Bridging the Democracy Gap in the EU?’ (1997) 35 *JCMS* 595, at 604, and Bader, Chapter One *supra*, note 25, at 168.

<sup>55</sup> E.g. P. Craig, ‘Democracy and Rule-making Within the EC: An Empirical and Normative Assessment’ (1997) 3 *European Law Journal* 105, esp. at 120-1.

<sup>56</sup> See, e.g., Wiener and Della Sala, note 54 *supra* at, 601-602, also Closa, note 52 *supra*, at p.1, and J. Weiler, ‘European models: Polity, people and system’ in *Lawmaking in the European Union*, cited at Chapter Two *supra*, note 64, at p.23.

<sup>57</sup> *Per* Britz and Schmidt, the current Community law principle of democracy, which derives from the constitutional traditions of the Member States, and from the amendment of Article 6 (ex F) TEU by the ToA, demands that law-making must be “subject to the control of the European peoples” (Chapter Two *supra*, note 7, at 62, see also *ibid.*, at

Secondly, the general consensus appears to be that Union citizenship could add legitimacy to the Union, but only if the concept of Union citizenship is taken seriously, which necessitates the inclusion of the all-important dimension of participation in political decision-making as a dimension of Union citizenship.<sup>58</sup> Wiener and Della Sala present citizenship as a three-dimensional concept: citizens' rights, being "the legal entitlements of an individual towards the community"; citizens' access to political participation; and citizens' sense of 'belonging' to the community.<sup>59</sup> These dimensions are interrelated, and this conceptualisation of citizenship allows Wiener and Della Sala to examine the concept of European citizenship as an aspect of EU constitution-building.<sup>60</sup> They consider that the difficulties encountered in the ratification of the TEU indicate that it is not enough for Member States to conclude an IGC with a *fait accompli* agreement for acceptance, without revision, by national representative institutions and/or referendums: a participatory citizenship practice demands that citizens should be involved in defining "the terms of belonging" to the Union.<sup>61</sup> The main problem, in Wiener and Della Sala's opinion, is that European citizens are becoming politically active, seeking

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58)." They observe that the CFI "does not consider the Council and the Commission to be vehicles of [democratic] legislation (*ibid.*, at 65)." However, they recall that the Council and the Commission are 'indirectly' democratically legitimated, referring to the fact that all Member State governments are elected; that these governments then proceed to appoint, with the consent of the European Parliament, the Commission; and that the European Parliament controls the Commission (*ibid.*, at 63). In their opinion, this gives the Commission and Council "the necessary democratic accountability for Community activities" (*ibid.*), but the participation of either the European Parliament or of adequately representative civil society NGOs in law-making is also necessary to provide 'substantive' (social) legitimacy: such participation provides a means whereby "decision-makers can recognise the interests of the people...the participation of interest groups increases the representativity of state decisions and thereby the efficiency and legitimacy of the exercise of power" (*ibid.*, at 67).

<sup>58</sup> E.g. Craig, note 55 *supra*, at 122: "Legitimacy, in terms of inputs and social acceptability, is likely to be improved both directly and indirectly through participation. The direct legitimating function flows from the fact that people are more likely to accept the resulting norms when they are involved in their formation, rather than simply having such acts thrust upon them. The indirect legitimating function follows from the connection between transparency and reason-giving...and participation/consultation...Insofar as transparency and reason-giving are seen as ways of strengthening the Community's legitimacy, developments in this respect create pressures from people to be able to participate in the framing of the norms which are now more in the public domain." This complements Allott's view that democratisation strengthens civil society (note 3 *supra*, and text).

<sup>59</sup> Note 54 *supra*, at 602.

<sup>60</sup> *Ibid.*, at 603.

<sup>61</sup> *Ibid.*, at 609.

“ways to be part of the [EU] constitution-building process”.<sup>62</sup> However, citizens are encountering the problem of the EU’s democratic deficit. The EU’s ‘constitutional engineers’, i.e. the Member States, are seeking “the right mix [of procedures and principles] to pass the procedural test for [the legitimacy of decision-making within] liberal democracies”, but

“constitution-building cannot simply create Europeans because it creates Europe. This must be part of a dynamic process that recognises cultural diversity from many different social, economic and political spaces, not all of which are defined by territory.”<sup>63</sup>

This perspective on the EU’s constitutional requirements and EU citizenship is particularly useful. It embraces the idea that Union citizens should be able to participate in Union-level decision-making, and the idea that there should be a variety of ways in which citizens should be able to participate – socially and economically, as well as politically. It complements the idea that there should be a vibrant, diverse civil society, to represent constituencies based upon potentially transnational social, economic and cultural interests, as opposed to the traditional intra-national demographic constituency. It also, most importantly, reflects the idea that citizen participation in the constitution-building process is required in order to reach a logical conclusion of the project of European integration: the creation of a single European people. It is not enough to keep Union citizens informed about the development of the Union: the right to participate in that development is also necessary. Cosmopolitan democracy, being multidimensionally-transparent, would empower those Union citizens wishing to be more politically active to participate in this most fundamental aspect of EU decision-making.

### 3.2.7. *Conclusions.*

Civil society, already established within the Member States, is now developing at the international level, and is already active within the EU: meanwhile,

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<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

Union citizens are perceived to be actively seeking participation in the shaping of the Union's future. Cosmopolitan democracy requires international civil society to be strengthened, diversified and, above all, *empowered*: to represent public interests to decision-making bodies; to help hold those bodies to account; and to instigate legal proceedings in the public interest. Civil society also encourages and empowers ordinary citizens to become politically active. Given a thriving, diverse, transparent and accountable civil society, as well as cosmopolitan democracy, ordinary Union citizens would be able to participate in EU-level decision-making in at least three ways: via elections, at all levels of government; via referendums, which could be particularly important in connection with the further development of the Union's constitution; and via participation in civil society NGOs, which would lobby the institutions on their behalf and, possibly, help to supervise the implementation of EU-level policies on their behalf. Civil society lobbying and consultation could also be particularly important in determining the future development of the EU: it could, for example, help to make the next IGC much less secretive than the last.<sup>64</sup>

Just as the concept of multidimensional transparency accompanies that of cosmopolitan democracy, so does the concept of civil society. Civil society has the potential to enhance public participation in decision-making, essential to both cosmopolitan democracy and multidimensional transparency. Therefore, if the Member States and Commission are truly serious about their efforts to improve the "openness of the decision-making process," and about transparency, they should be seeking to increase the extent to which the public may participate in decision-making, and seeking to encourage and facilitate

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<sup>64</sup> Cf. G. de Búrca, 'The drafting of the European Union Charter of fundamental rights' (2001) 26 *ELRev* 126, at 131-132. Although civil society was excluded from formal involvement in the drafting of the Charter, which was drafted by representatives of the Member State governments, the Commission, the European Parliament and national parliaments, civil society NGOs were nevertheless encouraged to provide views: "a number of well-attended hearings took place and a vast number of submissions and representations were made by a wide range of organisations and interests, thus testifying to the emergence and potential vibrancy of a European civil society" (*ibid.*). Furthermore, importantly, "it is as though this procedure represented a trial response to the major criticisms of the normal IGC procedure for amending the Treaties, in that the [conclusions of the Tampere European Council] stipulated a degree of openness, inclusiveness and transparency, which have been conspicuously absent from the IGC treaty revision processes of the past" (*ibid.*). These observations suggest that civil society NGOs could be similarly involved in future IGCs.

such participation wherever possible. The question of whether that is actually the case is discussed in section 3.3.

### **3.3. The Commission's Approach to Transparency: Public Participation or Public Information?**

#### *3.3.1. The Commission as the 'engine' of transparency.*

It is, as indicated, appropriate to focus attention upon the Commission, as the institution specifically charged to develop measures to improve public access to information by Declaration No. 17. Also, the Commission has the right of initiative where transparency-related Community legislation is concerned, and is influential in suggesting amendments to the Treaties during IGCs. Two questions must be addressed in connection with the Commission's approach to transparency. Is the Commission seeking to encourage public participation in decision-making, or at least recognising the importance of information as a means of holding the institutions to account? If the answer were to be 'no', it would seem that the Commission has failed to recognise the full potential value of the right of public access to information as a democratising and legitimating factor (as recapitulated *infra*). Secondly, has the Commission exclusively concerned itself with access to information, or is it also promoting the idea of greater public participation in EU-level decision-making, or any other ideas that seem to be compatible with the development of multidimensional transparency within the EU?

#### *3.3.2. Public access to information as a dimension of multidimensional transparency, revisited, in the context of attempting to legitimate the EU.*

It is important to bear in mind that a right of public access to information may serve democracy in two ways. Firstly, the right of citizens

“to call public authorities to account...cannot be exercised effectively without access to information about what the public authorities are doing and why. Public access

enables citizens to scrutinise the activities of those exercising public authority and to make an independent evaluation of them.”<sup>65</sup>

Secondly, whereas citizens can scrutinise public authorities given *ex post facto* access to information concerning their activities, the provision *à priori* of information concerning proposed legislation and policies would naturally facilitate lobbying, aimed at influencing the outcome of the relevant decision-making processes. Neither the provision of access to information available to the institutions, nor the provision of information detailing the institutions’ forthcoming and proposed activities, should be confused with ‘the provision of information’, however. The latter is a vague phrase that could mean no more than the Commission, for example, issuing glossy, colourful pamphlets describing the EU and its activities in general terms. Such ‘information’ might merely be a form of propaganda, casting the EU and its institutions in a positive light, of little or no value in terms of either genuinely enhancing the institutions’ accountability or of encouraging and facilitating public participation in decision-making.<sup>66</sup>

Without an effective means of calling the institutions to account, and without a right to participate in decision-making processes, no right of public access would have any significant potential to enhance the legitimacy of the Union. Information may be “the oxygen of democracy”<sup>67</sup> but, to extend that particular metaphor, democratic processes involving elections and debates are democracy’s ‘lungs’. The *Article 19* perspective insists that democracy does not function without information, but it could equally be argued that the oxygen of information, without the lungs of democratic processes, would just be an atmospheric phenomenon, and if democracy were to be metaphorically likened to ‘intelligent life’, any palaeontologist would readily confirm that even

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<sup>65</sup> I. Harden, ‘Citizenship and Information’ (2001) 7 *European Public Law* 165, at 185.

<sup>66</sup> Such information might, however, conceivably direct the citizen’s attention towards a means of acquiring more useful information. The European Parliament, being aware of the need for better communication between the Union and its citizens, has expressed its desire to avoid allowing a Community information/communication policy to become a vehicle for propaganda (E. Davies, ‘Information and communication in the EU’, *European Information*, (1998) no. 3, p.2, at pp.3-4.)

<sup>67</sup> *Article 19* (Preface, *The Public’s Right to Know: Principles on Freedom of Information Legislation*, Chapter One *supra*, note 56).

an oxygen-bearing atmosphere may be devoid of intelligent life. Likewise, information does not make a democracy. Moreover, from the discussion of transparency, democracy and legitimacy in Chapters One and Two *supra*, it follows that the EU needs not only multidimensional transparency, but also a model of democracy in which multidimensional transparency is an intrinsic element, in order to become legitimate.

In short, information without democratisation will not necessarily generate social legitimacy, wherever democracy is associated with legitimacy. That conclusion is supported empirically by the Danish rejection of the TEU and the Irish rejection of the Treaty of Nice. Important as the right of public access to information is, therefore, as both a dimension of multidimensional transparency and an essential pre-requisite of cosmopolitan democracy, the EU should be developing that right as part of, and in the context of, a process of democratisation, aiming to make the institutions publicly accountable, and to secure as much public participation in decision-making as possible. In a more democratic Union, the institutions should be more able to determine whether a proposal would have adequate public support if it were to be adopted.

### *3.3.3. The Commission and transparency.*

Prior to the 1996 IGC, the Commission published an Opinion<sup>68</sup> in which it clearly stated that:

“...the Union’s activities must be accessible and comprehensible, so that those affected are in a position to obtain all the information they require.”<sup>69</sup>

This appears promising, at first glance: multidimensional transparency calls for accessible and comprehensible information. However, this brief quotation says nothing about the purpose(s) for which people might require the information they obtain. People affected by Union activities might require information

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<sup>68</sup> *Reinforcing political union and preparing for enlargement*, Official Publications Unit, Brussels, 1996.

<sup>69</sup> *Ibid.*, paragraph 19, at p.12.

purely in order to find out how they have been affected by those activities, not in order to actually influence EU decision-making, or to hold an EU-level decision-maker to account.

The first sentence of paragraph 19 of the Commission's Opinion was in fact far less indicative of a multidimensionally-transparent approach towards the right of public access to information. It simply stated that:

“What the Union does has to be understandable: democracy depends on this.”

The requirement for governmental decision-making processes to be understandable is only part of the first dimension of multidimensional transparency. Democracy certainly requires access to adequate quantities of comprehensible information, but the factor upon which any model of democracy most depends is the ability of the *demos* to participate in both law- and policy-making. People might come to understand the somewhat arcane decision-making processes of the Union reasonably well, and yet still feel that they have no effective means of influencing those processes, such as they would expect to have in a democracy.

The Commission also called, in paragraph 19 of its Opinion, for further development of the role of the European Parliament; for national parliaments to be more closely involved in EU affairs; for the EU to actually do less, so as to do it better; and for decision-making processes to be simplified and made more democratic. ‘Making decision-making processes more democratic’ simply involved making more use of the European Parliament, however, as was made clear in paragraphs 21 and 22 of the Commission's Opinion:<sup>70</sup> there was no call for more direct citizen participation in EU decision-making, or for alternative forms of public participation to be developed. As noted earlier, the European Parliament is not without problems and should not be regarded as the sole repository of democracy within the Union. Merely increasing the Parliament's

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<sup>70</sup> Note 68 *supra*, pp.13-14.

involvement in decision-making will neither achieve cosmopolitan democracy nor multidimensional transparency.

In fact, Mather suggests that the Parliament is the least likely of the three principal institutions (Commission, Council and Parliament) to achieve her three-dimensional concept of transparency. Its current transparency is limited by the sheer complexity of some of the decision-making procedures in which it participates, and by the use of ‘trialogue’ meetings between MEPs, the Commission and the Council Presidency, which meetings attempt to resolve disputes, but which normally take place *in camera*. Meetings of the individual political/national groups of MEPs are also closed. Mather also doubts that the Parliament is open to influence by a wide range of interest groups, because although more lobbying takes place now that the Parliament has more powers, MEPs are predominantly “white, male, middle-class, middle-aged-to-elderly professional people.” Her conclusion is damning: the complexity of its decision-making processes makes the Parliament unable to supply even her first dimension of transparency (comprehensibility); the secrecy of group meetings in which MEPs formulate their policies limits its ability to provide the second dimension (access to the thinking behind decisions); and its composition raises questions about its commitment to the third dimension (public participation). “It should not therefore be assumed that the [European Parliament’s] limited part in facilitating transparency arises solely from its own limited powers.”<sup>71</sup>

In its Report for the Reflection Group on the 1996 IGC, the Commission stated that:

“...the first challenge is obvious – to make Europe the business of every citizen. The emergence of open debate, covering all points of view on Europe, is in fact a real opportunity. Europe is no longer deciding its future behind closed doors.

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<sup>71</sup> Chapter One *supra*, note 1, at pp.10-11.

That is why the Commission does not regard the Treaty's objective of a Community closer to the citizens as a mere empty formula, but as an overriding principle which guides its actions.

The Commission will be listening to the views of ordinary men and women...<sup>72</sup>

Although merely listening to citizens is not the same as pro-actively consulting, inviting and encouraging public debate, the reference to open debate is nevertheless more suggestive of multidimensional transparency than the aforementioned reference to the provision of comprehensible information. Unfortunately, however, the Commission is of course not the only decision-making institution, nor is it the most important, and the regular reports of *Statewatch*<sup>73</sup> suggest that the Council of Ministers does not pay much attention to civil society, to say nothing of ordinary men and women.

Until very recently, in light of the foregoing vague and/or ambiguous pronouncements of the institution specifically charged with the development of transparency within the EU, it seemed that the Commission remained firmly committed to the Monnet-esque idea that ordinary people would come to support the Union if only the Union made more of an effort to explain its activities to them, and to show that it was taking action in areas of popular concern, such as unemployment.<sup>74</sup> Certainly, there was no explicit, unequivocal commitment, in the quoted passages from Commission publications, to either the provision of information *à priori* or to active consultation of the public regarding the details of proposed legislation and policies. Again, *per* Mather, it seems that only the first dimension of transparency (access to comprehensible information) will be introduced if transparency is only regarded as a means to the particular end of popularising the EU instead of democratising it:

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<sup>72</sup> Official Publications Unit, Brussels, 1995, at pp.3-4. If "Europe is no longer deciding its future behind closed doors", it is interesting to note that neither the Amsterdam nor the Nice IGC was open to the public. Both IGCs, moreover, presented the peoples of Europe with *faits accomplis*, although the Treaty of Nice, having been rejected by the people of Eire, seems unlikely to enter into force.

<sup>73</sup> <http://www.statewatch.org/secreteurope.html>.

<sup>74</sup> *Cf.* Mather, Chapter One *supra*, note 1, at p.9: "...what the EU's institutions mean by transparency does not match public understanding of the issue...the EU institutions also have different ends in mind when they consider the purposes of transparency..."

“if transparency exercises on the part of the EU institutions were never intended to achieve the goals of those outside the decision-making processes, it is unsurprising that popular dissatisfaction [with the Union] remains”,<sup>75</sup>

One potentially useful argument of the Commission’s, however, was that the EU should do less, so as to do it better. This reflected the EU’s newly declared commitment to proportionality and subsidiarity. As noted in Chapter Two *supra*, compliance with both principles could enhance the Union’s legitimacy, and the concepts of proportionality, subsidiarity, multidimensional transparency and legitimacy are intertwined, if not actually related. Also on a much more positive note, in terms of promoting multidimensional transparency, the Commission recently published its White Paper on European Governance.<sup>76</sup> The White Paper is arguably the first public communication in which the Commission has demonstrated any genuine understanding of the meaning of transparency. The Commission is now calling for:

- a broader debate on the future of Europe;
- immediate reform aimed at increasing accountability, openness and transparency, prior even to further modification of the Treaties;
- greater involvement of ordinary people and civil society; and
- further consultation regarding, and further consideration to be given to, the process of opening European decision-making up to citizens.

Although still to an extent concerned with making the decision-making processes “easier to follow and understand,”<sup>77</sup> the Commission is at least now proposing to establish minimum standards on consultation, suggesting that further participation of civil society NGOs in EU-level decision-making will be

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<sup>75</sup> Chapter One *supra*, note 1, at p.10.

<sup>76</sup> COM(2001) 428, 25 July 2001.

<sup>77</sup> *Ibid.*: see pp.4-5, and especially p.10: “The Institutions should work in a more open manner. Together with the Member States, they should actively communicate about what the EU does and the decisions it takes. They should use language that is accessible and understandable for the general public. This is of particular importance in order to improve the confidence in complex institutions.”

facilitated,<sup>78</sup> and proposing to strictly respect the principles of subsidiarity and proportionality. Importantly, the Commission finally acknowledges that (emphasis added):

*“Democracy depends on people being able to take part in public debate. To do this, they must have access to reliable information on European issues and be able to scrutinise the policy process in its various stages. Major progress has been made in 2001 with the adoption of new rules giving citizens greater access to Community documents.”*<sup>79</sup>

This is a major improvement upon the earlier Commission statement to the effect that democracy depends upon the EU’s work being understandable: here, participation in public debate is clearly linked to the right of access to information. The White Paper sets out five principles of good governance,<sup>80</sup> said to reinforce the principles of subsidiarity and proportionality:

- *openness* (chiefly requiring the institutions to communicate more effectively about Union-level decision-making);
- *greater participation*, of citizens and civil society, from the inception of a policy to its implementation;
- *accountability*: both the institutions and civil society NGOs must assume responsibility for their actions at EU level, and explain to the public their role in decision-making;
- *more effective policy-making*: the EU must deliver timely policies based on past experience and an assessment of their future impact; and
- *coherence*: policies must be easily understood and must be developed in a manner that takes account of all the Union’s objectives.

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<sup>78</sup> *Ibid.*: see pp.4-5 and especially p.10: “The quality, relevance and effectiveness of EU policies depend on ensuring wide participation throughout the policy chain – from conception to implementation. Improved participation is likely to create more confidence in the end result and in the Institutions which deliver policies. Participation crucially depends on central governments following an inclusive approach when developing and implementing EU policies.”

<sup>79</sup> *Ibid.*, at p.11.

<sup>80</sup> *Ibid.*, at p.10.

Were it not for the White Paper, it would be almost impossible to conclude that the Commission had been taking transparency seriously,<sup>81</sup> although its commitment to subsidiarity and proportionality, both dimensions of multidimensional transparency, had been made evident prior to the 1996 IGC. The White Paper is significant not only as evidence of the Commission's understanding of democracy as dependent upon public participation in decision-making and the provision of useful information, but also because many of its proposals are intended to be implemented without the need for Treaty amendments, if possible.<sup>82</sup> The White Paper, moreover, seems to be principally concerned with public participation, proportionality and subsidiarity: the mere provision of information is still mentioned, showing that the Commission still believes that the public is not being sufficiently informed about EU policies,<sup>83</sup> but the various calls for "greater public scrutiny and debate",<sup>84</sup> "a reinforced culture of consultation and dialogue",<sup>85</sup> "stimulating a public debate on the future of Europe and its policies"<sup>86</sup> and a means of helping "citizens to hold their political leaders and the Institutions to account for the decisions that the Union takes"<sup>87</sup> certainly imply the need for citizens to have adequate access to the information held by and available to the institutions. That is strongly reinforced by the passage quoted at note 79 *supra*.

It may seem as though the Commission has begun to consider the right of access to information from the perspective of an institution committed to

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<sup>81</sup> Cf. Craig, Chapter Two *supra*, note 64, at 53-4): the Commission had very little to say on the subject of public participation in decision-making, despite having 'highlighted the need for a genuine policy to bring the Union nearer the citizen and strengthen his and her involvement and trust in the decision-making process' (Commission Report for the Reflection Group on the 1996 IGC, at paragraph 76, under the heading of transparency). Craig concludes (*ibid.*) that "[i]t is self-evident that people will not make much use of [a scheme inviting public comments on Commission proposals] when it is not readily known to them and when there is no framework within which to place such *ad hoc* participation."

<sup>82</sup> Cf. p.8 of the White Paper, Chapter Two *supra*, note 1: "...in preparing for further institutional change, the Union must start the process of reform now. There is much that can be done to change the way the Union works under the existing Treaties."

<sup>83</sup> E.g. *ibid.* at p.11: "...the Institutions and Member States also need to communicate more actively with the general public on European issues...", and p.34: "...the greater the participation in European policies of national and regional actors, the more they will be prepared to inform the public about those policies."

<sup>84</sup> *Ibid.*, at p.33.

<sup>85</sup> *Ibid.*, at p.16.

<sup>86</sup> *Ibid.*, at p.30.

<sup>87</sup> *Ibid.*, at p.33.

multidimensional transparency. However, there is no evidence to indicate, unequivocally, that the Commission is contemplating multidimensional transparency as described in Chapter One *supra*. The White Paper describes openness, access to information and public participation as principles of ‘good governance’, but at no point does it explicitly connect all three principles with transparency. The word ‘transparency’ only appears twice in the entire document, once at p. 19 in connection with the transparency of the Union’s food safety policy, and again at p. 27 in connection with the transparency of international organisations with which the EU is involved.<sup>88</sup> Multidimensional transparency, as seen, expressly links access to information and public participation in decision-making, including the participation of civil society in decision-making. The role of civil society within the EU, as seen, is also discussed within the White Paper, but is not expressly linked to transparency either.

Therefore, although the Commission seems to be taking transparency more seriously than ever before, it has apparently still to conceptualise transparency as multidimensional, encompassing several of its principles of good governance. The White Paper’s welcome and positive approach to the issue of public participation in EU-level decision-making seems to have been inspired more by the Irish rejection of the Treaty of Nice<sup>89</sup> than by an abstract concept of transparency as public participation in decision-making. There is nothing to suggest that the Member States’ and Commission’s concept of transparency has evolved a great deal from that set out in Declaration No. 17, which specifically identified transparency with the provision of public access to the information available to the institutions. ‘Openness’ of the decision-making processes is still identified with public access to information concerning those processes.<sup>90</sup> The White Paper proposes, at page 4, to provide “[u]p-to-date, on-

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<sup>88</sup> It seems rather presumptive on the part of the Commission to suggest, at p.27 of the White Paper, that the Union can improve the legitimacy and transparency of international organisations by ‘strengthening its voice in multilateral negotiations’, when its own legitimacy and transparency remain dubious.

<sup>89</sup> Referred to at p.3 of the White Paper.

<sup>90</sup> The right of public access to documents is apparently regarded as “the linchpin of the entire openness policy” of the Union: the quotation is from a conference paper given by Mary Preston (Head of Unit for “Citizen-oriented measures”, Secretariat General, European

line information on preparation of policy through all stages of decision-making”, but that is merely information: it is not openness in the sense of opening decision-making processes to public participation.

The only evolution that seems to have taken place is in terms of the perceived function of public access to information held by the institutions. Whereas the Commission originally regarded this as a means of increasing public awareness of the EU and its activities, the White Paper now acknowledges that such information is also necessary for public debate on the Union’s future. The concept of transparency as public access to information remains at best two-dimensional, however: information must be 1) available, and 2) understandable.

It will be recalled that, *per* Mather, public participation in decision-making is probably more correctly described as a function of transparency than as a dimension, although it is possible to regard participation as an intrinsic part of the ‘transparency package’.<sup>91</sup> This, of course, is the approach taken within this thesis. Meanwhile, the Member States’ concept of transparency, according to Declaration No. 17, is an intrinsic part of what might be described as the EU’s ‘popular legitimacy package’: one of four measures introduced by the TEU to improve the legitimacy of the new European Union, including also subsidiarity; greater democracy, via the increased involvement of the European Parliament; and Union citizenship, a ‘Community-building’ measure.<sup>92</sup> Securing the legitimacy of government is not an intrinsic dimension of multidimensional transparency, but it can certainly be regarded as a function thereof, and as a function of cosmopolitan democracy, as suggested by Chapter Two *supra*. The securing of legitimacy in any democratic polity could be regarded as the principal function of multidimensional transparency: the roads

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Commission), entitled ‘Openness and the European Union Institutions’, Stockholm, 27/28 June 1996, <http://europa.eu.int/ISPO/legal/stockholm/en/preston.html#21>.

<sup>91</sup> Chapter One *supra*, text at note 13.

<sup>92</sup> de Búrca, Introduction *supra*, note 7, at 350.

explored by the pro-transparency commentators mentioned in Chapter One *supra* seem to lead in that direction.<sup>93</sup>

The Member States and institutions must, if they are committed to securing legitimacy for the EU through the introduction of transparency, have regard to all the factors which may conceivably undermine the legitimacy of the Union's decision-making processes and ask how transparency might, logically, improve the situation. There is at least one potential legitimacy problem that the mere provision of a right of public access to information is unlikely to resolve.

#### *3.3.4. A caveat concerning corporatism, the Commission, and consultation.*

Cosmopolitan democracy calls for pluralism. Pluralism calls for the widest possible public participation in EU-level decision-making, and for the widest possible right of access to the information available to the institutions, which conclusion follows from conceptualising transparency as multidimensional. One caveat that could apply to the scope of the consultation of civil society by the Commission, however, notwithstanding the fact that the participation of civil society in EU decision-making processes could facilitate the participation of ordinary citizens in those processes, particularly at EU level, where it could be difficult for ordinary citizens to make themselves heard,<sup>94</sup> and notwithstanding the sentiments expressed within its White Paper, is the Commission's perceived tendency to favour corporatism, as opposed to pluralism.

This tendency is ascribed to the Christian/Social Democratic political traditions of the six original Member States.<sup>95</sup> Grant likens the social partnership arrangement obtaining under Articles 138 and 139 (ex 118a and 118b) EC to the model of 'tripartism',<sup>96</sup> originating in the International Labour Organisation's conference structure, which involves two representatives from

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<sup>93</sup> Another function is the (disputed) function of improving the quality and effectiveness of government, see Chapter One *supra*, text at note 67.

<sup>94</sup> Cf. Chanan, Chapter Two *supra*, note 60.

<sup>95</sup> W. Grant, *Pressure Groups, Politics and Democracy in Britain*, Harvester Wheatsheaf, Hemel Hempsted (Herts), 1995, at pp.121-3.

<sup>96</sup> *Ibid.*

the government and one each from the management and labour sectors within each member state.<sup>97</sup> Corporatism is believed to undermine democracy because it is biased towards larger, transnational organisations, especially large transnational business undertakings,<sup>98</sup> which allows other interest groups to become marginalised.<sup>99</sup> Furthermore, corporatism's establishment of closed policy-making communities might ultimately place a corporatist regime on the brink of a descent into fascism, according to one commentator.<sup>100</sup>

Although the concern that the Commission is more inclined to favour corporatism was specifically raised in connection with the EC social dialogue process, which the Commission oversees under Article 138 EC,<sup>101</sup> the spectre of a Commission which has somehow developed a propensity to invite opinions from certain organisations but not others, however similar those others may be in terms of their membership and interests, is also raised in other areas of law- and policy-making. The Commission's White Paper appears to be correct to highlight the need for civil society NGOs to improve their accountability<sup>102</sup> and representativity,<sup>103</sup> but the Commission itself might improve the representativity of NGOs simply by ensuring that as many NGOs representing the same class of 'constituents' are consulted as possible.<sup>104</sup>

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<sup>97</sup> See <http://www.ilo.org/public/english/about/history.htm>.

<sup>98</sup> *Ibid.*, at p.124.

<sup>99</sup> A. Cawson, *Corporatism and Political Theory*, Blackwell, Oxford, 1986, at p.42.

<sup>100</sup> R. Harrison, *Pluralism and Corporatism: The Political Evolution of Modern Democracies*, George Allen and Unwin Ltd., London, 1980, at p.189. Per Obradovic ('Accountability of interest groups in the Union lawmaking process' in Craig and Harlow, *Lawmaking in the European Union*, Chapter Two *supra*, note 64, at p.367), a countervailing view is supplied by P. Hirst (*Representative Democracy and its Limits*, Polity Press, Cambridge, 1990, p.7): corporatism is said to "enhance public influence over government...by mixing the state with civil society. [Hirst's] argument is that corporatist mechanisms of consultation and bargaining are a vital supplement to representative democracy."

<sup>101</sup> Grant, note 95 *supra*: see also Cullen and Morrow, Chapter One *supra*, note 83, at 30.

<sup>102</sup> Cullen and Morrow, Chapter One *supra*, note 83, at 37: see also Obradovic, note 100 *supra*, at p.356: "...accountability of the European corporatist groups is every bit as essential to a democracy as political accountability, and in large measure, accountability of the social partners is part of the larger framework of political accountability in the Union."

<sup>103</sup> Cf. Britz and Schmidt, Chapter Two *supra*, note 7, at 67-68: "[i]n Community law, there exists no explicit provision requiring that the management and labour organisations participating in the legislative procedure under Articles 138-139 [EC] be representative. This requirement, however, can be distilled from a general demand for substantive [social] legitimacy."

<sup>104</sup> Cf. Obradovic, note 100 *supra*, at pp.381-2: see also Case T-135/96, *UEAPME v Council* [1998] ECR II-2335, paragraphs 85-90.

Even if corporatist decision-making is not a threat to democracy,<sup>105</sup> the potential lack of representativity of the groups involved threatens the legitimacy of the decisions reached. Therefore, unless steps are taken to ensure the adequate representativity of civil society NGOs, particularly where such NGOs can determine laws and policies instead of merely exerting an influence, the greater involvement of NGOs in EU-level decision-making might conceivably undermine the Union's efforts to increase the legitimacy of its law and policy output.

### *3.3.5. Conclusion: are the Member States and Commission taking transparency seriously?*

If legitimacy is weak in, for example, social policy law, because certain social partner organisations feel excluded from social policy- and law-making processes, the introduction of a right of public access would not seem to be an obvious solution to that particular problem. More extensive consultation of social partner organisations, and/or a requirement for social partner organisations to adequately demonstrate their capacity to represent all classes of labour/management likely to be affected by a particular proposal, might be called for instead. Fortunately, the Commission appears to be considering that possible solution.<sup>106</sup> However, that possible solution is not related to transparency in the White Paper. It can only logically be related to transparency if transparency is conceptualised as multidimensional, including public participation in decision-making as a dimension, and not merely equated with the one- or two-dimensional concept of public access to information.

A multidimensional approach to transparency provides a theoretical framework which is not only capable of connecting the various discrete concepts of access to information, subsidiarity, citizenship and democracy, but which is also capable of demonstrating the full capacity of those discrete concepts to add

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<sup>105</sup> Hirst, note 100 *supra*.

<sup>106</sup> *Cf.* p.4 of the White Paper: the Commission proposes to “[e]stablish partnership arrangements going beyond the minimum standards in selected areas committing the Commission to additional consultation in return for more guarantees of the openness and representativity of the organisations consulted.”

democracy and legitimacy to all aspects of the European Union's governance. The Commission's White Paper, though welcome, is obviously not as radical as the idea that the EU should adapt itself to conform to the model of cosmopolitan democracy. That would guarantee subsidiarity, transparency and democracy, greatly enhance the concept of Union citizenship, and increase the potential for transparency to act as a legitimating factor, because, as discussed in Chapters One and Two *supra*, in cosmopolitan democracy, 'openness' explicitly refers to direct public participation in decision-making processes at all levels of governance, and to accountability. In the EU, democracy and accountability remain important for legitimacy. Therefore, although the White Paper creates the distinct impression that the Commission in particular is taking transparency more seriously than ever before, it is clear that neither the Member States nor the Commission are taking the concept of transparency as a legitimating factor as seriously as they might be, if only they had from the outset conceived of transparency as including public participation in decision-making. The White Paper, instead of setting out five principles of 'openness, participation, accountability, effectiveness and coherence'<sup>107</sup> could instead have referred to three: (multidimensional) transparency, effectiveness and coherence.

#### **3.4. Conclusion: Refocusing upon Transparency as Public Access to Documents.**

In Chapter Three, the role of citizens and civil society in decision-making within a multidimensionally-transparent cosmopolitan democracy, and within the EU, was reviewed. The Commission was then found to have made interesting proposals to expand the role of citizens and civil society NGOs, which in practice could help to increase the transparency and accountability of the Union. It has called for a public debate on the EU and its future, and has even proposed to examine the transparency and accountability of civil society NGOs, so as to further improve the transparency of EU decision-making processes involving civil society. However, the fact that the Commission's

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<sup>107</sup> White Paper, p.10.

proposals relate in practice to the concept of multidimensional transparency was found to be a coincidence: the Commission still regards both transparency and openness as the provision of access to information, as do the Member States. To be more precise, the EU concept of transparency remains the concept, at best two-dimensional, of a right of public access.

Therefore, it seems that neither the Commission nor the Member States are taking the concept of transparency as seriously as they might. Consideration of multidimensional transparency leads to the conclusion that, whereas the White Paper is a significant step in the right direction, it does not go far enough in order to secure the legitimacy that the EU might obtain if only it were to embrace multidimensional transparency. Transparency as public participation in decision-making has far greater potential value as a legitimating factor than transparency as access to documents: meanwhile, the concept of multidimensional transparency incorporates three of the Commission's five principles of good governance – openness, participation and accountability<sup>108</sup> - within a single, coherent conceptual framework.

However, having concluded that the EU concept of transparency is that of public access to documents, it is clear that, in a very important sense, the question set out in the title to Chapter Three has not yet been answered. For, although it seems true to say that the Commission and Member States are not taking the concept of transparency seriously by ignoring its multidimensional nature, nothing has been said regarding the extent to which the Commission and the Member States are taking their own concept of transparency, being transparency as public access to documents, seriously.

The European Union is still in search of legitimacy, and the White Paper includes proposals relating to public participation and debate that not only require the right of public access, but which could also make that right quite effective in helping to secure more legitimacy. The Commission's approach to the right of public access within the White Paper is more like the approach that

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<sup>108</sup> Text at note 107 *supra*.

it would be expected to take if it were actually seeking to promote multidimensional transparency than was its former approach. In its Report for the Reflection Group on the 1996 IGC, the Commission all but characterised the right of public access as a right of access to officially approved propaganda. This again makes the White Paper a welcome development, because the right of public access only has some capacity to legitimate the Union if it is made available in conjunction with serious efforts to democratise the Union. However, the right must also be taken seriously, by the Member States, the Commission, and the other institutions, in order to be effective.

Taking the right of public access seriously means according it the respect that it would be accorded in a multidimensionally-transparent regime. It must not only be regarded as a means of holding the institutions to public account, but also as an aid to participatory, deliberative democracy. It will be recalled that, at page 11, the White Paper stated that:

“Major progress has been made in 2001 with the adoption of new rules giving citizens greater access to Community documents.”

This raises several questions.<sup>109</sup> For example, is the right of access to *Community* documents really supposed to help make the way in which the *Union* works more open, as the White Paper suggests? In other words, do citizens have access to documents relating to Titles V and VI TEU, as well as to matters arising under the EC Treaty? More important questions arise, as suggested, from considering the role of the right of public access in a multidimensionally-transparent regime. *Is* the right of public access being taken sufficiently seriously? The EU and its institutions should surely be seeking to make themselves as legitimate as they possibly can through the

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<sup>109</sup> Including a question that cannot be addressed in detail within the scope of this thesis, concerning the inclusivity of Union citizenship as discussed by, *inter alia*, Shaw (note 50 *supra*) and Wiener and Della Sala (note 54 *supra*). If the right of public access is intended to bring the Union closer to its citizens, why are *non-Union* citizens able to exercise this right? A forthcoming article (R. Davis, ‘Citizenship of the Union...rights for all?’ (2002) 27 *ELRev* 121) concludes that the Union regards persons ordinarily resident in the Member States as citizens *de facto*, notwithstanding Article 17(1) EC, Union citizens *de jure* being persons holding the nationality of a Member State.

provision of access to information, if that is indeed the desire of the Member States.

Therefore, it is also possible to ask whether these rules 'giving citizens greater access to Community documents' are capable of facilitating public participation in EU-level decision-making, should citizens seek access to those documents in order to take advantage of the opportunities for greater participation called for by the White Paper. Also, are the rules liberal, or are they riddled with exceptions that limit the scope of the right of public access beyond the limits that would be acceptable in a multidimensionally-transparent regime? What are those limits? To what extent, if any, does the right distinguish between physical documents and the information that the documents contain? Are the institutions welcoming applications for access to documents in their possession, or resisting attempts by members of the public and civil society to secure such access? Is there an adequate enforcement mechanism, to guarantee that the rules governing public access to documents will be upheld? Are there any schemes in place to review the operation of the rules, to suggest improvements, and to encourage ever more 'openness' in the sense of the provision of information concerning the Union and its decision-making?

Part One of this thesis has focussed upon the concept of multidimensional transparency, but it is now time to focus more exclusively upon the issue of the right of public access, from the perspective of a citizen interested in the capacity of this right to facilitate the development of multidimensional transparency within the European Union. As indicated in the Introduction, the abundance of questions raised above will be addressed in the course of the remaining Parts of this thesis. Part Two examines the provisions of substantive law governing the right of public access within the EU, starting, in Chapter Four *infra*, with the rights of access to the file and access to information concerning the environment.

PART TWO: THE SUBSTANTIVE LAW GOVERNING  
TRANSPARENCY AS ACCESS TO INFORMATION IN THE  
EUROPEAN UNION.

CHAPTER FOUR.

'Access to the File' and Access to Environmental Information.

**4.1. Introduction.**

*4.1.1. Two restricted rights of access to information and documents.*

Within the Community legal order, neither the right of access to the file, nor the right of public access to environmental information, are equivalent to the right of public access envisaged as a dimension of multidimensional transparency. The right of access to the file, as will be seen, is a right of defendants in proceedings of a judicial nature, and access is granted only to documents that could be used in their defence. The right of access to environmental information, obviously, does not concern access to information of all types. Nevertheless, no review of the provisions governing public access within the European Union would be complete without at least a brief overview of these two restricted rights, for the reasons outlined *infra*.

*4.1.2. Access to the File.*

Beers regards 'the' right of access to government-held information as divisible into four distinct rights: official access, party access, personal access, and public access.<sup>1</sup> Access to the file is the Community Courts' term for Beers' right of party access.<sup>2</sup> *Per* Harlow, "the access right originated and is best

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<sup>1</sup> Chapter One *supra*, note 64, at p.178.

<sup>2</sup> As confirmed in Case T-65/96, *Kish Glass & Co. Ltd v Commission* [2000] ECR II-1885, paragraph 34: "[T]hird parties cannot claim to have a right of access to the file held by the Commission on the same basis as the undertakings under investigation." See also Harden, Chapter Three *supra*, note 65, at 183: "Public access is...separate from legal rules and principles, such as the rights of the defence [see further *infra*], which require

developed” in EC competition law.<sup>3</sup> The Commission investigates the commercial activities of individual undertakings and groups thereof, and may regulate those activities by Decision, which Decision might also impose financial penalties should (an) undertaking(s) be found to have infringed Community competition law.<sup>4</sup> Under Article 230(4) (ex 173(4)) EC, undertakings may seek judicial review of such Decisions, being addressed to them. It is not uncommon for undertakings to do so, particularly when a financial penalty has been imposed. Both the undertaking(s) seeking judicial review and the CFI (or ECJ, on appeal) require access to information held by the Commission: the former in order to ensure ‘equality of arms’ and to effectively contest the Commission’s Decision; the latter in order to ensure that the Commission has complied fully with the relevant provisions of competition law.

The right to a fair trial/fair hearing set down in Article 6(1) ECHR depends upon rights of the defence, including access to the file. Article 220 (ex 164) EC requires the ECJ to “ensure that in the interpretation and application of this Treaty the law is observed.” ‘The law’ in this context includes rights of the defence, being legal principles common to the Member States.<sup>5</sup> The ECJ’s failure to have due regard to such principles would constitute a failure to uphold the rule of law.<sup>6</sup> Access to the file is therefore justified, *inter alia*, as a claim-right by its status as an essential prerequisite of the right to a fair trial/hearing, and by the need to observe the rule of law.<sup>7</sup>

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information and documents to be supplied to persons who have a special interest in receiving them.”

<sup>3</sup> Harlow, Chapter One *supra*, note 8, at 291: see also M. Levitt, ‘Access to the File: the Commission’s administrative procedures in cases under Articles 85 and 86’ (1997) 34 *CMLRev* 1413, at 1415: “...defendant undertakings in Commission competition proceedings have a positive and enforceable right of access to the Commission file...” For a discussion of EC competition law see further, e.g. R. Whish, *Competition Law* 4<sup>th</sup> Edition, Butterworths, London, 2000. Levitt (*op. cit.*, at 1420 – 1424, describes ‘the file’, which is defined as “the totality of documents which might be relevant to the defence, wherever they may be located” (*ibid.*, at 1421).

<sup>4</sup> Regulation No. 17 (OJ Sp. Ed. 1962, 204/62, p.87).

<sup>5</sup> *Cf.* the opinion of Advocate General Warner in Case 17/74, *Transocean Marine Paint v Commission* [1974] ECR 1063, at 1089: “the right to be heard forms part of...‘the law’ referred to in Article 164 (now 220) [EC]...of which, accordingly, it is the duty of this Court to ensure the observance.”

<sup>6</sup> See, e.g. Case 4/73, *Nold v Commission* [1974] ECR 491, at paragraph 13.

<sup>7</sup> Harlow (Chapter One *supra*, note 8, at 287) states that access to the file “is grounded in, and has developed out of, the *administrative law procedural rights* known...as ‘the rights of

The ECJ has insisted that legal persons have the right to examine documents used by the Commission when pursuing infringement proceedings under Regulation 17 and related legislation:

“...[T]he necessity to have regard to the rights of the defence is a fundamental principle of Community law...Its observance requires *inter alia* that the undertaking concerned must have been enabled to express its views effectively on the documents used by the Commission to support its allegations of an infringement.”<sup>8</sup>

This paragraph is among the earliest specific references to the right of access to the file as a right of the defence,<sup>9</sup> often cited in subsequent cases.<sup>10</sup>

It is not argued that access to the file is required in order for a state to function as a democracy: it does not concern public participation in law- and policy-making. It is not, therefore, directly related to multidimensional transparency. Nevertheless, access to the file concerns both access to documents held by an institution, and, more importantly, access to justice in the event that those documents are withheld. It is not, therefore, entirely unlike the right of public access that constitutes a dimension of multidimensional transparency, and the same Community Courts are called upon to protect both rights. Section 4.2 will consider the standard of review by the Community Courts of alleged infringements of the right of access to the file, facilitating a comparison between the Courts’ approach to such cases and their approach to the judicial review of refusals to grant public access, as analysed in Chapter Six *infra*.

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the defence” (emphasis added). This analysis apparently suggests that the rights of the defence were developed in the context of E(E)C competition law, although they were in fact common to the legal traditions of the Member States (T. Tridimas, *The General Principles of EC Law*, Oxford University Press, Oxford, 1999, chapter 7, esp. at p.244, citing Case 32/62, *Alvis v Council* [1963] ECR 49). Harlow may therefore have understated the importance attached to the rights of the defence by the Community Courts, as general principles of EC law are constitutional in nature (*cf.* Levitt, note 3 *supra*, at 1429).

<sup>8</sup> Case 322/81, *NV Nederlandsche Banden-Industrie Michelin v Commission* [1983] ECR-3461, paragraph 7.

<sup>9</sup> *Cf.* Case 85/76, *Hoffman-La Roche & Co. AG v Commission* [1979] ECR-461, paragraph 9: “Observance of the right to be heard in all proceedings in which sanctions...may be imposed is a fundamental principle of Community law...even if the proceedings in question are administrative..”

<sup>10</sup> E.g. Case C-51/92 P, *Hercules Chemicals NV v Commission* [1999] ECR I-4235, at paragraph 14.

Such a comparison should help to illustrate the Courts' attitude towards the multidimensional transparency-related right of public access, with which this thesis is primarily concerned.

#### 4.1.3. Access to Environmental Information.

There is no convincing reason to regard the right of access to environmental information as a special case of the right of access to information.<sup>11</sup> Nevertheless, the right of access to environmental information only is the subject of the Aarhus Convention.<sup>12</sup> This right has been explicitly linked to public participation in environmental decision-making,<sup>13</sup> suggesting that transparency in the context of environmental decision-making is a multidimensional concept. Moreover, as discussed in section 4.3 *infra*, EEC legislation requiring the Member States to grant both public access to environmental information, and a right of public participation in environmental decision making, pre-dates by several years the entry into force of the ToA, which provided the earliest Treaty-based commitment to transparency in relation to all Union activities (Article 1 (ex A) TEU, as amended). It is therefore interesting to compare these provisions to the right of public access analysed in Chapter Five *infra*, given that, as Merrills argues,<sup>14</sup> adequate access to environmental information should be obtainable via the right of public access.

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<sup>11</sup> Cf. J. Merrills, 'Human Rights Approaches to Environmental Protection: An Overview' in *Human Rights Approaches to Environmental Protection*, eds. A. Boyle and M. Anderson, Clarendon Press, Oxford, 1998, at p.9. The Opinion of Advocate General Fennelly in Case C-217/97 *Commission v Germany* [1999] ECR I-5087 suggests (paragraph 24) that there is a distinction between access to information and access to environmental information: however, the Advocate General's reasoning is neither clear nor convincing.

<sup>12</sup> Full text available online at <http://www.mem.dk/aarhus-conference/issues/public-participation/ppartikler.htm>.

<sup>13</sup> See further section 4.3 *infra*.

<sup>14</sup> Note 11 *supra*.

## **4.2. The Right of Access to the File in Community Law.**

### *4.2.1. Introduction.*

A complete, exhaustive examination of the extensive case law concerning the right of access to the file is beyond the scope of this thesis. A brief discussion based upon recent case law will suffice to illustrate the nature and scope of this right, for comparative purposes. Furthermore, the facts of the cases cited *infra* are largely irrelevant. It suffices to note that each undertaking/group of undertakings discussed had sought the annulment of a Commission Decision made under Regulation No. 17 or related legislation, and had alleged, *inter alia*, an infringement of the right of access to the file.<sup>15</sup>

### *4.2.2. Characteristics of the right of access to the file.*

The need for the Commission to respect the rights of the defence is regarded as an essential procedural requirement. Infringement of the rights of the defence, prior to the Commission's adoption of a Decision, therefore constitutes a breach of such a requirement: a ground for review under Article 230 (ex 173) EC. However, it is important to note that, if an infringement of the right of access to the file is established, this will not by itself result in the annulment of a contested Decision. The right of access to the file does not imply that undertakings should be granted access to any or all documents they might request from the Commission, or which the Commission has in its possession. It is only intended to ensure that an undertaking has adequate access to such documents as it might use in defending itself against any allegations the Commission might make.

“Access to the file is not an end in itself, but is intended to protect the rights of the defence. Thus, the right of access to the file is inseparable from and dependent on the principle of the rights of the defence...”<sup>16</sup>

<sup>15</sup> I.e., access to all the documents upon which the Commission had based its Decision.

<sup>16</sup> Joined Cases T-25-26, 30-32, 34-39, 42-46, 48, 50-65, 68-71, 87-88, and 103-104/95, *Cimenteries CBR SA et al. v Commission* [2000] 5 CMLR 204 (hereinafter ‘*Cimenteries*’), paragraph 156.

This can also be illustrated with reference to *BEUC*.<sup>17</sup> The *BEUC* represents consumer interests at EU level. It wished to comment upon the Commission's investigation into the alleged 'dumping' of certain goods from the Far East.<sup>18</sup> Having been denied access to the Commission's file concerning the anti-dumping proceeding *in casu*, *BEUC* sought the annulment of the Commission's decision refusing access to the file, pleading an infringement of the right to a fair hearing. However, the ECJ observed that anti-dumping proceedings and anti-dumping duties

"...are not directed against practices attributable to consumers or organisations such as the *BEUC*...The *BEUC* therefore wrongly complains that the Commission infringed its right to a fair hearing by refusing it access [to the file]...neither the principle of the right to a fair hearing nor...the basic anti-dumping Regulation required the Commission to do so."<sup>19</sup>

The *BEUC* had no right of access to the file because, not being a defendant to the anti-dumping proceedings to which the file in question related, it did not require rights of the defence in connection with those proceedings.

The CFI, with reference to earlier case law, has indicated that a plea alleging an infringement of the rights of the defence, consequent upon an infringement of the right of access to the file, will succeed if

"...the non-disclosure of the documents in question might have influenced the course of the procedure and the content of the decision to the applicant's detriment."<sup>20</sup>

Elsewhere, the CFI has apparently rejected such a plea on the grounds that the applicants for annulment of the Decision against them had not demonstrated

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<sup>17</sup> Case C-170/89, *Bureau Européen des Unions de Consommateurs v Commission* [1991] ECR I-5709.

<sup>18</sup> 'Dumping' involves the importation of goods for retail within the EC at a price below the 'normal' value of such goods, with which price EC-based manufacturers of such goods cannot compete. The Commission is authorised to protect the competitiveness of EC manufacturers by imposing an 'anti-dumping' import duty on the goods in question (Council Regulation (EEC) No. 2423/88, OJ 1998 L 209/1).

<sup>19</sup> Note 17 *supra*, paragraph 23.

<sup>20</sup> Case T-221/95, *Endemol Entertainment Holding BV v Commission* [1999] ECR II-1299.

that the file might have exonerated them,<sup>21</sup> and on the grounds that a Decision would not have been any different if the Commission itself had not had access to the documents requested by the applicant undertaking.<sup>22</sup>

The ECJ, however, has clearly stated that an undertaking need not demonstrate that if it had had access to certain documents, the Commission's Decision would have been any different. The undertaking in question need only show that it might have used those documents in its defence. An infringement of the rights of the defence during the procedure leading to the adoption of a Commission Decision can, in principle, lead to the annulment of that Decision: it is not sufficient to remedy the infringement if access to the file was obtained during the course of the action for annulment itself. Nevertheless, if having obtained such belated access to the file, the applicant undertaking(s) cannot show that the documents obtained might have been used for the defence, the Community Courts will not accept a plea that the rights of the defence had been infringed by the Commission's failure to grant access to those documents at the appropriate time.<sup>23</sup>

The right of access to the file during the procedure leading to the adoption of a Commission Decision is, as stated, a general principle of Community law. However, in the context of court proceedings, access to the file is governed exclusively by the EC Statute of the Court of Justice and the Rules of Procedure of the Court of First Instance.<sup>24</sup> When the appellant undertaking in *Baustahlgewebe*<sup>25</sup> submitted that the CFI should have ordered the production of Commission documents notwithstanding the fact that Baustahlgewebe had not demonstrated the relevance of those documents to its case, it was argued

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<sup>21</sup> Joined Cases T-213/95 and T-18/96, *Stichting Certificatie Kraanverhuurbedrijf & Federatie van Nederlandse Kraanverhuurbedrijven v Commission* [1997] ECR II-1739, paragraph 220.

<sup>22</sup> Case T-5/97, *Industrie des Poudres Sphériques v Commission* [2000] ECR II-3755, at paragraph 233.

<sup>23</sup> *Hercules Chemicals*, note 10 *supra*, paragraphs 77-81. See also Levitt, note 3 *supra*, at 1416, footnote 13: "It is only if the non-disclosure of the documents...could not have affected the rights of defence, in the sense that, if disclosed, they could not conceivably have assisted the undertaking's defence to the Commission's allegations, that a claim that the rights of defence have been infringed will be rejected..."

<sup>24</sup> Case C-185/95 P, *Baustahlgewebe GmbH v Commission* [1998] ECR I-8417, at paragraph 90.

<sup>25</sup> Note 24 *supra*.

that “a party and its advisers cannot appraise the importance of a document to that party’s case until they are aware of its existence and content.”<sup>26</sup> The ECJ rejected this apparently cogent argument, observing that a party seeking the production of documents was indeed obliged to identify the documents it sought and to demonstrate their possible relevance to its case, and that Baustahlgewebe had not done so.<sup>27</sup>

The Community Courts do not expect an undertaking to adduce evidence relating to documents that it has never actually seen, however, and of the very existence of which it is uncertain.<sup>28</sup> However, the Courts are clearly not receptive to pleas which in essence amount to a claim that granting access to the file or ordering the production of documents might possibly reveal something useful to the applicant undertaking. If an applicant undertaking is not aware of the existence and/or content of documents in the Commission’s possession which might be relevant to its case, but nevertheless suspects (as Baustahlgewebe may have suspected) that unknown, undisclosed documents influenced the Commission’s Decision, it would seem appropriate to plead a misuse of powers rather than an infringement of the right of access to the file. The Commission is supposed to base its Decision exclusively upon the contents of the file, access to which should be granted to the undertaking in question during the administrative procedure leading to the adoption of the Decision. Therefore, if the Commission were to allow other documents, not included in that file, to influence its Decision, it would have misused its powers.

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<sup>26</sup> *Ibid.*, at paragraph 79.

<sup>27</sup> *Ibid.*, at paragraphs 93-94.

<sup>28</sup> *Cf. Cimenteries*, note 16 *supra*, at paragraph 161: “Applicants who have raised a plea alleging infringement of their rights of defence cannot be required to set out in their application detailed arguments or a consistent body of evidence to show that the outcome of the administrative procedure might have been different if they had had access to certain documents which were in fact never disclosed to them. Such an approach would in effect amount to requiring a *probatio diabolica*...” In any event, the Courts are strict regarding the burden of proof: *per Levitt*, note 3 *supra*, at 1420: “...in any dispute as to whether there has been proper disclosure of documents by the Commission, the burden of proof is not on the defendant to demonstrate that the Commission withheld relevant documents which ought to have been disclosed. The duty is on the Commission to ensure that the defendant has access to all documents relating to the case.”

Interestingly, the Commission is not obliged to disclose any documents that are *not* included in the file, even if they could be used by an undertaking in its defence. A failure on the Commission's part to disclose any such documents to an undertaking that actually requests access to them only constitutes an infringement of the rights of the defence if the undertaking could have used those documents in its defence.<sup>29</sup> Again, however, in order to establish that fact before the Community Courts, an undertaking would need to be aware both of the existence and content of the documents in question. The Courts, as indicated, do not permit undertakings to mount 'fishing expeditions' in the hope of discovering any previously unseen documents that might be relevant to their respective cases.

The right of access to the file is not unlimited. Access may be refused in order to protect the business secrets of other undertakings, although the Commission might be obliged to provide non-confidential summaries of any documents it withholds. Access may also be refused whenever information has been disclosed to the Commission in confidence, or whenever any documents requested are internal Commission documents.<sup>30</sup> Any refusal to grant access to the file, in response to a request made after the Commission has adopted a Decision and notified the undertaking(s) to which it is addressed, cannot affect the legality of that Decision. The Decision closes the proceedings: nothing that transpires after the proceedings have closed can be regarded as an infringement of an essential procedural requirement.<sup>31</sup>

In summary, an infringement of the right of access to the file can, in principle, only lead to the annulment of a Decision based upon that file if the applicant undertaking, knowing of the existence of documents which might be relevant to its case, can demonstrate that access to those documents had not been granted prior to the adoption of the Decision, and that the undisclosed documents in question could definitely have been used in its defence, even if the final Decision itself would probably have been the same. Of interest, as

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<sup>29</sup> *Cimenteries*, note 16 *supra*, paragraph 383.

<sup>30</sup> *Endemol*, note 20 *supra*, paragraphs 66-67.

<sup>31</sup> Case T-229/94, *Deutsche Bahn AG v Commission* [1999] ECR II-859, paragraphs 102-3; *SCK and FNK*, note 21 *supra*, at paragraphs 220-221.

will be seen in Chapter Five *infra*, is the fact that the partial disclosure of confidential documents may be required if it would be otherwise impossible to exercise the rights of the defence.

4.2.3. *The Cimenteries case and the standard of review of infringements of the right of access to the file by the Community Courts.*

Both Community Courts may occasionally encounter competition cases of enormous complexity, particularly when many cases are joined. One rather extreme example is *Cimenteries*,<sup>32</sup> concerning a group of cement producers and trade associations who sought to contest Commission Decision 94/815/EC of 30 November 1994,<sup>33</sup> which imposed fines in respect of infringements of Article 85 (now 81) EC.

It was soon established that the Commission had not granted the necessary access to the file.<sup>34</sup> However, the CFI reiterated that:

“...the finding that the Commission did not give the applicants proper access to the investigation file during the administrative procedure cannot in itself lead to annulment of the contested decision as against the 39 applicants who submitted the corresponding line of argument.”<sup>35</sup>

It was, as indicated in section 4.2.2. *supra*, necessary for the CFI to determine whether the rights of the defence had been infringed as a result of the Commission’s failure to grant access to the file.<sup>36</sup> To that end, the Court considered the question of whether any of the undisclosed material “might have contained exculpatory evidence.”<sup>37</sup>

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<sup>32</sup> Note 16 *supra*.

<sup>33</sup> OJ 1994 L 343/1.

<sup>34</sup> *Cimenteries*, note 16 *supra*, e.g. at paragraph 141.

<sup>35</sup> *Ibid.*, at paragraph 156.

<sup>36</sup> *Ibid.*, paragraph 157.

<sup>37</sup> *Ibid.*, paragraph 159. Cf. also paragraph 364: “The Court finds...that some applicants have identified in their applications documents which were used against them in the contested decision but which were not available to them during the administrative procedure or from which they could not foresee the conclusions the Commission was going to draw. In accordance with settled case law, those incriminating documents must be excluded as evidence. Far from leading to the annulment of the entire decision, the exclusion of those

The CFI had so arranged matters that all thirty-nine applicants had been able to consult the original, non-confidential documents lodged by the Commission; to specify any document to which they had not had access and which could have assisted their defence; and to explain why the administrative procedure might have had a different outcome if they had had access to the document(s) in question. Each such document was to be annexed to the relevant pleadings, to which the Commission was able to lodge a response.<sup>38</sup>

A lengthy and detailed examination followed, of the extent to which the undisclosed material might have influenced the outcome of the administrative proceedings leading to the contested Decision. The CFI noted during the course of this examination that a document can be regarded as incriminating only where the Commission uses it to support a finding of an infringement in which an undertaking has allegedly participated. If an applicant undertaking had merely been unable to express its views on a document used by the Commission, that would not in itself suffice to establish an infringement of the rights of the defence: the undertaking must show that the Commission had used such a 'new item of evidence' to support its allegation that the undertaking concerned had infringed Community competition law.<sup>39</sup> This observation reflects the fact that an undertaking must have been able to use any undisclosed documents in its defence: it is not enough to note that there were undisclosed documents upon which the undertaking might have passed comment.

It was held that certain documents had indeed been used illegally by the Commission because their non-disclosure infringed the rights of the defence of the applicants concerned.<sup>40</sup> However, the CFI also stated that:

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documents is significant only in so far as the corresponding objection raised by the Commission could be proved only by reference to them..."

<sup>38</sup> *Ibid.*, paragraph 169.

<sup>39</sup> *Ibid.*, paragraph 284.

<sup>40</sup> E.g. *ibid.*, at paragraphs 379 and 435.

“[t]he assessment of the consequences of that infringement will be carried out when the Court examines the substance of the claim that the contested decision is unlawful.”<sup>41</sup>

This indicated that only certain specific provisions of the contested Decision were likely to be annulled as a result of this particular finding.

The issue of access to the file was considered several times, in connection with the various pleas<sup>42</sup> relating to infringements of an essential procedural requirement during the administration procedure, including not only infringement of the rights of the defence through failure to grant access to the file, but also a plea alleging that the statement of objections<sup>43</sup> was imprecise and incomplete.<sup>44</sup> For example, paragraphs 1110-1295 considered whether, in respect of several applicants, a failure to disclose certain incriminating documents in support of the allegations made against certain undertakings infringed the rights of the defence, in order to determine whether or not there had been a breach of the Commission’s duty to give reasons for its Decisions (Article 190 EC, now 253). Paragraphs 2816-2967, 3105-3132, 3311-3342, 3387-3395, 3985-4015, 4475-4515, 4675-4693, and 5090-5113 considered the right of access to the file in connection with pleas alleging an infringement of: Articles 85(1) and 190 of the Treaty; the principle of equal treatment; the rights of the defence; and pleas alleging an abuse of process and a misuse of powers. These pleas were raised in connection with specific provisions of the Commission Decision, adding to the complexity of the case.

Paragraph 4475 simply reads as follows:

“The arguments whereby the parties concerned allege infringement of their rights of defence when they were given access to the file have to a large extent already been examined.”

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<sup>41</sup> *Ibid.*, paragraph 379.

<sup>42</sup> There were 22 pleas in total.

<sup>43</sup> A pre-Decision notification of the allegations against (an) undertaking(s) subjected to an investigation by the Commission.

<sup>44</sup> *Cimenteries*, note 16 *supra*, at paragraph 86.

Nevertheless, the judges of the Fourth Chamber (Extended Composition) did not decline to examine these arguments further beyond that paragraph. *Cimenteries* is not only of interest because of the *dicta* therein concerning the right of access to the file, but also because it suggests that a most thorough judicial review took place. Although the judges scrutinised a very large number of documents, and considered at length the relevance thereof to the pleas submitted, it is not suggested that this fact, nor the fact that almost 5 years elapsed between the registration of the case and the judgment, provides sufficient grounds to describe the review as 'thorough'. That conclusion is based upon other factors.

Firstly, the Commission, in reaching Decisions under Regulation 17 and related legislation, enjoys a broad, though not unlimited, discretion.<sup>45</sup> Secondly, EC competition law requires the Commission to make complex economic decisions. Thirdly, there are two types of judicial review: procedural and substantive. Substantive review approaches, more or less closely, a review of the merits of a decision: procedural review, on the other hand, determines that a decision was/was not adopted in accordance with the law. Fourthly, any unwillingness on the part of the Community Courts to carry out a substantive review of a particular type of decision tends to cause the adjective 'marginal' to be applied to its review of such decisions.<sup>46</sup> The suggestion that a review is marginal would not imply that it had been thorough. However, fifthly, the right of access to the file is a procedural right, and, sixthly, according to Tridimas:

"The case law now seems to accept that procedural and substantive scrutiny are in an inverse relationship. Where the Court exercises only marginal review on substantive

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<sup>45</sup> See, e.g. paragraphs 45-47, Case C-449/98 P, *International Express Carriers Conference v Commission*, judgment of 17 May 2001, and paragraph 88, Case C-119/97 P, *Union Française de l'Express and Others v Commission* [2000] 4 CMLR 268.

<sup>46</sup> Cf. Tridimas, note 7 *supra*, at p.95: "Although [the ECJ] is prepared to assess whether a measure is appropriate and necessary in view of all relevant circumstances and to scrutinise the way the institution concerned has exercised its discretion, where it comes to the adoption of legislative measures involving economic policy choices, it will defer to the expertise and the responsibility of the adopting institution exercising only 'marginal review' " (citing in support H. Schermers and D. Waelbroeck, *Judicial Protection in the European Communities*, 5<sup>th</sup> Edition, Kluwer Law International, Deventer, 1991, paragraphs 310-3).

grounds because the decision-making process involves complex technical evaluations and the Community institutions enjoy broad discretion, the need to ensure respect of process rights becomes all the more important.”<sup>47</sup>

These six factors combine to indicate that, although the Courts’ review of the substance of any Commission Decision in the field of competition law might be ‘marginal’, its review of the application of procedural rights will indeed be all the more thorough, as appears to have been the case in *Cimenteries*. These factors will be remembered when the standard of review by the Courts is discussed further, in Chapter Six *infra*, with regard to the right of public access. The CFI, when reviewing access to the file, certainly appears to consider the substantive issue of whether any failure to grant access to certain documents might conceivably have ‘shed a different light upon’ the facts relied upon by the Commission.<sup>48</sup> So long as the CFI considers only whether or not any undisclosed documents might have been used in the defence, and does not dismiss a plea alleging the infringement of the rights of the defence on the grounds that the Commission’s Decision would not have been any different had the documents actually been disclosed,<sup>49</sup> there would seem to be nothing to suggest that the right of access to the file is not being taken seriously by the Community Courts.

#### 4.2.4. Conclusion.

This section has illustrated the restricted nature of the right of access to the file: it is, as stated, not to be regarded as a general public right of access, but as a right of access to those documents which might be used by natural and legal persons in their defence. The right is effectively protected: partial access is required, to documents that cannot be disclosed in their entirety; and the Community Courts apparently take great care to establish whether or not the right was infringed, and if so, whether or not the infringement affected the

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<sup>47</sup> Note 7 *supra*, at p.272.

<sup>48</sup> E.g. *Cimenteries*, note 16 *supra*, at paragraphs 4478-4515, especially paragraphs 4480-4483, 4485, 4488, 4490, 4492, 4495, 4497, 4499, 4501, 4504-4505, 4508-4509, 4511, 4513 and 4515.

<sup>49</sup> Note 23 *supra* and text.

ability of the undertaking(s) concerned to muster an effective defence. However, the CFI's *dicta* in *Cimenteries* clearly reiterate the fact that neither Community Court will accept an infringement of the right of access to the file *simpliciter* as a ground for annulment of a Commission Decision: the infringement must also have made it impossible for the applicant(s) for annulment to have exercised their rights of the defence.

*Cimenteries* illustrates the thoroughness of the CFI's review, in a case in which the Commission had clearly failed to grant access to the file. Whenever that failure was found to have breached the rights of the defence of any of the undertakings involved, the provision of the contested Decision resulting from that stage of the Commission's administrative procedure was annulled. It remains to be seen whether the Community Courts regard the right of public access to documents held by the institutions as such a fundamental principle of Community law. The right of access to the file will be revisited in Chapter Five *infra*, wherein its scope and content will be compared to the right of public access to documents, and in Chapter Six *infra*, wherein the approach of the Community Courts towards both rights will be compared.

### **4.3. Access to Environmental Information.**

#### *4.3.1. Multidimensional transparency in the environmental sphere.*

Following a UK White Paper<sup>50</sup> claiming that people will be "best placed to make their own consumer decisions and to exert pressure for change as consumers, investors, lobbyists and electors" if they are kept informed, four researchers sought to assess "the extent to which public access to certain sources of environmental information is likely to promote the notion of stewardship."<sup>51</sup> The promotion of stewardship is viewed as the end to which

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<sup>50</sup> 'This Common Inheritance' CM 1200, HMSO, London, 1990.

<sup>51</sup> J. Rowan-Robinson, A. Ross, W. Walton and J. Rothnie, 'Public Access to Environmental Information: A Means to What End?' (1996) 8 *Journal of Environmental Law* 19, at 19: this title supports the conclusion that the right of access to information is instrumentally valuable (Chapter One *supra*, section 1.3.2.).

access to environmental information is the means. The provision of environmental information, according to the research:

- increases public confidence in government and industry regarding environmental action;
- better informs consumer choice (e.g. by encouraging 'green purchasing' and the assumption of personal responsibility for reducing waste);
- facilitates public scrutiny which will encourage industry to be more environmentally responsible; and
- facilitates public participation in policy formulation and decision-making.<sup>52</sup>

The researchers examined several sources of environmental information, including: local authority environmental health/planning boards; public registers (e.g. the Radioactive Substance Register); Scottish National Heritage; HM Industrial Pollution Inspectorate; Friends of the Earth; and White Papers. They concluded by observing that most people have

“a passive rather than an active interest in the environment...[m]embers of the public seemed willing to involve themselves, to take some responsibility for dealing with problems on their doorstep. But most are not prepared to go much beyond this. People with a passive interest in the environment are unlikely to have much direct use for public registers or reports. They will tend to rely on secondary sources such as the media...”<sup>53</sup>

A degree of public reliance upon newspapers and television indicates that journalists, if not the general public, might find a right of access to environmental information useful. The researchers suggested that, “in order to involve the public in a stewardship role, other than for incidents on their doorstep,” only the pro-active dissemination of information is likely to be effective: reliance upon members of the public seeking environmental information on their own initiative would be far less effective.<sup>54</sup> Nevertheless,

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<sup>52</sup> *Ibid.*, at 20-21.

<sup>53</sup> *Ibid.*, at 38.

<sup>54</sup> *Ibid.*, at 39.

the researchers supported the idea of developing opportunities for public participation in environmental decision-making, and suggested that the provision of environmental information would not only lead to a more environmentally-aware public, but also to the development of a public that would demand opportunities to use that information in decision-making.<sup>55</sup>

The latter suggestion, of course, supports the idea public access is instrumentally valuable, as discussed in Chapter One *supra* (section 1.3.2). It also supports the conclusion reached in Chapter Three *supra* (section 3.3.2), that the right of access to information is most useful if the information gained can be utilised in order to influence decision-making. Meanwhile, relevant Community legislation and the Aarhus Convention (see further section 4.3.3. *infra*) indicate that the Union and its Member States are perfectly capable of regarding transparency as multidimensional, at least insofar as transparency in the sphere of environmental law- and policy-making is concerned.

#### 4.3.2 Community Legislation.

##### 4.3.2.1. Introduction.

Insofar as a Council Directive of the pre-TEU EEC may be regarded as the product of negotiations between all the Member States, two such Directives illustrate a commitment on the part of the Member States to a multidimensional form of transparency in environmental matters: Directive 85/337/EEC,<sup>56</sup> on the assessment of the effects of certain public and private projects on the environment ('environmental impact assessment'), which concerns the provision of information and a degree of public participation in decision-making; and Directive 90/313/EEC,<sup>57</sup> on the freedom of access to environmental information. Both Directives remain in force.

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<sup>55</sup> *Ibid.*, at 40-42.

<sup>56</sup> OJ 1985 L 175/40, as amended by Council Directive 97/11/EC (OJ 1997 L 73/5).

<sup>57</sup> OJ 1990 L 158/56.

#### 4.3.2.2. Directive 85/337.

The Preamble acknowledges that members of the public may usefully contribute towards the decision-making process(es) preceding the granting, or refusal, of development consent for a project which might affect the environment.<sup>58</sup> However, the Directive does not apply to projects approved by the national legislature, “since [its] objectives...including that of supplying information, are achieved through the legislative process”.<sup>59</sup> In light of this, Directive 85/337 cannot be said to have established comprehensive multidimensional transparency in environmental decision-making, but it constitutes a step in the right direction.

Of the relevant substantive provisions, Article 2(3) provides that projects may exceptionally be exempted from the provisions of the Directive, without prejudice to Article 7, which requires a Member State to provide information concerning a project to another Member State, if that project is likely to significantly affect the environment within that other Member State, or if another Member State so requests. Article 5(3) prescribes the minimum information to be provided to the public, if a project is not exempted, including, for example, “a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects” upon the environment.

Article 6 is most relevant, in terms of multidimensional transparency, because it refers not only to access to information, but also to public consultation. However, this provision leaves much to the discretion of Member States: in particular, the ability to ‘determine the public concerned’. Such discretion, of course, argues against the likelihood of the Directive having direct effect. Article 4(2) also gives the Member States discretion<sup>60</sup> to decide, without

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<sup>58</sup> As did points 14-16 of the European Parliament’s Opinion (OJ 1982 C 66/87).

<sup>59</sup> Article 1(5), Directive 85/337, as amended.

<sup>60</sup> However, see J. Scott, *EC Environmental Law*, Addison Wesley Longman Ltd., Harlow, Essex, 1998, at pp.122-4: Article 4(2) obliges national courts, whenever called upon to decide whether the authorities of a Member State have exercised their discretion under that Article lawfully, to verify that all relevant considerations were taken into account: this at least makes Directive 85/337 justiciable before national courts.

prejudice to the Article 7 requirement to provide information to another Member State, whether certain categories of projects listed within Annex II to the Directive are to be assessed in consultation with the public. The determinations of the Member State's authorities under Article 4(2) must be published (Article 4(3)).

Directive 85/337 at least obliges the Member States to disclose certain information to the public, either with a view to obtaining potentially useful input from ordinary people before deciding whether to grant development consent to a project, or in order to explain why a project has been exempted from the Directive's scheme. Article 8 provides that information gathered from, *inter alia*, any public consultation must be taken into consideration in deciding whether to grant developmental consent to a project that has *not* been exempted from the Directive's provisions. Under Article 10, however, the information that should normally be provided may be limited: basically, the Directive is without prejudice to any national regulations intended to safeguard 'the public interest'. The question of what constitutes a legitimate public interest in secrecy will be discussed further in Chapter Five *infra*, section 5.3.

With regard to the application of Directive 85/337, *Greenpeace* was denied *locus standi* to challenge a Commission grant for a developmental project in Spain.<sup>61</sup> Upon appeal,<sup>62</sup> the ECJ upheld the CFI's ruling, observing that the rights conferred by Directive 85/337, which *Greenpeace* had invoked in support of its attempt to secure *locus standi*,<sup>63</sup> were adequately protected by national courts.<sup>64</sup> It has been argued that the Community has 'double standards', favouring access to the courts in order to challenge developmental projects, until somebody or some organisation attempts to bring proceedings

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<sup>61</sup> Case T-585/93, *Stichting Greenpeace Council et al. v Commission* [1995] ECR II-2205.

<sup>62</sup> Case C-321/95 P, *Stichting Greenpeace Council et al. v Commission* [1998] ECR I-1651.

<sup>63</sup> *Ibid.*, paragraph 21: "the appellants submit that their arguments relating to individual concern are based essentially on their individual rights conferred by Directive 85/337, Articles 6(2) and 8 of which provide for participation in the environmental impact assessment procedure in relation to certain projects (judgment in Case C-431/92 *Commission v Germany* [1995] ECR I-2189, paragraphs 37 to 40), and that they are singled out by virtue of those rights which are recognised and protected in Commission Decision C (91) 440."

<sup>64</sup> *Ibid.*, paragraphs 30-34.

for the same purpose against a Community institution, instead of the authorities of a Member State.<sup>65</sup> Although it must be remembered that to *Greenpeace*, the central issue was not any failure to provide information, but the alleged unlawfulness of the Commission's grant, and that Directive 85/337 does not apply to the Commission, the case nevertheless gives some cause for concern. Access to justice, in order to protect all the rights conferred by a multidimensionally-transparent regime, of which public access is only one, is an essential feature of multidimensional transparency, as discussed in Chapter Two *supra*, sub-section 2.2.3.3.

#### 4.3.2.3. Directive 90/313.

The 10<sup>th</sup> recital to the preamble to the Commission Proposal<sup>66</sup> specified that:

“...free access must be ensured even with regard to data supplied to the government by other persons where the government could legitimately demand transmission of that information or obtain it itself; whereas it must not be limited solely to persons who can prove a legitimate interest in the case...”

This principle was adhered to in the actual Directive, although the recital did not survive the final re-drafting process. *Per* Mary Preston,<sup>67</sup> the lack of any requirement to provide reasons for seeking access to documents or information is the result of a Community-wide comparative study of national legislation concerning public access: a requirement for applicants to provide reasons for

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<sup>65</sup> See further N. Gérard, ‘Access to Justice on Environmental Matters – a case of Double Standards?’ (1996) 8 *Journal of Environmental Law* 139, at 152-3. Scott, note 60 *supra*, at pp.139-141, suggests that participation in the decision-making process plus evidence of a collective environmental interest ought to confer *locus standi* upon interest groups: *cf.* also Gormley, Chapter Two *supra*, note 63 and text, although Gormley also indicates (*ibid.*, at 53-4) that the ECJ did not wish to allow natural persons without *locus standi* to gain standing by forming an environmentalist group, of which there are already many in the EU, being wary of the prospect of opening the floodgates to proceedings brought by such groups.

<sup>66</sup> OJ 1998 C 355/5.

<sup>67</sup> Letter to the author dated 7 July 2000, reference SG.C.2/MEP D(2000) 545126, signed Mary Preston, Head of Unit, Directorate C (Co-ordination II: Transparency and access to documents; grants; relations with interest groups) Secretariat-General of the European Commission. The letter confirms the similar observation of the Commission's Communication to the Council, Parliament and Economic and Social Committee on public access to documents held by the institutions (OJ 1993 C 156/05, at p.9, paragraph 3).

seeking such access is the exception within those Member States that provide for public access. Whereas this does not adequately answer the question 'why are people not required to give reasons for seeking documents?', it appears to be the only answer available: most Member States simply do not require people to do so.<sup>68</sup> As will be seen in Chapter Five *infra*, the Commission and Council have consistently adhered to the principle of not requiring reasons from applicants for public access. This is, perhaps, a matter of logic and/or administrative convenience: if, in principle, access to a given document is to be granted unless there are compelling reasons to withhold access, a person's actual reasons for requiring that document might be regarded as irrelevant.

Article 2(a) defines information relating to the environment as "any available information in written, visual, aural or data-base form on the state of water, air, soil, fauna, flora, land and natural sites", activities affecting/likely to affect these, and measures designed to protect them. Article 3(1) provides for the right of access to environmental information itself. Article 3(2) provides that Member States *may* refuse access to information to protect: the confidentiality of public authority proceedings; international relations; defence; public security; court proceedings; investigations; commercial/industrial confidentiality; intellectual property; personal data; information provided to public authorities voluntarily; and "material, the disclosure of which would make it more likely that the environment to which such material related would be damaged". Not only are none of these permitted exceptions mandatory, but also, under Article 3(2), partial access to documents must be granted if protected information can first be deleted. Article 4 requires a judicial/administrative review to be available, of any refusal to grant access to environmental information.

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<sup>68</sup> *Cf.* also Harlow, Chapter One *supra*, note 8, at 286: Council of Europe Recommendation No. R (81) 19 on public access states that access "shall not be refused on the grounds that the specific person has not a specific interest in the matter." This seems to indicate a pan-European tradition of not requiring applicants for public access to state their reasons.

### 4.3.3. *The Aarhus Convention ('the Convention')*.

#### 4.3.3.1. Introduction

This section briefly considers the Convention's history and its relevance to Community law. It then examines the substantive provisions concerning access to documents, public participation, and access to justice, enabling a comparison to be made between the Convention and the general provisions concerning access to documents held by the institutions, as discussed in Chapter Five *infra*.

#### 4.3.3.2. A Brief History.

The Convention represents an attempt by the United Nations to secure a multinational commitment to environmental protection based upon the 'precautionary principle'. The UN's explicit commitment to a global environmental policy is relatively new: in 1972, the Stockholm Declaration on the Human Environment, after noting the importance of the environment to our species, listed 26 principles concerning the impact of human activity upon the environment, including (no. 26) the principle that prompt agreement should be reached in order to secure the destruction of nuclear weapons. Although the precautionary principle was not specifically set out within the Stockholm Declaration, it seems to be implicit within the proclamation preceding the declaration of principles, paragraph 6 of which proclamation states that:

“..A point has been reached in history when we must shape our actions throughout the world with a more prudent care for their environmental consequences. Through ignorance or indifference we can do massive and irreversible harm to the earthly environment on which our life and well-being depend...”<sup>69</sup>

Implicit in this is the idea that people must in future take care to avoid acting without due care and thought, in order to protect the environment. Principle

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<sup>69</sup> Source: <http://www.tufts.edu/departments/fletcher/multi/texts/STOCKHOLM-DECL.txt>.

no. 15 of the 1992 Rio Declaration on Environment and Development is more explicit:

“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”<sup>70</sup>

The precautionary principle therefore requires some form of environmental impact assessment to be conducted, as a precaution against the possibility of future damage.

Principle no. 10 of the Rio Declaration states that:

“Environmental issues are best handled with the participation of all concerned citizens...each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

The Convention is the instrument designed to put the precautionary principle into effect, as its preamble indicates, although the principle is not explicitly referred to within the Convention.

#### 4.3.3.3. The Relevance of the Convention to the European Union.

As at 31 December 2001, the Convention is due to enter into force: Article 20 having provided that it will do so on the ninetieth day following deposit of the sixteenth instrument of ratification, acceptance, approval, or accession. There are 40 signatory states, including the 15 Member States and the European Community, but only 17 ratifications, including Denmark (29 September 2000)

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<sup>70</sup> Source: <http://www.greenpeace.org/~intl/rio1.html>.

and Italy (13 July 2001) but no other Member States.<sup>71</sup> The European Community also has yet to ratify, accept, approve or accede to the Convention.

#### 4.3.3.4. Relevant Convention provisions.

Article 1 provides for the right of access to environmental information, the right to public participation in environmental decision-making, and the right to access to justice in environmental matters, which, in practice, means access to justice in the event that the first two rights are not granted. The Convention, therefore, provides for multidimensional transparency in environmental matters.

Article 2 defines key terms within the Convention: a 'public authority' includes "the institutions of any regional economic integration organisation...which is a Party to this Convention". Article 4 provides the substantive right of freedom of access to information, including non-mandatory exceptions, which must be interpreted restrictively (Article 4(4), and which may be invoked to protect interests similar to those set out in Article 3 of Directive 90/313, discussed above. Article 5 also requires States Party to the Convention to actively disseminate information to the public. Articles 6-8 concern procedures for public participation in environmental decision-making, and Article 9 provides for the right of access to justice. Recalling the *Greenpeace* case,<sup>72</sup> under Article 9(2) such organisations as *Greenpeace* are automatically deemed to have *locus standi* to challenge the substantive and procedural legality of any decision subject to the provisions of Article 6, which concerns public participation in planning decisions.

The fact that the Convention may in future be binding upon the institutions is particularly interesting, as these have not previously been bound by an external obligation to provide access to information or access to public participation in policy-making and legislative processes. Of course, whether the institutions will accept their Convention responsibilities wholeheartedly, in the spirit of

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<sup>71</sup> Source: <http://www.unece.org/env/pp/ctreaty.htm>.

<sup>72</sup> Notes 61-62 *supra*.

multidimensional transparency, remains to be seen, assuming that the Convention is ever ratified by the Community. Meanwhile, a good indication of the institutions' approach to Convention rules might be provided by considering their approach to their own self-imposed rules governing access to documents: such consideration will commence in Chapter Five, *infra*.

#### **4.4. Conclusion.**

This Chapter has, for the purpose of facilitating later comparisons, provided a brief overview of two 'species' of rights of access to information that are neither related to each other, nor directly related to the general right of public access contemplated as a dimension of multidimensional transparency. It has been argued that the Community Courts take the right of access to the file seriously, insisting upon partial access to documents where this is required in order to enable defendants to exercise their rights of the defence, although the Courts also take care to ensure that access to the file cannot be used as the basis for a 'fishing expedition' by undertakings seeking to escape the consequences of infringing Community law. It was further argued that both the Member States and the Union seem to be in favour of introducing multidimensional transparency to environmental decision-making processes: the Convention to which all Member States and the Commission are signatories introduces a fairly liberal regime of multidimensional transparency, involving access to information, to participation and to justice.

It is worth remembering that the rights set out in the Convention would all be protected in by the right of public access in a multidimensionally-transparent regime.<sup>73</sup> Moreover, undertakings in the position of Baustahlgewebe might benefit from access to a public register of documents held by the institutions: if suspecting that the Commission has undisclosed documents in its possession which might be of use to them, they could request access to these using the general right of public access, having first identified the relevant documents from details in the register. In other words, multidimensional transparency

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<sup>73</sup> Merrills, note 11 *supra*.

could supplement access to the file, enabling undertakings to ‘go fishing’ for useful documents, and it would certainly make specialised environmental transparency regimes redundant. It remains to be seen, in Chapter Five *infra*, whether the EU’s provisions on public access to documents held by the institutions are as liberal as those of the Convention, insofar as they are comparable, and in Chapter Six *infra*, whether the Community Courts take the right of public access as seriously as they take the right of access to the file.

## CHAPTER FIVE.

### The right of public access to documents held by the European Union's institutions.

#### 5.1. Introduction.

As noted in Chapter Three *supra*, the EU's concept of transparency is the right of public access. An effective and liberal right of public access is essential to multidimensional transparency, having potential to enhance the democratic nature and legitimacy<sup>1</sup> of any regime. The EU claims to be founded upon the principle of democracy<sup>2</sup> and official concern has been expressed regarding its legitimacy.<sup>3</sup> However, in order to maximise its potential to democratise and legitimate the Union, public access within the EU legal order must actually fulfil the functions that make it essential to multidimensional transparency. It must provide access to the reasoning underlying decisions, in order to facilitate citizens' control of EU decision-makers and the prevention of corruption.<sup>4</sup> It should also facilitate public participation in decision-making processes.<sup>5</sup>

In Chapter One *supra*, it was observed that public access is instrumentally, but not intrinsically, valuable. Mather indicates that multidimensional transparency, by contrast, should be regarded as intrinsically valuable. She believes that only the public access dimension of multidimensional transparency will ever be introduced within the EU if transparency is only regarded as a means of popularising the Union, and strongly suggests that the Commission and Council think more about popularising the Union than

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<sup>1</sup> As Preston (Chapter Three *supra*, note 90) says, "[t]here is no better safeguard of the accuracy of information than the right of access to the documents themselves." In a democracy, accountability should be facilitated if citizens may verify the accuracy of government information, and the government's legitimacy should be enhanced if it offers citizens the opportunity to do so.

<sup>2</sup> Article 6 (ex F) TEU.

<sup>3</sup> The Commission White Paper, Chapter Two *supra*, note 1.

<sup>4</sup> Cf. D. Curtin, 'Citizens' Fundamental Right of Access to EU Information: An Evolving Digital *Passepartout*?' (2000) 37 *CMLRev* 7, at 8.

<sup>5</sup> Cf. Curtin, note 4 *supra*, at 7: "public access was considered [in, e.g., Sweden] an essential part of a citizens' freedom of information, and as a condition *sine qua non* for the will formation process so crucial in a democracy."

democratising it: an approach described as 'naïve',<sup>6</sup> reflecting the belief that the EU will never acquire legitimacy unless it also provides the remaining dimensions of multidimensional transparency. As discussed in Chapter Three *supra*, however, the Commission's White Paper on Governance suggests that the Commission is beginning to think seriously about democratisation. It has at least agreed that public debates require the public to have access to reliable information concerning the various stages of the EU's policy-making processes.<sup>7</sup>

The Commission now appears to be approaching public access from the perspective of an institution seeking to provide the other dimensions of multidimensional transparency, notwithstanding the fact that, in reality, it does not appear to regard transparency as a multidimensional concept. The question, as noted in the conclusion to Chapter Three *supra*, is that of whether public access is actually being taken seriously within the EU, as a democratising and legitimising factor and a key component of transparency. Is the first sentence of Declaration No. 17<sup>8</sup> simply rhetoric, or is the Union genuinely committed to maximising the potential of public access?

This Chapter, by examining the rules governing public access within the EU, will begin to address the questions outlined in the conclusion to Chapter Three *supra*, concerning the Union's approach to public access. Do the public access rules facilitate the holding of the institutions to public account, and encourage/facilitate public participation in decision-making?; are they liberal, or limited?; do they distinguish between documents and the information contained therein?; are the institutions welcoming applications for public access?; is there an adequate enforcement mechanism, to guarantee that the rules will be upheld?; and finally, is the operation of the rules under review, by an institution seeking to make public access a more liberal and/or a more effective right, in terms of its potential to make the EU a more

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<sup>6</sup> Mather, Chapter One *supra*, note 1, at p.9, with reference to Lodge, Chapter Two *supra*, note 13, at 350.

<sup>7</sup> Chapter Three *supra*, note 79 and text.

<sup>8</sup> "The Conference considers that openness of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration."

multidimensionally-transparent and legitimate polity?<sup>9</sup> The latter questions concerning remedies can only be adequately answered by examining the public access case law of the Community Courts and the public access decisions of the Ombudsman, which examination will take place, respectively, in Chapters Six and Seven *infra*. In this Chapter, section 5.2 considers the source of the right of public access within the EU legal order. Section 5.3 then seeks to identify the limits to public access that would be acceptable within a multidimensionally-transparent regime. Section 5.4 examines the provisions of the joint Commission and Council Code of Conduct governing public access (hereafter, 'the Code'),<sup>10</sup> comparing the restricted rights of access to information discussed in Chapter Four *supra*, and the acceptable limits to public access identified in section 5.3, with the Code. Section 5.5 then compares the rights discussed in Chapter Four *supra*, the acceptable limits identified in section 5.3, and the Code discussed in section 5.4, with the new Regulation (EC) No. 1049/2001<sup>11</sup> (hereafter, 'the Regulation') governing public access. Section 5.6 concludes this Chapter and Part Two of this thesis.

## **5.2. The Right of Public Access within the EU Legal Order.**

### *5.2.1. Did the Code, Decisions 93/731 and 94/90 confer a right of public access, or regulate a general principle of Community law?*

As stated in Chapter One *supra*, section 1.3.1, public access to Commission, Council and Parliament documents could now be regarded as a general

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<sup>9</sup> The analysis in this Chapter of the EU right of public access also considers the system of public access required by the democratic principle, as envisaged by ECJ Judge Ragnemalm: rules should allow access to all documents, in principle; 'document' should include any retrievable information including tape-recordings; 'held by' shows that documents emanating from external authors should be included, not only those authored by an institution; necessary exceptions must be narrowly, precisely drafted; there should be no need for an applicant to state his/her reasons for public access (*cf.* Chapter Four *supra*, notes 67-68 and text); it is essential to process requests for public access as soon as possible; there should be a register of documents; and there must be efficient legal remedies against refusals to grant public access (H. Ragnemalm, 'The Community Courts and Openness within the European Union' (1999) 2 *Cambridge Yearbook of European Legal Studies* 19, at 20-21).

<sup>10</sup> Decision 93/730/EC; OJ 1993 L 340/41; see Appendix A.

<sup>11</sup> OJ 2001 L 145/43; see Appendix C.

principle of Community law.<sup>12</sup> It is included in the EU Charter of Fundamental Rights, identified as a solemn declaration of the rights requiring protection by the Community Courts as general principles of Community law.<sup>13</sup> However, both the Charter and Article 255 (ex 191a) EC are recent additions to the EU legal order: Article 255 was added by the ToA in 1996, the Charter was proclaimed in 2000, but the Code was adopted in 1993. Therefore, if the Code itself did not confer a general right of public access upon EU citizens, from whence, within the post-TEU-but-pre-ToA legal order, did that right originate? Was public access already a general principle of Community law?

As Michael O'Neill observes, prior to the TEU, official/judicial interest in Community-level public access was scarce.<sup>14</sup> Evidently, public access was not then a general principle of Community law, although the ECJ had acknowledged a right of 'party access' to information<sup>15</sup> to guarantee fair trials.<sup>16</sup> Equally clearly, Declaration No. 17 contemplated public access within the EU: although the Member States called upon the Commission to report back to the Council concerning measures 'to improve' public access, it was actually necessary for the Commission to suggest measures providing for such access. Hence the Code.

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<sup>12</sup> Curtin observes that the right derived from Article 255 (ex 191a) EC cannot lead to "general [Community] legislation on [public access]", because it only applies to those three institutions (note 4 *supra*, at 14, emphasis in original), therefore even the Charter may not be regarded as protecting a general principle of public access *per se*. See also Harden, Chapter Three *supra*, note 65, at 181: a provision applying to *all* EU institutions and bodies might have raised questions regarding the scope of Article 230 (ex 173) EC, having regard to the need for a judicial remedy in the event that public access is refused. This may have deterred the Member States from drafting such a provision, although the obvious solution would be to re-draft Article 230 also.

<sup>13</sup> *Per* Lenaerts and de Smijter, Chapter One *supra*, note 20.

<sup>14</sup> 'The Right of Access to Community-Held Documentation as a General Principle of EC Law' (1998) 4 *European Public Law* 403, at 407-408: see also Ragnemalm, note 9 *supra*, at 21.

<sup>15</sup> *Ibid.*, at 408 (reference to Case C-2/88, *Zwartveld* [1990] ECR I-4405).

<sup>16</sup> As, of course, had the right of access to the file discussed in Chapter Four *supra*: *Zwartveld* concerned a request for Commission-held information, not submitted by a defendant, but by another party to a case, namely a Dutch investigating magistrate.

### 5.2.2. A Brief Introduction to the Code.

Until 3 December 2001 (when the Regulation entered into force) access to documents held by the Commission and Council was governed by the Code.<sup>17</sup> This, although jointly developed, was independently adopted by the Council<sup>18</sup> and the Commission,<sup>19</sup> using their power to adopt their own Rules of Procedure.<sup>20</sup> The Code might appear to have been a voluntary agreement concluded in order to fulfil the Commission's task, set by the second sentence of Declaration No. 17.<sup>21</sup> However, as discussed in section 5.2.3. *infra*, the remaining institutions were obliged to adopt similar public access provisions in order to comply with the general principle of good administration, pending the adoption of general Community legislation governing public access. On the issue of whether the right of public access existed within the EU legal order independently of the Code, a dispute arises from the ECJ's judgment in the Netherlands' application for the annulment of Decision 93/731.

### 5.2.3. Netherlands v Council.<sup>22</sup>

The Netherlands, supported by the European Parliament, sought the annulment of Council Decision 93/731, submitting that public access was too important to be left to any institution's internal Rules of Procedure; and that the Council had both exceeded its powers and relied incorrectly upon Article 151 (now 207) EC as the legal basis for Decision 93/731, if that Decision was indeed intended to confer upon Union citizens the right of public access to Council documents. The ECJ dismissed the application for annulment, finding that, in light of the "progressive affirmation of" public access evident in the domestic legislation

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<sup>17</sup> Note 10 *supra*.

<sup>18</sup> Council Decision 93/731 EC, OJ 1993 L 340/43, amended by Council Decision 96/705 Euratom, ECSC, EC, OJ 1996 L 325/19: see Appendix B.

<sup>19</sup> Commission Decision 94/90/ECSC, EC, Euratom, OJ 1994 L 46/58, which provides (Article 1) that "[t]he code of conduct on public access to Commission documents...is adopted."

<sup>20</sup> Article 207 (ex 151) EC (re the Council) and Article 218 (ex 162) EC (re the Commission).

<sup>21</sup> "The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to information available to the institutions." Curtin (note 4 *supra*, at 12) suggests that the ECJ regarded the Code as a voluntary measure: see further on that point section 5.2.3. *infra*.

<sup>22</sup> Case C-58/94 *Netherlands v Council* [1996] ECR I-2169.

of most Member States, the Council had decided to amend its rules of internal organisation,<sup>23</sup> and that

“so long as the Community legislature has not adopted general rules on the right of public access...the institutions must take measures [to provide public access] by virtue of their power of internal organisation, which authorises them to take appropriate measures in order to ensure their...conformity with the interests of good administration...”<sup>24</sup>

This confirmed the Council’s power “to adopt measures intended to deal with requests for access to documents in its possession” in the absence of Community legislation providing for public access.<sup>25</sup>

The ECJ has been heavily criticised for not explicitly agreeing that public access is a fundamental human right/general principle of Community law,<sup>26</sup> yet the word ‘must’ in paragraph 39 arguably obliged all institutions to provide for public access to documents in their possession, pending the adoption of general Community legislation governing public access. As implied earlier, even if the Commission and Council had regarded the Code as a voluntary measure, the subsequent adoption of similar provisions by institutions and bodies such as the Committee of the Regions<sup>27</sup> and the European Court of Auditors<sup>28</sup> was *required* in the interests of good administration. The Ombudsman made the following pertinent observation:

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<sup>23</sup> *Ibid.*, paragraphs 34-6.

<sup>24</sup> *Ibid.*, paragraph 39.

<sup>25</sup> *Ibid.*, paragraph 40.

<sup>26</sup> Harlow, Chapter One *supra*, note 8, at 295; Öberg, Chapter One *supra*, note 41, at p.4, and note 44, at 314-5. The ECJ appears to have been slightly less heavily criticised by O’Neill, note 14 *supra*, at 411-2, and Curtin, note 4 *supra*, at 12, both of whom characterised its review of public access as ‘minimalist’. The European Parliament’s submission to the ECJ suggested that public access had been recognised as a human right in various international instruments: on that point, however, *cf.* Verhoeven, Chapter One *supra*, note 51. Ragnemalm (note 9 *supra*, at 24) observes that Advocate General Tesauro “clearly established that the right of access to documents existed prior to ...Decision 93/731” because “developments in the legal systems of the Member States” showed this to be “an essential feature of the democratic principle.” However, the ECJ did not explicitly follow this Opinion.

<sup>27</sup> Decision 397D0165(01), OJ 1997 L 351/70.

<sup>28</sup> Decision 18/97, OJ 1998 C 295/1.

“To me, it is difficult to understand why it should be mandatory [referring to paragraph 39 of the *Netherlands* judgment]...to adopt measures to deal with requests for access to documents unless there is an underlying right of the citizen at stake...”<sup>29</sup>

It seemed as though the ECJ had agreed that there is a right to public access, but had failed to locate its source within the EU legal order. *Per* Öberg, the fact that the ECJ did not, in *Netherlands*, explicitly and unequivocally recognise public access as an independent general principle of Community law constitutes a ‘missing link’ in its reasoning.

The ECJ regarded Decision 93/731 “as a ‘measure intended to deal with requests for access to documents in its possession’, adopted in the interests of good administration.”<sup>30</sup> Öberg continues:

“If the Court denied the existence of a general right of access to documents in Community law in *Netherlands v Council*, the legal basis for such a right must be sought elsewhere, for example in the internal rules of the institutions.”<sup>31</sup>

Those internal rules are intended to organise the institutions’ internal functioning in the interests of good administration, not to ensure protection for individuals,<sup>32</sup> although an institution’s failure to comply with its internal rules of procedure might constitute an essential procedural requirement, which could lead to the annulment of any decision adopted on the basis of those rules.<sup>33</sup> In Öberg’s view, it follows from this reasoning that Decision 93/731 obviously does not confer the right of public access upon Union citizens, being a right intended to benefit individuals, because if that had been its intention, Decision 93/731 would obviously have been adopted on the incorrect legal basis. Internal rules simply do not provide rights for individuals. Öberg concludes that there must already have been a general principle of public access in

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<sup>29</sup> Speech cited in Chapter One *supra*, note 2.

<sup>30</sup> Chapter One *supra*, note 44, at 314, citing paragraph 39 of the *Netherlands* judgment, note 22 *supra*.

<sup>31</sup> *Ibid.*, at 314-5.

<sup>32</sup> *Ibid.*, at 315 (reference to Case C-69/89, *Nakajima v Council* [1991] ECR-I 2069, paragraph 49).

<sup>33</sup> *Ibid.* (reference to Case C-137/92 P, *Commission v BASF and others* [1994] ECR I-2555, paragraphs 75 and 76).

Community law, constituting the source of this right at the time of the *Netherlands* judgment.<sup>34</sup>

Öberg is evidently reluctant to see the “fundamental human right”<sup>35</sup> of public access relegated in status to a principle of good administration, amenable to regulation by the internal rules of the institutions, hence his attack upon the ECJ for failing to unequivocally state that public access is a general principle of Community law, as are all the human rights common to the Member States.<sup>36</sup> His reasoning, however, is illogical: public access could not already have been a general principle of Community law, otherwise the ECJ could not lawfully have denied the existence of a general right of public access in the *Netherlands* judgment, thereby inviting commentators to search for the source of that right within the internal rules of the institutions. Therefore, Öberg’s conclusion is erroneous. *Per* Curtin, the ECJ:

“...did not elevate in this period the principle of public access to the status of an explicit “general principle” of Community law, presumably in line with its view of the highly specific and voluntary nature of the principle as assumed by certain institutions.”<sup>37</sup>

A logical conclusion is that the right of public access to Council documents was first conferred upon EU citizens by the Code, as adopted by Decision 93/731.<sup>38</sup> The Code also introduced the principle of granting the ‘widest possible access to documents held by the institutions’.<sup>39</sup>

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<sup>34</sup> *Ibid.* On Ragnemalm’s analysis (note 9 *supra*, at 24), this is a reasonable conclusion, although Ragnemalm adds that “it is obvious that the precise content of such a general principle has not yet been clarified. The regimes that apply in the different Member States vary. Moreover...there is no exact equivalent at national level to the activity of the Community institutions and the nature of the information in their possession” (*ibid.*, at 25).

<sup>35</sup> Chapter One *supra*, note 44, at 313.

<sup>36</sup> *Cf.* also O’Neill, note 14 *supra*, at 411-412: The legal basis issue was only “a preliminary point from which the Netherlands Government launched its most salient argument that the Council wrongly categorised a fundamental right as a matter of internal organisation...The Court proceeded to disregard the issue of the existence of such a fundamental right at the Community level...”

<sup>37</sup> Note 4 *supra*, at 12. *Cf.* Ragnemalm, note 9 *supra*, at 24-25, who suggests that public access was at least an *implicit* general principle of Community law at this time.

<sup>38</sup> *Cf.* the CFI in Case T-124/96, *Interporc Im- und Export GmbH v Commission* [1998] ECR II-231, at paragraph 46: “Decision 94/90 is a measure conferring on citizens a right of access to documents held by the Commission.” Recalling that Decision 94/90 is exactly

The circumstances leading up to the adoption of the Code may explain why the ECJ refrained from recognising a general principle of public access. The Code was, perhaps, not entirely voluntary, the IGC having by Declaration No. 17 called upon the Commission to consider public access. The Declaration also implied that the Member States were contemplating a right of public access developed by the Council on a proposal from the Commission. The Member States are of course the authors of the Treaties, and public access to EU documents is potentially a politically sensitive issue, given the strong tradition of public access in Scandinavian Member States and the much weaker 'tradition' in the UK. The ECJ may therefore have decided that the Member States desired to have the rules governing public access at EU level developed by the Community legislature. That conclusion is supported by their subsequent express reservation of the task of developing the Article 255 right of public access to the Commission, Council and Parliament.<sup>40</sup>

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analogous to Decision 93/731 insofar as both Decisions related to the same Code, Decision 93/731 must be regarded as conferring the same right on citizens in respect of Council-held documents. See also paragraph 38 of the Opinion of Advocate General Léger in Case C-353/99 P, *Council v Heidi Hautala MEP*, judgment of 6 December 2001: "Decision 93/731...lays down the principle of public access to Council documents."

<sup>39</sup> Although Österdahl has criticised this formulation as implying "a qualification of the rule of openness built into the very rule itself," by comparison to "'free access' under Article 1 and even 'right of access' under Article 2 of Chapter 2 of the Freedom of the Press Act which is the fundamental rule under the Swedish law on openness" (I. Österdahl, 'Openness v Secrecy: Public Access to Documents in Sweden and the EU' (1998) 23 *ELRev* 336, at 346) it must be remembered that total FOI is apparently unattainable. So long as the Member States are threatened, by external and anti-democratic forces, which forces seek to seriously disrupt or to destroy the normal functioning of the liberal democratic societies therein, there will always be a need for some secrecy regarding the measures taken by the States to defend themselves against such threats. Therefore, a right to the 'widest possible' public access, as opposed to total FOI, is the most that can be expected, even in Sweden (*cf.* L. Lustgarten and I. Leigh, *In from the Cold: National Security and Parliamentary Democracy*, Clarendon Press, Oxford, 1994, ch. 1 (pp.1-35); H. Burkert, 'A Functional Approach to the Legal Rules Governing Secrecy and Openness', in *Proceedings of the Seventeenth Colloquy on European Law* (Zaragoza, 21-23 October 1987) on 'Secrecy and Openness: individuals, enterprises and public administrations', Council of Europe, Strasbourg, 1988, at p.17; F. Rourke, *Secrecy and Publicity: Dilemmas of Democracy*, Johns Hopkins Press, Baltimore, 1996, at p.21; and Österdahl, *op. cit.*, at 353 ("[i]n general the content of the Swedish Secrecy Act corresponds with the rules on secrecy contained in the various instruments of Community secondary legislation").

<sup>40</sup> R. Davis, 'The Court of Justice and the right of public access to Community-held documents' (2000) 25 *EL Rev* 303, at 308. See also Curtin (note 4 *supra*, at 14-15), who explains that, in light of the ToA amendments to the TEU, it is not possible to regard Article 255 EC as giving the institutions "total discretion" to decide that their own interests in maintaining secrecy "must prevail over the citizens' right of access to documents." Article 1 (ex A) TEU, as amended, now provides that decisions are to be

Had the ECJ derived public access as a general principle of Community law from the traditions of the Member States, this would have left it with the additional task of developing the rules required by that general principle.<sup>41</sup> This task could have been problematic. The Court's approach to public access might have been too liberal for some Member States but too illiberal for others, as well as being unsatisfactory to pro-transparency academics:<sup>42</sup> it would also have usurped a role clearly intended for the Community legislature. Furthermore, importantly, most Member States have constitutional or legislative rules governing public access, which is never regulated entirely by case law. The development of rules by case law could take time, depending upon the cases appealed to the ECJ. Alternatively, the prospect of having the ECJ develop public access rules might 'open the floodgates' to a spate of cases launched by persons ultimately seeking to have those rules amended or clarified. That might affect legal certainty: if the rules were constantly being challenged and changed, it could be difficult to keep citizens adequately informed about their right to access certain categories of document. More importantly, perhaps, a flood of public access appeal cases would only increase the Community Courts' notoriously heavy caseload. Leaving the institutions to develop public access prevented all but one of these potential problems – that of the ECJ's approach being criticised - from arising.<sup>43</sup>

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taken *as openly as possible* and as closely as possible to the citizen. Union citizenship, meanwhile, supplements national citizenship (Article 17(1) (ex 8a(1)) EC). "The *greatest possible* level of openness must [therefore]...*include* the level of openness *already achieved* at the national level in any and all of the Member States...*this status quo* is the *minimum* level of openness which must be taken as acquired and to which the development of EU concrete rules and principles will have a *supplemental* function (*ibid.*, emphasis added)." Basically, therefore, Article 255 EC should now be regarded as conferring a right intended to give citizens the widest possible access to documents of the Council, Commission and Parliament, notwithstanding its location within the EC Treaty as a 'provision common to the several institutions'.

<sup>41</sup> Cf. O'Neill, note 14 *supra*, at 431.

<sup>42</sup> Harlow (Chapter One *supra*, note 8, at 295) criticises the ECJ's judgment in *Netherlands* as its "choice of the narrow ground of individual right of access was to set the tone of future judicial review." Cf. Curtin, note 4 *supra*, at 13: the Courts had not "explicitly acknowledged [public access] as a fundamental constitutional principle" facilitating citizens' access to the Union's political processes.

<sup>43</sup> Davis, note 40 *supra*, at 308.

Furthermore, it must be remembered that had the ECJ annulled Decision 93/731, there would have been no rules governing public access to the institutions' documents. The ECJ was unlikely to have discovered a general principle of public access with which to replace the Code adopted by Decision 93/731, given its anticipation of 'general legislation' governing public access. The academic criticism directed at the ECJ's approach in *Netherlands* seems to suggest, however, that notwithstanding the importance attached to public access, it would have been better to have had no right of public access at all than to have had the Code, because the Code did not confer a fundamental, constitutional right of public access upon EU citizens, constituting a failure, on the part of the institutions, to take transparency seriously.

#### 5.2.4. Conclusion.

If public access to the documents of three institutions is a general principle of Community law today, that is because of various negotiations between the Member States *qua* Treaty authors and the Community legislature. It has not been developed as such by the ECJ.<sup>44</sup> The ECJ has been heavily criticised because of this, although the *Netherlands* judgment promoted public access. Its refusal to annul Decision 93/731 gave Union citizens a right of access to Council documents.<sup>45</sup> It obliged the remaining institutions to adopt similar measures in the interests of good administration, presumably because Declaration No. 17 indicated that the Member States themselves now considered good administration to require public access. This ruling remains important, in the absence of Community legislation governing public access to documents held by all EU institutions and bodies.

Before the ToA, both the right and general principle governing public access were located within the Code adopted by Decisions 93/731 and 94/90. It is, therefore, now time to examine the substantive provisions of the Code and

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<sup>44</sup> Cf. Tridimas, Chapter Four *supra*, note 7, at p.221: in Community law, the right of public access is not the product of case law but of Community legislation, and although it was not initially regarded as fundamental in the EC legal order, "its constitutional status is gaining recognition."

<sup>45</sup> Davis, note 40 *supra*, at 309.

those Decisions in order to determine the extent to which these might be described as 'liberal'. Consideration must first be given to the extent to which public access might legitimately be restricted, in a regime aiming to secure for its citizens 'the widest possible access' to documents. This requires the identification of legitimate public interests in secrecy. If the Code's provisions allowed public access to be unduly restricted, it would follow that the Code was not as liberal as it might have been, which in turn implies that the Commission and Council had not been taking public access sufficiently seriously.

### **5.3. Legitimate Public Interests in Secrecy.**

#### *5.3.1. What is a legitimate public interest in secrecy?*

Usually, the *individual* interest of an applicant for public access would be immaterial, in a multidimensionally-transparent regime, which would be expected to grant public access automatically upon request, unless the non-disclosure of a document could be justified in the *public* interest. That appears to be the EU's approach to public access: see further sections 5.4 and 5.5 *infra*. Therefore it is necessary to identify (a) public interest(s) that might legitimately justify such non-disclosure: the legitimate public interest(s) in secrecy.

Taking public access seriously requires the public interest in public access itself to be respected. A policy of automatic disclosure, unless the non-disclosure of a given document can be justified in the public interest, implicitly acknowledges that there is at least one public interest in public access. Declaration No. 17 alludes to this by referring to the institutions' democratic nature. As discussed in Chapter One *supra*, there is a collective public interest in securing the democratic accountability of decision-makers, and there is a further collective public interest in securing democratic access to decision-making procedures.<sup>46</sup> As also implied in Chapter One *supra*,<sup>47</sup> in order to be

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<sup>46</sup> Cf. Curtin and Meijers, Chapter One *supra*, note 70 and text: see also notes 71-72 and text. See further Curtin, note 4 *supra*, at 13: public access is linked to the democratic principle by Declaration No. 17, as recognised by Advocate-General Tesouro in his Opinion in

legitimate, any public interest in secrecy must be capable of outweighing the public interest in public access, otherwise the right of public access could be unduly limited by unwarranted exceptions, based upon interests that could be sufficient to outweigh an individual citizen's specific interest in requesting public access, but not necessarily sufficient to outweigh the collective public interest of all citizens in public access.

### 5.3.2. *Examples of legitimate public interests in secrecy.*

Pressure group *Article 19* has produced a list of public interests in secrecy, which it apparently regards as legitimate:<sup>48</sup>

- the public interest in law enforcement;
- the public interest in the maintenance of individual privacy;<sup>49</sup>
- the public interest in national security;<sup>50</sup>
- the public interest in the protection of commercial and other confidentiality;
- the public interest in public and individual safety; and
- the public interest in the effectiveness and integrity of government decision-making processes.<sup>51</sup>

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*Netherlands v Council* (note 22 *supra*), and should be regarded "as a fundamental right for citizens giving them timely and accurate access to the political process itself."

<sup>47</sup> Chapter One *supra*, notes 71-72 and text.

<sup>48</sup> *Article 19, The Public's Right to Know: Principles on Freedom of Information Legislation*, Chapter One *supra*, note 56: Principle 4. The public interests selected by *Article 19* are likely to be regarded as legitimate in a multidimensionally-transparent regime. Unfortunately, however, *Article 19* also states that the disclosure of documents could be refused in order to protect other "legitimate aims listed in the law" (*ibid.*), which not only resembles a 'catch-all' provision, but also offers no guidance concerning those "legitimate aims".

<sup>49</sup> The legitimacy of a public interest in individual privacy is supported by Birkinshaw (Chapter One *supra*, note 65, at pp.16-17): individuals require privacy in order to function effectively within society, and without respect for individual privacy, society as a whole could become 'callous', 'captious' and 'unprincipled'.

<sup>50</sup> See further Lustgarten and Leigh, note 39 *supra*. Political and civil rights are intrinsic components of national security (*ibid.*, at p.5). Any danger to the core values of democracy and respect for human rights is, therefore, a threat to the state (*ibid.*, at pp.7-8). The term 'national security' should be reserved for "matters that are as near as possible of universal and equivalent benefit to all citizens of the [democratic] state [which respects human rights]" (*ibid.*, at p.27).

<sup>51</sup> This interest is discussed further in section 5.4 *infra*.

These interests, however, may not be invoked in order to justify ‘blanket bans’ upon public access. There is a tripartite proportionality test:

- non-disclosed documents must contain information relating to a legitimate public interest; and
- disclosure must threaten substantial harm to that interest; and
- such harm must outweigh the public interest in access to the document.

*Article 19* also states that, for example, if non-disclosure is justified in the interests of national security, that justification might cease to be valid if a “specific national security threat subsides.”<sup>52</sup> Exceptions to a policy of access to information/documents should be as narrow as possible: the content of a document should be considered carefully, in order to determine whether it is covered by an exception. Furthermore, although *Article 19* implies that the listed public interests might normally legitimately override the public interest in access to information, it does not accept this as inevitable, specifying that there must always be a balancing of the interest in disclosure against the interest in maintaining secrecy.<sup>53</sup> Therefore, although not required to give any reasons for seeking access to documents held by the institutions, if a person or an NGO seeking access to an EU document does provide (a) reason(s), and the reason(s) provided outweigh(s), for example, the public interest in the protection of privacy, access should be granted.

Unfortunately, as noted, *Article 19* also seems to contemplate a ‘catch-all’ exception, to protect “legitimate aims listed in the law.” This does not help to shed light upon the elusive concept of the legitimate public interest in

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<sup>52</sup> Note 48 *supra*.

<sup>53</sup> On the balancing of interests, see further Lustgarten and Leigh, note 39 *supra*, at p. 9: action taken in the name of national security cannot be justified by weighing the needs of national security against a loss of individual liberty: such a loss must also be deducted from any supposed gain in national security. In the case of a collective constitutional right such as public access, the loss of the potential to publicly debate government policy, and thereby to hold the government to account, must therefore be set against any supposed increase in the extent to which democracy is being protected by keeping information secret.

secrecy.<sup>54</sup> Examples of such aims might be those in Articles 4(4)(e) (the protection of intellectual property rights) and 4(4)(h) (the protection of the environment to which information relates) of the Aarhus Convention (Chapter Four *supra*, section 4.3). Nevertheless, even the inclusion of a ‘catch-all’ provision in the list of legitimate public interests in secrecy need not necessarily undermine public access, so long as due deference is always paid to the importance of that right. *Article 19*’s approach to a legitimate public interest in secrecy emphasises that, whatever the law’s aim, the protection of that aim must always be weighed carefully against the public interest in the disclosure of information/documents. Furthermore, “[r]estrictions whose aim it to protect governments from embarrassment or the exposure of wrongdoing can never be justified.”<sup>55</sup>

### 5.3.3. Conclusion.

A legitimate public interest in the non-disclosure of documents has three characteristics. It must never be intended to shield governments from public criticism. It must be ‘listed in the law’, as are the public interests that may be protected, for example, under Article 10(2) ECHR. It must be such that it would be substantially harmed by the disclosure of information/documents to the public. If an interest is not so characterised, public access should be granted. Even if an interest has these characteristics, however, *Article 19* insists that public access should be granted whenever the benefit of public access outweighs the substantial harm caused to the interest in question. This approach to public access is to be expected of a regime that is truly committed to transparency. As indicated, these factors must be borne in mind when examining the substantive provisions governing public access, and when examining the attitude of the institutions and the Community Courts towards those provisions.

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<sup>54</sup> “Legitimate secrecy... involves a paradox: much of the most sensitive information is either of no relevance whatever to policy and democratic debate, or is completely incomprehensible to any but a handful of technical experts - or both... What ought to be revealed are dishonesty, false or misleading statements, unacknowledged policies, and deniable operations authorised or engaged in by policymakers at the highest level...” (Lustgarten and Leigh, *ibid.*, at pp.31-2).

<sup>55</sup> Note 48 *supra*: cf. Lustgarten and Leigh, note 39 *supra*, discussed at note 54 *supra*.

## **5.4. The Code.**

### *5.4.1. The Code, Decision 93/731 and Decision 94/90.*

The Code retained the tradition, discussed in Chapter Four *supra*,<sup>56</sup> of not requiring applicants for public access to provide reasons. Commission Decision 94/90 simply adopted the Code (Article 1), adding only a few details concerning fees (Article 2(5)) and the consultation of documents (Article 2(6)), and adding that failure to reply within one month constituted an intention to refuse access, or, in the event of failure to reply to a confirmatory application (Article 2(4)), a final refusal. Council Decision 93/731, however, conferred the right of public access “under the conditions laid down in this Decision” (Article 1(1)). The Decision implemented each individual principle of the Code, but in a different order.

Originally, there were no substantive differences between the Code and the Decision.<sup>57</sup> The operative provisions of Decision 93/731 were significantly amended by Decision 2000/527/EC,<sup>58</sup> however. Article 1(1) was amended as follows:

“The public shall have access to Council documents, except for documents classified as TRÈS SECRET/TOP SECRET, SECRET or CONFIDENTIEL within the meaning of the Decision of the Secretary-General of the Council/High Representative for Common Foreign and Security Policy of 27 July 2000 on measures for the protection of classified information applicable to the General Secretariat of the Council, on matters concerning the security and defence of the Union or of one or more of its Member States or on military or non-military crisis management, under the conditions laid down in this Decision.

Where a request for access refers to a classified document within the meaning of the first subparagraph, the applicant shall be informed that the document does not fall within the scope of this Decision.”

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<sup>56</sup> Chapter Four *supra*, notes 67–68 and text.

<sup>57</sup> The minor amendments introduced by Decision 96/705 are not relevant to this thesis.

<sup>58</sup> OJ 2000 L 212/9.

This provision was castigated by both *Statewatch* and the House of Lords,<sup>59</sup> not only because it automatically removed whole categories of documents from the scope of Decision 93/731, which, importantly, could have been protected adequately by the existing list of exceptions, but also because it pre-empted the adoption of the Regulation, discussed in section 5.4 *infra*. Moreover, although it was not necessary to consult the European Parliament in order to amend Decision 93/731, the fact that such a sweeping curtailment of the right of public access could be made unilaterally by the Council was also condemned.

Article 2, which had echoed the Code (the first three indents of the paragraph headed ‘Processing of initial applications’) received an additional paragraph:

“Without prejudice to Article 1(1), no Council document on matters concerning the security and defence of the Union or of one or more of its Member States or on military or non-military crisis management which enables conclusions to be drawn regarding the content of classified information from one of the sources referred to in paragraph 2 may be made available to the public except with the prior written consent of the author of the information in question.

Where access to a document is refused pursuant to this paragraph, the applicant shall be informed thereof.”

In Article 4(1), ‘the security and defence of the Union or of one or more of its Member States’, and ‘military or non-military crisis management,’ were added to the list of public interest exceptions included within the Code. Decision 2000/527, nicknamed ‘the Solana Decision’ after the Council’s Secretary-General, Javier Solana, was clearly illiberal, enabling the Council to withhold many documents from public scrutiny, notwithstanding the fact that they could have been adequately protected under existing public interest exemptions.<sup>60</sup>

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<sup>59</sup> <http://www.statewatch.org/news/2001/mar/03holrep.htm> and the Eighth Report of the House of Lords Select Committee on the European Communities, Session 2000-2001, <http://www.publications.parliament.uk/pa/ld200001/ldselect/ldecom/31/3101.htm>.

<sup>60</sup> This regression towards secrecy might conceivably have represented an attempt to reverse judgments of the Community Courts/decisions of the Ombudsman favouring applicants for public access, according to evidence presented to the House of Lords Select Committee on the European Communities: see Chapter One *supra*, note 30, paragraphs 66, 96, 104, and 114, and especially paragraph 74, in which Professor Curtin, and Tony Bunyan of *Statewatch*, suggest that those judgments had seriously inconvenienced the

*Statewatch* also observed that the Decision of 27 July 2000 to which the amended Article 1(1) refers, requires documents to be classified according to the highest possible classification:

“Where a number of items of information constitute a whole, that whole shall be classified at least as highly as its most highly classified constituent item”<sup>61</sup>

Although illiberal, this does not preclude the grant of partial access to classified documents, however.

The Solana Decision has now been superseded by the Regulation. Therefore, given the extent and thoroughness of the House of Lords’ and *Statewatch*’s published scrutiny and criticism thereof, the Solana Decision may be summarised as an obviously unwarranted and unjustifiable limitation upon public access. Its existence supports, however, any suspicion that the Council may be more concerned about maintaining secrecy than about granting public access,<sup>62</sup> notwithstanding the rhetoric of its guidelines published on 28 June 1999 aimed at improving transparency and the provision of information concerning EC activities.<sup>63</sup>

Turning to the question of whether the Code was liberal prior to Decision 2000/527, certain issues require particular consideration, such as: the definition of a ‘document’; the list of exceptions to the right of public access; and the requirement, if any, to establish that the disclosure of a document would cause substantial harm to a protected interest. The time limits for the processing of applications are important, since a right of public access might not be useful to would-be lobbyists if many months pass before access is granted. However,

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institutions. The ECJ and CFI were, arguably, taking the self-imposed public access rules of the Commission and Council more seriously than those institutions: see further Chapter Six *infra*.

<sup>61</sup> Source: <http://www.statewatch.org/news/dec00/06solana2.htm>.

<sup>62</sup> For a source of such suspicions see, e.g., K. Armstrong, ‘Citizenship of the Union? Lessons from *Carvel and The Guardian*’ (1996) 59 *MLR* 582, at 582-3.

<sup>63</sup> *Bulletin Quotidien Europe* No. 7496: “It is the Council’s hope that the new provisions on openness and transparency contained in the Treaties will be reflected in genuine, perceptible changes in the daily practice of Community institutions.”

*prima facie*, one month or two is reasonable: most Member States<sup>64</sup> and the Aarhus Convention<sup>65</sup> provide that access should be granted within a month unless circumstances, such as the bulk/complexity of the information sought, justify an extension of a further month. The charging of a reasonable fee for the provision of certain documentation is also standard practice.<sup>66</sup> Furthermore, the Code provided for a fully independent review of refusals to grant access, by either the CFI or the Ombudsman.

The Code's definition of a 'document' as 'any written text whatever its medium' was narrower than the definition of 'information' in Article 2(a) of Directive 90/313 (see Chapter Four *supra*) which refers to "visual, aural and data-base information" as well as written texts. Likewise, the Aarhus Convention (Article 2(3)) refers to information in "written, visual, aural, electronic or any other material form." However, the Code permitted requests for access to electronically stored documents, which is particularly welcome in terms of facilitating public access.<sup>67</sup> A serious problem was the requirement that an application must be sent directly to a document's author.

This 'authorship rule' immediately enabled the institutions to deny access to entire classes of documents: documents written by another institution, a natural or legal person, a Member State or another national/international body, notwithstanding the fact that they are indeed currently 'held by' the Commission and Council. There is no such rule in the right of access to the file: certain documentary evidence of anticompetitive behaviour contained within the Commission's file will have been supplied to it, not written by it. Moreover, in the context of access to the file, as discussed in Chapter Four *supra*, the Commission may be required to maintain the confidentiality of certain documents supplied to it, but may not be entitled to base its Decision upon those documents if it cannot at least prepare a non-confidential summary of their contents, so that the undertaking(s) being investigated may have access

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<sup>64</sup> Based upon the Commission's comparative study of FOI within the Member States, annexed to Commission Communication 93/C 156/05 (OJ 1993 C 156/5): see OJ 1993 C 156/9.

<sup>65</sup> Article 4(2).

<sup>66</sup> OJ 1993 C 156/9; Article 4(8) of the Aarhus Convention.

<sup>67</sup> Curtin, note 4 *supra*, at 10.

to the file. Access to internally-prepared Commission documents is likely to be refused simply because those documents are internal.<sup>68</sup> This situation is almost the mirror image of that produced by the authorship rule in the Code.

It can be concluded immediately that the public interest exceptions in the Code were less liberal than those in Directive 90/313, however, because Article 3(2) of the Directive provided that Member States ‘may’ allow access to information to be refused to protect the listed public interests (including national security), whereas the Commission and Council decided that they ‘shall’ refuse information which ‘could undermine’ the similar public interests listed in the Code (including national security). There was no requirement to balance the listed public interests against the public interest in access to documents, nor any mention in the Code of a ‘substantial harm test’ as demanded by *Article 19*. The subject-matter of the mandatory exceptions was not remarkable, in light of the discussion in section 5.3 *supra*. The protection of monetary stability, for example, seems to be a legitimate aim of the Commission and Council. The discretionary exception for the confidentiality of the institutions’ proceedings also corresponded to the public interest, recognised by *Article 19*, in the effectiveness and integrity of government decision-making processes. *Statewatch*, however, has condemned this ‘space to think exception’.

Tony Bunyan, *Statewatch* editor, said of the proposals for the Regulation:

“...the Commission wants to create the so-called “space to think” for officials (public servants) and permanently deny access to innumerable documents. The “space to think” for officials is apparently more important than the peoples’ right to know...But there is another problem with the “space to think” for officials, it would also give them the “space to act”. Many of the documents hidden by this rule would concern the implementation of measures - the practice that flows from the policies.”<sup>69</sup>

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<sup>68</sup> Chapter Four *supra*, text at note 30. S. Kadelbach is apparently in the minority in endorsing the ‘authorship rule’, as a means of maintaining co-operation between the Member States and the EU: see ‘Case Law’ (2001) 38 *CMLRev* 179, at 189.

<sup>69</sup> ‘Access to documents ‘could fuel public discussion’ in ‘Essays for An Open Europe’, Chapter One *supra*, note 10.

The space to think exception is deemed, by the institutions, to be necessary, enabling them to formulate policies before those policies enter the public domain. There is a belief that policies developed under the spotlight of publicity will be poor.<sup>70</sup> Given that Bunyan is satisfied with the Ombudsman in the latter's dealing with refusals by the Council to allow *Statewatch* access to certain documents,<sup>71</sup> it is somewhat surprising to find that he does not apparently agree with Mr Söderman's opinion regarding space to think. The Ombudsman considers that every administration must carry out internal preparatory work before presenting matters to the public, and that those involved in such preparatory work "should have the possibility of an informal exchange of ideas and criticism."<sup>72</sup> However, as soon as an administration has formally adopted a draft text, or whenever a document containing the results of its thinking is "transmitted outside the boundaries of the organisational space in which it has been drafted", then that text/document "should be included in a public register."<sup>73</sup> The Ombudsman is not, therefore, opposed to the notion of a space to think *per se*, as Bunyan appears to be: on the contrary, he favours allowing policy options to be formulated without interference from the public or the press. *Statewatch* seems to be in the minority,<sup>74</sup> with *Article 19* having acknowledged as legitimate a similar interest in secrecy, and the Ombudsman's explicit endorsement of the space to think exception. The need for institutions to have some space to think will probably not disappear from the list of exceptions to any European level right of public access in the near future: the

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<sup>70</sup> Committee of Independent Experts, 2<sup>nd</sup> Report, vol. 2, chapter 7, paragraph 7.6.6 (<http://www.europarl.eu.int/experts/pdf/rep2-2en.pdf>).

<sup>71</sup> See <http://www.statewatch.org/news/2001/jul/ombuds.htm>.

<sup>72</sup> Speech entitled 'Access to official documents and archives - the democratic aspect', delivered at Lund University, Sweden, 5 April 2001 (<http://www.europa-ombudsman.eu.int/speeches/en/2001-04-05.htm>).

<sup>73</sup> *Ibid.*

<sup>74</sup> Notwithstanding the fact that similar arguments (including empirical observations) were put to the House of Lords Select Committee on the European Communities by witnesses including the Bar European Group and the World Wide Fund for Nature, against the notion that the institutions needed 'space to think' (Chapter One *supra*, note 30, paragraphs 80-81). The Ombudsman's office cogently observed that "[f]or example, when a legal service produced an opinion for its institution on a matter, that opinion might go through several drafts. Nobody would want to see published the early drafts that were consigned to the wastepaper basket" (*ibid.*, paragraph 82). That the necessary 'space to think' should only cover the production of an opinion/consultation document/communication, which would cease to be covered by the 'space to think' exception as soon as it was ready for internal publication, is not unreasonable, and accords with Swedish national practice (see paragraph 83 of the Select Committee Report, Chapter One *supra*, note 30).

Aarhus Convention recently reaffirmed that information could be withheld if its disclosure “would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law” (Article 4(4)).

One aspect of the Code with which *Statewatch* was more justifiably concerned was the institutions’ ability to seek a ‘fair solution’ in order to comply with ‘repeat applications’. As will be seen in Chapter Seven, *infra*, the Council in particular seemed, so far as *Statewatch* was concerned, eager to treat any subsequent request for *different* documents concerning the *same policy area* as documents previously disclosed to the same applicant, as a ‘repeat application’. As will be discussed in section 5.5 *infra*, *Statewatch* strongly opposed the incorporation of this aspect of the Code into the Regulation.

To summarise, the chief problem areas of the Code were: the authorship rule; the mandatory nature of most of the exceptions; the absence of any harm test, to be applied before deciding whether documents should be withheld; and the meaning of a repeat application. After briefly examining the Council’s provisions for making information available to the public without the need for anyone to apply for public access, attention will turn, in section 5.5 *infra*, to the question of whether the new Regulation addresses any of these problems.

#### 5.4.2. *Improving Transparency? Council Decisions 2000/23/EC<sup>75</sup> and 2001/320/EC.<sup>76</sup>*

Decision 2000/23, without prejudice to Decision 93/731, sought to improve the public register of Council documents, available online at <http://ue.eu.int> since 1 January 1999. Article 1 requires a list of provisional Council and COREPER agendas to be published in advance of meetings and updated to reflect any changes. Article 2 requires the public register of documents to include the document number and the subject matter of classified documents, unless such mention could undermine the public interests set out in the Code above

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<sup>75</sup> OJ 2000 L 9/22.

<sup>76</sup> OJ 2001 L 111/29.

(including, following amendment by the Solana Decision, the security and defence of the Union or one of its Member States, and military or non-military crisis management). No reference is to be made, however, to documents classified TRÈS SECRET/TOP SECRET, SECRET or CONFIDENTIEL within the public register, following the Solana Decision amendments. Articles 3 and 4 concern, respectively, technical preparations for online publication and the date on which the Decision came into force, being 1 January 2000.

Decision 2000/23 certainly improved the position for an ordinary European or an NGO wishing to know the agenda of a future Council meeting, but once again, the Solana amendments are unjustifiable: the public interest in defence and crisis management could already be protected by reference to public security *simpliciter*, and it should still be possible to outline the subject-matter of a confidential or classified document without compromising secrecy: even a simple statement that Document X concerns ‘troop deployment’ or ‘Europol counter-terrorist investigations’ would advise members of the public that they would be unlikely to obtain access to Document X.

At first glance, Decision 2001/320 appears welcome: it makes ‘certain categories of documents available to the public’. The first recital of its Preamble, however, states that:

“Transparency is an essential principle for the functioning of the institutions of the Community. Public access to documents is one of the instruments to apply [*sic*] this principle.”

Although describing transparency as essential, and, importantly, implying that public access is not actually being conflated with transparency, it can still be asked why transparency is regarded as essential to the Community institutions instead of the natural and legal persons affected by their decisions.<sup>77</sup>

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<sup>77</sup> Cf. Harlow, Chapter One *supra*, note 8, at 290. This formulation would indicate an instrumentalist, i.e. administration-centred, approach towards public access.

Decision 2001/320 applies only to non-classified Council documents (Article 1(1)) and allows the Member States to ask that documents originating from a Member State be withheld unless prior agreement to their disclosure is given Article 1(2). Article 3(1) calls upon the General Secretariat to make available, immediately after the final version has been distributed to Council/COREPER members: documents made public by agreement of the author; provisional agendas of Council meetings; and any text intended to be published in the Official Journal. Article 3(2) provides likewise for COREPER meetings, and information excluding Legal Service opinions and contributions. Article 4(1) requires certain legislative documents to be publicly available: cover notes and copies of letters concerning legislative acts addressed to the Council by other institutions or, subject to Article 1(2), the Member States; notes submitted to the Council and COREPER for approval and the drafts to which they refer; and decisions adopted by the Council during the Article 251 (ex 189b) EC legislative procedure, including joint texts approved by the Conciliation Committee. Article 4(2) requires the publication of documents drawn up before the coming into force of Decision 2001/320 (i.e. 1 May 2001) provided they are not covered by exemptions in Article 4(1) of Decision 93/731.

Decision 2001/320 purports to add transparency, albeit for the benefit of the Council itself and not citizens, although it actually accomplishes nothing beyond, perhaps, speeding up the public access process slightly. All the documents to which it refers are either intended for publication, or already available under the provisions of Decision 93/731. Decision 2000/23, prior to the Solana amendments, seems to have been more useful insofar as it enables a member of the public or an NGO to find out when the Council or COREPER are due to meet, and at least a broad idea of the subject-matter of that meeting, which could assist potential lobbyists.

### **5.5. The Regulation.**

No attempt will be made here to analyse the proposals and drafts preceding the Regulation. These have been thoroughly criticised elsewhere, for example by

the House of Lords Select Committee on the European Communities<sup>78</sup> and *Statewatch*.<sup>79</sup> To discuss such criticism now seems redundant in light of the adoption of a final text. Moreover, this thesis has nothing original to add to the criticisms already published,<sup>80</sup> all of which convey the same basic message: the proposals and drafts were considered to be too illiberal.<sup>81</sup>

In Chapter Three *supra*, it was observed that the provision of public participation in decision-making has not been established as an aspect of the Union's concept of transparency. The Regulation represents, perhaps, a step towards the explicit recognition of the fact that public participation should be regarded as a component of transparency, as suggested by recital no. 2 of the Preamble, linking openness, as public access, to participation in decision-making, to accountability in a democratic system, and to the strengthening of the democratic principle set down by Article 6 TEU.

One problem is, although transparency as public access helps to empower citizens wishing to participate in decision-making, it is not necessarily clear by what means, if any, citizens might so participate at EU level. The Regulation offers no guidance, and the Member States and institutions still equate openness with public access. Therefore, the Preamble invites ordinary European citizens to criticise the continuing lack of (an) easily-

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<sup>78</sup> 16<sup>th</sup> Report, Chapter One *supra*, note 30.

<sup>79</sup> See <http://www.statewatch.org/secret/observatory.htm>.

<sup>80</sup> The author is also aware, through membership of the *European Freedom of Information List*, of the existence of at least one academic thesis in which such criticisms have been analysed in depth, submitted by Mr Achim Berge. *EFIL* is an e-mail facility owned and operated by Ulf Öberg (<http://groups.yahoo.com/group/EFIL>): its members, mostly based within the Member States, share views and exchange information concerning transparency-related issues.

<sup>81</sup> A further concern arises from the direct applicability of the Regulation. The preamble indicates that the Regulation is not intended to amend national public access legislation, but that, "by virtue of the principle of loyal cooperation which governs relations between the institutions and the Member States, Member States should take care not to hamper the proper application of this Regulation and should respect the security rules of the institutions." Public access is a constitutional right in certain Member States (e.g. Sweden), and certain Member States have accepted the supremacy of Community law upon condition that their national constitutional rights shall receive equivalent protection under both Community and national law (e.g. Germany: see Craig and de Búrca, Chapter One *supra*, note 6, at pp.268-276). It is not inconceivable that the supremacy of EC law may once more be at issue, in the event that information held concurrently by a Member State and an institution were to be disclosed under national, constitutional, public access rules, when the institution has or would have refused to grant access to the same information under the Regulation.

comprehensible, well-publicised and readily-accessible method(s) by which they might use information gained via the right of public access to participate in EU-level decision-making: citizens might therefore continue to regard the Union as an illegitimate source of law. Having suggested the desirability of democratic participation at EU level, the institutions should open their decision-making processes to public input, as far as possible, and should ensure that citizens are fully informed of their opportunity/opportunities to participate, much as the Member States are required to do in respect of environmental decision-making processes, *per* Directive 85/337, as discussed in Chapter Four *supra*. An approach to transparency concentrating upon public access at the expense of public participation could only leave citizens wondering how to utilise any information they might succeed in gathering from the institutions' files.

Although the Regulation preserves the principle of granting the widest possible access to documents (Article 1), it was immediately perceived to be less liberal than the Code because, unlike the Code, Article 2(1) does not actually grant the right of access to 'the public'.<sup>82</sup> In practice, as noted by the House of Lords Select Committee, this does not make much difference, but it is an important principle: *public* access implies a right for all, not just those ordinarily resident within the EU.<sup>83</sup> Article 2(3) is welcome, however: it abolishes the problematic 'authorship rule'. Article 3 provides key definitions. The definition of a document now includes visual and aural recordings, making it wider than the previous definition employed by the Code and bringing the Regulation into line with the Aarhus Convention.

Article 4 lists exceptions. It appears slightly more liberal than the Code because although there are still mandatory exemptions in respect of five public interests (Article 4(1)), Article 4(2) accepts that there may be an overriding public interest in the disclosure of certain documents to which access under the Code would invariably have been denied. There is also provision for granting partial access to documents (Article 4(6)). However, institutions are not

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<sup>82</sup> See Chapter One *supra*, note 30.

<sup>83</sup> *Ibid.*

required to conduct a 'substantial harm' test,<sup>84</sup> unless the disclosure of documents might 'seriously undermine' an institution's decision-making procedures (Article 4(3)).<sup>85</sup> Moreover, it is difficult to imagine how an applicant for public access might possibly argue that there can be an overriding public interest in the disclosure of a document that s/he has either never seen,<sup>86</sup> or of the existence of which s/he might be unaware, so as to convince the Community Courts or the Ombudsman that a institution had manifestly erred in its judgment regarding the relative weight to assign to the competing public interests. At least the Regulation has changed 'could undermine' to 'would undermine', and it has been acknowledged that public interest exceptions need not necessarily apply to any document forever (Article 4(7)). Nevertheless, the Regulation is disappointingly like the Code, insofar as it emphasises the circumstances in which public access 'shall be refused'. The presumption of secrecy would be more unequivocally reversed if, for example, Article 4(2) were to state that access to a document 'shall be granted, unless there is an overriding public interest in the protection of commercial interests, etc', and Article 4(3) were to state that access 'shall be granted unless there is an overriding public interest in the protection of the confidentiality of the institutions' decision-making processes.'

The Regulation is more liberal than the Code is in its lack of any reference to 'repeat' or 'repetitive' applications for public access. The original proposals would have enabled an institution to find a 'fair solution' to a 'repetitive' application. This was condemned by *Statewatch* because almost all its applications for public access concern documents relating to Title VI TEU and

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<sup>84</sup> Not surprisingly, this was also criticised by the Select Committee, esp. at paragraphs 101-2, *ibid.* The belief expressed therein is that all exceptions to the right of public access should be discretionary.

<sup>85</sup> As analysed by Ian Harden of the Ombudsman's Office for the benefit of *EFIL* members (note 80 *supra*), Article 4(3) protects the institutions' 'space to think' by distinguishing between the circumstances in which an institution has not reached any decision yet and those in which a decision has been adopted. It applies to both incoming documents and documents drawn up for internal use when no decision has been adopted (paragraph 1) but only to documents containing opinions for internal use as part of the preliminary deliberations after a decision has been adopted. In both cases disclosure must 'seriously undermine' the relevant institution's decision-making process and access must be granted if there is an overriding public interest in disclosure.

<sup>86</sup> Recalling the argument of the plaintiffs in Joined Cases T-213/95 and T-18/96, *SCK & FNK v Commission*, discussed in section 4.3.2., Chapter Four *supra*, cited at note 21.

could therefore have been regarded as ‘repetitive’, the Council having previously attempted to deny access to *Statewatch*’s ‘repeat’ applications under the Code.<sup>87</sup> Article 6(3) only provides that a fair solution may be sought in the event of an application for a very long document or for a very large number of documents.

Articles 7 and 8 reduce the time limits for the processing of applications from one month to 15 days, and the extension period in exceptional circumstances is likewise reduced from one month to 15 days. This is an improvement, if the applicant for public access seeks to influence a decision-making process on the basis of the document sought, s/he/it will have more of an opportunity to do so if the document is provided promptly. This development also suggests that the institutions may after all be contemplating the public wishing to participate in decision-making, although the withholding of internal consultation documents unless there is an overriding public interest in their disclosure (Article 4(3)) suggests otherwise. Article 4(3) tends to support *Statewatch*’s suggestion that the institutions wish to exclude civil society from the early stages of policy formation.<sup>88</sup>

Article 5 obliges Member States to consult the institution concerned before granting access to any document in their possession originating from an institution, if there is any doubt regarding whether or not that document should be disclosed, so that the Member State will not adopt a decision that may jeopardise the attainment of the Regulation’s objectives.<sup>89</sup> The applicant’s request may be referred to the institution instead. This seems potentially problematic, following Curtin’s pre-Regulation analysis of the nature of public access in the post-ToA Union:

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<sup>87</sup> See paragraph 137, 16<sup>th</sup> Report of the House of Lords Select Committee on the European Communities (Chapter One *supra*, note 30): *Statewatch* described the reference to ‘repetitive applications’ as “a thinly disguised attempt to by-pass the European Ombudsman’s ruling in the *Statewatch* complaint [discussed in Chapter Seven *infra*]”, whilst Steve Peers is also quoted as describing this draft as “an attempt to prevent diligent researchers, such as myself and organisations such as *Statewatch*, from making more than a handful of applications a year.”

<sup>88</sup> *Ibid.*, paragraphs 78-79.

<sup>89</sup> Including the need to handle applications for access to ‘sensitive’ documents (discussed *infra*) carefully and to have regard to the exemptions in Article 4: see Article 9(5).

“It follows [from the analysis of the ToA]...that if access would be granted under national law to EU documents then EU law cannot deprive them of such access. This is a kind of reverse principle of supremacy in the interests of citizens.”<sup>90</sup>

Article 5 seems to suggest that the institutions have not fully accepted the idea that supremacy within the EU should be accorded to national laws governing public access, just as it is not accorded to national laws governing, for example, the free movement of workers.<sup>91</sup> One obvious concern is that it would be unconstitutional in certain Member States, such as Sweden, to refuse access to documents held by national authorities merely because those documents emanated from EU institutions. Moreover, that would conflict with the ToA’s obligation to provide “the greatest *possible* level of openness” which “must in any event include the level of openness already achieved at the national level in any and all of the Member States.”<sup>92</sup> In short, so long as the EU still does not guarantee and protect public access to at least the same extent as it is guaranteed and protected in Sweden,<sup>93</sup> and if the institutions have not recognised the ‘reverse’ principle of supremacy discussed by Curtin, a problem could arise if an institution were to seek to curtail national public access rules by requesting, upon consultation from a Member State, the non-disclosure of any document that would previously have been disclosed to citizens of that Member State under national law. This problem may be unlikely to

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<sup>90</sup> Note 4 *supra*, at 26.

<sup>91</sup> Cf. Tridimas, Chapter Four *supra*, note 7, at pp.213-214, who implies that the ECJ, if considering a right as a general principle drawn from the constitutional traditions of the Member States, need not opt for the maximalist protection that may be granted by any one Member State’s constitution, nor for the minimalist protection of the ‘lowest common denominator’ position, but should accord that right, e.g. public access, a suitable weighting to meet the requirements of overall Community policy.

<sup>92</sup> Curtin, note 4 *supra*, at 15 (emphasis in original). This analysis of the ToA may be somewhat optimistic. Article 1 TEU, as amended, only provides that ‘decisions must be taken as openly as possible’, not that any decisions so taken must in turn achieve the greatest possible level of transparency: meanwhile, Article 255 (ex 191a) EC provides only for a right of public access to be granted subject to such principles and conditions as may be defined by the Parliament and Council, not for a right subject to any general principle of granting the widest possible access to documents.

<sup>93</sup> Of course, if the EU were to adopt the maximalist protection granted by any one of the Member States, that, too, would eliminate the potential for Union citizens of that Member State to have potentially wider public access rights than Union citizens of any other Member State.

materialise,<sup>94</sup> but theoretically the possibility of an institution-Member State conflict of opinion exists.<sup>95</sup>

Article 9 is particularly unwelcome. The Ombudsman, however, believes that it is not illiberal:

“Applications for access to sensitive documents are dealt with under basically the same conditions as for non-sensitive documents in relation to exceptions and procedures, including the possibility of recourse to the Court or the Ombudsman if an application is refused. The differences of treatment are as follows:

- if access to a document is refused, reasons must be given in a manner which does not harm the interests protected by the exceptions.
- initial and confirmatory applications are to be handled within the institutions only by persons with the necessary security clearance to enable them to have knowledge of the documents.
- the originator of the document, not the institution which holds it, makes the final decision on whether one or more of the exceptions applies (Art 9 (3)).

“Sensitivity” is not therefore a separate category of exception and public access cannot be refused merely on the grounds that a document is sensitive: one or more of the exceptions must be invoked and the applicant has the right to challenge refusal of access to a sensitive document before the Court or the Ombudsman.”<sup>96</sup>

It remains difficult to see how access to a particular document may be requested if a potential applicant is unaware of its existence after consulting the public register. Moreover, a decision to classify a document as ‘sensitive’ would not be amenable to judicial review: not being addressed to a natural or legal person, that particular decision would not be of direct and individual concern to any such person,<sup>97</sup> even assuming that a person who had never seen a document could marshal an argument to the effect that it had been incorrectly classified, and that the Community Courts would then be able to substitute their own classification for that adopted by the institutions (see further Chapter

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<sup>94</sup> Olle Abrahamsson, Director-General for Legal Affairs at the Swedish Ministry of Justice as at 25 April 2001, opined on that date that Swedish authorities would continue to make independent decisions on public access and that, following consultation under Article 5, the institution’s reply would be ‘advisory’, preserving Sweden’s national autonomy on public access (source: Ulf Öberg, owner of *EFIL* (note 80 *supra*)).

<sup>95</sup> See further note 81 *supra*.

<sup>96</sup> Paragraph 5.3 of the Ombudsman’s speech, Chapter One *supra*, note 2.

<sup>97</sup> *Cf.* Gormley, Chapter Two *supra*, note 63.

Six *infra*). The Ombudsman might not be able to inspect the document in question either (see further Chapter Seven *infra*), and, most importantly of all, may not have jurisdiction to find maladministration in respect of any decision taken by the originator of a 'sensitive' document, whose decision regarding whether or not to release that document or to include it in the public register is, as the Ombudsman observes, final, under the terms of Article 9(3). It follows from Article 9(1) that the document's originator may not be an EU institution or body: Article 9(3) could, therefore, also preclude the jurisdiction of the CFI to review the originator's decision either to classify a document as sensitive, or to refuse to consent to its release. The only (inadequate) consolation in respect of this apparent 'loophole' in the Regulation is provided by Article 17(1), which will at least allow citizens to see how many 'sensitive' documents are being excluded from the public register each year, and by Article 9(7), which allows the Commission and Council to at least inform the Parliament regarding sensitive documents.

Article 10(3) provides that documents may be transcribed into Braille, large print, or tape, for the benefit of blind or partially sighted applicants. Article 11 provides for a public register of documents in electronic form, which is particularly useful, enabling applicants to sufficiently identify the documents they seek in order to comply with Article 6(1). Article 12 calls for as many documents as possible to be made directly accessible by electronic means; Article 14 calls upon the institutions to inform the public of their rights under the Regulation, with the co-operation of the Member States; and Article 15 calls upon the institutions to develop good administrative practices in connection with public access and to share best practices. The remaining provisions do not appear to significantly affect the substantive operation of the right of public access.

## **5.6. Conclusion.**

This Chapter has identified, in section 5.2, the Union citizens' right of public access to Commission and Council documents as a right originally conferred by Decisions 93/731 and 94/90, and now conferred by the Regulation, although

the concept of public access to the Commission's, Council's and Parliament's documents may have attained the status of a general principle of Community law. The right of access to documents held by other institutions and bodies is still required by virtue of the ECJ's judgment in *Netherlands*: public access is required by the principle of good administration.<sup>98</sup>

Although its approach is criticised for failing to take adequate consideration of the importance of public access as essential to the collective constitutional right of citizens to participate in democratic decision-making processes, the ECJ nevertheless promoted a right of public access to documents held by most EU institutions/bodies. Moreover, the fact that this appeared to be an individual, procedural, administrative right, as opposed to a fundamental, collective, constitutional citizens' right, was ultimately the fault of the Member States, not the ECJ, insofar as the Member States made it clear that the Community legislature was to develop public access.<sup>99</sup> It remains to be seen, in Chapter Six *infra*, whether the Community Courts ever explicitly linked public access to the democratic principle, and/or sought to interpret the Code with a view to facilitating public access to EU decision-making processes, as would be expected of the courts in a multidimensionally-transparent regime.

In sections 5.4 and 5.5, respectively, the substantive provisions of Decisions 93/731 and 94/90, and of the Regulation, were examined in light of the idea of a legitimate public interest in secrecy, as identified in section 5.3. Where possible, the right of access to the file, and the rights of access to environmental information discussed in Chapter Four *supra*, were compared to the Code and Regulation. On balance, the Regulation makes some significant, liberalising improvements to the provisions of the Code, such as might enable

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<sup>98</sup> The House of Lords Select Committee on the European Communities (Chapter One *supra*, note 30, at paragraph 94) concluded that Article 308 (ex 235) EC might have been added to Article 255 (ex 191a) EC as an additional legal basis for the Regulation, enabling the Regulation to cover public access to documents held by the EU institutions/bodies not specified in Article 255. Instead, a non-binding Joint Declaration of the European Parliament and Council dated 30 May 2001 (OJ 2001 L173/5) was issued, calling upon such institutions/bodies to adopt internal rules based upon the Regulation.

<sup>99</sup> Cf. Harlow, Chapter One *supra*, note 8, at 295-296: the fact that the Community legislature was left to develop public access rules constitutes "a barrier against the installation of a constitutional right to transparency, constraining the Ombudsman and inhibiting the jurisprudence of the Community courts."

the right of public access to be of use to citizens seeking access to decision-making processes. However, all those improvements could be seriously undermined by the continuing emphasis upon mandatory exemptions, not all of which require the institutions to conduct a 'substantial harm' test, and by the possibility that, by virtue of Article 9(3), the institutions might be able to refuse access to documents deemed to be 'sensitive' by parties whose decisions to so classify those documents and/or to refuse to consent to their release would fall outside the jurisdiction of the Community Courts and the Ombudsman.

Having concluded that the EU's current provisions governing public access are not as liberal as they might be, it follows that they will not be as helpful in enabling citizens to hold the institutions to public account as they might be, especially since decisions to classify documents as 'sensitive' may be difficult to challenge. Nor will the rules encourage/facilitate public participation in decision-making as much as they might, if only they were clearly drafted with potential lobbyists in mind, instead of being aimed at citizens who have apparently been conceptualised as passive consumers of information. Perhaps the Commission's White Paper, discussed in Part One, will encourage the institutions to regard citizens as potential participants in the political process. The Regulation distinguishes between documents and the information contained therein, but the wide range of mandatory exceptions hardly suggests that the institutions welcome applications for public access: the 'Solana Decision' preceding the entry into force of the Regulation suggests the complete opposite, casting doubt upon the sincerity of the Council's own call for genuine changes in the practices of the institutions, to give effect to the principle of transparency.<sup>100</sup> As indicated in the introduction to this Chapter, the question of the adequacy of the enforcement mechanisms provided by the public access rules, the Courts and the Ombudsman, can only be assessed after examining their approach to public access complaints. It is clear that the operation of the rules is subject to judicial review, and to review by the Ombudsman, but it remains to be seen whether the Courts and Ombudsman are

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<sup>100</sup> Note 63 *supra*.

trying to increase the potential of public access to make the EU a more multidimensionally-transparent and legitimate polity.

To conclude Part Two of this thesis, therefore, the substantive law governing public access in the EU does not indicate that the institutions responsible for conferring the right of public access regard that right as an essential ingredient of transparency as public participation in decision-making processes. The preamble to the Regulation implies that public access is part of a multidimensional concept of transparency involving citizen participation in decision-making and greater accountability for the institutions,<sup>101</sup> but its substantive provisions, particularly Articles 4 and 9, do not live up to that rhetoric, nor do they live up to the principle of providing the widest possible public access as interpreted by Curtin with reference to the Treaties.<sup>102</sup> There remains much scope for public access to be refused according to a list of mandatory exceptions.<sup>103</sup> This is not the approach to be expected of a regime taking a multidimensional approach to transparency, ensuring accountability and facilitating public participation in decision-making. Clearly, neither the institutions nor the Member States have been taking public access sufficiently seriously.<sup>104</sup>

In Part Three, the adequacy of judicial review by the Courts (Chapter Six) and of 'quasi-judicial review' by the Ombudsman (Chapter Seven), as remedies for the institutions' reluctance to grant public access, will be examined. Further indications of the institutions' various attitudes towards public access will

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<sup>101</sup> Cf. also Curtin, note 4 *supra*, at 16: the "effective reversal" of the presumption in favour of secrecy, so that it is now a presumption in favour of openness, "can be considered as one of the very important consequences of the inclusion of a Treaty-based right [to public access] in the Treaty of Amsterdam."

<sup>102</sup> Note 40 *supra*.

<sup>103</sup> As Harlow said of the mandatory exceptions included within the original Code, which the Regulation barely improves upon, "[i]t is in fact quite hard to think of any document which could pass these rigorous tests. *Ex abundanti cautela*...the two institutions [Commission and Council] receive an additional, discretionary power to refuse access in order to protect [their] interest in the confidentiality of [their] proceedings" (Chapter One *supra*, note 8, at 289).

<sup>104</sup> Declaration No. 35 annexed to the Final Act of Amsterdam is a good indicator of some Member States' attitude towards public access in the EU: "The Conference agrees that the principles and conditions referred to in Article 255(1) [EC] will 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."

emerge from consideration of the Courts' case law and the Ombudsman's decisions. An alternative remedy will be examined in the final Chapter, which might, perhaps, help to circumvent the multiple mandatory exceptions in Article 4 of the Regulation and might also close the potential loophole in Article 9. The institutions, as seen, have improved their public access regime slightly, but they remain disappointingly predisposed towards secrecy. It may be possible to encourage them to become less secretive, by introducing an adequate remedy for citizens to whom public access has been denied.

**PART THREE: REMEDIES IN THE EVENT OF AN EU  
INSTITUTION'S REFUSAL TO GRANT ACCESS TO DOCUMENTS.**

**CHAPTER SIX.**

**Judicial Review by the Community Courts.**

**6.1. Introduction.**

In Chapter Five *supra*, section 5.2.3., it was noted that the ECJ was heavily criticised for its approach towards transparency as public access, following the *Netherlands* judgment.<sup>1</sup> This Chapter will further consider the approach of the Community Courts, seeking to assess the adequacy of judicial review as a remedy should the institutions refuse to grant public access. Can judicial review successfully overcome the obstacles to public access laid down by the Code and Regulation, such as the mandatory exemptions discussed in Chapter Five *supra*, in order to secure for citizens a liberal right of public access capable of facilitating accountability and public participation in decision-making processes, which functions make public access essential to multidimensional transparency? Section 6.2 will argue that there is a single criticism underlying every critique of the Courts' attitude towards public access: this Chapter will seek to determine whether, and to what extent, that criticism can be justified.

Section 6.3 begins the process of addressing the criticism of the Courts by considering the powers of the Courts in public access cases. Section 6.4 examines the duty to give reasons, which, as will be seen by reference to the case law examined in section 6.5, is frequently invoked by applicants seeking the annulment of decisions refusing public access. Section 6.6 provides an overview of the public access cases, having regard to: the standard of review; the Courts' approach to the duty to give reasons; their use/development of any principles that might be regarded as having a liberalising effect upon the EU

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<sup>1</sup> Case C-58/94 *Netherlands v Council* [1996] ECR I-2169.

public access rules; the contrast between the Courts' attitude towards the institutions in public access cases and access to the file cases (see Chapter Four *supra*); and, finally, asking whether public access has now been explicitly linked to the democratic principles upon which the European Union is said to be founded. Are the Courts still treating public access as a voluntarily granted, administrative, procedural right, or as an important constitutional right of all persons, natural and legal, who are subject to EU law? In short, does their approach to public access now resemble that which would be expected from the courts of a multidimensionally-transparent regime? In conclusion, section 6.7 returns to the question of the adequacy of judicial review as a remedy in public access cases.

## **6.2. One Basic Criticism of the Community Courts.**

The chief criticism of the ECJ remains, as discussed in Chapter Five *supra*, section 5.2.3., that it initially regarded public access as a matter for the institutions' internal functioning: a voluntary principle of administrative law, not a fundamental, collective constitutional right. This has apparently led it, and encouraged the CFI, to conduct a 'marginal' review of refusals to grant public access, which

“avoids the need to examine in detail the reasons why access has been refused...and... enables the Court[s] to ignore various requests to perform an *in camera* examination of the documents...requested. Even though the decisions refusing access were annulled in the majority of cases, the annulment was based in virtually all...cases on the breach of the duty...to give *reasons* when denying access to a given document.”<sup>2</sup>

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<sup>2</sup> Curtin, Chapter Five *supra*, note 4, at 12, emphasis in original. There may be good reasons for avoiding *in camera* examinations, however, as illustrated by the Department of Justice of the United States of America's *Freedom of Information Act Guide*, May 2000 (see <http://www.usdoj.gov/oip/litigation.htm#camera>), citing (at footnote 276) *Armstrong v Executive Office of the President*, 97 F.3d 575 (D.C. Cir. 1996) at 580: “First, [limited in camera review] makes it less likely that sensitive information will be disclosed. Second, if there is an unauthorized disclosure, having reduced the number of people with access to the information makes it easier to pinpoint the source of the leak.” Cf. Case T-111/00, *British American Tobacco International (Investments) Ltd (BAT) v Commission*, judgment of 10 October 2001, discussed in section 6.5 *infra*.

It will be argued, in section 6.6 *infra*, that in concentrating upon the duty to give reasons, the Courts have nevertheless made it difficult in practice for the institutions to withhold public access, under the rules of the Code that they themselves adopted. Recent case law also suggests that the CFI is willing to inspect documents to which access has been refused, as will be seen in section 6.5 *infra*.

The ECJ's apparent failure to attach sufficient importance to public access *ab initio* has evidently overshadowed the positive practical achievements of both Community Courts, which have normally upheld the right of public access by annulling most decisions refusing access.<sup>3</sup> Criticism of the CFI followed the first case concerning Council Decision 93/731,<sup>4</sup> in which the CFI ruled in the applicant's favour, but was said to have left the Council in control of the flow of information to citizens. Furthermore, the CFI was said to have ignored the applicant's status as a Union citizen. Instead, the issue was "fundamentally an inter-institutional one."<sup>5</sup>

This conclusion follows from Armstrong's argument that the Court was reviewing the implementation of rules adopted by the Council itself, without public input or debate, which rules the Council could easily change in order to circumvent the effects of an annulment of a decision refusing public access. However, it must be remembered that John Carvel had sought the annulment of a decision adopted under Decision 93/731. He had not sought the annulment of Decision 93/731 itself, nor submitted that Decision 93/731 should only have been adopted after public consultation and a public debate.

It seems that Armstrong's criticism is, in essence, a further criticism of the ECJ's refusal to annul Decision 93/731 in the first place, on the grounds advanced by the Netherlands, that such a fundamental right cannot be left to

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<sup>3</sup> Davis, Chapter Five *supra*, note 40, at 309, recalling especially that the refusal to annul Decision 93/731 allowed the public to enjoy a right of access to Council documents that they would not otherwise have had, and that the ECJ required the other institutions to develop public access rules.

<sup>4</sup> Case T-194/94, *John Carvel and Guardian Newspapers Ltd v Council* [1995] ECR II-2767, discussed in section 6.5 *infra*.

<sup>5</sup> Armstrong, Chapter Five *supra*, note 62, at 588.

the internal rules of the institutions, but should be provided by legislation produced in consultation with citizens and civil society. Basically, therefore, it can be concluded that the Community Courts stand accused of being insufficiently interested in public access, to the detriment of applicants for such access, because they have failed to recognise that public access is an important, collective constitutional right of citizens in a democracy. It is necessary to consider the powers and limitations of the Community Courts in the context of judicial review proceedings, in order to address this criticism.

### **6.3. On Judicial Review in Public Access Cases.**<sup>6</sup>

Whenever an application for public access is denied, the applicant may seek the annulment of the decision refusing access,<sup>7</sup> which decision alone is addressed to him/her/it.<sup>8</sup> Decisions 93/731 and 94/90 were not open to challenge by natural or legal persons, who would not, *per* Article 230 (ex 173) EC, be directly or individually concerned by a Decision applying to ‘the public’.<sup>9</sup> Furthermore, Article 231 (ex 174) EC provides that:

“If the action [for annulment] is well founded, the Court of Justice shall declare the act concerned to be void...”

That is the sole remedy available to applicants seeking judicial review by the Community Courts. It is not possible, under the EC Treaty, for the ECJ or CFI to substitute its own decision for a decision that has been annulled, so as to order the production of documents, even if the Court considered that the benefit of public access would outweigh the harm caused to a protected interest. It is not the fault of the Courts that they cannot even order an institution to

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<sup>6</sup> For a more detailed account of judicial review, see, e.g. Craig and de Búrca, Chapter One *supra*, note 6, at pp.453-514.

<sup>7</sup> Paragraph 4, Article 230 (ex 173) EC: “Any natural or legal person may...institute proceedings against a decision *addressed to that person...*” (emphasis added).

<sup>8</sup> Remembering that legal persons can seek public access.

<sup>9</sup> See further Gormley, Chapter Two *supra*, note 63, on the problems faced by applicants seeking *locus standi* to challenge decisions that are not of direct and individual concern to them. Although the Courts have interpreted ‘direct and individual concern’ rather restrictively (Case 25/62 *Plaumann & Co v Commission* [1963] ECR 95), it is ultimately the fault of the Member States *qua* Treaty authors that non-privileged applicants must demonstrate that decisions are of direct and individual concern to them.

reconsider its refusal to grant public access: there is no Community law equivalent of the mandatory order (formerly *mandamus*) available to English courts carrying out a judicial review.<sup>10</sup> It therefore seems unreasonable to criticise the Courts for remaining within the limits of their powers.

Finally, the grounds for review are strictly limited to those found within Article 230, of which an ‘infringement of an essential procedural requirement,’ such as the duty to give reasons, is evidently regarded as one of the most appropriate grounds in public access cases: applicants frequently plead that the institutions have failed to provide adequate reasons.<sup>11</sup> If the Courts find that a given decision may be annulled for want of adequate reasons, without it being necessary to consider any further pleas that may have been submitted, this does not necessarily indicate that the Courts are conducting a marginal review in public access cases, as will be argued in the following section.

#### **6.4. The Duty to Give Reasons.**

A plea alleging an infringement of an essential procedural requirement, arising from a failure to give adequate reasons, is one of two pleas most likely to result in the annulment of a decision refusing public access. The other is a plea alleging an infringement of the provisions of the public access rules themselves, which requires no further explanation,<sup>12</sup> only illustration. Martin Shapiro has argued that the requirement to give reasons can permit judges “to match their own policy analyses against those of the [decision-makers]”, enabling them to conduct a substantive judicial review.<sup>13</sup> If a legal system

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<sup>10</sup> Nor can the Courts order an institution to declassify a ‘sensitive’ document, which limits their ability to counter the potential effect of Article 9 of the Regulation, discussed in Chapter Five *supra*, section 5.5.

<sup>11</sup> See further section 6.5 *infra*. Shapiro notes that the ECJ has consistently regarded the duty to give reasons under Article 190 (now 253) EC as an essential procedural requirement (M. Shapiro, ‘The Giving Reasons Requirement’ [1992] *University of Chicago Legal Forum* 179, at 197): see also Joined Cases C-9/95, C-23/95 and C-156/95 *Belgium and Germany v Commission* [1997] ECR I-645, paragraph 44, and Joined Cases C-71/95, C-155/95, C-271/95 *Belgium and Germany v Commission* [1997] ECR I-687, paragraph 53.

<sup>12</sup> Other than to note that the principle *patere legem quam ipse fecisti* is observed within Community law: the institutions are bound to comply with the rules that they have made for themselves.

<sup>13</sup> Note 11 *supra*, at 184.

requires that reasons be given in order that the court may review decisions, as is the case in Community law,<sup>14</sup> then, *per* Shapiro:

“Judges begin to say to agencies, “You must give us enough reasons to enable us to tell whether you have acted reasonably or arbitrarily and capriciously.” As this dynamic unfolds, giving reasons moves from a mild and self-enforcing restraint on administrative discretion to a quite severe, judicially enforced set of procedural and substantive restraints...it has in the American context.”<sup>15</sup>

In a formal sense, that which Shapiro describes as ‘giving reasons review’ is procedural, not substantive. Judges inform decision-makers that they have overlooked an essential procedural requirement by not providing adequate reasons. “The emphasis is, of course, on the ‘given’, not on the ‘adequate’ – that is, on the failure to perform a required action, not on the badness of the action performed.”<sup>16</sup> Nevertheless, judges obtain a powerful policy veto:

“The judge says, “I reject your [decision] because you have not offered good reasons for it. Resubmit [it] with a better set of reasons...I reserve the right to reject [it] again if the second set of reasons are no better than the first.” In this situation, most prudent [decision-makers] will recognise the need to change the substance of their [decision] rather than simply change the rhetoric of the reasons. The agency’s change in the [decision], however, will be seen as ‘voluntary’.”<sup>17</sup>

Importantly, Shapiro concludes that Article 190 (now 253) EC can be invoked in order to achieve greater transparency in EU-level decision-making.<sup>18</sup> Given that public access itself has that aim, for the Courts to base their review of public access decisions upon the duty to give reasons in Community law does not seem illogical.

It is well established that Community law requires reasons to be given for any decision or act:

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<sup>14</sup> See further section 6.4 *infra*.

<sup>15</sup> Note 11 *supra*, at 184-5.

<sup>16</sup> *Ibid.*, at 187-88.

<sup>17</sup> *Ibid.* Cf. also J. Usher, *General Principles of EC Law*, Addison Wesley Longman Ltd., Harlow, Essex, 1998, at p.115: “the statement of reasons has become an extremely important element in the development of judicial control over individual decisions...”

<sup>18</sup> Note 11 *supra*, at 201.

- whenever Article 253 (ex 190) EC specifically applies; and/or
- in order to enable natural and legal persons to exercise the rights of the defence; and/or
- whenever the general principle of good administration so requires: a 'catch-all' provision.

An alleged infringement of the duty to give reasons may be contrasted with an alleged failure to grant access to the file. The latter plea, as concluded in Chapter Four *supra*, does not normally result in the annulment of a contested decision, and the Community Courts, moreover, seem quite reluctant to allow it to succeed, although the *Cimenteries* case<sup>19</sup> discussed in Chapter Four *supra*, section 4.2.3, indicates that they take the right of access to the file seriously. Judge Christopher Bellamy of the CFI has suggested that an institution's failure to comply with the duty to give reasons, however, has for all practical purposes become a ground of review in Article 230 proceedings,<sup>20</sup> supporting Shapiro's conclusion that this duty provides a powerful tool for substantive judicial review.<sup>21</sup> The Community Courts would be conducting a marginal review if they were to merely verify that a statement of reasons accompanied a refusal to grant access to a document. However, as they consider the reasons and sometimes find them inadequate to explain the refusal, the standard of review is more rigorous: such a review could not only lead to the annulment of the decision refusing access, but may oblige the institution concerned to reverse its decision, if it were unable to produce more cogent reasons for withholding the document(s) in question.

Although the right of public access was originally characterised by the ECJ as a requirement of the general principle of good administration,<sup>22</sup> which also

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<sup>19</sup> Chapter Four *supra*, note 16.

<sup>20</sup> Public Lecture entitled 'The Court of First Instance: Perspectives for the Future,' delivered at the University of Durham, 26 November 1998. See also Harlow, Chapter One *supra*, note 8, at 287: the duty to give reasons has acquired 'constitutional' status, and Shapiro, note 11 *supra*, at 198.

<sup>21</sup> Notes 16-17 *supra* and text.

<sup>22</sup> Note 1 *supra*, paragraph 39.

requires the giving of reasons,<sup>23</sup> the duty to give reasons for refusing public access arises under Article 253 (ex 190) EC, as confirmed by the cases discussed in section 6.5 *infra*. Of this duty, Shapiro notes that:

“The ECJ has repeatedly held that the nature and extent of the reasons that must be given depend on the nature and circumstances or context of the particular action taken...The ECJ tends to demand only general reasons for major legislation and to demand more detailed reasons for more circumscribed decisions.”<sup>24</sup>

‘More circumscribed decisions’ include decisions refusing public access. It is now necessary to examine the public access case law. If the duty to give reasons makes it difficult in practice for an institution to refuse public access, this would do much to undermine the argument that the Courts have no interest in upholding the right to public access.

## **6.5. The Public Access Cases.**

### *6.5.1. Cases in which the applicant(s) for annulment of a refusal to grant public access was/were at least partially successful.*

In *Carvel*, the eponymous journalist requested COREPER reports and Council minutes concerning social affairs, justice and agricultural policy. The Council refused access, invoking Article 4(2) of Decision 93/731 protecting the confidentiality of its proceedings. Kenneth Campbell suggests that this constitutes evidence of the Council’s

“presumption of secrecy in relation to its own deliberations...a stance...at marked variance with the philosophy for access proposed by the Commission...”<sup>25</sup>

because Article 4(2) of the Decision provided that the Council *may* refuse access to documents in order to protect its confidentiality: it was not expected to do so automatically.

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<sup>23</sup> At least, in the absence of specific legislation: see Usher, note 21 *supra*, at pp.115-116.

<sup>24</sup> Note 11 *supra*, at 198.

<sup>25</sup> ‘Access to European Community Official Information’ (1997) 46 *ICLQ* 174, at 178.

The CFI held that, as the exception used the discretionary ‘may’ instead of the mandatory ‘shall’, the Council was required to

“genuinely balance the interests of the citizen in gaining access to its documents against any interests of its own in maintaining the confidentiality of its deliberations.”<sup>26</sup>

The Council had not demonstrated that such a balancing of interests had been undertaken. The idea that it might conceivably have done so by providing a detailed statement of reasons is implied.<sup>27</sup> The decision refusing access was annulled. One potential problem arising from this judgment is that applicants for public access need not provide reasons for requesting access, in order that a balancing of the actual interests involved might take place.<sup>28</sup> If access to a given document were refused, but the institution concerned would have accorded more weight to the applicant’s interest had that interest actually been declared, then access might have been granted. However, a strict policy, on the part of the institutions, of invoking the discretionary exemption for the protection of their procedural confidentiality only in order to protect their legitimate ‘space to think’<sup>29</sup> should keep to a minimum the number of occasions upon which an applicant might risk having insufficient weight accorded to his/her undeclared interest.

*WWF*<sup>30</sup> concerned the Commission’s refusal to grant public access under Decision 94/90. WWF believed that it would infringe Community environmental law, and constitute a misuse of structural funds, to use such funds to finance a visitors’ centre in Eire’s Burren National Park. The Commission, after investigating, dismissed that complaint. WWF then requested access to documents held by Directorates-General XI (Environment) and XVI (Regional Policies), concerning the project’s funding. DG XI’s

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<sup>26</sup> Note 4 *supra*, paragraph 68.

<sup>27</sup> See Case T-105/95 *World Wide Fund for Nature (WWF) UK v Commission* [1997] ECR II-313, discussed *infra*.

<sup>28</sup> See *BAT*, note 2 *supra*, discussed *infra*.

<sup>29</sup> See Chapter Five *supra*, section 5.4

<sup>30</sup> Note 27 *supra*.

refused to grant access, invoking the mandatory exemption for protection of the public interest in investigations of alleged infringements of Community law, and the discretionary exemption for the protection of the Commission's confidentiality. DG XVI invoked only the discretionary exemption. The Secretary-General refused the confirmatory application citing the reasons provided by DG's XI and XVI. WWF pleaded an infringement of Article 190 (now 253) EC.

The CFI upheld this plea. The Commission could not rely upon the possibility of opening infringement proceedings against a Member State in order to justify a refusal to grant public access. It should have given some indication, at least by reference to categories of documents, of the subject-matter of those documents, and noted whether they related to potential infringement proceedings involving inspections and investigations.<sup>31</sup> It was not required to provide, in respect of each document sought, 'imperative reasons' for invoking the public interest exception: this would jeopardise the essential function of that exception by requiring the disclosure of the contents of the documents in question.<sup>32</sup> The contested decision did not fulfil those requirements, however, nor did it explain how the disclosure of the documents requested might adversely affect the confidentiality of the Commission's proceedings. Neither WWF nor the CFI could verify that the Commission had balanced its interests in confidentiality against the interests of WWF. The statement of reasons was, therefore, inadequate,<sup>33</sup> and the decision refusing access was annulled. The *WWF* judgment also held that the exceptions to the general principle<sup>34</sup> of granting the widest possible access to Commission-held documents must be interpreted strictly, in order not to frustrate that principle,<sup>35</sup> and that the Commission could rely concurrently upon a mandatory public interest

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<sup>31</sup> *Ibid.*, paragraphs 64 and 74.

<sup>32</sup> *Ibid.*, paragraph 65.

<sup>33</sup> This supports the contention that the Council might have demonstrated a balancing of its interests against John Carvel's by providing a more detailed statement of reasons: see note 27 *supra* and text.

<sup>34</sup> Recalling that this 'general principle' then derived from the Code and Decision 94/90 itself.

<sup>35</sup> Note 27 *supra*, paragraph 56. This reasoning is well established in case law, as illustrated by the Opinion of Advocate-General Léger in Case C-353/99P, *Council v Heidi Hautala*, delivered on 10 July 2001, at paragraph 106, citing a list of consistent authorities beginning with Case 4/73, *Nold v Commission* [1974] ECR 491.

exception and the discretionary exemption for the protection of its confidentiality.<sup>36</sup>

*Interporc I*<sup>37</sup> demonstrates a formulaic approach. Paragraphs 1-8 cover, more concisely, the same ground covered by paragraphs 1-13 of *Carvel* and paragraphs 1-9 of *WWF*, tracing the legal history of public access from Declaration No. 17 through to the adoption of the Code and the relevant (Commission or Council) Decision, the provisions of which are also outlined. *Interporc* imported Argentinean beef free of levies under a special quota arrangement, but an import duty was levied following the Commission's and Germany's discovery that certain certificates authenticating the beef's origins had been falsified. *Interporc* sought recovery of that duty claiming it had acted in good faith, and in its bid to recover payment, requested public access to ten categories of Commission-held documents concerning Argentinean beef imports. Initially, access to certain documents was refused in order to protect the public interest in international relations; to others, because the request had to be directed to the relevant Member State/Argentinean authorities as their authors; to others, in order to protect the public interest in inspections and investigations, and to protect individual privacy; the remaining documents were withheld in order to protect the confidentiality of the Commission's proceedings.<sup>38</sup> The confirmatory application was refused in order to protect the public interest in court proceedings,<sup>39</sup> because all the documents concerned another Commission Decision that had become the subject-matter of another action for annulment brought by *Interporc*.<sup>40</sup>

*Interporc* sought both the annulment of the decision refusing access and declaratory relief, submitting that it would have deprived Decision 94/90 of effect if the Commission had been allowed, "in a subsequent administrative proceeding", to rely upon different grounds to justify the non-disclosure of documents following the annulment of its initial refusal to grant public access,

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<sup>36</sup> Note 27 *supra*, paragraph 61.

<sup>37</sup> Case T-124/96, *Interporc Im- und Export GmbH v Commission* [1998] ECR II-231.

<sup>38</sup> *Ibid.*, paragraphs 13-15.

<sup>39</sup> *Ibid.*, paragraph 18.

<sup>40</sup> I.e. Case T-50/96, *Primex Produkte Import und Export and Others v Commission* [1998] ECR II-3773, to which the Secretary-General's Decision referred.

as this would have required the applicant to instigate further judicial review proceedings.<sup>41</sup> The CFI ruled the head of claim seeking declaratory relief inadmissible, observing that, as noted in section 6.3 *supra*, it may not issue instructions to the institutions under Article 173 (now 230) EC.<sup>42</sup>

The CFI considered the alleged infringements of Article 190 (now 253) and Decision 94/90 concurrently.<sup>43</sup> It recalled, citing *WWF*, that the contested decision did not explain why all the documents requested, some of which were several years old, were covered by the exception for the protection of the public interest in court proceedings. The statement of reasons was therefore inadequate, and the decision refusing access was annulled.<sup>44</sup> This judgment is noteworthy because the CFI also called upon the Commission to examine 'each document requested',<sup>45</sup> although it only had to supply reasons in respect of each *category* of documents requested.

*Svenska*<sup>46</sup> might have inspired Article 5, Regulation No. 1049/2001, discussed in Chapter Five *supra*, section 5.5. The applicant journalists' union sought to compare Sweden's approach, to documents concerning the institutions' activities, to that of the Council. Twenty documents were requested from both Swedish authorities and the Council. The former granted access to eighteen: the latter, to two. The applicants sought the annulment of the Council's refusal to provide the remaining documents. A crucial question concerned the CFI's jurisdiction. The documents concerned activities relating to Title VI TEU. France and the UK observed that the Court lacked jurisdiction over Title VI, although the UK had accepted that Decision 93/731 itself applied to Title VI documents, upon which point France disagreed.<sup>47</sup> This attempt to confine the right of public access to documents concerning Community activities was, however, unsuccessful. Sweden, Denmark and the Netherlands had submitted that although the Court could not review the legality of any Title VI

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<sup>41</sup> Note 37 *supra*, paragraph 59.

<sup>42</sup> *Ibid.*, paragraph 61.

<sup>43</sup> *Ibid.*, paragraph 26.

<sup>44</sup> *Ibid.*, paragraphs 55-57.

<sup>45</sup> *Ibid.*, paragraph 52: see, e.g. Curtin, Chapter Five *supra*, note 4, at 33.

<sup>46</sup> Case T-174/95, *Svenska Journalistförbundet v Council* [1998] ECR II-2289.

<sup>47</sup> *Ibid.*, paragraphs 70-72.

documents, it could review decisions refusing access to those documents.<sup>48</sup> The Court agreed, finding that its assessment of the legality of the contested decision derived from its Article 173 (now 230) jurisdiction to review the legality of Council decisions pursuant to Decision 93/731: moreover, the contested refusal itself drew the applicants' attention to their right to seek judicial review. Title VI activities might, however, fall within the scope of an exception provided for under Decision 93/731.<sup>49</sup>

This highly significant judgment therefore clarified the scope of Decision 93/731, and, by implication, Decision 94/90: the Community Courts could review decisions refusing public access even to documents concerning the intergovernmental pillars of the Union. The CFI also held that Decision 93/731 was intended to give effect to the principle set down by the Code, of granting the widest possible access to information, with a view to strengthening the democratic character of the Council.<sup>50</sup> This suggests that the CFI was beginning to characterise public access as a democratic right. The Council's decision infringed Article 190 (now 253) and was therefore annulled: it did not specify whether access to certain documents was being refused only in order to protect its confidentiality, therefore neither the applicant nor the CFI could verify that it had genuinely balanced the interests involved, as required by the *Carvel* judgment.<sup>51</sup>

In *Rothmans*<sup>52</sup> the CFI held that the Commission could not classify the Customs Code Committee – a 'comitology' committee established in order to oversee delegated legislation adopted by the Commission on the Council's behalf<sup>53</sup> - as 'another Community institution within the meaning of the Code of Conduct', to which the request for access to its minutes should have been

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<sup>48</sup> *Ibid.*, paragraphs 74-75.

<sup>49</sup> *Ibid.*, paragraphs 85-87. See also paragraphs 118-120, in which the CFI observed that the Council itself did not regard all Title VI documents as being automatically covered by the exception to protect the public interest in public security.

<sup>50</sup> *Ibid.*, paragraph 66.

<sup>51</sup> *Ibid.*, paragraph 114, recalling also paragraph 61 of *WWF*, and paragraphs 124-125.

<sup>52</sup> Case T-188/97, *Rothmans International BV v Commission* [1999] ECR II-2463.

<sup>53</sup> On comitology and comitology committees, see, e.g., Craig and de Búrca, Chapter One *supra*, note 6, at pp.138-40.

submitted.<sup>54</sup> The applicant's plea alleging an infringement of the duty to give reasons was summarily dismissed because the citing of the 'authorship rule' was sufficiently clear.<sup>55</sup> However, denying access to documents of a comitology committee under this rule would have unduly narrowed the scope of the principle of granting the widest possible access to documents. Therefore, the Commission had infringed Decision 94/90.<sup>56</sup>

The exceptionally significant *Hautala* judgment<sup>57</sup> confirmed the Courts' jurisdiction to review decisions refusing access to documents concerning Title V TEU, the Common Foreign and Security Policy.<sup>58</sup> It is most noteworthy for paragraphs 77-88 of the judgment, however, concerning the applicant MEP's plea that the Council had infringed Article 4(1), Decision 93/731, by refusing to grant partial access to documents that were otherwise covered by an exemption. The CFI recalled the *Netherlands* judgment, ruling that, in the absence of specific Community legislation governing public access, Decision 93/731 neither required the Council to grant, nor prevented it from deciding to grant, partial access to documents. The Code underlying the Decision recalled Declaration No. 17, and laid down the general principle of granting the widest possible public access to Commission and Council documents. As the ECJ had observed in the *Netherlands* judgment, at paragraph 35, Declaration No. 17 connects public access to the democratic nature of the institutions. As also noted by Advocate General Tesouro at paragraph 19 of his Opinion in *Netherlands*,<sup>59</sup> the basis for the right to public access

"should be sought in the democratic principle, which constitutes one of the cornerstones of the Community edifice, as enshrined now in the Preamble to the Maastricht Treaty and Article F [TEU, now, after amendment, Article 6] of the Common Provisions."

The CFI proceeded to note that the:

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<sup>54</sup> *Rothmans*, note 52 *supra*, paragraph 59: the refusal to grant access was annulled for this reason (*ibid.*, paragraph 64).

<sup>55</sup> *Ibid.*, paragraphs 36-38.

<sup>56</sup> *Ibid.*, paragraphs 54-63.

<sup>57</sup> Case T-14/98, *Heidi Hautala MEP v Council* [1999] ECR II-2489, discussed further in section 6.5 *infra*.

<sup>58</sup> *Ibid.*, paragraph 42.

<sup>59</sup> [1996] ECR I-2171.

“...principle of proportionality requires that ‘derogations remain within the limits of what is appropriate and necessary for achieving the aim in view’.”<sup>60</sup>

The Council’s aim, of protecting the public interest with regard to international relations, could be achieved by the removal of any potentially harmful passages from documents prior to their disclosure. The principle of proportionality would allow the Council to balance the interest in public access to the censored documents against the administrative burden imposed by the need to censor them, enabling it to safeguard the interests of good administration. The Council was therefore obliged to consider granting partial access to any information that was not covered by any exceptions. The Council’s belief that public access did not apply to the information contained within documents was an error of law vitiating its decision refusing partial access, which was duly annulled.

*Interporc II*<sup>61</sup> is significant for three reasons. It confirmed that an undertaking granted access to the file could request access to further documents under Decision 94/90;<sup>62</sup> that a refusal to grant public access upon receipt of a confirmatory application was not unlawful simply because it referred to grounds not discussed in the initial refusal, which followed because the institution’s Secretary-General was required to thoroughly review the initial application; and that the exemption for the protection of court proceedings covered only documents specifically drawn up for the purpose of those proceedings.<sup>63</sup> Critics might take issue with paragraph 66 of *Interporc II*: the CFI observed that Declaration No. 17 does not “have the force of a rule of law of a higher order” than Decision 94/90. However, the act of requiring the

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<sup>60</sup> Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 38

<sup>61</sup> Case T-92/98, *Interporc Im- und Export GmbH v Commission* [1999] ECR II-3521: a follow-up to *Interporc I*, still concerning Commission documents relating to the import of Argentinean beef.

<sup>62</sup> *Ibid.*, paragraphs 38-49.

<sup>63</sup> *Ibid.*, paragraphs 54-57; see also Kadelbach, Chapter Five *supra*, note 68, at 185. *Interporc* had sought access to documents which had not been produced to it following *Interporc I*, successfully pleading that the Commission had infringed Decision 94/90 in denying access to documents not already disclosed in accordance with the rights of the defence (note 61 *supra*, paragraphs 38-49). However, its plea alleging an infringement of the duty to give reasons when certain documents were withheld under the ‘authorship rule’ was dismissed (*ibid.*, paragraphs 77-79).

'authorship rule' to be construed as narrowly as possible demonstrates respect for the principle of granting the widest possible access to documents, notwithstanding the fact that this principle was evidently deemed to arise from Decision 94/90 itself, instead of being an independent general principle of Community law.

*Kuijer*<sup>64</sup> challenged the CFI to consider directly a plea alleging the breach of a fundamental principle of Community law requiring public access to documents held by the institutions. The CFI did not do so. The contested refusal to grant access to Commission documents concerning asylum and immigration matters was annulled because the statement of reasons was inadequate<sup>65</sup> and because the Council had refused to grant partial public access.<sup>66</sup> The CFI deemed it unnecessary to consider the applicant's third plea: the contested decision could be annulled on the basis of the first two.<sup>67</sup> This judgment is, of course, liable to attract the same criticism levelled against the judgment in *Netherlands*, since the CFI refused to comment on the existence of an independent general principle of Community law concerning public access. However, the third plea was based upon a misunderstanding of the law: the only general principle of public access in the EU legal order at this time was that originally conferred by the Code, as noted in Chapter Five *supra*, section 5.2.

In *JT's Corporation*,<sup>68</sup> the CFI partially annulled a refusal to grant access to four categories of documents concerning trade missions in Bangladesh: the statement of reasons did not show that the Commission had determined that the disclosure of certain documents was likely to undermine the public interest in inspections and investigations.<sup>69</sup> Whereas the Code stated that disclosure shall (or may) be refused if it *could* undermine a public interest, or the institution's confidentiality, the institutions were evidently required to decide whether

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<sup>64</sup> Case T-188/98, *Aldo Kuijer v Council* [2000] ECR II-1959.

<sup>65</sup> *Ibid.*, paragraphs 45-48.

<sup>66</sup> *Ibid.*, paragraphs 54-61.

<sup>67</sup> *Ibid.*, paragraph 61. The CFI had also decided *Hautala* without ruling on this same plea (note 57 *supra*, paragraph 89).

<sup>68</sup> Case T-123/99, *JT's Corporation Ltd. v Commission* [2000] ECR II-3269.

<sup>69</sup> *Ibid.*, paragraph 64, citing *Svenska*, note 46 *supra*, paragraph 112.

disclosure was *likely to* undermine such an interest. That, arguably, is a slightly stricter ‘harm test’, imposed by the CFI.

In *BAT*,<sup>70</sup> the applicant sought minutes of the Committee on Excise Duties concerning tobacco taxation, which was ultimately refused because their disclosure could have undermined the Commission’s confidentiality. The CFI, in a significant development, ordered production of the documents at issue,<sup>71</sup> observing that it must, without substituting its own assessment for the Commission’s, “ascertain whether the Commission has indeed struck a balance between the interests at stake without overstepping the boundaries of its power of assessment.”<sup>72</sup> It also observed that the Commission knew about the applicant’s actual interest in seeking the minutes in question: BAT sought to oppose the EC classification, for taxation purposes, of a new product called ‘expanded tobacco’. That knowledge was held to be relevant to the balancing exercise that the Commission was required to undertake.<sup>73</sup> The CFI found that the minutes concerned discussions which had been terminated by the time the applicant submitted its request for access, as a result of which the “disclosure of the identities of the delegations referred to therein could no longer inhibit the Member States from...expressing their respective positions regarding the tax treatment of expanded tobacco.” Therefore, the Commission’s decision was vitiated by a manifest error of assessment, and was duly annulled.<sup>74</sup>

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<sup>70</sup> Note 2 *supra*.

<sup>71</sup> Although the CFI had previously ordered, and obtained, the production of confidential Commission-held documents in the context of court proceedings: see Case T-145/98, *ADT Project Gesellschaft v Commission* [1999] ECR II-2627, *BAT* is the first public access case in which such an order has been made (see also the press release, No. 50/01 of 10 October 2001, <http://curia.eu.int/en/cp/info/index.htm>).

<sup>72</sup> Note 2 *supra*, paragraph 41.

<sup>73</sup> *Ibid.*, paragraphs 44-45. This is significant in light of the fact, noted earlier, that one problem with the *Carvel* judgment is that it only required the institutions to balance their interests in confidentiality against a general public interest in public access.

<sup>74</sup> *Ibid.*, paragraphs 56-58.

6.5.2. *Cases in which the applicant(s) for annulment of a decision refusing public access was/were wholly unsuccessful.*

In *Carlsen*<sup>75</sup> the applicants sought an injunction ordering the Council to release certain documents, to which access had been refused under Decision 93/731, to both the Danish Supreme Court and the parties in a case pending before that court, on condition that the documents were not to be publicly disclosed.<sup>76</sup> Access to the opinions of the Council's legal services was refused, invoking three 'public interests': the maintenance of legal certainty; the stability of EC law; and the Council's ability to obtain independent legal advice. The applicants pleaded an inadequate statement of reasons and an infringement of Decision 93/731. CFI President Saggio found that the Council, having expressly stated the public interests that might be harmed by the disclosure of the documents sought, had provided an adequate statement of reasons.<sup>77</sup> Judge Saggio's ruling clearly showed that, in his opinion, 'the public interest' was not confined to the five categories specified within Article 4, Decision 93/731.<sup>78</sup> He decided that the protection of the public interest "in the stability of Community law" justified a refusal to disclose the opinions of the Council's legal services.<sup>79</sup>

Curtin observes that, firstly, the public interests relied upon by the Council were indeed not specified in Decision 93/731, which does not present the 'five cases set out in brackets' as being of secondary importance with respect to the public interest contemplated by Judge Saggio.<sup>80</sup> Only if the list of public interests protected by the Decision had been preceded by words such as

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<sup>75</sup> Case T-610/97 R, *Hanne Norup Carlsen and Others v Council* [1998] ECR II-485.

<sup>76</sup> The two documents concerned the views of the Council's and the Commission's Legal Services regarding the legal basis of Directive 79/409 (OJ 1979 L 103/1), a measure concerned with the conservation of wild birds. The case before the Danish court concerned the constitutionality of Denmark's accession to the Communities.

<sup>77</sup> Note 75 *supra*, paragraphs 38-42.

<sup>78</sup> *Ibid.*, paragraphs 46-48.

<sup>79</sup> *Ibid.*, paragraphs 46, 48-50.

<sup>80</sup> Chapter Five *supra*, note 4, at 33. The institutions may in future attempt to deny access to documents drawn up by their Legal Services on the basis of Article 4(3) of Regulation 1049/2001, which provides that documents for internal use shall not be disclosed if such disclosure could seriously undermine the institution's decision-making processes, unless there is an overriding public interest in the disclosure of the documents concerned. It is to be hoped that the CFI will be far less sympathetic (to the institutions) in such cases than was Judge Saggio in *Carlsen*.

‘including’ or ‘for example’ might the President’s interpretation of that list as non-exhaustive have been credible. Moreover, the Commission does not automatically refuse access to documents originating from its own legal services, but examines each on a case-by-case basis. There seems to be no reason for the Council to behave differently.<sup>81</sup>

*Carlsen* demonstrates a lack of regard for transparency on the part of the CFI’s President, and supports Campbell’s contention that the Council welcomes public access less than the Commission.<sup>82</sup> Judge Saggio, in an approach wholly inconsistent with subsequent public access cases, endorsed reasons that did not explain the Council’s refusal to grant public access in light of the clear wording of Decision 93/731. The Council, by invoking a novel public interest not specified within the Decision, may have been seeking to disguise a desire to maintain the confidentiality of its proceedings: the discretionary exception protecting its confidentiality would have required a balancing exercise, whereas the exception protecting public interests is mandatory, and so would not.<sup>83</sup> However, there is one respect in which *Carlsen* might be regarded as ‘good law’.

Access to the file in Community law is, as discussed in Chapter Four *supra*, based upon the rule of law: people should have all the information necessary in order to secure a fair trial, but there is no reason to grant any further access to documentation once that requirement has been fulfilled. Access to the file cannot, therefore, be relied upon in order to obtain access to documents that are not immediately pertinent to a person’s defence. The philosophy underlying public access, however, *per* the Code and Regulation, and as implicitly

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<sup>81</sup> *Ibid.*, at 33. *Carlsen* might have allowed the Commission to impose, with impunity, a ‘blanket ban’ upon the disclosure of documents prepared by its own Legal Services. In Case T-44/97, *Ghignone and Others v Council*, judgment of 8 November 2000, paragraphs 47-48, the CFI apparently confirmed the notion, inherent in *Carlsen*, that legal privilege automatically attaches to legal advice from the legal services of the institutions.

<sup>82</sup> Note 25 *supra* and text.

<sup>83</sup> *Cf.* Curtin, Chapter Five *supra*, note 4, at 33. The need for the Courts to strictly scrutinise the invocation of mandatory exemptions becomes even more acute in the absence of a Community law requirement to balance interests under such an exemption (*ibid.*, at 35), which absence was confirmed recently in Case T-204/99, *Olli Mattila v Council and Commission*, judgment of 12 July 2001, discussed *infra*.

acknowledged by the CFI in the opening paragraphs of all public access cases<sup>84</sup> citing Declaration No. 17, is 'the democratic principle'. This principle requires that people should have the widest possible access to all types of information, without giving reasons. It would not normally make sense for applicants for public access to refer to access to the file cases. Judge Saggio correctly dismissed the plea based upon access to the file case law in *Carlsen*.<sup>85</sup> As will be seen in section 6.6.2. *infra*, however, there is perhaps one set of circumstances in which applicants for public access might usefully reason by analogy to the right of access to the file.

In *Van der Wal*,<sup>86</sup> the applicant sought access to the Commission's responses to various questions, submitted by national courts, concerning competition law. This was refused: to disclose such 'legal analyses', it was claimed, might undermine the cooperation between the Commission and national courts, which would 'obviously' not appreciate the disclosure of answers to questions concerning pending cases.<sup>87</sup> The Commission therefore invoked the public interest in court proceedings. The CFI addressed separately the pleas alleging infringement of Decision 94/90 and breach of the duty to give reasons. Paragraphs 41-43 of the judgment resemble paragraphs 46-53 of *Interporc I*, the only difference is that the duty to give reasons when relying upon an exception is not mentioned in *van der Wal* in connection with the plea alleging infringement of Decision 94/90. The Commission was nevertheless required to show that it had considered whether disclosure of the documents sought:

"is in fact likely to undermine one of the facets of public interest protected by the first category of exception."<sup>88</sup>

The CFI rejected the first plea, concluding that the Commission could rely upon the exception for the protection of court proceedings in order to protect its

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<sup>84</sup> Excluding *Carlsen*, note 75 *supra*.

<sup>85</sup> Paragraphs 51-52 of the judgment, note 75 *supra*. Cf. Harden, Chapter Three *supra*, note 65, at 183, concluding that public access is entirely separate from access to the file, and Ragnemalm, Chapter Five *supra*, note 9, at 20: respect for access to the file "can never be a substitute for the general right of citizens to check the acts of their public authorities."

<sup>86</sup> Case T-83/96, *van der Wal v Commission* [1998] ECR II-545.

<sup>87</sup> *Ibid.*, paragraph 15.

<sup>88</sup> *Ibid.*, paragraph 43.

relationship with national courts, since Article 6 ECHR required that those courts be left free to apply their own Rules of Procedure in adopting decisions concerning the publication of information. This ruling was overturned by the ECJ upon appeal,<sup>89</sup> in a manner consistent with the principle of proportionality: the ECJ discovered a less restrictive approach to public access that nevertheless protected the autonomy of national courts.<sup>90</sup> The CFI's incidental finding, that the applicant for public access had not claimed that the documents sought merely reproduced information that would be "otherwise available" under Decision 94/90,<sup>91</sup> gave some cause for concern. It seemed almost as though the CFI had forgotten that an applicant was not required to justify his/her/its request for public access under the Code. Such an error of law might have been submitted as a further ground for appeal to the ECJ.<sup>92</sup> However, Kadelbach considers that the CFI had genuinely been attempting to balance the interests of parties to litigation with the public interest in openness of the Commission's replies to national courts: although it had interpreted the exception based upon the public interest in court proceedings too broadly, this error may have been excusable, since third party rights had never been at issue in previous public access cases.<sup>93</sup>

The CFI also dismissed the second plea,<sup>94</sup> in a manner that might appear disappointingly marginal following *Interporc I*. The Commission supplied reasons, therefore it fulfilled its Article 190 (now 253) duty. However, it must be remembered that the CFI had already examined the Commission's reasons

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<sup>89</sup> Joined Cases C-174/98 P and C-189/98 P, *Netherlands and van der Wal v Commission*, judgment of January 11, 2000. The ECJ found (at paragraphs 17-18) that the CFI had misconstrued the requirements of Article 6 ECHR. It also found (at paragraphs 25-28) that, whereas national law might oblige the Commission to withhold its replies to a national court, the Commission was obliged to consult the national court concerned in order to ascertain that fact. It went on to invoke Article 54 of the EC Statute of the Court of Justice in order to annul the Commission's refusal to grant access to the documents sought (paragraphs 31-33). Importantly, Advocate-General Cosmas explicitly referred, at paragraph 76 of his Opinion, to 'the' principle of transparency, as *expressed by* the right of public access and *regulated by* Decision 94/90. Critics may be disappointed that the ECJ did not address that point, but a possible explanation for its failure to do so has already been discussed in Chapter Five *supra*, section 5.2.3: see also Davis, Chapter Five *supra*, note 40.

<sup>90</sup> Kadelbach, Chapter Five *supra*, note 68, at 190.

<sup>91</sup> Note 86 *supra*, paragraph 52.

<sup>92</sup> Davis, Chapter Five *supra*, note 40, at 307.

<sup>93</sup> Kadelbach, Chapter Five *supra*, note 68, at 186.

<sup>94</sup> *Van der Wal*, note 86 *supra*, paragraph 71.

in detail, in connection with the plea alleging infringement of Decision 94/90, and, although it had erred in law, it would have been inconsistent, having dismissed the first plea, to have upheld the second, requiring the Commission to produce better reasons for its decision. Moreover, had the CFI considered both pleas concurrently, as in *Interporc I*, its judgment would not have differed: its error was, as noted, not due to its failure to respect the principle of granting the widest possible access to documents, but to its conclusion that the Commission could rely upon the exception in respect of court proceedings in light of Article 6 ECHR.

The unsuccessful applicant in *Bavarian Lager*<sup>95</sup> sought access to the Commission's file concerning Article 226 (ex 169) EC proceedings against the UK, which proceedings concerned agreements to purchase imported beer. The Commission's refusal had invoked the mandatory exception for the protection of the public interest in inspections and investigations. The applicant in *Denkavit*<sup>96</sup> was also unsuccessful. The Commission had again invoked the public interest in inspections and investigations: this time, its proceedings concerned measures taken to combat swine fever within the Netherlands. It seems that the CFI is quite willing to defer to the Commission when the Commission invokes the public interest in inspections and investigations.

In *JT's Corporation*, discussed above, the CFI held that the Commission was nevertheless required to consider whether each individual document requested was actually covered by that particular exception, and in *Bavarian Lager* it emphasised that this exception did not automatically cover every document relating to the Commission's investigations.<sup>97</sup> Harlow, however, justifiably wonders why the need to protect the proper conduct of infringement procedures justifies the withholding, in the public interest, of access to preparatory documents concerning investigations under Article 169 (now 226) EC in the

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<sup>95</sup> Case T-309/97, *The Bavarian Lager Company Ltd. v Commission* [1999] ECR II-3217.

<sup>96</sup> Case T-20/99, *Denkavit Nederland BV v Commission* [2000] ECR II-3011.

<sup>97</sup> Note 95 *supra*, paragraph 41. Only documents which might lead in future to an infringement proceeding against a Member State are covered. See also Harden, Chapter Three *supra*, note 65, at 179.

first place.<sup>98</sup> If Article 226 proceedings reach the judicial stage, the resulting judgment of the ECJ is made public. If such proceedings are halted or suspended before a reasoned opinion is delivered to the Member State under investigation, however, it appears that any citizens or undertakings concerned by the conduct of that Member State may already learn why the Commission has not decided to pursue Article 226 proceedings, via a complaint to the Ombudsman, whose decisions are also made public.<sup>99</sup> It is not, therefore, entirely clear why the public interest demands that Commission documents concerning Article 226 investigations, even during the preparatory stages, should invariably be kept secret.<sup>100</sup>

The applicant in *Mattila*<sup>101</sup> inventively submitted eight pleas when seeking the annulment of a decision refusing access to documents concerning EU-Russian relations. These were: 1) manifest error of assessment in interpreting the protection of international relations; 2) breach of the principle of proportionality by not granting or considering partial access; 3) failure to consider each individual document; 4) failure to state reasons; 5) failure to take account of the applicant's private interest in seeking the documents; 6) violation of the principle of independent review (review by COREPER I of COREPER II's refusal to grant access not being deemed independent); 7) misuse of powers; and 8) the institution's failure to cooperate by rejecting the request for lack of precision without making any effort to locate the documents requested.<sup>102</sup>

The CFI declared pleas 6)-8) to be inadmissible according to its Rules of Procedure. This has no direct bearing on public access, the CFI being best placed to interpret its Rules of Procedure. Pleas 1)-4) were dismissed, after due

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<sup>98</sup> Chapter One *supra*, note 8, at 29, referring to paragraph 41 of the *Bavarian Lager* judgment. *Per Harlow*, this judgment is symptomatic of an 'instrumentalist approach', in which the executive, i.e. the Commission, is accorded priority as representative of the public interest.

<sup>99</sup> E.g. the decisions in Complaints 1554/99/ME and 227/2000/ME against the Commission (<http://www.euro-ombudsman.eu.int/decision/en/991554.htm>).

<sup>100</sup> See further the discussion of Case T-191/99, *David Petrie and Others v Commission*, judgment of 11 December 2001, *infra*.

<sup>101</sup> Note 83 *supra*.

<sup>102</sup> *Ibid.*, paragraphs 28-30.

consideration. Plea 5) was deemed 'irrelevant', the CFI noting that it follows from the very refusal to grant access that the applicant has an interest in the annulment of that refusal, and that the Council and Commission had only to balance interests when considering access to documents concerning their deliberations, which was not the case in *Mattila*.<sup>103</sup> Arguably, that is a perfectly correct interpretation of the Code: again, the fundamental criticism that might be levelled at the CFI in this case is that its judgment is based entirely upon that Code.

In *Petrie*,<sup>104</sup> the applicants sought access to documents concerning the Commission's investigation into an alleged breach of Community law, concerning Italy's practice of issuing short-term contracts to teachers of foreign languages, including Mr Petrie. The applicants, believing that the Commission had not been made aware of the true situation, sought to examine its file.<sup>105</sup> Access was refused on the grounds that certain specified documents originated with Italian authorities, to whom the request for access should be made: access to the remaining documents was refused as their disclosure might adversely affect the public interest in investigations and investigations, and in court proceedings.<sup>106</sup> The applicants submitted that the decision refusing access infringed Article 255(1) EC and Article 1(2) TEU.<sup>107</sup> The CFI held, justifiably, that neither Article fulfilled the *van Gend* criteria for direct applicability, so as to render Decision 94/90 inoperative.<sup>108</sup> More controversially, perhaps, the CFI also held that Article 255 could not be used as a guide to interpreting Decision 94/90 'in advance of a determination by the Community legislature of the principles and limits to govern application of the article.'<sup>109</sup> However, as the Court subsequently reiterated that the objective of the Decision is to give effect to the principle of granting 'the widest possible access' to documents,<sup>110</sup>

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<sup>103</sup> *Ibid.*, paragraphs 106-108.

<sup>104</sup> Note 100 *supra*.

<sup>105</sup> *Ibid.*, paragraph 15.

<sup>106</sup> *Ibid.*, paragraph 17.

<sup>107</sup> *Ibid.*, paragraph 28.

<sup>108</sup> *Ibid.*, paragraphs 34-36 (reference to Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1).

<sup>109</sup> *Ibid.*, paragraph 37. An *EFIL* member has observed, informally, that this approach confuses direct effect with the principle of interpretation.

<sup>110</sup> *Ibid.*, paragraph 64.

which formula does not appear in Article 255, this finding arguably did not adversely affect the Court's interpretation of Decision 94/90.

The Court, also justifiably, dismissed the plea alleging a failure to give reasons: the reasons supplied were sufficient to inform the parties and to enable the Court to carry out its review.<sup>111</sup> The disappointing aspect of that review, however, is the CFI's dismissal of the plea alleging an infringement of Decision 94/90, on the grounds that some of the documents concerned Article 226 proceedings, which obliged the Commission to maintain their confidentiality.<sup>112</sup> As the Commission itself observed, when contesting the admissibility of the application for annulment, the parties were already in possession of some of the requested documents and aware of the contents of others.<sup>113</sup> The Court's finding that those documents nevertheless required confidential treatment therefore seems inconsistent with reality: its reasoning remains unconvincing, and is suggestive of an unwarranted degree of deference to the Commission. However, although it was perhaps disappointing to note that the Court was clearly unmoved by the fact that the applicants had a genuine interest in the alleged infringement under investigation,<sup>114</sup> the Court could ignore that interest because the Commission was not obliged by Decision 94/90 to balance the interests of applicants for public access, assuming that those interests are known, against the public interests protected by the mandatory exceptions.

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<sup>111</sup> *Ibid.*, paragraphs 73-81.

<sup>112</sup> *Ibid.*, paragraphs 67-69.

<sup>113</sup> *Ibid.*, paragraph 24.

<sup>114</sup> *Ibid.*, paragraph 70. The Commission has voluntarily adopted a code of conduct giving procedural rights to individuals whose complaints might serve as the foundation of an Article 226 investigation, including a right to comment on the Commission's initial position before any formal decision is taken to close the file without issuing a reasoned opinion (decision of 13 October 1997 in the Ombudsman's own-initiative inquiry 303/97/PD, <http://www.euro-ombudsman.eu.int/decision/en/970303.htm>, esp. paragraph 10). In light of this, pragmatically speaking, individual complainants might well be regarded as parties during the pre-contentious stage of Article 226 proceedings, contrary to the CFI's bald statement to the effect that individuals cannot claim a right to be heard under the principle *audi alteram partem* during such proceedings. The latter analysis would improve transparency under Article 226: by contrast, the Court's view is that all information relating to Article 226 proceedings must always be kept confidential, notwithstanding the valuable role of the public in providing the Commission with information concerning possible infringements of Community law.

## **6.6. Are the Community Courts interested in public access?**

### *6.6.1. An overview of the cases discussed in section 6.5 supra.*

The case law provides some indication of the practical value of judicial review as a remedy for refusals to grant public access. Access was finally refused in *JT's Corporation* by decision dated 11 March 1999. The application for annulment of that decision was lodged on 21 May 1999 and the judgment was handed down on 12 October 2000, almost eighteen months later. Successful applicants for the annulment of a decision refusing access must submit a fresh application and the Commission must adopt a fresh decision:<sup>115</sup> a further two months might therefore elapse before access would finally be granted. This delay is far from ideal, particularly as Article 4(2) of the Aarhus Convention confirms the belief that information should be disclosed as soon as possible, and in any event, after not more than two months. The ideal independent review of a refusal to grant public access would be able to reach a final conclusion promptly.<sup>116</sup>

The public access case law also illuminates the attitude of the institutions, particularly the Council, which appealed, unsuccessfully, against the *Hautala* judgment.<sup>117</sup> The jurisprudence suggests that the institutions have sought to interpret the exceptions in their public access rules as widely as possible, in order to preserve as much secrecy as possible, or to have invoked mandatory exemptions in a bid to avoid balancing their interests in confidentiality.<sup>118</sup> The Commission was said to have given a low priority to FOI in the cases discussed by Kadelbach,<sup>119</sup> supporting the overall conclusion of Chapter Five *supra*, that the institutions have not taken public access sufficiently seriously.

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<sup>115</sup> Cf. Ragnemalm, Chapter Five *supra*, note 9, at 28; Harlow, Chapter One *supra*, note 8, at 290.

<sup>116</sup> Ragnemalm, Chapter Five *supra*, note 9, at 21, calls for efficient legal remedies against refusals to grant public access and adds that there should ultimately be an appeal to a court of law, but one can ask whether that would be truly efficient in terms of the time taken and potential cost.

<sup>117</sup> Case C-353/99 P, *Council v Hautala and Others*, judgment of 6 December 2001; see section 6.6.2. *infra*.

<sup>118</sup> Curtin, see note 83 *supra* and text.

<sup>119</sup> Chapter Five *supra*, note 68, at 193.

Having regard to the attitude of the Member States, applicants for public access have been supported by the Netherlands,<sup>120</sup> Sweden,<sup>121</sup> Denmark<sup>122</sup> and Finland,<sup>123</sup> whilst the secretive institutions have been supported by France,<sup>124</sup> Spain<sup>125</sup> and the UK.<sup>126</sup> This also supports the conclusion of Chapter Five *supra*, section 5.2, that public access is too politically sensitive an issue to be left to the Community Courts. The Member States apparently have widely differing attitudes towards the right,<sup>127</sup> although they are also fickle: in the appeal against the *Hautala* judgment, France and the UK intervened to support Heidi Hautala.

Having also concluded in Chapter Five *supra*, section 5.2, that the ECJ may originally have declined to develop public access rules because the Member States clearly entrusted the Community institutions with the task of doing so, the case law nevertheless illustrates that both Community Courts frequently sought to interpret the institutions' rules in order to ensure that the general principle of granting the widest possible public access to documents, as set down by the Code, was not unduly frustrated. In the course of annulling refusals to grant public access for want of adequate reasons, the CFI held that the institutions had to balance their interest in confidentiality against the interests of the applicant for public access,<sup>128</sup> under the Code, and must adequately explain why documents are protected by (a) mandatory exception(s), albeit without disclosing the content of the documents in question.<sup>129</sup> Were it not for the stringency of the requirement to give reasons in

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<sup>120</sup> *Van der Wal*, note 86 *supra*, *Netherlands and van der Wal*, note 89 *supra*, *Svenska*, note 46 *supra*.

<sup>121</sup> *Svenska*, note 46 *supra*, *Rothmans*, note 52 *supra*, *Hautala*, note 57 *supra*.

<sup>122</sup> *Svenska*, note 46 *supra*.

<sup>123</sup> *Hautala*, note 57 *supra*.

<sup>124</sup> *Svenska*, note 46 *supra*, *Hautala*, note 57 *supra*.

<sup>125</sup> *Council v Hautala and Others*, note 117 *supra*.

<sup>126</sup> *Svenska*, note 46 *supra*.

<sup>127</sup> *Cf. Tridimas*, Chapter Four *supra*, note 7, at p.224. *Cf. also Harlow*, Chapter One *supra*, note 8, at 301.

<sup>128</sup> *WWF*, note 27 *supra*, *Interporc 1*, note 37 *supra*, *Svenska*, note 46 *supra*, *Kuijer*, note 64 *supra*, and *BAT*, note 2 *supra*.

<sup>129</sup> *WWF*, note 27 *supra*, *JT's Corporation*, note 68 *supra*, *van der Wal*, note 86 *supra*.

public access cases, the institutions would have been able to withhold access to documents far more easily.<sup>130</sup>

The CFI has, unfortunately, been inconsistent. *Carlsen* contrasts markedly with the other cases discussed in section 6.5 *supra*, even those in which the application for annulment was dismissed. Judge Saggio neither considered the principle of granting the widest possible access to documents, nor the need to interpret exceptions to that principle as narrowly as possible.<sup>131</sup> Hopefully, such an illiberal ruling will never be repeated,<sup>132</sup> particularly since the applicants involved had sought information to facilitate their participation in a political process.<sup>133</sup> In *van der Wal*, the CFI abandoned the pro-transparency approach that had led it to impose additional duties upon the institutions: to inspect individual documents;<sup>134</sup> to assess the likelihood of harm being caused to a protected interest;<sup>135</sup> to balance interests;<sup>136</sup> and to grant partial access to documents.<sup>137</sup> Thankfully, the ECJ upon appeal obliged the Commission to actually ask a national court, if in doubt, whether national law required the answers to the questions submitted by that national court to remain unpublished, before invoking the public interest in court proceedings.<sup>138</sup> Neither *Bavarian Lager*, nor *Denkavit*, nor, especially, *Petrie*, convincingly explains why access to documents relating to possible Article 226 proceedings should be withheld in the public interest.

Nevertheless, it must be remembered that the CFI applied the Code to documents concerning the intergovernmental pillars of the EU.<sup>139</sup> In public access cases, the institution refusing access is consistently required to justify its position. A failure to comply with the duty to give reasons will result in the

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<sup>130</sup> Even *Harlow* appears to concede that the CFI's public access jurisprudence is placing increasing emphasis upon the control of the institutions (Chapter One *supra*, note 8, at 290).

<sup>131</sup> *Rothmans*, note 52 *supra*, re the 'authorship rule'.

<sup>132</sup> Notwithstanding *Ghignone*, note 81 *supra*.

<sup>133</sup> Kadelbach, Chapter Five *supra*, note 68, at 194.

<sup>134</sup> *Interporc I*, note 37 *supra*.

<sup>135</sup> *Interporc II*, note 61 *supra*.

<sup>136</sup> *Carvel*, note 4 *supra*.

<sup>137</sup> *Hautala*, note 57 *supra*.

<sup>138</sup> *Netherlands and van der Wal*, note 89 *supra*.

<sup>139</sup> *Svenska*, note 46 *supra*, and *Hautala*, note 57 *supra*.

annulment of a decision to refuse public access.<sup>140</sup> The judgments in the majority of public access cases do not support the idea that the Community Courts have no interest in public access,<sup>141</sup> nor, in *BAT*, did the CFI decline to review documents itself in order to conclude that the Commission had manifestly erred in its assessment thereof. It is to be hoped that the Courts will take a similarly pro-transparency approach to the provisions of the Regulation, when called upon to interpret these.

The fact that neither Court has unequivocally recognised a general principle of public access independent of that set out in the Code of Conduct may, in light of the Charter of Fundamental Rights as discussed in Chapter One *supra*, section 1.3, be a moot issue: Regulation No. 1049/2001 should certainly be interpreted with a view to ensuring that the widest possible public access to documents is granted by the institutions, since public access has been solemnly proclaimed to be a fundamental Union citizens' right. Importantly, in answer to the Courts' critics, it is difficult to imagine the extent to which an expressly acknowledged independent general principle of public access would have made any practical difference to even the *van der Wal* judgment, in which the CFI's error lay in its finding that Article 6 ECHR required the Commission to withhold access to its replies to the questions posed by national courts.<sup>142</sup> However, further consideration must be given to this issue in light of the *Hautala* judgments, which are pro-transparency as public access, yet disappointingly equivocal regarding the importance attached by the CFI and the ECJ to public access as a fundamental right derived from the democratic principle.

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<sup>140</sup> *Cf.* a failure to grant access to the file, as discussed in Chapter Four *supra*, section 4.2

<sup>141</sup> *Cf.* Tridimas, Chapter Four *supra*, note 7, at p.224: the Courts have 'given teeth' to the right of public access.

<sup>142</sup> Davis, Chapter Five *supra*, note 40, at 307.

6.6.2. *Hautala*: recognising public access as a general principle of Community law?

The CFI's judgment apparently represents the 'high water mark' of its approach to public access to date.<sup>143</sup> The CFI invoked the general principle of proportionality in reviewing the substance of the Council's decision refusing access, asking whether the Council was taking the minimum action required in order to secure its aim of protecting the public interest with regard to international relations.<sup>144</sup> That is not indicative of a 'marginal' review.<sup>145</sup> Furthermore, the CFI came very close indeed, at first glance, to expressly recognising public access as a general principle of Community law:<sup>146</sup> it clearly stated that:

“...Decision 93/731 must be interpreted *in light of the principle of the right to information* and the principle of proportionality.”<sup>147</sup>

As noted in Chapter One *supra*, section 1.2, multidimensional transparency calls for a right to information and, as discussed in Chapter Two *supra*, subsection 2.2.3.2., also requires decisions to be proportionate, which could help to ensure that decisions are accepted as legitimate. By apparently recognising a right to information as a consequence of the democratic principle, and by requiring public access decisions to be adopted according to the principle of

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<sup>143</sup> Even Harlow describes it as “a bold decision” (Chapter One *supra*, note 8, at 302). That public access is not yet recognised by the Courts as an EU constitutional right is agreed by Kadelbach, Chapter Five *supra*, note 67, at 188.

<sup>144</sup> Note 57 *supra*, paragraph 85.

<sup>145</sup> Cf. Curtin, Chapter Five *supra*, note 4, at 12-13, indicating that the CFI “went further” in *Hautala* than it had previously done, in terms of the standard of its review.

<sup>146</sup> Cf. Ragnemalm, Chapter Five *supra*, note 9, at 26-27, who suggests that the CFI recognised a principle of transparency implemented by Decision 93/731 in *Carvel*, which pre-dated the ECJ's judgment in *Netherlands*, although in the subsequent *WWF* judgment it was clear that this principle emanated from the Code. Ragnemalm's suggestion that *Interporc I* “indicates a somewhat less ambiguous recognition of the existence of a general principle of access to documents held by Community institutions” is difficult to accept: the very wording of the ‘general principle’ recognised by the CFI in that case is identical to that found within the Code, indicating that this general principle did not exist independently of the Code, and as Ragnemalm also notes, the later *van der Wal* judgment shows that the CFI still regarded the Code as the basis for the principle of public access. Kadelbach, Chapter Five *supra*, note 68, at 187, discussing post-*Hautala* cases, maintains that neither Community Court has recognised a general principle of public access independent of the Code.

<sup>147</sup> Note 57 *supra*, paragraph 87 (emphasis added).

proportionality, the CFI seemed to have adopted the approach towards public access that would be expected of a court in a multidimensionally-transparent regime. The ECJ upheld the CFI's judgment upon appeal, endorsing the CFI's interpretation of Decision 93/731 and the application of the principle of proportionality,<sup>148</sup> but without finding it necessary to address the question of whether the CFI had incorrectly based its judgment upon the existence of a 'principle of the right to information'.<sup>149</sup>

However, the CFI also held in *Hautala* that the Council could avoid granting partial access to documents if doing so would generate an unreasonable amount of administrative work and the benefit of granting partial access would be outweighed by the fact that no useful information would be provided to the applicant, in order to safeguard the public interest in good administration.<sup>150</sup> Curtin has severely criticised the priority accorded to the principle of good administration over the right to information, arguing that both the principles of good administration and proportionality favour granting partial access to otherwise exempted documents in the first place.<sup>151</sup>

This judgment might have been less problematic had public access been accepted by the academic community as a requirement of the principle of good administration, as it was originally characterised by the ECJ in the *Netherlands* judgment. Even if public access had been expressly recognised as a general principle of Community law, however, it would seem pointless to oblige the Council to disclose fragmentary scraps of text that would scarcely benefit an applicant for public access, in practical terms. Whereas priority should be accorded to the principle of granting public access, there is a line to be drawn between providing partial access to a document and providing access to a few innocuous sentences that might not even connect to form a coherent paragraph: the former might be useful, the latter would not be. The judgment is more problematic for not emphasising the need to prioritise public access than for its

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<sup>148</sup> Note 117 *supra*, paragraphs 21-30.

<sup>149</sup> *Ibid.*, paragraph 31.

<sup>150</sup> Note 57 *supra*, paragraph 86.

<sup>151</sup> Chapter Five *supra*, note 4, at 17-18.

implicit acknowledgement of the fact that a suitably censored text might be virtually unreadable.

The status of the general principle of good administration should not be underestimated, Tridimas having submitted that general principles of EC law have the same normative status as the Treaties, being constitutional principles derived from the rule of law.<sup>152</sup> Viewed from that perspective, public access as a constitutional principle might legitimately be balanced against good administration as a constitutional principle.<sup>153</sup> However, the CFI should have made it expressly clear that the latter principle should only be invoked if the nature of a document were such that any censoring of the original text would, literally, render the document unreadable.

In *Hautala*, the applicant might perhaps have reasoned by analogy to access to the file cases. In access to the file, the Commission is obliged to produce non-confidential summaries of documents upon which it is relying. Requiring the Council to produce a non-confidential summary of documents that are non-disclosable under the public access rules might be a practical alternative to requiring it to censor documents, and the resulting summary should be sufficiently coherent to be of at least some use to the applicant.

In conclusion, although the case law does not support the contention that the Community Courts have no interest in public access,<sup>154</sup> the CFI in particular has not consistently applied itself to the task of securing the most liberal interpretation possible of the public access rules, particularly with regard to the exceptions covering the public interest in investigations, inspections and court proceedings. Judicial review could therefore be made more effective if the

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<sup>152</sup> Chapter Four *supra*, note 7, at p.33: but *cf.* Harlow who implies that the duty to give reasons, viewed as a principle of good administration, lacks 'constitutional' status (Chapter One *supra*, note 8, at 287).

<sup>153</sup> *Cf.* also Tridimas, Chapter Four *supra*, note 7, at pp.213-214: as discussed in Chapter Five *supra*, note 91, the ECJ could determine the appropriate weighting to accord to public access in accordance with Community policy. Having said that, however, if the EC is as committed to transparency as the Treaties imply, priority should be accorded to public access in most circumstances.

<sup>154</sup> *Cf.* Kadelbach, Chapter Five *supra*, note 68, at 194, concluding that even *Bavarian Lager* shows evidence that openness of decision-making in the EU is becoming a reality, thanks to the Community Courts.

Courts were to adopt and maintain a more unequivocally pro-transparency attitude.<sup>155</sup> One problem with regard to the effectiveness of judicial review as a remedy might be its essentially reactive nature: not only does it take place only upon the lodging of an application, but also the Courts may only consider the pleas submitted to them. Even if they are then ‘pro-active’ in seeking to narrow the scope of exceptions, they have no capacity, for example, to consider the possibility of requiring the production of a non-confidential summary of any document that could not otherwise be disclosed, unless specifically asked to do so. Judicial review by the Community Courts also takes a long time: too long, perhaps, to be of much use to applicants seeking to participate in decision-making. Finally, judicial review is potentially expensive, particularly since success is not guaranteed, as the case law illustrates.

### **6.7. Conclusion.**

This Chapter has argued that the Community Courts stand accused of taking no interest in public access. However, notwithstanding the fact that they could not have sought to develop public access as a constitutional right without usurping the role of the Community legislature, this criticism cannot be accepted. In most public access cases, as noted, it would be difficult to see how the express recognition of an independent right of public access in Community law would have altered the outcome of the CFI’s judgments. Considering the Courts’ limited powers under Article 230 EC, which prevent them from substituting their own judgment for that of the institutions in public access and as regards the classifications of documents, and given the extent to which the CFI in particular has widened the scope of public access through, *inter alia*, insisting upon the provision of detailed statements of reasons for refusals to grant public access, enabling it to conduct a substantive review in the guise of a more limited procedural review, it seems that the real problem has been the CFI’s inconsistent approach. It appears to have been far more consistent in its

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<sup>155</sup> Cf. Shaw, Chapter Three *supra*, note 50, at 325: “[i]t is difficult to escape the conclusion, despite the wording adopted by the Court of Justice, that the EU has not adopted a rights-based approach to the question of transparency.”

approach to access to the file. Moreover, as discussed earlier,<sup>156</sup> the Courts' positive influence on public access has apparently met with a negative reaction from the other institutions, which highlights the extent to which the Courts have undermined their attempts to preserve secrecy.

The CFI should be particularly wary when reviewing the invocation of mandatory exceptions: as indicated, it has not explained why documents relating to Article 226 proceedings can justifiably be withheld in the public interest, although the Commission is apparently able and willing to explain its position to complainants who might be further aggrieved by its decision not to open an investigation. Otherwise, the remedy of judicial review will not help applicants to overcome such obstacles to public access. However, the Courts, as noted in section 6.3, are unable to remove those obstacles under Article 230: Regulation No. 1049/2001 cannot be challenged by natural or legal persons, to whom the Regulation would not be of direct and individual concern.<sup>157</sup> Furthermore, although the Courts still fall short of demonstrating the approach to be expected of the courts in a multidimensionally-transparent regime, the Member States, acting collectively in the Council, have evidently been taking transparency far less seriously than the CFI. The attitude of Spain, France and the UK towards public access appears dubious, notwithstanding the *volte-face* of the latter two States in the *Hautala* appeal.

As concluded in section 6.6, judicial review is a basically reactive, time consuming and potentially expensive remedy, and it would be so even were the Courts to have acknowledged the existence of a fundamental right to public access in EC law *ab initio*. It could be improved upon by the Courts themselves, by adopting a more consistent pro-transparency approach, and by the Member States, in re-writing the Treaties so as to widen the Courts' powers, perhaps allowing them to order the disclosure of documents. The latter seems unlikely to happen, however. Judicial review is not the only remedy in the event of an institution's refusal to grant public access. Might the

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<sup>156</sup> Chapter Five *supra*, note 60.

<sup>157</sup> See note 9 *supra*.

possibility of complaining to the Ombudsman be a better alternative? Chapter Seven will now consider that issue.

## CHAPTER SEVEN.

### Quasi-Judicial Review by the European Ombudsman.

#### 7.1. Introduction.

Few have done more to promote multidimensional transparency within the EU than the first, and current, Ombudsman: Mr Jacob Söderman. The Ombudsman frequently emphasises the importance of transparency, including public access,<sup>1</sup> and, as discussed in section 7.2 *infra*, has sought to increase his capacity to provide a remedy whenever citizens' complaints concern an institution's refusal to grant public access ('public access complaints').

Section 7.2 will briefly illustrate the Ombudsman's interest in transparency, as evidenced through his own initiative inquiries, speeches, and Annual Reports to the European Parliament. Section 7.3 considers the Ombudsman's powers with regard to complaints. Section 7.4 will explain the term 'quasi-judicial review' before sampling the Ombudsman's decisions in public access complaints, illustrating quasi-judicial review, and paying particular attention to decisions which have positively influenced, or which might have so influenced, the law concerning public access to the institutions' documents. Section 7.5 considers criticisms of the Ombudsman's approach to transparency and public access complaints. In conclusion, section 7.6 assesses the effectiveness of the Ombudsman as a remedy, by comparison to the Community Courts.

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<sup>1</sup> Occasionally, the Ombudsman's tendency to speak frankly attracts criticism. Commission President Prodi complained to the European Parliament after Mr Söderman publicly expressed strong disapproval of the Commission's proposed draft for Regulation No. 1049/2001. (<http://www.euopen.com/debate/soderpro/prodi1.pdf>). Arguably, Mr Prodi should also be criticised for complaining that an independent EU official, genuinely concerned about transparency, had made his opinion public: such an attitude is not consistent with democracy.

## 7.2. The Ombudsman and Multidimensional Transparency.

Mr Söderman's *curriculum vitae*<sup>2</sup> suggests that his background has predisposed him towards FOI.<sup>3</sup> He has had six years' experience as Parliamentary Ombudsman of Finland;<sup>4</sup> has held government office, subject to Finland's public access rules; and has received the European Information Association Award for Achievement in European Information in 1996. He has also published extensively concerning the concept of an Ombudsman, and has proposed the following amendment to the Statute of the Ombudsman, seeking to strengthen his official right of access to documents:

"The Community institutions and bodies shall be obliged to supply the Ombudsman with any information that he has requested of them and to allow him to inspect and take copies of any document or the contents of any data medium. They shall give access to documents originating in a Member State and classed as secret by law or regulation only where that Member State has given its prior agreement."<sup>5</sup>

At present, the Ombudsman may be refused access to documents "on duly substantiated grounds of secrecy".<sup>6</sup>

Mr Söderman became European Ombudsman in 1995. In June 1996 he demonstrated his interest in public access by commencing his first own

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<sup>2</sup> <http://www.euro-ombudsman.eu.int/cv/en/default.htm>.

<sup>3</sup> See Chapter One *supra*, note 2 and subsequent text. The Ombudsman made clear his commitment to multidimensional transparency in a speech entitled 'The role and impact of the European Ombudsman in access to documentation and the transparency of decision-making', Maastricht, 18-19 September 1997, [http://www.euro-ombudsman.eu.int/speeches/pdf/en/eipa\\_en.pdf](http://www.euro-ombudsman.eu.int/speeches/pdf/en/eipa_en.pdf).

<sup>4</sup> The Republic of Finland has a strong tradition of public access. Its Constitution, as revised in 1999, provides that: "...Documents and recordings in the possession of the authorities are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents and recordings" (<http://www.om.fi/constitution/3340.htm>).

<sup>5</sup> Proposed amendment to Article 3(2) of the Statute of the Ombudsman (Decision 94/262/ECSC, EC, Euratom, OJ 1994 L 113/15: see Appendix D), based upon Article 138e (now 195) EC: see section 2.7.3 of the Ombudsman's Annual Report for 2000, OJ 2001 C 218/3. The Ombudsman has adopted a decision implementing the Statute: see <http://www.euro-ombudsman.eu.int/basis/en/provis.htm>. Articles 6, 7 and 8 concern, respectively, the circumstances in which the Ombudsman will close a case with a reasoned decision; a critical remark; and a draft recommendation to the European Parliament (see further section 7.4 *infra*).

<sup>6</sup> Article 3(2) of the Statute of the Ombudsman, note 5 *supra*.

initiative inquiry ('the inquiry') into the rules governing public access to documents held by EU institutions and bodies, excluding the Council and Commission, which already adopted such rules. *Per* the Ombudsman, public access rules:

"...can promote transparency and good relations between citizens and the Community institutions and bodies in three ways:

- the process of adopting rules requires the institution or body to examine, for each class of documents, whether confidentiality is necessary or not...this process itself may help encourage a higher degree of openness;
- if rules are adopted and made publicly available, people who request documents can know what their rights are. The rules themselves can also be subject to public scrutiny and debate;
- clear rules can promote good administration, by helping officials deal accurately and promptly with public requests for documents."<sup>7</sup>

The Ombudsman sought to determine whether other EU institutions and bodies had adopted such rules. He did not ask "whether the rules themselves are the right ones to ensure the degree of transparency that European citizens increasingly expect of the Union". However, he added that:

"...the Commission and Council rules are quite limited compared to the rules governing some national administrations. In particular, they do not require registers of documents to be published. Nor do they give any right of access to documents held by one body, but originating in another."<sup>8</sup>

These observations clearly indicate that the Ombudsman found the Code disappointing.<sup>9</sup> In the decision concluding the inquiry,<sup>10</sup> the Ombudsman

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<sup>7</sup> <http://www.euro-ombudsman.eu.int/recommen/en/317764.htm>. With regard to the Ombudsman's second point, that public access rules may be subject to public scrutiny and debate, *cf. Statewatch's* criticism of the secrecy surrounding the adoption of Regulation No. 1049/2001 (Chapter Five *supra*, note 79).

<sup>8</sup> *Ibid.*

<sup>9</sup> *Cf. Harlow*, Chapter One *supra*, note 8, at 297, who has not perceived any criticism of the Code emanating from the Ombudsman.

<sup>10</sup> Note 7 *supra*. This inquiry was subsequently followed up by three further own initiative inquiries into the public access provisions (if any) of the Community Plant Variety Office, the European Agency for Safety and Health at Work, Europol, and the European Central Bank. The Ombudsman's inquiries revealed that, in his opinion, satisfactory provision had been made for public access: in the case of Europol, however, this followed the

recalled that the ECJ's judgment in *Netherlands*<sup>11</sup> evidently required all Community institutions and bodies to "take appropriate measures" to provide for public access, as a requirement of good administration. The Ombudsman concluded that "failure to adopt and to make easily available to the public rules governing public access to documents constitutes an instance of maladministration."<sup>12</sup>

The Ombudsman therefore observed the positive, practical effect of the *Netherlands* judgment: as discussed in Chapter Five *supra*, although accused of lacking interest in public access, the ECJ nevertheless obliged all Community institutions and bodies to make provision for a right of public access. The Ombudsman based a special report on the inquiry, addressed to the President of the European Parliament on 15 December 1997, stating that:

"Consistency and equal treatment of citizens require that when [the Regulation due to be adopted under Article 255 (ex 191a) EC] becomes part of Community law, the general principles and limits which it lays down should be applied throughout the Community administration."<sup>13</sup>

This evidently reflects concern that Article 255 (ex 191a) EC applies only to the Council, Commission and European Parliament. The Ombudsman welcomed, in the conclusion to the special report, the "positive and co-operative spirit" of the institutions and bodies investigated during the inquiry. The special report also described the fact that most of those institutions and bodies had modelled their public access rules on the Code adopted by the Commission and Council as 'quite proper':<sup>14</sup> notwithstanding the

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submission of draft recommendations by the Ombudsman. (The decisions closing these enquiries, are available, respectively, at <http://www.euro-ombudsman.eu.int/decision/en/99oi1cpvo.htm>, <http://www.euro-ombudsman.eu.int/decision/en/99oi1eashaw.htm>, <http://www.euro-ombudsman.eu.int/decision/en/99oi1europol.htm>, and <http://www.euro-ombudsman.eu.int/decision/en/99oi1ecb.htm>.)

<sup>11</sup> Case C-58/94, *Netherlands v Council* [1996] ECR I-2169, paragraph 39.

<sup>12</sup> Note 7 *supra*.

<sup>13</sup> Report 616/PUBAC/F/IJH of 15 December 1997,

<http://www.euro-ombudsman.eu.int/special/pdf/en/970616.pdf>, section 3, p.7.

<sup>14</sup> *Ibid.*, section 3, p.6. Also, in the decision closing the inquiry (note 7 *supra*), the Ombudsman stated that most of the institutions and bodies investigated intended "to

Ombudsman's earlier reservations concerning the Code.<sup>15</sup> The Ombudsman added, however, that the Parliament might wish to investigate the question of whether those rules ensured "the degree of transparency that European citizens expect of the Union."<sup>16</sup>

The inquiry apparently succeeded in prompting other Community institutions and bodies, such as the European Agency for the Evaluation of Medicinal Products,<sup>17</sup> to adopt public access rules, and in establishing a good working relationship between those institutions/bodies and the Ombudsman. One further point of interest is Mr Söderman's tendency to speak of 'citizens' in connection with transparency, although the Commission's and Council's Code of Conduct conferred the right of public access upon 'the public', and Regulation No. 1049/2001 confers this right upon all natural and legal persons ordinarily resident/registered within the Union, whether legally-defined Union citizens or not. The Ombudsman was established in order to increase the Union's legitimacy and to bring the Union closer to its citizens,<sup>18</sup> which might explain the tendency to regard all actual and potential complainants as citizens.<sup>19</sup> Armstrong's criticism of the CFI in *Carvel*<sup>20</sup> cannot therefore also be directed against the Ombudsman, to whom all complainants are clearly regarded as Union citizens.

The Ombudsman has expressed reservations regarding the Union's emphasis upon transparency as public access:

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follow the *good example* set by the Council and Commission in adopting rules governing public access" (emphasis added).

<sup>15</sup> Note 8 *supra* and text.

<sup>16</sup> Section 3, p.7 of the Special Report, note 13 *supra*. Cf. again Harlow, Chapter One *supra*, note 8, at 297, who contends that the Ombudsman "did not point out to the Committee of Petitions that the [Parliament] might be able to" question the content of the various institutions' and other bodies' public access rules.

<sup>17</sup> <http://www.emea.eu.int/>.

<sup>18</sup> R. Davis, 'Quasi-Judicial Review: The European Ombudsman As An Alternative To The European Courts' [2000] 1 *Web Journal of Current Legal Issues*, <http://webjcli.ncl.ac.uk/2000/issue1/davis1.html>.

<sup>19</sup> Article 1 of the Ombudsman's decision implementing the Statute (note 5 *supra*) officially defines a citizen as 'any natural or legal person who lodges a complaint'.

<sup>20</sup> Chapter Six *supra*, note 5 and text.

“The general report [on the theme of “the Citizen, the Administration and Community law”] has a section about transparency, *but it contains detailed discussion of only one aspect of the subject: public access to documents*. In the working sessions, discussion ranged more widely. Many participants emphasised the need for legislative procedures to be more transparent...”<sup>21</sup>

Public access is clearly not the only transparency-related issue of concern to the Ombudsman:

“Many of the complaints made to the Ombudsman during the first mandate have alleged lack of transparency. Three main subjects have been raised: the Article 226 (formerly Article 169) procedure; recruitment competitions for Community officials; and access to documents.”<sup>22</sup>

In conclusion, multidimensional transparency within the Union evidently has a proactive champion in Mr Söderman, who, it seems, is both more able and more willing to criticise the institutions’ approach to transparency than are the Community Courts. It remains to be seen whether the Ombudsman’s powers to address public access complaints allow the Ombudsman to provide an effective alternative remedy to judicial review.<sup>23</sup>

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<sup>21</sup> Report to the final plenary session of the 1998 FIDE Congress Stockholm, Sweden, June 6, 1998, <http://www.euro-ombudsman.eu.int/speeches/en/fide1.htm> (emphasis added). See also ‘Fundamental rights and the administration in the Europe of tomorrow’, 8 March 2001, <http://www.euro-ombudsman.eu.int/speeches/en/2001-03-08.htm>. Cf. also Chapter One *supra*, note 2 and text.

<sup>22</sup> ‘Transparency in the Community Institutions’, Luxembourg, 19 October 1999, <http://www.euro-ombudsman.eu.int/speeches/en/cfi10.htm>.

<sup>23</sup> Citizens refused public access must be advised, under Article 8(3), Regulation No. 1049/2001, of their entitlement to institute court proceedings *and/or* to complain to the Ombudsman, implying that they may do both. However, the Ombudsman may not investigate matters *sub judice* or *res judicata* (Article 1(3) of the Statute, note 5 *supra*), and complaints submitted to the Ombudsman “shall not affect time limits for appeals in administrative or judicial proceedings” (Article 2(6) of the Statute, note 5 *supra*). Therefore, complainants must decide whether or not to seek the annulment of a decision refusing public access within two months, *per* Article 230 (ex 173) EC, or risk losing the right to do so, and, having chosen to seek judicial review, they will be unable to complain to the Ombudsman whilst the matter is *sub judice*, or, thereafter, to complain about either the CFI’s conduct of the review or its judgment (*per* Article 2(1) of the Statute, note 5 *supra*, and Article 195 (ex 138e) EC, the Ombudsman may not investigate complaints concerning the Community Courts acting in their judicial role). Conversely, it seems virtually impossible to apply for judicial review of the Ombudsman’s decision. The applicant in Case T-103/99, *Associazione della cantine sociali venete v European Ombudsman and European Parliament* [2000] ECR II-4165, asked the Ombudsman to intervene in a public access complaint. One year after the submission to the Ombudsman of the applicant’s observations concerning the Commission’s initial response to the

### **7.3. Powers of the Ombudsman in Public Access Complaints.**

Before examining the public access complaints submitted to the Ombudsman in section 7.4 *infra*, it is useful to note the Ombudsman's definition of maladministration:

“Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it.”<sup>24</sup>

It is also desirable, as indicated, to examine the Ombudsman's powers. Article 3 of the Ombudsman's Statute<sup>25</sup> indicates that, unlike the Community Courts, the Ombudsman is charged to find a friendly solution, between the complainant and the institution/body complained of, 'as far as possible'. The Ombudsman, it must be remembered, has no automatic right of access to all documents, nor any power to annul a decision refusing public access, nor any power to order the disclosure of documents. It has been argued, however, that in view of the Ombudsman's role in bringing Europe closer to its citizens, and in view of the Ombudsman's power to explicitly recommend the disclosure of documents, which the CFI cannot do, the Ombudsman might not be unduly hindered by his lack of coercive powers. An institution must consider its position carefully before continuing to refuse public access once the Ombudsman has recommended that access be granted. The institution concerned would be reinforcing its public image as unduly secretive, and to ignore the Ombudsman would undermine the very purpose of appointing an Ombudsman with a view

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complaint, the applicant urged the Ombudsman to adopt a decision. Two months later, the applicant instituted proceedings under Article 232 (ex 175) EC challenging the Ombudsman's apparent failure to act. The CFI held that the Ombudsman is not a Community institution within the meaning of Article 232 (paragraph 46). Furthermore, a 'decision' of the Ombudsman, drawing the attention of both Parliament and the institution complained of to an instance of maladministration, in accordance with Article 195 (ex 138e) EC, was not a reviewable act, capable of producing legal effects affecting third parties, for the purposes of Article 230 (ex 173) EC. Article 195 only requires that the complainant "shall be informed of" the Ombudsman's findings. Therefore, the Ombudsman's failure to adopt a decision could not be challenged via Article 232 (paragraphs 49-51). A complaint to the Ombudsman and an application to the CFI for annulment of a decision refusing public access should be regarded as mutually exclusive alternative remedies.

<sup>24</sup> Section 2.2.1, Annual Report for 2000, note 5 *supra*.

<sup>25</sup> Note 5 *supra*.

to bringing the Union closer to its citizens.<sup>26</sup> The decisions examined in section 7.4 *infra* indicate that the Ombudsman is often successful in prompting a recalcitrant Council to disclose documents.

If citizens wish to complain about the substantive public access rules, they are, as noted in Chapter Six *supra*, section 6.3, unable to challenge such measures as Decision 93/731 via an application for annulment, the provisions of which are neither of direct nor individual concern to individual citizens. The absence of direct and individual concern would not prevent the Ombudsman from investigating such a complaint, however,<sup>27</sup> although the Ombudsman will only investigate complaints in which there is a *prima facie* suggestion that maladministration has occurred. It appears doubtful, following the Ombudsman's own initiative inquiry into public access, that the Ombudsman would find that the act of adopting rules resembling those in Decision 93/731 constituted an act of maladministration. The only principle binding upon all EU institutions and bodies as a result of the *Netherlands* judgment is a requirement to adopt some rules providing for public access pending the adoption of general legislation. The ECJ did not specify that such rules must be as liberal as those adopted by the most liberal Member States. Furthermore, since the Ombudsman, although critical of the Code underlying Decision 93/731, nevertheless welcomed the adoption of similar public access rules by other EU institutions and bodies, it seems that citizens will almost certainly be unable to challenge the substantive content of such similar rules by complaining to the Ombudsman, because there would be no *prima facie* maladministration.

#### **7.4. The Public Access Complaints.**

##### *7.4.1. Quasi-Judicial Review.*

Although the Ombudsman is not a judge and his principal task is to mediate in order to find a friendly solution to instances of maladministration, he may

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<sup>26</sup> Davis, note 18 *supra*.

<sup>27</sup> Harden, Chapter Three *supra*, note 65, at 170: "*actio popularis* complaints to the Ombudsman are possible."

nevertheless close an inquiry into a complaint by adopting a decision which bears remarkable similarity to a judgment of the CFI, indicating that the Ombudsman has conducted that inquiry as though he were a single-judge chamber of that Court. Basically, whenever the Ombudsman's methodological approach resembles that of the CFI, he may be said to have conducted a quasi-judicial review.<sup>28</sup> The merit of a quasi-judicial approach is perhaps most evident whenever maladministration is not found. The resulting decision should satisfy the complainant that the complaint, although in effect dismissed as unfounded, has been thoroughly investigated and considered.<sup>29</sup> Quasi-judicial review is illustrated in sub-section 7.4.2.2. *infra*.

#### 7.4.2. The Ombudsman's decisions.

##### 7.4.2.1. Introduction.

A search of the Ombudsman's online database<sup>30</sup> as at 31 December 2001 reveals 31 decisions relating to public access: approximately twice the number of judgments in the CFI's case law. The author's attention has been drawn to three further relevant decisions via *EFIL*.<sup>31</sup> These 34 decisions may conveniently be grouped into the categories used within the Ombudsman's database, i.e.:

- no maladministration found;
- dropped by the complainant;
- settled by the institution;
- friendly solution;
- critical remark;
- draft recommendation accepted by the institution; and
- other.

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<sup>28</sup> Davis, note 18 *supra*: see also Harden, Chapter Three *supra*, note 65, at 179.

<sup>29</sup> Davis, note 18 *supra*. It should be noted that complainants are always reminded that the ECJ is the highest authority regarding the interpretation of Community law, whenever the Ombudsman's has considered the application of Community law and/or an institution's exercise of its powers under the Treaties.

<sup>30</sup> <http://www.euro-ombudsman.eu.int/decision/en/default.htm>.

<sup>31</sup> Chapter Five *supra*, note 80.

According to the Ombudsman, there have been no public access complaints within the 'other' category, as at 31 December 2001. One complaint was dropped by the complainant and is, therefore, not worth examining.<sup>32</sup> Complaints settled by the institution, of which there is also only one,<sup>33</sup> are worth considering if the Ombudsman was clearly influential in achieving the settlement. It is possible that the Ombudsman's inquiry into this complaint prompted the European Parliament to act, since it did not supply the information requested by the complainant until after the Ombudsman's inquiry had begun, although there is nothing to suggest that it was not going to do so anyway, since in order to supply the information requested, quite detailed research into the terms of an unwritten agreement concerning the recruitment and the remuneration of auxiliary agents was required.

Four categories of complaint therefore remain to be examined. In light of the Ombudsman's definition of maladministration,<sup>34</sup> decisions of the Ombudsman must observe binding legal principles emerging from the public access case law of the Community Courts, whereas the Courts are not obliged to take into consideration decisions of the Ombudsman. The Ombudsman's decisions therefore have less potential than judgments of the Courts to develop Community public access law. Therefore, only the most significant and/or representative decisions will be considered within this sub-section.

#### 7.4.2.2. 'No Maladministration Found.'

No maladministration was found in fifteen public access complaints.<sup>35</sup> This is worth noting, since the total cost of a complaint to the Ombudsman may be no

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<sup>32</sup> Decision in Complaint 819/2000/IJH, against the Commission, <http://www.euro-ombudsman.eu.int/decision/en/000819.htm>

<sup>33</sup> Decision in Complaint 216/2000/(XD)LBD, against the European Parliament, <http://www.euro-ombudsman.eu.int/decision/en/000216.htm>; the complainant is identified as 'Mr G.'

<sup>34</sup> Note 24 *supra* and text.

<sup>35</sup> Decisions in Complaints 1087/10.12.96/STATEWATCH/UK/IJH against the Council; 614/97/PD against the Council; 620/97/PD against the Commission; 59/98/OV against the Commission and Parliament; 306/98/PD against the Commission; OI/1/99/IJH as regards the Community Plant Variety Office; OI/1/99/IJH as regards the European Agency for

more than that of a couple of postage stamps,<sup>36</sup> to those unable or unwilling to submit a complaint electronically. If the complainant in each of those fifteen complaints, almost half the total submitted, had opted to seek the annulment of the refusal to grant public access, s/he/it would probably have been unsuccessful, and would therefore have had to pay the costs of the Court and the defendant institution(s).

The decision in Complaint 1087/10.12.96/STATEWATCH/UK/IJH ('Complaint 1087') against the Council was the last in a series of complaints lodged in 1996 by *Statewatch*, concerning the Council's refusal to grant access to twenty-three documents. The Secretariat-General of the Council had responded to the original application for access citing Article 3(2) of Decision 93/731, according to which the Council<sup>37</sup> would attempt to find a 'fair solution' to repeat applications, or to applications for very large documents. According to the Council, the complainant's request constituted a repeat application for very large documents. The provision of sixteen documents from the twenty-three requested was regarded as a fair solution by the Council. The Secretary-General's response to a confirmatory request for access to the remaining seven documents invoked Article 4(2) of Decision 93/731, stating that the Council had carefully balanced its interest in the confidentiality of its proceedings against the applicant's interests in obtaining access, and had decided that: three documents were still under discussion or had been very recently adopted; two contained details of the Member States' positions concerning the budget of the EU's police service 'Europol'; and two contained detailed opinions of the Council's legal services, concerning Europol. Therefore, access to all seven documents would be withheld.

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Safety and Health at Work; OI/1/99/IJH as regards the European Central Bank; 939/99/ME against the Commission; 148/2000/(IJH)JMA against the Commission; 158/2000/PB against the Commission; 327/2000/PB against the Council; 814/2000/PB against the Commission, 202/2001/OV against Europol, and 943/2001/GG against the Commission. (N.B. All decisions discussed in this Chapter are accessible via <http://www.euro-ombudsman.eu.int/decision/en/default.htm>.)

<sup>36</sup> There are normally two communications per complaint: following the initial complaint, the complainant is normally invited to submit further observations to the Ombudsman, concerning the response of the institution complained of.

<sup>37</sup> In practice, the relevant Departments of the Secretariat-General.

*Statewatch* submitted that the Council's treatment of its request for documents was unfair and potentially unlawful, in that the Council was not entitled to apply the fair solution provision to the request for the first sixteen documents. This aspect of the complaint was found to have constituted maladministration, to which the Ombudsman responded by closing the decision with a critical remark, identical to that made as a response to the earlier complaints submitted by *Statewatch*. For these reasons, this aspect of Complaint 1087/96 will be discussed further in section 7.4.2.4. *infra*. Complaint 1087/96 also submitted, however, that the Council was not entitled to refuse access to the remaining seven documents under Article 4(2) simply because those documents had either been recently adopted or contained detailed views of the Member States. The Ombudsman was able to inspect the documents as part of his inquiry into the complaint. He reasoned as follows:

“3.2 ...The complainant claims that, in applying Article 4 (2), the Council is not entitled to refuse access to documents on the grounds that they have been recently adopted, or that they include the views of Member States. *The Ombudsman is not aware of any legal rule or principle which would require the Council, when balancing the interests under Article 4 (2), to exclude either of these elements from consideration.*

3.3 *The Ombudsman's inspection of documents confirmed that the contents of the documents in question correspond to the reasons given by the Council.*

3.4 There appears therefore to be no maladministration by the Council in relation to this aspect of the case.”<sup>38</sup>

This decision is set out in a manner resembling a judgment of the CFI, presenting in order the facts, the arguments of the parties, and the Ombudsman's findings. However, it is an extremely disappointing example of quasi-judicial review, from a pro-transparency perspective. The net result of the Ombudsman's inquiry is that the Council was found to be telling the truth about the seven documents in question; therefore there was no maladministration. Although the Ombudsman's definition of

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<sup>38</sup> <http://www.euro-ombudsman.eu.int/decision/en/961087.htm> (emphasis added).

maladministration<sup>39</sup> was duly observed, the principle of granting the widest possible access to documents should have been regarded as binding upon the Council in light of its Code of Conduct. According to that principle, to which the Ombudsman did not refer, the Council's interest in maintaining the confidentiality of its proceedings is, as the Ombudsman himself has observed elsewhere, an interest in allowing the various internal departments of the Council to protect their 'space to think'.<sup>40</sup> Once a document has been communicated to other departments, that consideration should no longer apply.<sup>41</sup> Therefore, the Ombudsman's conclusion that the Council was entitled to refuse public access in order to protect its confidentiality simply because the requested documents had been recently adopted seems not only dubious, but contradictory of his later opinion concerning the 'space to think'.

Decisions 620/97/PD and 306/98/PD concerned the Commission's refusal to grant access to a document relating to the Commission's investigation of an alleged infringement of Community state aid law by Sweden. The complainant, 'Mr L.', represented the Swedish newspaper *Västerbottens-Kuriren*. The Commission's refusal stated that the Swedish authorities themselves had labelled the information supplied to it, for investigative purposes, as 'Secret'. The public interest in inspections and investigations was also invoked. This reasoning, the complainant claimed, did not explain the Commission's decision to refuse access.<sup>42</sup> The Ombudsman sought the Commission's opinion concerning the complaint, and invited the complainants to submit observations concerning the Commission's response, in accordance with the standard inquiry procedure. He also inspected the document in question, finding that, with the exception of one page, the document contained nothing that was either secret or prejudicial to the conduct of the Commission's investigations. *Prima facie*, therefore, the decision to refuse access to the entire document constituted maladministration. The Ombudsman sought a friendly solution, upon which the Commission agreed to release the document,

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<sup>39</sup> Note 24 *supra* and text.

<sup>40</sup> Chapter Five *supra*, note 72 and text.

<sup>41</sup> *Cf.* Chapter Five *supra*, text at note 73.

<sup>42</sup> *Cf.* Harlow's opinion on the exclusion of documents under this exception, Chapter Six *supra*, note 98 and text.

with the exception of the one page in respect of which secrecy was justified. The complainant maintained that access to that page should be granted, in response to which the Ombudsman stated that:

“1.1...Under Community law as it presently stands, the Commission appears to be entitled to refuse access to the evaluation part of the report. Therefore, the Commission does not appear to have failed to comply with any rule or principle binding upon it.”<sup>43</sup>

This decision illustrates another thorough quasi-judicial review, during which the Ombudsman inspected the document to which access had been refused in order to support his conclusion that there was no maladministration. The complainant may not have been satisfied with this outcome, but may at least be reassured that the Ombudsman addressed the complaint fully in light of the current law. However, the Ombudsman’s conclusion that the Commission “appears to be entitled to refuse access” to the disputed page, does not suggest that the Ombudsman necessarily believed that the Commission should have been entitled to do so.

The complaint to which decision 614/97/PD relates (‘Complaint 614/97’) does not concern public access *per se*, but an alleged lack of transparency on the part of the Council. The complainant ‘Mrs E.’ had suggested that the Council should set up a “centralised judgment registry database” in order to “improve the operation of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters.”<sup>44</sup> The Council, after due discussion, declined to implement this proposal. The complainant alleged, *inter alia*, that the Council had not kept her “sufficiently informed of its discussions on the proposals submitted,” resulting in a lack of transparency. The Ombudsman’s investigation revealed that the complainant had never formally requested access to Council documents. The complainant then asked the Ombudsman to investigate the grounds for the Council’s rejection of her proposal. The Ombudsman reasoned that, firstly, the Council had addressed the substance of the complainant’s grievances; secondly, “there is no legal

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<sup>43</sup> <http://www.euro-ombudsman.eu.int/decision/en/970620.htm>.

<sup>44</sup> <http://www.euro-ombudsman.eu.int/decision/en/970614.htm>.

entitlement for the citizen to set in motion a legislative procedure”; and thirdly, that after discussion within the Council, the reasons for the rejection of the proposal by the majority had been disclosed to the complainant. Therefore, there had been no maladministration.<sup>45</sup>

The decision in Complaint 59/98/OV against the Commission and European Parliament (‘Complaint 59/98’) concerned an alleged lack of transparency regarding access to the Register of Interests of Commission Members and the Register of Interests of MEPs. The Ombudsman found no maladministration with regard to the Commission’s grant of access to the Register of Interests of Commission Members, because although the complainant ‘Mr S.’ was dissatisfied with the actual contents of that Register, the Commission had fully responded to his request by providing a copy of it: no further details concerning the Register had actually been requested. However, it is worth noting that the Commission was described as having granted access to the Register only as a result of the Ombudsman’s intervention: this seems to be an example of the phenomenon to which Heede has referred in observing that the Ombudsman need not often engage in active mediation, as the mere act of lodging a complaint often prompts an institution to resolve the maladministration complained of by way of a friendly solution.<sup>46</sup> This demonstrates the effectiveness of the Ombudsman remedy, notwithstanding the Ombudsman’s lack of coercive powers. With regard to the complaint against the European Parliament, the Ombudsman criticised the availability of public access to the Register of MEPs’ Interests, but having observed that the Parliament was already in the process of ensuring that this document was more widely available, concluded that “no further remark by the Ombudsman on this issue seems to be necessary.” Evidently, the Ombudsman might otherwise have closed this case with a critical remark.

The most interesting feature of decisions in which no maladministration was found is that they are often set out in a similar style to judgments of the CFI,

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<sup>45</sup> *Ibid.*

<sup>46</sup> K. Heede, ‘Enhancing the Accountability of Community Institutions and Bodies: The Role of the European Ombudsman’ (1997) 3 *European Public Law* 587, at 597.

presenting a statement of facts, arguments of the parties, and the Ombudsman's findings, including a discussion of the relevant law. This format, combined with the fact that the Ombudsman will inspect documents if possible and desirable in order to reach a conclusion, should reassure complainants that the Ombudsman will consider their complaints thoroughly. However, it would have been still more reassuring in the case of Complaint 1087/96, discussed above, had the Ombudsman referred to the principle of granting the widest possible access, and considered whether the Council's refusal to grant access to recently-adopted decisions was indeed necessary in order to protect the confidentiality of Council proceedings. Moreover, the Ombudsman should have explicitly considered, in Complaint 1087/96, the fact that it is a matter of settled case-law that exceptions to a right or principle in Community law must be construed as narrowly as possible.<sup>47</sup>

#### 7.4.2.3. 'Friendly Solution'.

A friendly solution was found in the case of the complaint ('Complaint 1045/96') against the Commission to which decision 1045/21.11.96/BH/IRL/JMA related.<sup>48</sup> Complaint 1045/96 concerned a request for documents relating to the Commission's policy on poverty and social exclusion within the Union, and to 'migrant organisations' funded by the Commission. The Commission informed the Ombudsman that although one document had been supplied, another was not actually a Commission document because it had been compiled by the Member States. The complainant, an anonymous citizen known as 'Mr H', advised the Ombudsman that the information contained therein had been partially translated by the Commission, that the resulting document had been circulated in the guise of a Commission document, and that it was, as a result of this, regarded as a Commission document by the Irish Department of Social Welfare. The complainant also emphasised that the Commission's reasoning, based upon the 'authorship

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<sup>47</sup> See Chapter Six *supra*, note 35 and text.

<sup>48</sup> <http://www.euro-ombudsman.eu.int/decision/en/961045.htm>.

rule’,<sup>49</sup> “could have negative consequences for transparency in the European Union.”<sup>50</sup>

The Ombudsman inspected the document, and suggested, by way of a friendly solution, that the Commission ought to grant access to it. The Commission reaffirmed that the document was not regarded as a Commission document, but nevertheless agreed to ask the Member States for permission to disclose it. Permission was obtained, and the resulting grant of access to the document satisfied the complainant. This decision highlights the Ombudsman’s positive influence as a mediator, as well as the fact that the Ombudsman can succeed through persuasion in ensuring that public access is granted notwithstanding his lack of coercive power to actually order such access.

Nevertheless, it is worth noting that this is the only public access complaint in which the Ombudsman clearly achieved a friendly solution. As noted in section 7.3 *supra*, the Ombudsman is obliged to seek a friendly solution wherever possible. However, an attempt to find a friendly solution might, perhaps, not be the most appropriate response to a public access complaint, given the degree of importance attached to the right of public access by potential complainants. A refusal to grant public access would simply not be comparable to, for example, the Commission’s refusal to pay monies allegedly owed under the (disputed) terms of a contract:<sup>51</sup> complainants might be prepared to compromise when a disputed contract is at issue, but not when an important collective constitutional right, often regarded as fundamental,<sup>52</sup> is at stake. It will be remembered that although the Ombudsman had sought a friendly solution in the complaint to which decisions 620/97/PD and 306/98/PD related, as discussed above, his success in securing public access to all but one page of the document sought did not actually satisfy the complainant, who had to be content with the Ombudsman’s assurance that the Commission was entitled to withhold access to that page under current

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<sup>49</sup> Discussed in Chapter Five *supra*, section 5.4.1.

<sup>50</sup> Note 48 *supra*.

<sup>51</sup> See, e.g. decision 485/97/VK/OV,  
<http://www.euro-ombudsman.eu.int/decision/en/970485.htm>.

<sup>52</sup> As discussed in Chapter One *supra*, section 1.3

Community law. That complaint cannot, therefore, be regarded as having been resolved by a *friendly* solution. As yet, however, there have been too few public access cases to analyse statistically, in order to enable one to conclude that a public access complaint is significantly less likely to result in a friendly solution than other types of complaints alleging maladministration.

#### 7.4.2.4. 'Critical Remark'.

Inquiries into four complaints submitted by *Statewatch* in 1996 were closed with a critical remark. This is the second most severe 'coercive' power that the Ombudsman may exercise, indicating to both the institution concerned and the citizen that the Ombudsman considers the maladministration found to be particularly serious. The critical remark is, essentially, intended to 'shame' the institution to which it is directed into taking action to bring the maladministration to an end, although a critical remark may also be made following the achievement of a friendly solution, perhaps as a warning against the repetition of the action complained of.<sup>53</sup> Critical remarks therefore have some potential to develop EU public access law, insofar as they may encourage the institutions to adopt a more liberal approach to public access.

It will be recalled that part of Complaint 1087/96, discussed above, also attracted a critical remark from the Ombudsman. The same critical remark had been made earlier in decision 1053/25.11.96/STATEWATCH/UK/IJH ('Complaint 1053/96').<sup>54</sup> The *Statewatch* complaints are particularly significant because the Ombudsman's jurisdiction to investigate complaints regarding the Council's refusal to grant access to documents concerning Title VI TEU was at issue.<sup>55</sup> The decision in Complaint 1053/96 has been selected for discussion, as representative of the decisions within the 'critical remark' category.<sup>56</sup>

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<sup>53</sup> As in the decision in Complaint 1056/25.11.96/STATEWATCH/UK/IJH, <http://www.euro-ombudsman.eu.int/decision/en/961056.htm>.

<sup>54</sup> <http://www.euro-ombudsman.eu.int/decision/en/961053.htm>.

<sup>55</sup> The Ombudsman's jurisdiction over Title VI matters was subsequently established by Article 41(1) (ex K.13(1)) TEU, as amended by the ToA.

<sup>56</sup> In addition to the decision in Complaint 1053/96, critical remarks were also made in the decisions concerning Complaints 1056/25.11.96/STATEWATCH/UK/IJH,

The complaint, which took some 20 months to resolve instead of the Ombudsman's more usual 9-12 months,<sup>57</sup> was closely monitored by *Statewatch*, whose bulletin of November-December 1996<sup>58</sup> detailed the facts behind the complaint. *Statewatch* editor Tony Bunyan had requested access to Council minutes concerning Justice and Home Affairs meetings, in which *Statewatch* is particularly interested. Fourteen meetings were listed in an attempt to prevent the Council refusing access on the grounds that the request had been 'imprecise'. The Council deemed the request to be a 'repeat application for a very large number of documents', in respect of which it intended to seek a 'fair solution'.

However, the documents in question had never been requested before, and Article 3(2) Decision 93/731 only provided for a 'fair solution' to repeat applications or to applications for very large documents, not to applications for a very large *number of* documents. Mr Bunyan discovered that, in reviewing the operation of Decision 93/731, the Council appeared to have been troubled by the fact that a single applicant (himself) had requested more than a third of the total number of documents requested to date (i.e. 1995), and by the fact that the requests concerned Title VI TEU. The Council was, it seemed, actively seeking to limit the number of applications for access from such groups as *Statewatch*: it was interpreting 'repeat application' as 'an application *similar to* a previous application' and the phrase 'very large documents' to mean 'a large *number of* documents'.<sup>59</sup>

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1057/25.11.96/STATEWATCH/UK/IJH, and 1087/10.12.96/STATEWATCH/UK/IJH against the Council; 506/97/JMA against the Commission; 634/97/PD against the Council; 985/99/IP against the Parliament, and 374/2000/ADB against the Commission.

<sup>57</sup> It is not clear, from the text of the decision, why the inquiry took so long. The Council, according to *Statewatch*, was completely intransigent, which may have precluded any attempt to negotiate a friendly solution. Alternatively, as the CFI had still to give judgment concerning the applicability of Decision 93/731 to Title VI TEU (see Case T-174/95, *Svenska Journalistförbundet v Council* [1998] ECR II-2289, Chapter Six *supra*, note 46 and text), it is conceivable that the Ombudsman had been awaiting confirmation of his opinion concerning that issue from the CFI. The final decision in this complaint was not adopted until 28 July 1998, after the *Svenska* judgment of 17 June.

<sup>58</sup> Vol. 6 no. 1.

<sup>59</sup> Hence the concern of *Statewatch* regarding the proposals for Regulation No. 1049/2001, as discussed in Chapter Five *supra*, section 5.5.

Complaint 1053/96 therefore sought to challenge the Council's reliance upon Article 3(2) of Decision 93/731 in order to withhold access to the minutes requested. The Council had denied, at first, that the Ombudsman had jurisdiction to investigate this complaint as the documents in question concerned Title VI TEU. However, even before the landmark judgment of the CFI in *Svenska*,<sup>60</sup> which confirmed that Decision 93/731 applied to documents held by the institutions irrespective of the 'pillar' of the Union to which those documents related, the Ombudsman observed that some of the documents in the first public access case, *Carvel*,<sup>61</sup> concerned 'third pillar' issues, and that the CFI's jurisdiction had not been contested. Therefore, the Ombudsman believed that he had jurisdiction to investigate this complaint.<sup>62</sup> The Ombudsman fully supported *Statewatch*'s position and closed the inquiry with a critical remark to that effect, before reminding the complainant that the ECJ is the highest authority concerning the interpretation of Community law:

"3.6...The term "repeat applications" in Article 3 (2) does not include applications by the same person for different documents, nor is the Article to be interpreted so as to bring all applications for a very large *number* of documents within its scope."<sup>63</sup>

As noted, the Ombudsman's opinion concerning his jurisdiction eventually won the support of a majority of Member States, leading to the amendment of Article K.13 (now 41) TEU by the ToA. It seems that the Council was prepared to listen to the Ombudsman, although its responses to the complainant's observations support the conclusion that the Council does not welcome public access to its documents.<sup>64</sup>

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<sup>60</sup> Note 57 *supra*.

<sup>61</sup> Case T-194/94, *John Carvel and Guardian Newspapers Ltd v Council* [1995] ECR II-2767.

<sup>62</sup> Annual Report of the Ombudsman for 1997 (completed 20 April 1998), OJ 1998 C380/1, section 2.2.1.

<sup>63</sup> <http://www.euro-ombudsman.eu.int/decision/en/961053.htm> (original emphasis).

<sup>64</sup> Complaint 916/2000/GG (<http://www.euro-ombudsman.eu.int/decision/en/000916.htm>) concerned the Council's apparent complete disregard of the Ombudsman's earlier decision in Complaint 1056/25.11.96/STATEWATCH/UK/IJH ('Complaint 1056/96'), which also suggests that the Council was determined not to grant access to the documents concerned despite the Ombudsman's critical remark to the effect that it should do so. *Statewatch* had submitted a further request for the documents immediately after the Ombudsman had issued the decision in Complaint 1056/96. However, in an argument worthy of the fictional Sir Humphrey Appleby of the BBC television comedy series, '*Yes, Minister*', the Council reasoned that because it never actually registered nor systematically filed draft agendas to its meetings, it did not actually 'hold' such

#### 7.4.2.5. 'Draft Recommendation'.

The Ombudsman's highest 'coercive' power is the issue of a draft recommendation. An instance of maladministration resulting in a draft recommendation is reported to the European Parliament in accordance with Article 3(7) of the Ombudsman's Statute. The Parliament may then apply political pressure to the institution concerned in an attempt to secure its compliance with the recommendation. Draft recommendations will affect the administration of Community public access rules, if they are accepted by the institution to which they are directed. A recent example of an inquiry into a public access complaint that was concluded with a draft recommendation, of which the author is aware of eight others,<sup>65</sup> is that into the complaint to which decision 917/2000/GG relates ('Complaint 917/2000').<sup>66</sup>

Complaint 917/2000 was submitted by *Statewatch*. *Statewatch* had learned of the existence of certain documents, described as 'room documents, non-papers, meetings documents, and *sans numéro* documents', which had either been circulated to Council members or their representatives, in advance of Council meetings concerning justice and home affairs, or presented during such meetings. The complainant observed that the Council not only failed to systematically record the existence of such documents, in a manner that would facilitate their identification and location in the event that a citizen might wish to apply for access to them, but also that, *per* Council instructions, no further mention of such documents was to be made on provisional agendas and in documents detailing the outcomes of Council proceedings. Confidential, *restreint*, *sans numéro* and 'non-paper' documents, moreover, were not to be

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documents within the meaning of Article 1(2), Decision 93/731. The Council also claimed that the Ombudsman had no jurisdiction to enquire into the legality of its actions: *cf.* the definition of maladministration (text at note 24 *supra*), which makes it clear that maladministration would be committed by an institution failing to observe the law. Not surprisingly, these arguments were not accepted by the Ombudsman: a draft recommendation was issued to the effect that the documents sought should be disclosed.

<sup>65</sup> Decisions in Complaints 1055/25.11.96/STATEWATCH/UK/IJH against the Council; 633/97/PD against the Commission; OI/1/99/IJH as regards Europol; 713/98/(IJH)/GG, 271/2000(IJH)JMA and 277/2000/(IJH)JMA against the Commission, and 916/2000/GG and 1542/2000/(PB)SM against the Council.

<sup>66</sup> <http://www.euro-ombudsman.eu.int/recommen/en/000917.htm>.

included in the Council's online public register. *Statewatch* complained about the Council's failure to grant public access to several such documents in particular, and about its failure to maintain a record of all such documents.

The Ombudsman dismissed as unfounded the Council's belief that the provisions of Decision 93/731 permitted a distinction to be drawn between preparatory documents which nevertheless have a quality of 'finality', and preparatory documents which are merely 'transitory and preliminary' in nature. Whereas the Council was not automatically obliged to grant access to all such documents, citizens should nevertheless be able to determine which documents had been placed before it. The Council's approach to *Statewatch*'s request for public access to particular preparatory documents therefore constituted maladministration. The Council had also claimed that a requirement to register every paper circulated to its members, or their representatives, would unduly burden its General Secretariat. The Ombudsman regarded the second aspect of *Statewatch*'s complaint as raising two distinct questions: that of whether access had to be granted to a particular list of documents and that of whether the Council is obliged to maintain such a list. As *Statewatch* could not prove that the Council had actually listed its 'non-papers', etc. in a documentary form, there could be no maladministration in the Council's failure to grant access to such a list. However, in light of the fundamental importance of public access, the Council was, in the Ombudsman's opinion, obliged to accept the additional administrative work entailed by the inclusion of all such documents in a publicly-accessible register.

The Ombudsman issued two draft recommendations. The disclosure of the specific documents requested by *Statewatch* was recommended, unless the Council could invoke any of the exceptions listed in Article 4 of Decision 93/731. The Council was also recommended to maintain a list or register of all the documents put before it and to make that list/register publicly available. As is customary when delivering a draft recommendation, the Ombudsman added the following formula:

“In accordance with Article 3 (6) of the Statute of the Ombudsman, the Council shall send a detailed opinion by [in this instance] 31 May 2001. The detailed opinion could consist of acceptance of the Ombudsman’s decision and a description of the measures taken to implement the draft recommendations.”

On 30 November 2001, the Ombudsman issued a Special Report to the European Parliament, pursuant to Article 3(7) of the Ombudsman’s Statute.<sup>67</sup> The Council, in its detailed opinion, had accepted the second draft recommendation that it should maintain a public register of all documents put before its members, but submitted that there was no value in maintaining a record of documents whose content was “subsequently reflected in a document which appears on the public register or [which] has proven to have no use whatsoever during the [decision-making] process. On the other hand, to establish and keep a complete register of *all* those papers [original emphasis] would impose a heavy administrative burden...and thereby, on balance, go clearly against the principle of good administration.” The Council added that it considered the first draft recommendation to have already been implemented.

The Ombudsman did not accept that the Council had complied with the first draft recommendation, and asked the European Parliament to adopt that recommendation as a resolution. He also observed that the Council’s continuing intention to exempt ‘ephemeral’ documents of a ‘limited useful life’ from a public register was difficult to accept: such documents had not been objectively defined; even if their content was subsequently reflected in a published document, citizens might be interested in knowing who first made a particular proposal; and citizens might also wish to know about proposals that had been rejected, i.e. ‘found to be of no use whatsoever’, to use the Council’s phrase. Article 11(2), Regulation No. 1049/2001, drew no distinction between documents on the basis of their ‘useful life’, therefore the Ombudsman believes that the Regulation has now created a legal duty to establish and maintain a public register of all documents placed before the Council, as recommended. In light of this interpretation of the Regulation, the Ombudsman felt no need to renew his second draft recommendation, which related to the now-superseded

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<sup>67</sup> <http://www.euro-ombudsman.eu.int/special/pdf/en/000917.pdf>.

Decision 93/731. He nevertheless sought the views of the European Parliament concerning this issue, possibly doubting that the Council would even now consider itself obliged to register every document placed before its members.

The Ombudsman's second recommendation would have affected the interpretation of Article 1(2) of Decision 93/731: documents 'held' by the Council would need only to have been 'considered' by the Council. It is to be hoped that the Council will accept the Ombudsman's interpretation of Article 11(2), Regulation No. 1049/2001. Furthermore, were the Council to add all 'non-papers', etc. to its public register, enabling citizens to identify those in which they might be interested, this recommendation would also have a positive impact upon the Council's practice concerning transparency. The most worrying aspect of Complaint 917/2000 is that it suggests determination on the Council's part to deliberate as secretly as possible. The Council is the Union's legislature under Titles V and VI TEU: as such it is of course responsible for measures capable of affecting civil liberties within each Member State, hence the interest of *Statewatch* in monitoring its activities. As the Commission has called for greater openness and participation in its White Paper on European Governance,<sup>68</sup> the Member States might wish to consider that the openness of legislative proceedings is increasingly regarded as important in a modern democracy, and might adapt their attitude towards Council proceedings accordingly.

#### **7.5. Criticisms of the Ombudsman's approach to transparency and public access.**

It is not clear whether Harlow is impliedly criticising the Ombudsman for categorising access to information as a principle of good administration instead of a fundamental constitutional right.<sup>69</sup> Arguably, however, it was the ECJ's characterisation of public access as a requirement of good administration in the *Netherlands* judgment that brought public access clearly and unequivocally within the Ombudsman's remit in the first place. Moreover, this thesis has

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<sup>68</sup> Chapter Two *supra*, note 1.

<sup>69</sup> Chapter One *supra*, note 8, at 296.

already noted that the Ombudsman attaches fundamental importance to multidimensional transparency, as, apparently, does Harlow herself.<sup>70</sup> However, she criticises the Ombudsman's own initiative inquiry into public access as demonstrating a "slippage from this constitutional high ground to the narrower concept of access."<sup>71</sup> Having regard to the passages quoted from the Ombudsman's Special Report in section 7.2 *supra*, it seems that Harlow's research into the Ombudsman's attitude towards the substance of the institutions' public access rules is incomplete. The Ombudsman expressed reservations, and urged the Parliament to investigate the substantive provisions of the Code. Harlow seems not to dispute the Ombudsman's claim that the mere existence of public access rules in the EU is important for the reasons set out above:<sup>72</sup> she even adds that decisions adopted under the public access rules of agencies and bodies which are not specifically mentioned within Article 230 EC might nevertheless be reviewable by the Community Courts, if such decisions affect third party rights.<sup>73</sup> The latter issue is, however, reserved for further discussion in Chapter Eight *infra*: it suffices to note here that the Ombudsman could justify his decision to investigate the existence of public access rules, as opposed to examining the substance of those rules.

Harlow's harshest criticism is that the Ombudsman, in reviewing public access complaints, "has stuck strictly to the letter of the law, upholding every decision which falls within the Codes."<sup>74</sup> The Ombudsman has diligently sought to secure public access, bearing in mind that it may be difficult to secure a friendly solution, as discussed in sub-section 7.4.2.3. *supra*. He has also sought to prevent the institutions from relying upon a too-broad interpretation of the exceptions to the public access rules. Harlow's criticism obscures this fact, whereas a thorough review of the public access complaints indicates that, even when maladministration was not found, the Ombudsman was prepared to issue critical remarks if necessary to promote better transparency-related

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<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*, at 297.

<sup>72</sup> Note 7 *supra* and text.

<sup>73</sup> Chapter One *supra*, note 8, at 297, referring to Case 294/83, *Parti ecologiste 'Les Verts' v European Parliament* [1986] ECR 1045, which case is discussed in Chapter Eight *infra*.

<sup>74</sup> *Ibid.*, at 298.

practices in future.<sup>75</sup> The only complaint in which the Ombudsman might, perhaps, have been more proactive was Complaint 1087/96, as noted in sub-section 7.4.2.2. *supra*. Harlow concludes that the Ombudsman is not dynamic, yet she acknowledges that “his intervention seems to stimulate settlement,”<sup>76</sup> which is important to complainants and has been particularly pleasing to *Statewatch*.<sup>77</sup> Moreover, further research suggests that the Ombudsman, as implied at the outset of this Chapter, is one of the most dynamic campaigners on behalf of transparency and more liberal public access rules within the EU.<sup>78</sup> Curtin, for example, observes that the Ombudsman’s role “can be particularly crucial in cases of maladministration or embedded institutional practices” affecting public access.<sup>79</sup>

## **7.6. Conclusion.**

This Chapter has attempted to illustrate the current Ombudsman’s efforts to promote both multidimensional transparency within the EU and the development of liberal public access rules. The Ombudsman has consistently emphasised the importance of transparency and public access in Annual Reports and speeches, and has attempted to promote transparency by conducting own initiative inquiries and making draft recommendations and/or critical remarks, which have also been made as a result of inquiries into complaints. Although his powers are non-coercive and his decisions non-binding, the Ombudsman offers a cheap, but thorough, authoritative and

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<sup>75</sup> E.g. Complaint 59/98, discussed in sub-section 7.4.2.1. *supra*.

<sup>76</sup> Chapter One *supra*, note 8, at 298.

<sup>77</sup> *Per* reports concerning *Statewatch*’s complaints to the Ombudsman, Chapter Three *supra*, note 73.

<sup>78</sup> See, for example, Harden, Chapter Three *supra*, note 65, at 174, observing that Article 22 of the Ombudsman’s model Code of Good Administrative Behaviour ([http://www.euro-ombudsman.eu.int/recommen/pdf/en/code1\\_en.pdf](http://www.euro-ombudsman.eu.int/recommen/pdf/en/code1_en.pdf)) requires officials to provide members of the public with the information that they request; and *ibid.*, at 177, noting that the Council established a public register of its documents (Decision 2000/23/EC, OJ 2000 L 9/22, discussed in Chapter Five *supra*, section 5.4) following the Ombudsman’s draft recommendation in Complaint 633/97/PD (<http://www.euro-ombudsman.eu.int/decision/en/970633.htm#Target1>) to the effect that the Commission should keep a public register of its documents. Finally, *ibid.*, at 180-181, Harden considers that the institutions and bodies investigated by the Ombudsman adopted public access rules as a result of his own initiative inquiries, and notes that Article 23 of the Code of Good Administrative Behaviour provides for officials to give access to documents in accordance with the applicable rules.

<sup>79</sup> Chapter Five *supra*, note 4, at 11.

frequently effective alternative to the Community Courts. Subject to a finding that maladministration has occurred, the Ombudsman often succeeds in securing for the complainant access to the requested documents, as noted by *Statewatch* in connection with Complaint 916/2000. The Ombudsman remedy is particularly useful for aggrieved citizens to whom a transparency-related decision may not be of direct and individual concern.<sup>80</sup> Furthermore, the Ombudsman, unlike the Courts, may explicitly recommend that public access be granted.<sup>81</sup> The current Ombudsman has been somewhat more consistent than the CFI in his approach to public access. Whereas the decision in Complaint 1087/96 was disappointing, in later decisions the Ombudsman, having followed the Courts' lead by explicitly referring to the principle of granting the widest possible access to documents and the need to construe all exceptions to that right as strictly as possible, has invariably sought to narrow the scope of any exceptions being relied upon by the institution wishing to maintain secrecy.

Nevertheless, some problems have also been highlighted within this Chapter. The Ombudsman's willingness to inspect documents to which public access has been refused, in order to verify that they have been lawfully withheld, has been noted, for example in connection with Complaint 1087/96 and decisions 620/97/PD and 306/98/PD. However, the factor that could hinder the Ombudsman most is the possibility that documents may be withheld from his/her<sup>82</sup> own investigative scrutiny. Whereas access should only be refused to him/her on 'duly substantiated grounds of secrecy', there is no guarantee that the Council's idea of a duly substantiated ground of secrecy would conform to that of the Ombudsman: it is theoretically possible for the Council to deny the Ombudsman access to documents that ought, at least, to be disclosed to him/her, even if not to the applicant for access. Without an unlimited right of official access to documents,<sup>83</sup> in order to conduct an independent review of a public access decision, the Ombudsman might simply be unable to reassure complainants that any refusal to grant public access is justified.

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<sup>80</sup> Harden: see note 27 *supra* and text.

<sup>81</sup> Davis, note 18 *supra*.

<sup>82</sup> Recognising that a future Ombudsman might be female.

<sup>83</sup> See further Beers, Chapter One *supra*, note 64.

The Ombudsman remedy also takes time. If documents were urgently required in order to try to influence decision-making processes, it would certainly be faster to seek a quasi-judicial review by the Ombudsman than to apply for judicial review by the CFI. The Ombudsman usually takes half the time of the Court, or less, to reach a decision. However, if the Ombudsman were able to inspect documents and to order their disclosure, if appropriate, instead of being expected to seek a friendly solution wherever possible, which necessitates a sometimes lengthy dialogue between the complainant and the institution concerned, the remedy might be faster still.

There are two further problems, which have not been highlighted by reference to the Ombudsman's 'case law'. Firstly, the Ombudsman must deal with *maladministration*, not merely public access complaints. Of the complaints referred to in the Ombudsman's Annual Report for 2000, public access and transparency-related complaints together formed the single largest category of complaint, but nevertheless accounted for only 28% of the total number of complaints. Furthermore, whilst the present Ombudsman is very pro-active as regards transparency, it is possible that a future Ombudsman might have different priorities, and it is certain that even the present Ombudsman cannot devote his entire energies to the pursuit of greater transparency within the Union. Secondly, the Ombudsman's workload has trebled since 1996 and is already such that it has not been possible to undertake a systematic check in order to determine the rate of institutional compliance with the Ombudsman's critical remarks.<sup>84</sup>

Following this conclusion, it is possible to draw more general conclusions concerning both remedies for refusals to grant public access, based upon the discussion in Chapter Six *supra* and this Chapter. On the whole, both the Community Courts and Ombudsman have sought to curb the apparent tendency of the institutions to apply the public access rules with a view to refusing

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<sup>84</sup> 'The effectiveness of the Ombudsman in the oversight of the administrative conduct of government', 7th International Ombudsman Institute Conference, Durban, South Africa, 30 October - 3 November 2000, <http://www.euro-ombudsman.eu.int/speeches/en/durban1.htm>.

access, by merely invoking (an) exception(s) without explaining adequately why that/those exception(s) apply to given documents. Both the Courts and Ombudsman have demanded comprehensive statements of reasons for a decision refusing public access. However, if public access is refused on the grounds that the rules provide for requests to be referred to the author of a document, a plea alleging insufficient reasons will not then be entertained,<sup>85</sup> and if a provision of the public access rules themselves proves to be a particular obstacle to public access, it seems that neither the Courts nor the Ombudsman might be of use to ordinary Europeans. The Courts would not find public access rules to be of direct and individual concern to applicants for public access, and the Ombudsman, having both welcomed the adoption of rules similar to the Commission's and Council's Code of Conduct<sup>86</sup> and dismissed concerns about Article 9 of Regulation No. 1049/2001,<sup>87</sup> appears unlikely to find any maladministration in the adoption of such rules.

Furthermore, because neither the Community Courts nor the Ombudsman may order the disclosure of documents following, respectively, the annulment of an institution's decision refusing public access or any finding of maladministration in such a decision, neither remedy can guarantee that access will actually be granted to a complainant. Also, neither the Courts nor the Ombudsman might be able to challenge a particular decision to classify a document as 'sensitive'. That decision may have been adopted by an institution or body outside their respective jurisdictions. Alternatively, such a decision would not be of direct and individual concern to an applicant for judicial review, whereas although the Ombudsman may, unlike the Courts, investigate a complaint that would be classified as an *actio popularis*, s/he may nevertheless be unable to inspect the document in question in order to determine whether it had been classified properly. As seen, the latter problem could conceivably be removed by amending the Ombudsman's Statute in order

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<sup>85</sup> E.g. Case T-188/97, *Rothmans International BV v Commission* [1999] ECR II-2463, paragraphs 36-38, as discussed in Chapter Six *supra*, note 52 and subsequent text.

<sup>86</sup> Note 7 *supra*.

<sup>87</sup> Chapter Five *supra*, note 96 and text.

to grant official access to all documents,<sup>88</sup> but the Ombudsman would remain unable to order the reclassification of a 'sensitive' document.

It has been further noted that both the Ombudsman and the Courts may take a long time to address public access complaints, which is not consistent with the idea that requests for public access should be considered promptly, within two months at most,<sup>89</sup> and which could be problematic if access is sought by an applicant desiring information in order to try to influence decision-making processes taking place in the meantime, given that, as stated, there is no guarantee that access will be granted as a result of pursuing either remedy. In Chapter Eight *infra*, these actual and potential limitations of the existing remedies will be considered further, with a view to suggesting a more effective means of securing the liberal approach to public access that would be expected by citizens of a multidimensionally-transparent polity.

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<sup>88</sup> Note 5 *supra* and text.

<sup>89</sup> *Cf.* Regulation No. 1049/2001, Articles 7 and 8.

## CHAPTER EIGHT

### Would the establishment of an Information Tribune for the European Union help to secure for Union citizens a liberal right of public access to documents held by the institutions, and thereby help to improve multidimensional transparency in EU decision-making?

#### 8.1. Introduction.

Thus far in Part Three, it has been concluded that the remedies currently available to citizens to whom public access is denied have a limited capacity to provide an effective means of redress. There is no means whereby an aggrieved citizen or NGO might secure, promptly, an order for the disclosure of a document in the event that an institution cannot justify its non-disclosure with reference to a legitimate public interest in secrecy. Both the Courts and the Ombudsman have had limited success in transforming the EU-level culture of secrecy.<sup>1</sup> Although the Member States and institutions equate transparency with public access, the evidence analysed thus far within this thesis suggests that they have neither embraced a public access culture at EU level nor sought to provide a truly effective method of policing the application of the Union's public access rules.

Therefore, if the Commission genuinely desires to improve the Union's democratic nature and legitimacy,<sup>2</sup> both of which might be enhanced by the introduction of multidimensional transparency, it might consider recommending the appointment of a new official, empowered to supervise the application of the Union's public access rules; to order the disclosure of documents the non-disclosure of which cannot be justified by reference to any legitimate public interest in secrecy, protected by law; and to encourage the liberalisation of the rules governing public access. As noted, the adoption of public access rules employing existing remedies has failed to radically

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<sup>1</sup> Cf. the Council's adoption of the 'Solana Decision', Chapter Five *supra*, section 5.4.1., and the adoption of Articles 4 and 9 of Regulation No. 1049/2001, discussed in Chapter Five *supra*, section 5.5.

<sup>2</sup> Cf. its White Paper, Chapter Two *supra*, note 1.

transform the Union's culture into a culture of openness. Such a cultural change must take place if the Union is ever to be transformed into a multidimensionally-transparent polity. A cultural change must also take place if the Commission's White Paper proposals are to succeed in democratising the Union, by ensuring the greater participation in decision-making of citizens and civil society NGOs who are sufficiently well informed to participate effectively. The appointment of a dedicated official might, perhaps, succeed in promoting such a change.

Within this final Chapter, section 8.2 will briefly discuss the origin of the title of 'Information Tribune' and the role contemplated for such an official at national level. Section 8.3 will discuss the adaptability of the national Information Tribune to meet the needs of citizens of the Union, and will consider the powers that the European Information Tribune (EIT) would or might require in order to promote multidimensional transparency at EU level. Section 8.4 will consider the extent to which the Treaties would require modification in order to establish an EIT with appropriate powers, and to ensure that those powers could not be abused. Section 8.5 will further discuss and evaluate the arguments for and against the appointment of such a powerful official. Section 8.6 will then present the overall conclusions of this Chapter, by way of conclusion to Part Three of this thesis.

## **8.2. The Concept of an Information Tribune.**

An Information Tribune was mooted by Leigh and Lustgarten<sup>3</sup> in order to secure greater public accountability of the United Kingdom's government. The title 'Tribune' indicates that this official would be accountable to, and would report directly to, the public, being completely independent of the government, including the national Parliament.<sup>4</sup> Leigh and Lustgarten's Tribune was evidently a species of Ombudsman for the benefit of members of the United Kingdom's Parliament. A UK MP might complain to the Tribune when seeking to challenge any apparent failure of UK Ministers or civil servants to

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<sup>3</sup> Leigh and Lustgarten, Chapter One *supra*, note 69, at 715.

<sup>4</sup> *Ibid.*

respond to his/her requests for information, in order to facilitate the ability of UK MPs to hold the government to public account. However, the Tribune would also have addressed complaints concerning requests for government-held information submitted by members of the general public; supervised the operation of any FOI legislation; offered help and advice to the government concerning FOI; and exercised virtually unlimited powers of investigation in the quest for public accountability of the government, including the right of access to classified documents and the power to interview any government official or employee, serving or retired, in private if need be. It was anticipated that the Information Tribune would, through the exercise of these powers, have helped “to stimulate the growth of politically knowledgeable and increasingly sophisticated citizens” within the UK.<sup>5</sup>

### **8.3. An Information Tribune for the EU?**

#### *8.3.1. The role of an EIT.*

*Prima facie*, it seems that the national Information Tribune discussed above might be adapted in order to produce a new European official, to promote public access, multidimensional transparency, and political awareness among Union citizens. The EIT would report directly to the public concerning the FOI-related activities and general transparency of the institutions, unlike the Ombudsman, whose reports, although invariably published, are submitted to the European Parliament. S/he would also investigate any complaints from MEPs, European Parliamentary Committees, or the European Parliament itself, concerning any apparent failure on the part of a Union official or institution to respond adequately to questions, or to supply information required for the purposes of any debate.<sup>6</sup> S/he would respond to all transparency-related complaints from members of the public and NGOs, including public access complaints, being armed with greater powers than those of the Ombudsman (see section 8.3.2. *infra*). Finally, s/he would continually supervise the

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<sup>5</sup> *Ibid.*

<sup>6</sup> This could be especially important in light of suspicions to the effect that the Council is not properly consulting the Parliament regarding matters relating to Title VI TEU (D. O’Keeffe, ‘Recasting the Third Pillar’ (1995) 32 *CMLRev* 893, at 904).

implementation and operation of Regulation No. 1049/2001, and the public access provisions adopted by other institutions and bodies following the *Netherlands* judgment,<sup>7</sup> with a view to recommending appropriate amendments to those rules in a bid to secure the widest possible access to documents for Union citizens.

### 8.3.2. *The powers of the EIT.*

#### 8.3.2.1. Introduction.

In order to promote multidimensional transparency at EU level and to secure a liberal right of public access for European citizens, the EIT would, naturally, require suitable powers, such as those of the national Information Tribune proposed by Leigh and Lustgarten: see section 8.2 *supra*. Actual or potential problems, arising from the granting of a particular power to the EIT, will be identified in this section for further discussion in sections 8.4 and 8.5 *infra*.

#### 8.3.2.2. The right to initiate investigations on his/her own initiative.

This important power, currently enjoyed by the Ombudsman under Article 195 (ex 138e) EC, gives the Ombudsman an advantage over the Community Courts insofar as s/he need not wait for a complaint to be lodged before investigating the conduct of the Union's institutions and bodies, but can be pro-active. It would be essential for the EIT to be able to continually supervise the application of public access rules even if no complaints have been submitted. Otherwise, the EIT could not make certain that those rules were consistently being applied with a view to granting public access, rather than with a view to withholding as many documents as possible by invoking as many exceptions as possible.

Moreover, if the EIT suspected malpractice, but had not received any complaint, the lack of a power to nevertheless proceed with an investigation

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<sup>7</sup> Case C-58/64, *Netherlands v Council* [1996] ECR I-2169.

would seriously undermine his/her role as the EU's new guardian of transparency as public access, and consequently undermine his/her ability to promote multidimensional transparency. Citizens require official information in order to participate in governmental decision-making, therefore, unless that information is flowing as freely as possible, any consultation procedures open to citizens might be less effective than they would have been had the citizens been fully informed. The granting of this power to the EIT would present no substantial difficulties. The mere fact that the Ombudsman already has this power does not preclude the possibility of establishing an EIT with a power of own-initiative inquiry: see further section 8.5 *infra*.

#### 8.3.2.3. The right of official access to all documents.

No document could be withheld from the official scrutiny of the EIT, who would determine, objectively and in strict accordance with the law, whether an institution would be justified in withholding a given document from anyone requesting access to it.<sup>8</sup> There seems to be little danger in allowing the EIT to verify, independently, that the document in question contains truly sensitive information, given that, firstly, most such information is likely to be highly technical and therefore virtually incomprehensible to a non-expert,<sup>9</sup> and secondly, the EIT would be strictly bound never to reveal genuinely sensitive information. The Ombudsman, as noted, could be granted a similar unlimited right of official access to documents:<sup>10</sup> as also noted in Chapter Seven *supra*, the fact that documents may currently be withheld from him/her could seriously hinder the Ombudsman's ability to provide a remedy in public access complaints. This power would help the EIT to both secure public access for citizens following specific complaints, and to ensure that the greatest possible

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<sup>8</sup> This contrasts with the national Information Tribune proposed by Leigh and Lustgarten (Chapter One *supra*, note 69, at 715), from whose remit "the technical specifications of military equipment, matters of national security...and certain activities and policies requiring short-term secrecy in dealing with foreign governments or companies, are illustrations of matters that might...be excluded...or...certified as being properly kept secret for a limited period." The European Information Tribune would require access to all documents if only to verify, independently, that they do indeed concern such matters and therefore cannot be disclosed to the public.

<sup>9</sup> See Lustgarten and Leigh, Chapter Five *supra*, note 39, discussed at note 54.

<sup>10</sup> Chapter Seven *supra*, note 5 and text.

quantity of information would be made available to the public automatically, when used in conjunction with his/her further powers, discussed *infra*.

The cause of multidimensional transparency would be promoted were the EIT empowered to ensure the free flow of information. More informative EU institutions and bodies could be easier to hold to account, and better-informed EU citizens would be more able to participate in decision-making processes, subject, of course, to the establishment of appropriate mechanisms enabling citizens to hold the institutions to account and to participate in decision-making. The EIT could not single-handedly transform the EU's various systems of governance into those of Held's cosmopolitan democracy, but s/he could certainly encourage the development of a culture of openness at EU level that might increase the institutions' and Member States' receptivity to the concept of multidimensional transparency in governance. In order to encourage the development of a culture of openness, however, s/he would need to be able to dissuade the institutions from keeping documents secret without justification, which means that s/he must be able to inspect all currently classified documents.

The requirement that the EIT should not disclose certain information him/herself would not seem to be problematic: the Ombudsman is required by Article 3(2) of the Ombudsman's Statute to maintain the confidentiality of any classified documents that might be disclosed to him/her. Alternatively, since the EIT is supposed to determine whether or not information could be disclosed in the public interest, the requirement imposed could be that s/he must maintain confidentiality in respect of classified information whenever s/he decided him/herself that a legitimate public interest in secrecy would be substantially harmed thereby, and that the harm caused would outweigh the public interest in the disclosure of the information in question. This, however, might be problematic. There could be a dispute between the EIT and the originator of a document concerning the balancing of public interests in its disclosure. The Member States would probably insist upon the document's originator having a right to obtain judicial review of any decision of the EIT, before agreeing to allow the EIT to both inspect classified documents and to independently decide

whether or not their contents should be subsequently disclosed: see further subsection 8.3.2.4. *infra*.

#### 8.3.2.4. The right to order the disclosure of documents in the public interest.

This power, clearly, would transcend those of the existing remedies. Having decided that the non-disclosure of any document could not be justified by reference to a legitimate public interest in secrecy,<sup>11</sup> protected by law, the EIT would be able to order its disclosure. Without such a power, the EIT's ability to ensure the greatest possible flow of information to the public would be no different to that of the Ombudsman. The problem, as stated in section 8.3.2.3., would be that the originating or holding institution/body might dispute the EIT's conclusion that the document should be disclosed. Some provision for judicial review of the EIT's decisions would almost certainly be demanded before the Member States and institutions would agree to give the EIT such a power, requiring detailed consideration to be given to the necessary Treaty amendments (see further section 8.4 *infra*) and to the potential value of establishing an EIT in the first place (see further section 8.5 *infra*).

By way of an additional safeguard, the EU's public access rules, which would require amendment in order to take account of the EIT's role, could, if necessary, set down strictly limited categories of documents the disclosure of which could not be ordered by the EIT under any circumstances.<sup>12</sup> That would preclude any possibility of the EIT making an error of judgment and ordering the disclosure of a document that genuinely should have been withheld. The breadth of any such exemptions would ultimately be judged by citizens of the Union: if the EU truly wishes to be regarded as open and accessible to its citizens, it should exempt as few documents as possible from the EIT's remit. The EIT could always report to the public in the most general terms that, in his/her opinion, certain documents were being exempted from disclosure for no

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<sup>11</sup> Chapter Five *supra*, section 5.3.

<sup>12</sup> *Cf.* Section 88(2) of the Freedom of Information Act (Queensland) 1992, which restricts the ability of the Queensland Information Commissioner to order the disclosure of certain documents.

particularly good reason, prompting a call for the adoption of narrower exemptions.

#### 8.3.2.5. The right to question officials, whether serving or retired.

The national Information Tribune proposed by Leigh and Lustgarten<sup>13</sup> would require this power in order to be able to present UK citizens with full information concerning the traditionally “closely guarded secrets of the Executive”,<sup>14</sup> the UK Parliament having been deemed inadequate to secure the public accountability of government,<sup>15</sup> and traditional FOI legislation having also been found wanting, because much information relating to foreign and defence policies is traditionally exempted from its provisions.<sup>16</sup> The right to question officials would help the national Tribune to establish that information was being/had been wrongfully withheld from somebody/some persons ordinarily entitled to receive it, whether a UK MP, a UK Parliamentary Select Committee, or the general public.

The EIT’s chief task, as indicated in section 8.3.1. *supra*, would similarly be to ensure that ordinary Europeans might acquire the fullest possible information regarding all areas of EU activity, and to ensure that MEPs are adequately informed about the activities of the Council and Commission, enabling the European Parliament to be in the best possible position to exercise its consultative or legislative role. Interviews with the EIT could be held *in camera* and in the absence of any superior officials, in order to protect potential ‘whistleblowers’ who might reveal evidence of any unlawful withholding of information from a person or persons entitled to receive it.

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<sup>13</sup> Chapter One *supra*, note 69, at 715 (discussed in section 8.2 *supra*).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, at 697.

<sup>16</sup> *Ibid.*, at 714: the traditional FOI exemptions would have prevented the public from gaining access to much of the material required in order to bring to light the UK’s ‘Arms for Iraq’ scandal, the subject-matter of the ‘Scott Report’ analysed by Leigh and Lustgarten. Judicial control of the UK administration has also been described as “reactive, intermittent and erratic almost to the point of randomness” (Lustgarten and Leigh, Chapter Five *supra*, note 39, at p.16), prompting Lustgarten and Leigh to observe that public law principles must become part of “the ethos of good public administration” in order to be effective (*ibid.*). An EIT would certainly be able to ensure that this was true of the principle of granting the widest possible public access to documents.

The use of the term 'whistleblower' and the contemplation of a power to conduct interviews *in camera* also suggests that the EIT might have a role to play in identifying instances of fraud and corruption within the EU. The Ombudsman is to some extent an authorised whistleblower: *per* Article 4(2) of the Ombudsman's Statute,<sup>17</sup> if s/he, in the course of his/her inquiries into alleged maladministration, learns of facts which s/he considers might relate to criminal law, s/he must notify the Community institution having authority over the official or servant concerned,<sup>18</sup> and may also inform that institution "of the facts calling into question the conduct of a member of their staff from a disciplinary point of view". The EIT might be placed under a similar obligation: his/her questions relating to the suspected non-disclosure of information might at least indirectly reveal evidence of fraud or criminal activity. One of the functions of transparency is to reduce to a minimum the opportunities for those in government to engage in fraud or criminal activity,<sup>19</sup> therefore it would not be illogical to empower and oblige the EIT to notify the appropriate authorities of any such nefarious activity that might come to his/her notice. In light of the Ombudsman's Statute, there seems to be no theoretical reason why the EIT might not be so empowered and obliged to act: a more pressing issue might be whether the EIT would be superfluous to requirements in the EU's fight against fraud and corruption (see further section 8.5 *infra*).

#### 8.3.2.6. The right to descend upon an institution or body without warning in order to inspect files, including computer-based files.

This power would again help the EIT to determine that no information was being unlawfully withheld, either from EU officials or from citizens. Its use might also uncover evidence of fraudulent or criminal activity within an EU

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<sup>17</sup> Decision 94/262/ECSC, EC, Euratom, OJ 1994 L 113/15.

<sup>18</sup> Which may then apply the second paragraph of Article 18 of the Protocol on the Privileges and Immunities of the European Communities.

<sup>19</sup> *Cf. Article 19*: "[b]ad government needs secrecy to survive. [Secrecy] allows inefficiency, wastefulness and corruption to thrive" (<http://www.article19.org/>, available via an internal link entitled "Access to Information".) See also the Ombudsman, 'The struggle for openness in the European Union', 21 March 2001, <http://www.euro-ombudsman.eu.int/speeches/en/2001-03-21.htm>.

institution or body, which further raises the prospect of the EIT having some role to play in the EU's battle against corruption. Although such a police-like power appears rather draconian in light of the Ombudsman's task of securing a *friendly* solution to maladministration whenever possible, it would assist the EIT in his/her task of changing the culture of the Union from one of secrecy to one of openness. Where institutions and bodies might not yield readily to persuasion that openness and public scrutiny will not adversely affect their operations, the EIT's ability to scrutinise those operations on behalf of the public at any time and without warning would oblige them to start coming to terms with transparency. Furthermore, the knowledge that the EIT might materialise at any moment may dissuade officials from establishing a new culture of secrecy by hiding behind an apparently open façade: the EIT would be in a position to discover the file behind the file or the minutes of the meeting behind the meeting.<sup>20</sup>

This purely investigative power could, by way of a safeguard, be subject to a commitment on the EIT's part to maintain the confidentiality of any unannounced inspection or investigation until such time as s/he has decided which details, if any, may be revealed in the public interest. The institutions and bodies investigated might consider it invariably contrary to the Community interest to have details of any internal malpractices uncovered by the EIT made public, but that argument carries no weight in light of the very public resignation of the Santer Commission. That resignation followed the first report of the Committee of Independent Experts established by the European Parliament in January 1999 to investigate the Commission's handling of fraud, mismanagement and nepotism: Commissioners Cresson, Pinheiro and Wulf-Mathies were considered guilty of nepotism and various instances of mismanagement were uncovered, including the misappropriation of funds.<sup>21</sup> As the Ombudsman stated:

“Some people believe that an open administration is not effective. They believe that open methods of working reduce efficiency. This argument has sounded much less convincing

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<sup>20</sup> Cf. Birkinshaw, Chapter One *supra*, note 65 and text.

<sup>21</sup> As discussed in D. Skiadas, *The European Court of Auditors*, Kogan Page, 2000, pp.67-74.

since the fall of the Santer Commission. It was lack of transparency that brought down that Commission. To all those who argue against openness, I have one question to ask. Was it really effective that the European Union was without a fully working Commission for half a year?"<sup>22</sup>

It seems to be more in the Community interest to expose fraud and corruption, and to demonstrate that such nefarious activities are not tolerated, than to allow people to suspect that Community officials are above the law. The European Union did not collapse following the publicity accorded to the Santer Commission scandal. There seems to be no reason why the EIT should not be given far-reaching investigative powers.

8.3.2.7. The power to order the re-classification of any documents inspected which s/he deems to have been incorrectly classified.

The prior classification of documents involves determining whether or not a given document is going to be publicly available when it is produced, without waiting until somebody requests access to it.<sup>23</sup> The Ombudsman describes prior classification as "the key to good administration of the rules on public access" because the adoption of such a system would mean "that requests for access to documents can be dealt with promptly."<sup>24</sup> Upon receipt of a request for public access, the relevant official might know immediately whether or not access could be granted, or at least the precise exception(s) to the public access rules that would have been invoked in order to justify the non-disclosure of that document, and thus be in a position to respond very quickly to the applicant. However, as the Ombudsman also observed:

"To ensure that a system of prior classification works properly to guarantee the citizen's right of access to documents, two additional elements are essential. First, there must be a public register of all documents, including also those which are not in the public domain. Second, citizens must have the right to seek an independent review, by the courts or the Ombudsman."<sup>25</sup>

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<sup>22</sup> Speech at note 19 *supra*.

<sup>23</sup> *Cf.* the Ombudsman, speech cited at Chapter Seven *supra*, note 22.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

An independent review of the classification of documents seems essential if any system of prior classification is not to be open to abuse. However, a decision to classify a document would not be of direct or individual concern to a citizen, and the Ombudsman might be unable to inspect that document him/herself, in order to review the operation of the system of prior classification effectively. The EIT would be able to supervise the implementation of prior classification rules and, if necessary, to override an institution's classification of documents in order to prevent them from being 'over-classified'.<sup>26</sup> The possibility that much of the information contained within specific documents might be over-classified within the EU arises from its current classification policy, as discussed in Chapter Five *supra*, section 5.4.1.<sup>27</sup>

Michael Kirby J. believes that the over-classification of documents is a perfectly foreseeable phenomenon in any culture which

“asks not why *should* the individual have the information sought, but rather why the individual *should not* – at least where the information concerns the government of that individual's country...”<sup>28</sup>

Since the EIT's remit would be to change this culture at EU level by promoting public access and transparency, s/he should be able to order the partial disclosure of the non-confidential portions of classified documents, whenever such partial access would provide genuinely useful information to an applicant for public access. The EIT would be able to inspect a document and to decide, independently, whether the effort involved in deleting confidential portions thereof would outweigh the benefit to be gained by the partial disclosure

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<sup>26</sup> I.e., classified as 'Top Secret' when 'Confidential' would suffice to protect any relevant legitimate public interest(s) in secrecy, or 'Confidential' when the public interest in disclosure would nevertheless outweigh any possible harm to any legitimate public interest in secrecy.

<sup>27</sup> *Cf.* also Curtin, Chapter Five *supra*, note 4, at 23: the Commission and Council have granted access to some documents classified 'Secret', 'Restricted' and 'Confidential', but it is very difficult for citizens to know that such documents exist in the first place.

<sup>28</sup> 'Freedom of Information: The Seven Deadly Sins' [1998] *EHRLR* 245, at 253. *Cf.* the attitude of the institutions towards public access as depicted in Chapters Five, Six and Seven *supra*.

thereof, in order to determine whether the Council would be justified in invoking the principles of proportionality and of good administration in order to deny partial access to that document.<sup>29</sup> The power to order the disclosure or partial disclosure of classified documents could, as discussed in sub-section 8.3.2.4. *supra*, be granted subject to certain specific, narrow exemptions and to judicial review by the Community Courts.<sup>30</sup> However, without a power to order the re- or de-classification of documents the contents of which simply do not warrant the classification accorded to them, the EIT's ability to police the application of a system of prior classification would be virtually non-existent. S/he would only be able to promote the free flow of information and to produce a culture of transparency with powers to enforce the principle of granting the widest possible public access to documents.

#### **8.4. Establishing the EIT.**

##### *8.4.1. Independent institutional status.*

As indicated, above all, the EIT must be *independent*. S/he will represent ordinary Europeans in his/her own right. Perhaps the best model for the EIT is not the Ombudsman, who reports to the European Parliament, but the European Court of Auditors (ECA), an independent institution<sup>31</sup> charged with controlling the financial management of the Union's executive;<sup>32</sup> with holding those responsible for the Union's financial management to public account;<sup>33</sup> and with promoting the transparency of the Union's financial management.<sup>34</sup> Basically, the EIT would function with respect to the flow of information within the EU as the ECA functions with respect to the flow of public funds.

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<sup>29</sup> Cf. Case T-14/98, *Heidi Hautala MEP v Council* [1999] ECR II-2489, paragraph 86, discussed in Chapter Six *supra*, section 6.6.2.

<sup>30</sup> In Eire, decisions of the Irish Information Commissioner are amenable to judicial review on a point of law (Freedom of Information Act (Eire) 1997, s.42).

<sup>31</sup> Article 7(1) (ex 4(1)) EC, as amended; Article 5 (ex E) TEU, as amended.

<sup>32</sup> This term is understood to be appropriate insofar as the Commission and Council both exercise functions analogous to those of the national executive in a Member State.

<sup>33</sup> Skiadas, note 21 *supra*, at pp.1-2.

<sup>34</sup> *Ibid.*, at pp.88-89: the ECA raises public awareness of the Union's management of public funds and can thereby help to stimulate public debate.

#### 8.4.2. Necessary Treaty Amendments.

To give the EIT independent institutional status, Article 7(1) (ex 4(1)) EC would require amendment by adding 'an Information Tribune' to the list of institutions named therein: Article 5 (ex E) TEU would likewise require the addition of 'the Information Tribune', to make it clear that the EIT's remit extends to Titles V, VI and VII TEU. A new Section 6 within Part Five, Title I, Chapter 1 EC would also be required. The basic Article establishing the EIT might read as follows:<sup>35</sup>

#### SECTION 6 THE INFORMATION TRIBUNE

##### "Article 248a

The Information Tribune shall promote transparency in decision-making and public access to information held by the Community institutions. To that end he shall ensure that no official of any Community institution, agency or other body withholds any information from any official of another Community institution, agency or body who is authorised to receive that information, or to whom the disclosure of that information is required by law, and shall ensure that no information held by the various Community institutions, agencies and bodies is withheld without lawful justification from any natural or legal person residing or having its registered office in a Member State. He shall also advise officials concerning the proper administration of any legislation or other rules governing public access to documents held by the various Community institutions and bodies, and shall advise and assist members of the public wishing to obtain access to such documents."

The selection, appointment and dismissal of the EIT also require consideration. Members of the ECA must be independent, neither seeking nor taking instructions from any institution, body or government. They may not engage in any other occupation during their term of office, gainful or not. This suggests that the criteria for selecting the Ombudsman would be suitable for selecting the EIT.<sup>36</sup> The European Parliament must be consulted regarding the appointment of ECA members, who are then appointed by the Council acting unanimously. They can only be replaced upon retirement, resignation or a

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<sup>35</sup> Recalling that 'he' includes 'she' and that, by virtue of Article 5 TEU, the term '*Community institution/agency/body*' in effect means '*EU institution/agency/body*'.

<sup>36</sup> Cf. Article 6(2) of the Ombudsman's Statute, annexed to this thesis.

ruling from the ECJ to the effect that they are no longer qualified to perform their duties.<sup>37</sup>

The EIT would probably have to be appointed in the same way as an ECA member, otherwise the Member States are unlikely to agree to establish an EIT: they would doubtless wish to have as much control over his/her appointment as possible. With regard to his/her dismissal, however, the analogy with the ECA becomes problematic. Only the ECA itself may ask the ECJ to dismiss an ECA member. This helps to guarantee the ECA's independence,<sup>38</sup> but it would obviously be impractical to expect the EIT to ask the ECJ to remove him/her from office. A further unanimous Council decision, following consultation with the European Parliament, might be required in order to request the ECJ to dismiss the EIT. Alternatively, a corrupt or incompetent EIT could be removed if the European Parliament were to adopt, by an absolute majority of its members, a resolution requesting the ECJ to dismiss him/her. This could be preferable because, as illustrated by recent complaints to the Ombudsman,<sup>39</sup> the Council remains a secretive institution and is therefore the most likely target of criticism from the EIT, therefore the Council should not, perhaps, be free to judge the EIT's conduct. Furthermore, the EIT's accountability to the European citizens would suggest that the Parliament, as the sole institution whose members are also directly elected and able to receive petitions from citizens,<sup>40</sup> should have more control over the EIT's dismissal than the indirectly elected Council. The requirement for an absolute majority would ensure that the decision to request the EIT's dismissal could not be taken lightly, and the ultimate decision regarding his/her dismissal would, in any event, lie with the ECJ. Article 248b might, therefore, read as follows:

“Article 248b

1. The Information Tribune shall be appointed for a term of five years by the Council, acting unanimously after consulting the European Parliament. He shall be eligible for reappointment.

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<sup>37</sup> Article 247 (ex 188b) EC.

<sup>38</sup> Article 247(7) (ex 188b(7) EC: see also Skiadas, note 21 *supra*, at pp.7-9.

<sup>39</sup> E.g. complaints 916/2000 and 917/2000 submitted by *Stewatch*: see Chapter Seven *supra*, section 7.4.2.4.

<sup>40</sup> Article 194 (ex 138d) EC.

2. The Information Tribune shall be chosen from among persons who are Union citizens, have full civil and political rights, offer every guarantee of independence, and meet the conditions required for the exercise of the highest judicial office in their country or have the acknowledged competence and experience to undertake the duties of the Information Tribune.

3. The Information Tribune shall, in the general interest of the Community, be completely independent in the performance of his duties. He shall neither seek nor take instructions from any government or from any other body. He shall refrain from any actions incompatible with his duties.

4. The Information Tribune may not, during his term of office, engage in any other occupation, whether gainful or not. When entering upon his duties he shall give a solemn undertaking before the Court of Justice that, both during and after his term of office, he shall respect the obligations arising therefrom and in particular his duty to refrain from disclosing any lawfully classified information.

5. Apart from normal replacement, or death, the duties of the Information Tribune shall end when he resigns, or is compulsorily retired by a ruling of the Court of Justice pursuant to paragraph 6. In the event of early cessation of duties, a successor shall be appointed within three months of the office falling vacant for the remainder of the current five-year term.

6. The Information Tribune may be deprived of his office or of his right to a pension or other benefits in its stead only if the Court of Justice, at the request of the European Parliament acting by an absolute majority of its members, finds that he no longer fulfils the requisite conditions or meets the obligations arising from his office.

7. The Information Tribune shall have the same rank in terms of remuneration, allowances and pension as a judge at the Court of Justice of the European Communities.

Articles 12 to 15 and Article 18 of the Protocol on the Privileges and Immunities of the European Communities shall apply to the Information Tribune and to the officials and servants of his secretariat.”

The EIT’s investigative powers, power to receive complaints and power to order the re-classification or disclosure of documents in the public interest, as discussed in section 8.3 *supra*, would also require elaboration within the Treaty:

“Article 248c

1. The Information Tribune shall supervise, investigate and audit the implementation of all rules governing the inter-institutional transfer of information, the classification

of documents by the Community institutions and the granting of public access to documents held by the Community institutions, agencies and other bodies.

The Information Tribune may in addition receive complaints from any natural or legal person residing or having its registered office in a Member State concerning any refusal on the part of any institution, agency or other body established pursuant to this Treaty to disclose information. He shall inform the complainant of any decision addressed to the institution or body complained of as a result of his inquiries.

The Information Tribune shall report annually to the public on the outcome of his inquiries and shall provide a statement of assurance as to the legality and regularity of the implementation of the aforementioned rules, which shall be published in the *Official Journal of the European Communities*.

2. The Information Tribune shall examine whether all information has been disclosed and all documents classified in a lawful and regular manner and whether the principle of granting the widest possible access to documents held by Community institutions and bodies has been upheld. In doing so, he shall report in particular on any cases of irregularity.

3. The Information Tribune's investigations may, if necessary, be carried out without notice in the institutions and bodies of the Community. The Tribune may question, in private, any official of the Community institutions or bodies, whether serving or retired, if he has reasonable grounds to suspect that information has been unlawfully withheld from another official authorised to receive that information or to whom its disclosure is required by law, or reasonable grounds to suspect that information has been unlawfully withheld from the public, and if such questioning is necessary in order to determine the existence of any irregularity. All Community institutions and bodies shall forward to the Information Tribune, or shall permit him to have sight of upon demand, any information, computer files, or documents necessary to carry out his task.

4. If, in the course of inquiries, he learns of facts which he considers might relate to criminal law, the Information Tribune shall immediately notify, if appropriate, the Community institution with authority over the official or servant concerned, which may apply the second paragraph of Article 18 of the Protocol on the Privileges and Immunities of the European Communities. The Information Tribune may also inform the Community institution or body concerned of the facts calling into question the conduct of a member of their staff from a disciplinary point of view.

5.a. The Information Tribune may order any information found to have been unlawfully withheld by a Community institution or body to be disclosed to any official authorised to receive that information or to whom the disclosure of that information is required by law. He may himself disclose such information to the appropriate official.

b. The Information Tribune may order the re-classification of any document if the public interest(s) protected by its current classification would be sufficiently protected by a lower form of classification, unless the document in question is exempted from this provision under the terms of a Regulation adopted pursuant to Article 255.

c. The Information Tribune may order that a document be declassified and/or disclosed to the public if the public interest(s) protected by its current classification are not sufficient to justify the classification/non-disclosure of that document, unless the document in question is exempted from this provision under the terms of a Regulation adopted pursuant to Article 255.

d. The Information Tribune may not under any circumstances himself disclose information to the public if that information is not already available to the public.

6. The Information Tribune shall draw up an annual report of his activities, which shall be published in the *Official Journal of the European Communities*. Having regard to the rules governing the inter-institutional transfer of information, the classification of documents and the granting of public access to documents, he shall recommend such amendments to those rules as appear to him desirable<sup>41</sup> in order to ensure that decisions are taken as openly as possible and in order to ensure that the widest possible access to documents held by the Community institutions and bodies is granted.”

The need to subject the decisions of the EIT to judicial review could cause the greatest difficulties, although none are insuperable. The ECA’s function is purely supervisory and its decisions are not binding,<sup>42</sup> whereas the EIT, in order to be effective, would require the power to issue a Decision, within the meaning of Article 249 (ex 189) EC, to the effect that ‘Document X’ should be re-classified or even disclosed. Therefore Article 249 would require amendment to that effect. An extra sentence could be inserted after the first sentence:

“The Information Tribune shall take decisions or make recommendations.”

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<sup>41</sup> The substantive content of Regulation No. 1049/2001 is subject to a form of review: Article 17 provides that the Commission shall make any appropriate proposals for its amendment by 31 January 2004. However, a review by the Commission does not appear to be a fully independent review of the type that would be desirable in a multidimensionally-transparent regime: the Commission does not represent ordinary Europeans, and, to judge from the discussion of its draft proposals for Regulation No. 1049/2001 (see Chapter Five *supra*, note 60), it could be equally as likely to recommend changes aimed at preserving secrecy as to recommend changes aimed at encouraging openness.

<sup>42</sup> Skiadas, note 21 *supra*, at p.6.

Article 230 (ex 173) EC would then require amendment. As this issue presents certain complexities, the following section is devoted to the extent to which Article 230 would have to be amended in order to accommodate an EIT capable of issuing legally binding decisions.

#### *8.4.3. The need to amend Article 230.*

The EIT would, as seen, have various prerogatives in order to carry out his/her supervisory/investigative role, including the power to descend without notice upon another institution and demand official access to its files and the power to order the disclosure of documents in the public interest. The ECA is able to bring proceedings against other institutions in order to protect its rights of audit,<sup>43</sup> therefore the EIT could be added to the list of institutions able to bring proceedings for the purpose of protecting their prerogatives. The need for the ECA to be able to protect its rights of audit is emphasised by Skiadas, who notes that the need for an effective audit within the EU will not be satisfied if “the auditor cannot impose the measures necessary for the conduct of a sound financial management on the auditees”.<sup>44</sup> Likewise, the EIT would be in a very weak position unless s/he could impose measures required in the interests of securing the greatest possible flow of information to the public. S/he must therefore be able to seek judicial review of, for example, a Council Decision to the effect that Document X falls within the category of documents exempted from the EIT’s powers to order its disclosure, under the terms of any applicable Regulation.

The fact that only certain institutions<sup>45</sup> and decisions<sup>46</sup> are subject to judicial review according to the strict terms of the first paragraph of Article 230 would

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<sup>43</sup> Article 230 (ex 173) EC, paragraph 3: see Skiadas, note 21 *supra*, at p.87.

<sup>44</sup> *Ibid.*, at p.86.

<sup>45</sup> The European Central Bank is listed as a potential defendant, although not an institution *per* Article 7(1) EC.

<sup>46</sup> A decision of the European Parliament refusing public access to a document is, of course, intended to produce legal effects *vis-à-vis* third parties, and is therefore reviewable. A decision of the Parliament to classify ‘Document X’ as ‘Top Secret’, assuming the existence of a system of prior classification of documents according to which the Parliament would be authorised to so classify documents, would have the legal effect of preventing third parties from gaining lawful access to that document or from disclosing it

not unduly impair the EIT's functioning, for several reasons. Firstly, information-related decisions of the institutions most likely to withhold information and/or to give rise to complaints regarding the withholding of access to documents would be reviewable. Secondly, information-related decisions of the institutions responsible for EU policy-making and legislation, the information held by which is most likely to be of public interest, are reviewable. Thirdly, according to the strict wording of Article 230 the ECA would be unable to bring proceedings in order to protect its prerogatives against any institutions and bodies not named as potential defendants, yet this does not prevent the ECA from functioning effectively. Finally, the EIT would remain able to issue binding Decisions, within the meaning of Article 249 as it would have been amended, ordering other institutions and bodies to disclose documents in their possession.

Having discussed the capacity of the EIT to apply for judicial review, it is necessary to consider his/her amenability to judicial review in applications lodged by other institutions, bodies and natural and legal persons. It might be advisable to amend paragraph 1 of Article 230 to allow the ECJ to review the legality of 'acts adopted by the Information Tribune', in order to preclude doubt as to the admissibility of an application submitted, for example, by the Council in response to a Decision of the EIT ordering it to re-classify a 'Secret' document as 'Confidential', in which case it would not be clear that the document itself should be disclosed to third parties. This would certainly cause the EIT to become a potential defendant in applications for review lodged by the Commission and Council, although it is less clear that the other named institutions, including the Parliament, would be able to apply for judicial review of the EIT's decisions for the purpose of protecting their prerogatives.<sup>47</sup>

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to others in the event that they themselves were authorised to see it: on that reasoning, such a decision would be binding upon and capable of affecting the legal interests of another party (*cf.* Case 60/81, *International Business Machines Corporation v Commission* [1981] ECR 2639, at paragraph 9) and so should be deemed to be reviewable upon an application lodged by the EIT in order to protect his/her prerogatives, although it would not be of direct and individual concern to any natural or legal person.

<sup>47</sup> The right of the European Parliament to be consulted and/or to otherwise participate in legislative proceedings is clearly a prerogative that can be protected by an application for judicial review, as is evident from any application lodged by the Parliament in order to challenge the legal basis for adoption of a Council Regulation or Directive (e.g. Case C-

Furthermore, at present, under the strict terms of Article 230, a natural or legal person refused access to a document held by the European Investment Bank, or another body not specifically mentioned as a potential defendant within Article 230, might be unable to seek judicial review of such a refusal. It might be argued that a 'decision' refusing public access adopted by an institution not named within Article 249 would not constitute a decision within the meaning of that Article and therefore would not be a reviewable act.<sup>48</sup> S/he/it might certainly complain to the Ombudsman and, presuming the establishment of an EIT, to the EIT. However, if the EIT were to order the disclosure of the document in question, that Decision would be binding within the meaning of Article 249, as that Article would have been amended. Unless the institution/body to which that Decision was addressed could unquestionably apply for judicial review thereof, it might therefore be possible for the EIT to abuse his/her powers vis-à-vis that institution/body.

The problem of subjecting all decisions of the EIT to judicial review might, perhaps, require the approach taken by the ECJ in *Les Verts*.<sup>49</sup> There, a decision of the European Parliament was held to be a reviewable act notwithstanding the fact that the Parliament was neither expressly mentioned within Article 189 (now 249) EC nor listed as a potential defendant or potential plaintiff in Article 173 (now 230) EC. The ECJ found that it would be 'contrary to the spirit of the Treaty expressed in Article 164' (now 220) EC to allow measures adopted by the Parliament to 'encroach' upon the powers of

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189/97, *Parliament v Council* [1999] ECR I-4741, paragraphs 11, 15, 16 and 17). The Parliament might be granted power, under a hypothetical Regulation establishing a system for the prior classification of documents held by the institutions, to order certain documents to be classified, and such an order might be binding under the terms of that Regulation on anyone granted official access to that document (at least, unless and until the EIT were to order its re-classification or disclosure). It is not certain whether such a power, arising under secondary legislation, would be regarded as a 'prerogative' of the Parliament: only if it were, would the Parliament be able to challenge decisions of the EIT ordering it to re-classify or disclose the document in question, unless Article 230 were further amended as discussed *infra*.

<sup>48</sup> However, this argument is unlikely to be accepted: see Case 294/83, *Parti ecologiste 'Les Verts' v European Parliament* [1986] ECR 1045, discussed *infra*, and *cf.* Harlow, Chapter One *supra*, note 8, at 297, who notes with reference to that case that agencies and bodies not mentioned in the relevant Treaty articles might be reviewable if their decisions affect third party rights.

<sup>49</sup> Note 48 *supra*.

Member States or other institutions, or to exceed the limits of the powers conferred upon the Parliament by the Treaties, without the possibility of review by the Court. It was therefore concluded that an action for annulment might lie against acts of the European Parliament intended to have legal effects *vis-à-vis* third parties.<sup>50</sup> This approach would, as Harlow suggests,<sup>51</sup> allow natural and legal persons to seek the review of decisions refusing public access to documents, addressed to them by institutions and bodies not named in Article 230.

Importantly, the Parliament had argued that it ought to have a reciprocal capacity to challenge acts of the Commission and Council, which at the time it did not, under the strict terms of Article 173 (now 230).<sup>52</sup> However, Advocate General Mancini had stated that, in his opinion, the Parliament would be able to do so in order to protect its prerogatives,<sup>53</sup> even though it was not named as a potential applicant for judicial review. The ECJ, at least implicitly, concurred with the Advocate General's view that the action in the instant case should be declared admissible notwithstanding the Parliament's arguments. Therefore, on the basis of the *Les Verts* judgment, so long as a decision of the EIT would be regarded as encroaching upon the prerogatives of another institution or body by ordering that institution/body to re-classify or to disclose documents in its possession, there is reason to suppose that the institution/body in question would be able to seek judicial review of that decision in order to uphold the rule of law.

In order to avoid any doubt, however, particularly concerning the issue of whether an institution's capacity to make decisions regarding the classification or disclosure of documents could be described as a 'prerogative', given that such decisions might be contested by, or overridden by decisions of, the EIT, Article 230 could be amended by the insertion of a new paragraph 4:

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<sup>50</sup> *Ibid.*, paragraphs 20-25.

<sup>51</sup> See note 48 *supra*.

<sup>52</sup> Note 48 *supra*, paragraph 22.

<sup>53</sup> *Ibid.*, paragraph 7 of the Advocate-General's Opinion, at 1349.

“The Court of Justice shall have jurisdiction under the same conditions in actions brought by any Community institution or body for the purpose of reviewing the legality of decisions of the Information Tribune.”

This would make it clear that all decisions of the EIT would always be subject to review by the ECJ and thereby provide a powerful safeguard against the possibility of the EIT abusing his/her considerable powers.

#### *8.4.4. The need to amend Regulation No. 1049/2001.*

Not only this Regulation, but also all public access rules allowing recourse to the Community Courts and/or Ombudsman would have to be amended in order to recognise the EIT as the new remedy for public access complaints. In order to justify the EIT's existence (see further section 8.5 *infra*), the EIT would be expected to relieve both the CFI and Ombudsman of the responsibility of processing public access complaints, leaving the former free to cope with the remainder of its caseload and the latter free to investigate other forms of maladministration. The amendments required would be straightforward, e.g. Article 8(3) of the Regulation might be amended as follows:

“Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to make a complaint to the Information Tribune, or to institute court proceedings against the institution in accordance with the relevant provisions of the EC Treaty, or to complain to the European Ombudsman.”

The Community Courts might not agree to the idea that the existence of the EIT could or should be seen as ousting the possibility of direct judicial review: however, the EIT's power to order disclosure should make him/her a far more attractive possibility than the CFI or the Ombudsman. Putting the Ombudsman in third place might help to dissuade people from continuing to submit public access complaints to the Ombudsman.

#### 8.4.5. Conclusion.

Establishing an EIT as an independent EU institution, empowered to address binding decisions to the other institutions in matters falling within his/her remit, would place him/her in the strongest possible position from which to supervise the implementation of FOI rules, the classification of documents and the inter-institutional flow of information required by various Treaty provisions.<sup>54</sup> By adopting appropriate Treaty amendments the EIT could be given the power to protect his/her prerogatives before the ECJ and would also be indisputably subject to judicial review, to prevent him/her from abusing his/her powers. The most critical question is, however, that of whether it would actually be worth establishing an EIT.

### **8.5. Is an EIT necessary?**

#### 8.5.1. *The EIT: pros and cons.*

On the positive side, the EIT would, as seen, have strong powers to maintain the flow of information between the institutions and to the European public. This can only help to promote transparency. The EIT is intended to continually supervise the implementation of public access rules and any prior classification of documents by the institutions, thereby reducing the potential for complaints to arise concerning refusals to grant public access. S/he would be exclusively devoted to FOI and transparency, and would not be a purely reactive remedy.<sup>55</sup> It is also anticipated that the EIT would reach a conclusion regarding the justifiability of any refusal to disclose (a) document(s) far more quickly than the Ombudsman does at present. The EIT would not be required to pursue a friendly solution: s/he would simply examine the document(s) and decide whether the institution had made a manifest error of assessment or had misinterpreted the applicable rules, and if so, would be able to order full or

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<sup>54</sup> E.g. Article 300(3) (ex 228(3)) EC calling for the assent of the European Parliament: for a meaningful debate to take place MEPs must be in possession of all the relevant facts concerning the decision to which they are being asked to give assent.

<sup>55</sup> The Ombudsman is not purely reactive, but s/he cannot devote all his/her time to the supervision of the implementation of public access rules within the EU.

partial disclosure of the document(s). The complainant would then be informed that disclosure had been ordered, and would only have to wait for the document(s) to be produced.

On the negative side, however, the institution concerned might, instead of granting immediate public access, seek judicial review of the EIT's order. From the perspective of the institutions, this is a necessary safeguard against decisions of an EIT who might have manifestly erred him/herself in deciding that a document could be disclosed in the public interest. From the perspective of the applicant for access to that document, however, it could be a disadvantage: the applicant would have to wait for the ECJ to either uphold or annul the order of the EIT, in which case s/he/it might feel that s/he/it might just as well have applied for judicial review of the institution's refusal to grant access directly, especially if it had requested documents in order to gain information necessary to help him/her/it to influence decision-making procedures in progress. By the time the judgment of the ECJ was handed down, even if the EIT's order was upheld, the document's disclosure might be too late to be of use.

In light of the present position, however, the latter argument is weak. Firstly, it seems that few applications for public access are made by persons seeking to influence the decision-making process.<sup>56</sup> Secondly, such applicants might currently have to wait, not only for the CFI to finish reviewing the initial decision refusing access, but for the ECJ to finish hearing the institution's appeal against the CFI's annulment of that decision, and would still have no guarantee that the institution concerned would actually hand over the document in question: as seen, an institution might simply re-evaluate its refusal and produce a lawful statement of reasons for not disclosing the document in question, which neither Court might have examined. At least if the EIT had issued a binding order that the document should be disclosed, if that order were to be upheld following review by the ECJ, it will follow that the document in question will be disclosed. Thirdly, the ECJ could be, and in the interests of

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<sup>56</sup> Cf. Kadelbach, Chapter Five *supra*, note 68, at 194.

transparency should be, as circumspect in dealing with public access decisions made by the EIT as is the High Court of Ireland with regard to decisions of the Irish Information Commissioner:<sup>57</sup> meanwhile, frequent challenges to the EIT's decisions would cast grave doubt in the public mind regarding the institutions' commitment to transparency. Overall, a complaint to the EIT should still provide a speedier route to guaranteed public access, or at least a faster route to the production of a conclusive decision refusing public access, than the present system. For that reason, it would be worth establishing an EIT: also, the mere fact that his/her decisions were amenable to judicial review would not prevent him/her from exercising a general supervisory role, making recommendations, and reporting directly to the public concerning the institutions' attitude towards public access and transparency.

However, as noted in section 8.3.2 *supra*, there is a *prima facie* degree of overlap between the powers/role of the EIT and the present powers/role of the Ombudsman, the ECA and the European anti-fraud office, *OLAF*.<sup>58</sup> Insofar as the EIT's resemblance to the ECA and *OLAF* is concerned, it should be apparent that both institutions have different primary objectives. The fact that the EIT might conceivably assist the ECA and *OLAF* in uncovering financial fraud and mismanagement does not alter the fact that the audit remains the primary function of the ECA and that the fight against fraud remains the primary function of *OLAF*: the EIT's primary function is to identify and correct problems in the implementation of EU rules governing public access and the prior classification of documents. An EIT, if established solely to combat fraud, would doubtless be deemed superfluous to requirements, but neither the ECA nor *OLAF* could fulfil the primary functions of the EIT, and there is no reason why the EIT should not be able to assist the ECA and *OLAF* if circumstances so allow. Both the EIT and the Ombudsman, however, are concerned with public access to information and the good administration of the rules governing this, therefore further discussion of this potential overlap is warranted in order to show why an EIT is preferable to the Ombudsman.

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<sup>57</sup> The Irish Information Commissioner's web site indicates that, since 21 April 1998, few decisions have been challenged.

<sup>58</sup> The *Office européen de lutte antifraude*.

### 8.5.2. *EIT or Ombudsman?*

The Ombudsman firmly opposes the appointment of an EIT, observing, in connection with a proposed “Information Supervisor” to “deal with appeals and carry out some advisory tasks”, that the Courts have had to deal with on average two public access cases per year and the Ombudsman on average some five public access complaints per year. Also, the Ombudsman believes that the adoption of prior classification of documents would make the operation of the rules governing public access “prompt and efficient”. In his view the expense involved in establishing a new official, especially one that would “duplicate” the role of the Ombudsman in dealing with citizens’ complaints, could not be justified.<sup>59</sup>

In this speech, the Ombudsman is, for once, minimising the importance of transparency, by observing that relatively few public access complaints have been made. More importantly, the Ombudsman is entirely mistaken in believing that the EIT would duplicate the Ombudsman’s role. As seen, the EIT would be able to order the production of documents, which the Ombudsman cannot, and would have no difficulty in demanding official access to documents him/herself, unlike the Ombudsman.<sup>60</sup> The EIT would be exclusively devoted to FOI and transparency. S/he would not have to seek a friendly solution to complaints. Citizens would eventually cease to complain to the Ombudsman about FOI, given a powerful EIT able to deal with their complaints promptly and effectively: the Ombudsman would be free to deal with other areas of maladministration. The argument that the cost of an EIT might not be justifiable, in light of the number of complaints actually lodged by the public and civil society NGOs, overlooks the fact that it is not necessarily desirable to rely upon ordinary people and NGOs to expose problems within the EU by complaining. A pro-active EIT able to make frequent random inspections as part of his/her ongoing supervisory role, which role the

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<sup>59</sup> Speech of 18 September 2000, cited at Chapter One *supra*, note 67.

<sup>60</sup> *Cf.* the Ombudsman’s admission that he has not always been permitted to inspect documents without threatening to seek assistance from the European Parliament (<http://www.euro-ombudsman.eu.int/speeches/en/2001-03-05.htm>).

Ombudsman does not exercise, could potentially uncover problems that would be unlikely to prompt public complaints.

Most importantly, perhaps, the Ombudsman's optimistic assumption that prior classification will automatically result in a prompt and efficient public access service is questionable in a culture having, as noted, a tendency to over-classify documents in a bid to preserve secrecy. The institutions simply cannot be trusted to operate prior classification with a view to increasing transparency and public access, without independent supervision. Evidence of the institutions' continuing antipathy towards transparency comes from the Ombudsman himself, having noted that the Council's involvement in crisis management has resulted in the Council according absolute priority to military security<sup>61</sup> and that the Commission's attitude towards data protection will result in more documents becoming confidential than ever before.<sup>62</sup> Compelling evidence of the failure of public access rules alone to change a culture of secrecy comes from other jurisdictions,<sup>63</sup> in particular, Australia.

The Australian Law Reform Commission (ALRC) has suggested, in light of the Australian experience of FOI, that in the absence of a person/organisation having general responsibility for constantly monitoring the administration of Australian's FOI Act, able to identify and address problems and provide

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<sup>61</sup> Cf. Lustgarten and Leigh, Chapter Five *supra*, note 39, at pp.21-22: the traditional Member State interpretation of 'national security' can result in the undesirable imposition of penalties upon persons holding views deemed unacceptable to those in public office; the arbitrary conduct of government, without adequate public debate; and a potential loss of public accountability. To protect against such consequences, an EIT could encourage officials to change their thinking regarding the nature of the public interest in national security, and to recognise that national security concerns the protection of civil and political rights (*cf. ibid.*, at p.5), being "matters that go to the heart of the character of the state and society" (*cf. ibid.*, at p.27).

<sup>62</sup> Speech cited at note 19 *supra*.

<sup>63</sup> Eire, Canada and the Australian states of Queensland and Western Australia have Information Commissioners. That of Canada is a mediator, lacking power to order the disclosure of documents: see <http://infoweb.magi.com/~accessca/oic.html>. In Queensland the Information Commissioner has decision-making powers subject to judicial review: see <http://www.slq.qld.gov.au/infocomm/>. Western Australia's Commissioner is accountable to the state parliament and is like an Ombudsman, although s/he is charged with recommending legislative/administrative changes to promote the objects of FOI legislation (s.111(4) of the Western Australia State Freedom of Information Act 1992, and see <http://www.foi.wa.gov.au/>). Eire's Information Commissioner is described as an Ombudsman, but, as noted, has decision-making powers subject to judicial review: see <http://www.irlgov.ie/oic>.

assistance to the public concerning FOI, “the preventative [of secrecy] value of legislation of this character would be lost, in a concentration of effort in simply responding to individual claims”.<sup>64</sup> The main thrust of the ALRC’s argument is, therefore, the need for constant supervision of the operation of FOI legislation. It will be noted that the ALRC did not find its own Ombudsman to offer an adequate solution to this problem. Where a culture of secrecy once existed, old habits die hard, as the ALRC also observed. Australian FOI legislation had been in force for some 14 years when it reported, in 1996, that:

“Submissions and consultations indicate that the starting point for some agencies is...along the lines of deciding immediately that the document will not be disclosed and then scanning the exemption provisions to find a way of justifying their refusal to disclose the information.”<sup>65</sup>

The ALRC’s perceived solution to this problem was, in part, to reinforce the demand for cultural change by explaining the purpose of FOI legislation more fully,<sup>66</sup> but also to introduce an ‘FOI Commissioner’ to oversee the administration of FOI legislation; to promote public understanding of the FOI Act; to combat the culture of secrecy and “promote a fundamental change in the way public servants are permitted and expected to deal with information held by the government.” Importantly, the proposed Commissioner “should also convey the message that the privacy of officers and of members of the public can be protected within a culture of openness”,<sup>67</sup> which should dissuade officials from seeking to hide behind an apparently transparent façade. Clearly, the ALRC does not believe that the expense involved in establishing an EIT-

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<sup>64</sup> Point 6.2 of the ALRC Report, <http://www.austlii.edu.au/au/other/alrc/publications/reports/77/ALRC77Ch6.html#ALRC77Ch6>.

<sup>65</sup> Point 4.2 of the ALRC’s Report, <http://www.austlii.edu.au/au/other/alrc/publications/reports/77/ALRC77Ch4.html#ALRC77Ch4>.

<sup>66</sup> *Ibid.*, Recommendation 1: amend the object clause of the FOI Act “to explain that the purpose of the Act is to provide a right of access which will enable people to participate in the policy, accountability and decision making processes of government; open the government’s activities to scrutiny, discussion, comment and review; increase the accountability of the Executive; and [to show] that Parliament’s intention in providing that right is to underpin Australian’s constitutionally guaranteed representative democracy.”

<sup>67</sup> *Ibid.*, point 4.14.

like official alongside the existing Australian Ombudsman and Attorney-General's Department would be unjustifiable.

Furthermore, as noted in Chapter Seven *supra*, the Ombudsman may take up to twelve months to conclude an inquiry into a public access complaint: evidence from the Queensland Information Commissioner's experience suggests that six months is an optimum time for dealing with such complaints,<sup>68</sup> although the Commissioner's Report proceeds to show that some applications have still taken over 36 months to process. It must be noted, however, that the Queensland Commissioner's role resembles that of an Ombudsman insofar as s/he must enter into a dialogue/negotiation process, unlike the EIT envisaged above. Moreover, the Queensland Commissioner's Report highlights an increase in the number of applications and the existence of a backlog in processing them. Bearing in mind that the Information Commissioner's sole responsibility is to deal with complaints regarding refusals to grant access to information/documents and that the Queensland office has clearly been struggling to cope, it is conceivable that the Ombudsman, whose remit, as noted, is not confined to the processing of one category of complaint, could eventually find his office struggling to cope with complaints regarding alleged refusals to comply with any European FOI legislation.<sup>69</sup> At the very least, the Ombudsman would be unable to deal with such complaints within anything approaching six months of their lodgement.<sup>70</sup> Evidence from the ALRC highlights the need for its proposed Information Commissioner to publicise Australia's FOI legislation.<sup>71</sup> Such publicity could result in an increase in the number of FOI-related complaints. If the Ombudsman were to promote public awareness of the rules governing public access in the EU, there could also be more complaints arising within the EU, to add to the Ombudsman's burden: the

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<sup>68</sup> 7<sup>th</sup> Annual Report, Executive Summary, <http://www.slq.qld.gov.au/infocomm/ar9899.html>. The Irish Information Commissioner seeks to dispose of applications within four months, so far as is reasonably practicable (see further [http://www.irlgov.ie/oic/2136\\_3c2.htm](http://www.irlgov.ie/oic/2136_3c2.htm)).

<sup>69</sup> The number of complaints submitted to the Ombudsman concerning all types of maladministration had increased threefold by 2000: see the speech cited at Chapter Seven *supra*, note 84.

<sup>70</sup> The decision in Complaint 634/97/PD, concluded by a critical remark recommending the granting of access to the documents requested, took over seventeen months to address. The Ombudsman apologised for the delay: see <http://www.euro-ombudsman.eu.int/decision/en/970634.htm>.

<sup>71</sup> Point 6.10 of the ALRC Report, note 64 *supra*.

EIT could both promote public awareness of those rules and assume the burden of complaints.

However, given that the establishment of the EIT would require further expenditure and a not inconsiderable revision of the Treaties, it could be much simpler, in the Member States' collective opinion, to strengthen the Ombudsman, although this would not indicate as great a commitment to transparency on the part of the Member States as the establishment of an EIT. Theoretically, the Ombudsman's Statute could be revised to provide a right of access to all documents, and a right to question officials without those officials having any restriction upon their capacity to answer.<sup>72</sup> There is also a precedent, in Eire, of an Ombudsman who is simultaneously an Information Commissioner. The Irish Information Commissioner, Mr Kevin Murphy, has also been the Irish Ombudsman and Chairman of the Public Offices Commission since 1994.<sup>73</sup> Appointing Mr Söderman to the post of EIT would certainly save the expense in providing for another official, plus office, staff and salary, and would preclude any possibility of the EIT duplicating the Ombudsman's role. Mr Söderman's experience of dealing with public access complaints could be an advantage: whereas the EIT might become more expert in FOI-related issues than the Ombudsman in time, s/he may not initially have the current Ombudsman's transparency-related expertise. The most important need, however, would be to increase the Ombudsman's powers: the most up-to-date concept of an Information Commissioner invariably has greater powers

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<sup>72</sup> "...the stipulation [in Article 3 of the Ombudsman's Statute] that officials and other servants of Community institutions and bodies "shall speak on behalf of and in accordance with instructions from their administrations and shall continue to be bound by their duty of professional secrecy" is in my view unacceptable. In 1999, the European Commission interpreted this paragraph in such a way as to conclude that a Commissioner, as a Member of the institution, does not have an obligation to testify at the request of the Ombudsman. I believe that Commissioners should testify, when necessary, to the Ombudsman." (Speech to the Committee on Constitutional Affairs, Brussels, 5 March 2001 (Rapporteur: Almeida Garrett): 'Modification of Article 3 of the Ombudsman's Statute: Remarks by the European Ombudsman, Jacob Söderman,' <http://www.euro-ombudsman.eu.int/speeches/en/2001-03-05.htm>).

<sup>73</sup> The Irish Information Commissioner has the following powers and purposes (website cited at note 63 *supra*): to review FOI requests and make binding decisions where necessary, subject to an appeal on a point of law; to supervise compliance of public bodies with the Irish FOI Act; to encourage voluntary publications beyond the Irish FOI Act's minimum requirements; to publish information on the practical operation of the Act; and to prepare an Annual Report.

than those of the Ombudsman, including the power to order the disclosure of documents and to re-classify improperly classified documents.<sup>74</sup> The chief difference between the Ombudsman and the Irish Information Commissioner is, of course, the power to make binding decisions regarding the disclosure of documents.

It must be remembered, however, that a strengthened Ombudsman would lack independent institutional status and would not report directly to European citizens. The ethos of the Ombudsman as a source of friendly solutions might suffer if s/he were to be granted the power to issue binding decisions regarding the disclosure of information. Moreover, if the Ombudsman were so empowered, Article 230 should still be amended to enable those decisions to be challenged by way of judicial review. The Treaties would still require revision, therefore, and it might seem equally easy, or equally difficult, to amend them in order to accommodate an EIT instead. If the Ombudsman were not so empowered, then s/he could, obviously, never fulfil the EIT's role as the citizens' primary remedy in the event of an institution's refusal to grant public access.

Furthermore, the ALRC duly considered the possibility of allowing an existing official/agency to assume the role of the proposed Australian Information Commissioner. The conclusion was that no existing official/agency could do so: the Attorney-General was insufficiently independent; the Ombudsman should not become involved in policy development, but should concentrate upon maintaining the integrity of government; the Auditor-General would have the same difficulties as the Australian Ombudsman; the Australian Archives are not independent; parliamentary committees cannot constantly monitor FOI

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<sup>74</sup> Data from <http://www.privacyinternational.org/issues/foia/foia-survey.html> shows that, in Hungary (a prime example of a highly secretive (ex-Soviet Bloc) regime now embracing the principle of open government), the Parliamentary Commissioner for Data Protection and Freedom of Information oversees the operation of Act LXIII of 1992 on the Protection of Personal Data and the Publicity of Data of Public Interest. According the survey, the Commissioner is an Ombudsman for both data protection and FOI. Importantly, under the Hungarian Secrecy Act of 1995, the Commissioner is entitled to change the classification of state and official secrets as well. This example, together with that of the Irish Information Commissioner, demonstrates that the most up-to-date concept of an Information Commissioner is indeed that of an official having power to intervene in the decision-making of public bodies.

and are subject to political pressure; the Privacy Commissioner was deemed to be concerned with an entirely separate issue to that of FOI; and the Chief Information Officer was not concerned with meeting public demands for information.<sup>75</sup> The most obvious disadvantage of appointing the current Ombudsman to the post of EIT is that he is already too busy to systematically check the compliance of the institutions with any critical remarks that he might make.<sup>76</sup> It is not unreasonable, therefore, to ask how the Ombudsman could be expected to systematically and continually monitor their compliance with FOI legislation. If they are truly committed to transparency, therefore, the Member States should consider carefully the Australian experience of FOI legislation and appoint a dedicated new official, sufficiently independent and sufficiently empowered to promote transparency and public access to documents/information, particularly since the prospective Member State of Hungary, a far less well-established democracy than any current Member State, has now appointed a similar official to help re-enforce its democratic nature through the supervision of the public access component of multidimensional transparency.<sup>77</sup>

## **8.6. Conclusion.**

In this final Chapter, it has been argued that an independent EIT could be established, having the powers enumerated in section 8.3, by amending the Treaties and applicable legislation, perhaps as suggested in section 8.4. As seen in section 8.5, the fact that the EIT might occasionally assist the ECA and *OLAF* should not dissuade the Member States from appointing a separate official to oversee FOI and transparency within the EU: certainly, neither the ECA nor *OLAF* could devote themselves to the EIT's task. The Ombudsman could not fulfil the role of the EIT without greatly enhanced powers, which would change the Ombudsman's ethos. Moreover, the Ombudsman is concerned with the integrity with all aspects of the EU's administration: his/her workload is also such that s/he could not be exclusively concerned with FOI

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<sup>75</sup> Point 6.29 of the Report, note 64 *supra*.

<sup>76</sup> Speech cited at Chapter Seven *supra*, note 84.

<sup>77</sup> <http://www.obh.hu/adatved/indexek/index.htm>.

and would not be able to systematically and continually monitor the administration of EU public access/prior classification rules.

If the Member States and EU institutions are serious about the need for transparency, particularly transparency as public access, then the institutions should be compelled to obey the applicable rules, without compromise, and to apply those rules with a view to granting the widest possible public access, not with a view to maintaining secrecy. An EIT is the ideal official to ensure compliance with the rules through the adoption of binding decisions. S/he would transcend the capacity of the existing remedies discussed in Chapters Six and Seven *supra*, to guarantee public access, and would be more than just a remedy: s/he would supervise and control the transparency-related activities of all EU institutions and bodies, including those not covered by Regulation No. 1049/2001;<sup>78</sup> and identify and correct problems before complaints from the public could arise, or in circumstances where complaints from the general public would be unlikely to arise. For example, an MEP might complain to the EIT if the Council or Commission failed to respond fully and frankly to a call for information the receipt of which is a prerogative of the European Parliament. The EIT would facilitate the flow of information between the institutions, and to the public. Institutions and bodies would be able to seek judicial review of Decisions addressed to them by the EIT. There is now an adequate body of jurisprudence concerning public access to enable the EIT to interpret the relevant rules, and, provided that the ECJ is as circumspect with the EIT as is the Irish High Court with the Irish Information Commissioner, the annulment of decisions of the EIT should be the exception rather than the norm.

The expense of financing another institution should not deter the Member States from proving their commitment to transparency by establishing an EIT. The EIT would also recommend liberalising amendments to the law; educate both EU officials and citizens regarding public access and transparency; and, above all, work to overcome the EU's culture of secrecy, thereby preparing the

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<sup>78</sup> Cf. Curtin, Chapter Five *supra*, note 4, who asks, at 27, who is controlling the other agencies and bodies not mentioned in Article 255 EC and the decisions they are taking.

way for greater receptivity, on the part of the Member States, to the adoption of a far more multidimensionally-transparent system of governance, in which officials were comfortable with the idea of working under public scrutiny and more willing to critically analyse the efficacy and democratic nature of their decision-making processes, with a view to increasing transparency further.

By reporting directly to the public on the development and implementation of transparency within the Union, the EIT could help to bring the Union closer to its citizens and thereby help in resolving its perceived problem of illegitimacy, as discussed in Chapter Two *supra*. States Party to the Aarhus Convention, discussed in Chapter Four *supra*, are required under Article 9(1) to ensure that there is an alternative remedy to judicial review in the event of a refusal to grant access to environmental information, the final decision of which must be binding on the public authority holding that information. Therefore, should the Convention become part of Community law, this provision also supports the establishment of an EIT as an alternative to the existing Ombudsman.

A final point to emphasise is the importance of the EIT's approach to public access rules. Whenever an institution's refusal to grant public access is brought to the attention of the Courts or the Ombudsman, the criticism to the effect that a marginal review is undertaken<sup>79</sup> reflects the fact that the Courts and Ombudsman focus upon ensuring the maintenance of the rule of law. They are prepared to argue that the institutions have not interpreted the rules correctly in light of the principle of granting the widest possible access to documents, but they do not consider whether the widest possible access to documents should actually be greater than the widest possible access permitted under the current public access rules, with a view to increasing the potential of those rules to enhance democratic participation in decision-making. The EIT would consider not only the requirements of the rule of law when investigating complaints, but also the requirements of democracy, and would recommend

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<sup>79</sup> Chapter Six *supra*, note 2 and text: Chapter Seven *supra*, note 74 and text.

changes to the rules with those requirements in mind.<sup>80</sup> In light of these conclusions, the question asked in the title of this Chapter must be answered in the affirmative: the existing barely adequate remedies do not demonstrate as high a level of commitment to transparency in the form of public access to documents held by the institutions, as would the establishment of an EIT duly empowered to enforce the underlying principles of public access.

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<sup>80</sup> The rule of law and democracy are not mutually exclusive issues, of course: the Ombudsman has argued that open decision-making promotes the rule of law by, *inter alia*, eliminating the potential for “political fixing or bias” (speech cited at note 19 *supra*).

**CONCLUSION: THE RHETORIC AND REALITY OF TRANSPARENCY  
IN THE EUROPEAN UNION.**

In Part One of this thesis, it was argued that transparency is multidimensional, requiring governmental decision-making processes to be open to public scrutiny and public input. The multidimensional concept of transparency discussed in Chapter One has potential to legitimate the European Union, as illustrated in Chapter Two, but the Member States and institutions still tend to equate transparency with the right of public access to documents, as noted in Chapter Three. That fact, as noted, explains the emphasis within this thesis upon the substantive rules governing, and the remedies applicable to, public access to documents. However, the Commission's White Paper<sup>1</sup> now acknowledges that such access is essential to democracy and that democracy also involves public participation in decision-making processes.<sup>2</sup> This suggests that the Commission is beginning to accept that public access rules should facilitate both the holding of institutions to public account and public participation in decision-making. The question therefore arose, in the conclusion to Part One, of whether the EU's public access rules are sufficiently liberal to facilitate the development of an informed European public, fully empowered to participate in the more democratic and transparent decision-making processes that the Commission apparently wishes to establish. The establishment of such processes would in practice constitute an important step along the road to multidimensionally-transparent governance within the European Union.

In Part Two, it was concluded that the Union's rules governing public access are not as useful as they might be, in terms of facilitating public accountability and public participation in decision-making. *Per* Article 4(1) of Regulation No. 1049/2001, certain mandatory exemptions permit secretive institutions to refuse access to certain documents without conducting a 'harm test' and without

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<sup>1</sup> Chapter Two *supra*, note 1.

<sup>2</sup> Chapter Three *supra*, note 79 and text.

balancing the public interests at stake, unlike the Aarhus Convention, which only provides that access to environmental information *may* be refused in order to protect the public interests listed in Articles 4(3)(c) and 4(4). It also follows from Articles 9(3) and 17(1) of the Regulation that certain documents may not be included in the new public register. It could be virtually impossible for an ordinary European to even begin to challenge any refusal to grant public access to such documents: s/he would be unable sufficiently to identify them in order to request access to them in the first place, *per* the requirements of Article 6(1) of the Regulation. It is difficult to avoid the conclusion that the Member States and institutions employ attractive rhetoric whenever referring to transparency and openness, such as Recital 2 of the Preamble to Regulation No. 1049/2001, linking openness to public participation in decision-making, accountability and legitimacy, yet in practice, when put to the test, they seek to prevent a potentially large number of documents from being subjected to any form of public scrutiny, for up to thirty years under Article 4(7) of the Regulation.

Attention therefore turned to the remedies provided for refusals to grant public access to documents, in order to determine whether or not the Community Courts and the European Ombudsman were adequate to secure for citizens adequate public access to documents, for the purposes of engaging in the multidimensional transparency-related activities of holding the institutions to account and participating in decision-making processes, despite the existence of less than liberal public access rules and despite the institutions' apparent reluctance to grant such access. That reluctance, already apparent from Chapter Five,<sup>3</sup> became more evident as the cases and complaints referred to in Chapters Six and Seven, respectively, were analysed. In Part Three, it was concluded that these remedies, while not entirely deserving of some of the harsh criticism levelled against them regarding the standard of review employed,<sup>4</sup> were nevertheless unable to effect a major cultural change in the EU, to create a climate in which officials actively seek

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<sup>3</sup> See in particular Chapter Five *supra*, notes 60 and 87.

<sup>4</sup> Chapter Six *supra*, note 2 and text: Chapter Seven *supra*, note 72 and text.

to provide the widest possible public access to documents instead of looking to invoke as many exceptions as possible in order to maintain secrecy. The current remedies are also quite time-consuming; judicial review is potentially expensive; and there is no guarantee that access to the requested document will actually be granted even if a complaint is upheld. Nor do the Courts or Ombudsman guarantee the production of a conclusive decision to the effect that the document in question cannot be disclosed, if that happens to be the case: it is currently always open to the institution to refuse access on other grounds, and a review of that further refusal might then be required. The Courts and Ombudsman do not independently review the implementation of the EU's public access provisions with a view to suggesting liberalising amendments thereto.

The suggested solution to these problems is to establish a European Information Tribunal, modelled upon the national Information Tribunal proposed by Leigh and Lustgarten,<sup>5</sup> in order not only to enforce the principle of granting the widest possible public access to documents, but also to suggest liberalising amendments to the applicable rules, and to continually scrutinise both the flow of information from the institutions to the public and the inter-institutional flow of information required by the Treaties and any relevant inter-institutional agreements, in order to ensure that the existing decision-making processes of the Union are and remain as open as possible. The European Parliament cannot effectively debate matters of potential concern to citizens unless MEPs are in possession of all the relevant information, just as citizens themselves cannot participate in any transparent decision-making procedures that might be established pursuant to the Commission's White Paper initiative<sup>6</sup> without adequate knowledge of the issues at stake.

The EIT cannot, as noted in Chapter Eight *supra*, single-handedly effect the establishment of a multidimensionally-transparent system of governance within

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<sup>5</sup> See Chapter Eight *supra*, note 3 and text.

<sup>6</sup> See further Chapter Three *supra*, section 3.3.3.

the EU. In such a system, as discussed within Chapter Two *supra*, particularly section 2.2.3, the interrelationship between the “four themes” of citizenship, democracy, subsidiarity and transparency, which, as discussed by de Búrca,<sup>7</sup> are not only interrelated but also crucial to the Union’s legitimacy, would become apparent: well-informed citizens could participate in democratic, open and transparent decision-making processes and could hold the institutions to account should they, *inter alia*, fail to comply with the principle of subsidiarity. However, the EIT could, by obliging the institutions and Member States to work under the full spotlight of public scrutiny and to think in terms of keeping the public informed as opposed to maintaining secrecy at all costs, help to transform the Union’s culture of secrecy into a culture of openness, in which the idea of establishing a coherent multidimensionally-transparent system of governance as a means of resolving the Union’s legitimacy crisis might finally take root: piecemeal reforms, which have apparently had little success to date in light of the White Paper,<sup>8</sup> might finally be abandoned in favour of a ‘root-and-branch’ reconstruction of the Union’s decision-making processes.

If the institutions and Member States are as serious about the relationship between democracy, legitimacy and the limited concept of transparency as public access to documents as their rhetoric would suggest,<sup>9</sup> they should be prepared to establish an EIT in any event, in order to ensure, at least, that the right of public access to documents is taken seriously within the EU legal order. If they are as serious about bringing the Union closer to its citizens as their rhetoric would suggest,<sup>10</sup> they should be prepared to establish an official to scrutinise the flow of information within the Union on the citizens’ behalf. Ideally, if they are serious about the Union’s quest for legitimacy, they should admit at the outset that transparency means much more than mere access to information and adapt their policies accordingly. However, the establishment of a powerful EIT to oversee the

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<sup>7</sup> Introduction, *supra*, note 7, at 350.

<sup>8</sup> See Chapter Two *supra*, note 1.

<sup>9</sup> E.g. Declaration No. 17, annexed to the Final Act of the Maastricht Treaty.

<sup>10</sup> E.g. Article 1 (ex A) TEU.

administration of that particular dimension of multidimensional transparency could only be a step in the right direction.

## APPENDICES.

### Appendix A: The Commission and Council Code of Conduct on public access to documents.

#### **“General principle**

The public will have the widest possible access to documents held by the Commission and the Council. ‘Document’ means any written text, whatever its medium, which contains existing data and which is held by the Council or the Commission.

#### **Processing of initial applications**

An application for access to a document will have to be made in writing, in a sufficiently precise manner; it will have to contain information that will enable the document or documents concerned to be identified.

Where necessary, the institution concerned will ask the applicant for further details.

Where the document held by an institution was written by a natural or legal person, a Member State, another Community institution or body or any other national or international body, the application must be sent direct to the author.

In consultation with the applicants, the institution concerned will find a fair solution to comply with repeat applications and/or those which relate to very large documents.

The applicant will have access to documents either by consulting them on the spot or by having a copy sent at his own expense; the fee will not exceed a reasonable sum.

The institution concerned be able to stipulate that a person to whom a document is released will not be allowed to reproduce or circulate the said document for commercial purposes through direct sale without its prior authorisation.

Within one month the relevant departments of the institution concerned will inform the applicant either that his application has been approved or that they intend to advise the institution to reject it.

#### **Processing of confirmatory applications**

Where the relevant departments of the institution concerned intend to advise the institution to reject an application, they will inform the applicant thereof and tell him that he has one month to make a confirmatory application to the institution for that position to be reconsidered, failing which he will be deemed to have withdrawn his original application.

If a confirmatory application is submitted, and if the institution concerned decides to refuse to release that document, that decision, which must be made within a month of submission of the confirmatory application, will be notified in writing to the applicant as soon as possible. The grounds for the decision must be given, and the decision must indicate the means of redress that area available under judicial

proceedings and complaints to the ombudsman under the conditions specified in, respectively, Articles 173 [now 230] and 138e [now 195] EC.

### **Exceptions**

The institutions will refuse access to any documents whose disclosure could undermine:

- the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations),
- the protection of the individual and of privacy,
- the protection of commercial and industrial secrecy,
- the protection of the Community's financial interests,
- the protection of confidentiality as requested by the natural or legal persons that supplied the information or as required by the legislation of the Member State that supplied the information.

They may also refuse access in order to protect the institution's interest in the confidentiality of its proceedings..."

**Appendix B: Selected provisions of Council Decision 93/731.**

Article 1

1. The public shall have access to Council documents under the conditions laid down in this Decision.
2. 'Council document' means any written text, whatever its medium, containing existing data and held by the Council, subject to Article 2(2).

Article 2

...

2. Where the requested document was written by a natural or legal person, a Member State, another Community institution or body, or any other national or international body, the application must not be sent to the Council, but direct to the author.

...

Article 4.

1. Access to a Council document shall not be granted where its disclosure could undermine:
  - the protection of...[see Annex D]
2. Access to a Council document may be refused in order to protect the confidentiality of the Council's proceedings."

## Appendix C : Selected provisions of Regulation No. 1049/2001.

“...Whereas...

(2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union....

...

### Article 2

...

3. This 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...

### Article 3

For the purpose of this Regulation:

(a) ‘document’ shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution’s sphere of responsibility...

### Article 4

1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

(a) the public interest as regards:

- public security,
- defence and military matters,
- international relations,
- the financial, monetary or economic policy of the Community or a Member State.

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

2. The 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,
- court proceedings and legal advice,
- the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

4. As regard third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. The exceptions may apply for a maximum period of 30 years. In the case of documents covered by the exceptions relating to privacy or commercial interests and in the case of sensitive documents, the exceptions may, if necessary, continue to apply after this period.

#### Article 5

Where a Member State receives a request for a document in its possession, originating from an institution, unless it is clear that the document shall or shall not be disclosed, the Member State shall consult with the institution concerned in order to take a decision that does not jeopardise the attainment of the objectives of this Regulation.

The Member State may instead refer the request to the institution.

....

#### Article 9

1. Sensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as 'TRÈS SECRET/TOP SECRET', 'SECRET' or 'CONFIDENTIEL' in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters.

2. Applications for access to sensitive documents...shall be handled only by those persons who have a right to acquaint themselves with those documents. These persons shall also...assess which references to sensitive documents could be made in the public register.

3. Sensitive documents shall be recorded in the register or released only with the consent of the originator.
4. An institution which decides to refuse access to a sensitive document shall give the reasons for its decision in a manner which does not harm the interests protected in Article 4.
5. Member States shall take appropriate measures to ensure that when handling applications for sensitive documents the principles in this Article and Article 4 are respected.
6. The rules of the institutions concerning sensitive documents shall be made public.
7. The Commission and Council shall inform the European Parliament regarding sensitive documents in accordance with arrangements agreed between the institutions...”

## **Appendix D: Selected provisions of the Statute of the European Ombudsman.**

### Article 3

1. The Ombudsman shall, on his own initiative or following a complaint, conduct all the enquiries which he considers justified to clarify any suspected maladministration in the activities of Community institutions and bodies. He shall inform the institution or body concerned of such action, which may submit any useful comment to him.

2. The Community institutions and bodies shall be obliged to supply the Ombudsman with any information he has requested of them and give him access to the files concerned. They may refuse only on duly substantiated grounds of secrecy.

They shall give access to documents originating in a Member State and classed as secret by law or regulation only where that Member State has given its prior agreement.

They shall give access to other documents originating in a Member State after having informed the Member State concerned.

In both cases, in accordance with Article 4, the Ombudsman may not divulge the content of such documents.

Officials and other servants of Community institutions and bodies must testify at the request of the Ombudsman; they shall speak on behalf of and in accordance with instructions from their administrations and shall continue to be bound by their duty of professional secrecy.

3. The Member States' authorities shall be obliged to provide the Ombudsman, whenever he may so request, via the Permanent Representations of the Member States to the European Communities, with any information that may help to clarify instances of maladministration by Community institutions or bodies unless such information is covered by laws or regulations on secrecy or by provisions preventing its being communicated. Nonetheless, in the latter case, the Member State concerned may allow the Ombudsman to have this information provided that he undertakes not to divulge it.

4. If the assistance which he requests is not forthcoming, the Ombudsman shall inform the European Parliament, which shall make appropriate representations.

5. As far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint.

6. If the Ombudsman finds there has been maladministration, he shall inform the institution or body concerned, where appropriate making draft recommendations. The institution or body so informed shall send the Ombudsman a detailed opinion within three months.

7. The Ombudsman shall then send a report to the European Parliament and to the institution or body concerned. He may make recommendations in his report. The person lodging the complaint shall be informed by the Ombudsman of the outcome of the inquiries, of the opinion expressed by the institution or body concerned and of any recommendations made by the Ombudsman.

8. At the end of each annual session the Ombudsman shall submit to the European Parliament a report on the outcome of his inquiries.

#### Article 6

...

2. The Ombudsman shall be chosen from among persons who are Union citizens, have full civil and political rights, offer every guarantee of independence, and meet the conditions required for the exercise of the highest judicial office in their country or have the acknowledged competence and experience to undertake the duties of Ombudsman.

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