EUROPEAN UNIVERSITY INSTITUTE

Department of Law

"Open Government in the European Union: a Legal Analysis of a Fundamental Principle"

Magdalena Elisabeth de Leeuw

Thesis Submitted for the Assessment with a View to Obtaining the Degree of Doctor of Laws of the European University Institute

EUI, Florence, September 2001

B/C →

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EUI, Florence, September 2001

This thesis would not have seen the light of day without the support of many people. I would like to thank, in particular, my parents for their continuing moral and other support during the past five years; Andrea for having encouraged me all the time, and for being there always; Mario and Lola for their warmth; my supervisors, and, in particular, Professor Curtin for sharing her expertise in this field of law. Last but not least, thanks to Nadia, Cristina, Mark, Marcelle, Frederieke, Frederick, Maria, Sejal and James for having listened to my endless stories about the thesis and for having supported me each in their own way.

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PART I: BACKGROUND AND CONTEXT

1 INTRODUCTION

1.1 The principle of open government

1.1.1 General context

In the European Union (EU) context, openness in the decision-making process may constitute a fairly novel concept, but amongst the EU Member States it amounts to a well-established legal principle. Openness in the legislative decision-making process was already well-established in the European nation-state during the 18th and 19th centuries, and was recognised as an essential element of the nascent democratic systems in Europe. It emerged during the transformation of the class society into the parliamentary system. Openness was achieved through the opening-up of the plenary sessions of parliament and through the publishing of verbatim records and other documents underlying the legislative process. Administrative openness is of a much more recent date, at least for the majority of the Member States, and has been said to constitute another step in the continuing democratisation process. During the 1960s and 1970s, there was a growing belief in those countries that also the executive branch of government also had to be opened up. At the national level, this led to the adoption of rules on public access to government-held documents, whereas, at the local level, meetings of governing bodies were also opened up.

Openness in the decision-making process can be achieved through the opening-up of meetings or by providing access to documents/information underlying the decision-making process. It should be stressed that in Europe, open meetings are not a common practice within most of the Member States' (central) administrations.[1] As for parliament, except for open plenary sessions, parliamentary committees in most countries are still closed to the public.[2] Open government is, therefore, predominantly achieved through rules on public access to documents. The present research covers both aspects, i.e. meetings and documents, which shall be referred to as "open government." Thus, open government can be defined as the situation in which everybody has the possibility to acquire knowledge about government activities, in which meetings, where decisions are prepared or taken are open to the public and/or documents underlying the decision-making

[1] See the draft working document of the Committee of Institutional Affairs containing recommendations on openness in the EU, Rapporteur J.B. Bonde, 28 May 1997, PE 222.237/rev., p. 7.
[2] See §1.1.2.1.1.

process are accessible (upon request or active supply). In the academic literature, other definitions of "open government" can be found, which may be more widely or narrowly drafted (see §1.1.3).

Openness in the decision-making process is closely related to democracy. It is an undisputed fact that in order for a democracy to function it requires openness in the decision-making process. Without the availability and accessibility of information it is not possible to exercise control and keep those in power accountable, or to participate in an informed and enlightened manner. Openness in the decision-making process constitutes an essential aspect of any democracy, however conceptualised. The extent of openness needed for a democracy to function properly depends on the type of democracy that is embraced. The importance of having access to information, i.e. knowledge, has been understood perfectly by dictators. Their first action when they get into power is to cut off all channels of information, and to bring the information supply completely under their control. Total secrecy allows them to pursue their own goals without any control and interference from outside.

It should be observed that in democracies much information is already in the possession of the public through the supply of information as a result of the government's own-initiative (active information supply). The government is under the democratic duty to inform its citizens of the issues under discussion, the decisions taken and the reasons for their adoption. Open government, in the specific sense of access to documents, must be seen as complementary to the duty of the government to provide information on its own initiative. They are both aspects of democracy, but serve different goals. The latter duty aims at the ordinary citizens, whereas the former is, in particular, directed at interested citizens, such as academics, journalists or civil society. However, it would be dangerous if active supply of information by the government were the only means to get access. Open government allows anybody to get information independently of the government, whereas in the case of active supply people are dependent upon the goodwill of the latter. It is thus the government itself which determines what it shall release, in what form and at what time. Consequently, the possibility to conceal or manipulate the truth is much greater. Apart from the active supply of information and open government, much information comes into the public domain through the mechanism of ministerial responsibility and parliamentary inquiries. In current times, the mechanism of ministerial responsibility has appeared insufficient to provide enough openness to hold the government to account (see in detail §1.1.2.1.2). Some insight into the inner workings of government may also be gained through the courts (law and auditors), for example, the court may insist on the provision of information as evidence to support an assertion or by requiring reasons for decisions which effect our lives.[3]

[3] Birkinshaw (1996), p. 269. He discusses the role of the courts in the UK in helping to achieve openness or fuller provision of information.

In addition to arguments based upon democracy, justifications for open government has also been sought in fundamental rights, and, in particular, in those rights relating to participation, such as the right to vote and the right of freedom of expression and information. The oldest example of the link between openness and fundamental rights is offered by Sweden, where the right of public access to documents constitutes an aspect of the right of freedom of the Press. Clearly, in order to exercise the right to vote or freedom of expression, one needs to have access to information. Other arguments, some of which are less normative, have been advanced to justify a certain degree of openness in the decision-making process. These arguments have been made in particular with respect of the right of access to government-held documents. The basic reasons underlying the introduction of such legislation differs per country.[4] For example, alongside the argument based upon democracy, public access to information regarding the administration was in the Netherlands explained from the idea of the Rechtsstaat.[5] Another reason underlying, in particular, the Swedish rules on public access, is one based upon control and efficiency.[6] Efficiency would benefit from openness within the administration, as it would mean that all civil servants know that they are operating under control of the public eye, and this knowledge would contribute to preventing corruption and maladministration. The argument based upon corruption often underlies recently adopted rules on public access to documents. Publicity is further said to be desirable as it enhances the confidence of the citizens in their executive/administration. This is one of the primary arguments underlying the adoption of the rules on public access to documents in the European Union.

In the academic literature and in the law of international organisations, open government and, in particular, the right of access to documents is more often viewed as a fundamental human right. The fundamental nature has been claimed on the grounds that open government is essential to democracy and/or for the exercise of certain fundamental rights. In spite of the growing recognition of the fundamental nature of the right of access, only Sweden and Finland have accepted this status, although it must be stressed that many other EU Member States have enshrined provisions in their constitutions relating to open government and/or its specific facets. So far the European Convention on Human Rights (ECHR) has not recognised the right of information as a fundamental right. However, as can be seen from analysis of the case-law, and in particular that of the

[4] See Voorhoof (1991), p. 33. He provides a short overview of the different purposes which underlie the introduction of legislation on public access to documents in different countries.

[5] Through the publication of government information, the citizens gain clear understanding of the policy-proposals and the data which underlie a policy. This increases the possibilities, according to the Dutch Government, of judicial review before or after the decision has been taken. See also Akkermans (1992), p. 971.

[6] See also the speech of the Swedish Minister of Justice at the seminar on "the Principle of Publicity, Transparency and Public Access to Documents in the EU," Academy of Trier, Stockholm 16-17 September 1996.

Commission, it appears that steps are being made in the right direction.[7] The European Court of Human Rights has accepted that the government may be under positive obligations to provide information under Article 8 ECHR concerning the right to respect for private and family life. In contrast, the Human Right Commission has been more progressive, as it recognised the existence of positive duties under Article 10 ECHR.

The concern expressed at the national level in respect to openness seems to have its counterpart at the international level. In recent decades, increased attention has been paid to the issues of transparency and openness in the context of international organisations, the prime example clearly being obviously the European Union. Although the EU had a relatively late start, it was not until the early 1990s that it made its first hesitant steps to open up it seems now to have taken the lead among all other international organisations, such as the World Bank, the IMF and the World Trade Organisation, all of which are facing similar demands to become more democratic, transparent and open.[8] In these international organisations, transparency and openness are in particular seen as crucial for good governance, as they make it possible to keep those in power accountable for their policies and performance.

In this introduction the concept of open government, its foundation(s) and its status have been addressed in a very cursory fashion. The latter two issues shall be analysed thoroughly in Chapters 2 and 3. In the remaining part of this introduction the emergence of openness in the nation-state (§1.1.2.), international organisations(§1.1.2.2) and the EU (§1.2) will be analysed, and the research question underlying this thesis will be made explicit (§1.3). In order to prevent any confusion about the exact substance of this study, the concept of open government will be defined more precisely and will be contrasted with other terminology used in this field of law (§.1.1.3).

[7] See, in particular, *Guerra and others v. Italy*, 19 February 1998, (1998) 26 EHHR and *McGinley and Egan v. UK*, 9 June 1998, (1998) 27 EHRR. These cases are treated in §3.4.3.
[8] Curtin (2000), p. 9.

1.1.2 The historical background of open government

1.1.2.1 The emergence of open government in the nation-state

1.1.2.1.1 Legislative openness

As already noted, parliamentary openness emerged during the transformation of the class society into the parliamentary system.[9] In many countries the press has played a central role in establishing the principle of public debates and publication of the records of parliamentary debates. In the United Kingdom (UK), at the end of the eighteenth century, the last phase of the battle for freedom of the press centred on the right to report on the deliberations of the Parliament.[10] In this period, the public was grudgingly permitted to be present, but it was not allowed to make notes. Despite numerous precautions to prevent publication of these debates, extracts of such debates after appeared in the newspapers. In 1771, the battle was decided in favour of the journalists, and since then it has been possible to report parliamentary debates without any interference. In France, it seems that the question of parliamentary openness was not a matter of controversy.[11] Public access to debates seems to have been the result of an accidental situation: the fact that the chamber in Parliament, which was reserved to the "third" estate could host thousands of people. As a result, many people came to listen and to express their opinions. Moreover, two representatives of the Parliament, who wanted to keep their electors informed about what happened in Parliament and what decisions had been taken, founded a "Journal des Debates," which was printed and sold from 1789. The principle of parliamentary openness, i.e. public access to the debates of Parliament and publication of the proces-verbaux of the debates, was subsequently enshrined in the Constitution of 1791. In the Netherlands, during the Bataafse Republic, the political press was established, and much was written about public affairs.[12] Inspired further by France, where the representatives deliberated in public, the National Assembly, when it came together for the first time met in public (1796). Its Rules of Procedure prescribed publicity of meetings, and prohibited the system of imperative mandates ("imperatief mandaat").[13] When the Dutch became one nation the principle of

[9] Cramer (1958), p. 1-61.
[10] Ibid., p. 24-27.
[11] Ibid., p. 27-28.
[12] Ibid., p. 40-61.
[13] This system of fixed mandates meant that representatives acted in accordance with the instructions given by their principals. This system amounted to the representation of interests of only a small group of people. Ibid., p. 7.

public meetings and the prohibition of the imperative mandate was enshrined in the Constitution of 1815 on the initiative of Belgium, but only in respect of the Second Chamber. Until the revision of the Constitution in 1848 the First Chamber met behind closed doors. In the US, the right to report parliamentary debates was achieved without much resistance.[14]

According to Cramer, the emergence of the principle of parliamentary openness may be explained by referring to the abolition of the imperative mandate.[15] As long as the representatives acted on the basis of instructions ("last en ruggepraak") of their principals, openness was not strictly necessary. The principals knew how their representatives would act in the Assembly, and they were kept informed by them of its course. It was probably assumed that the representatives would indeed follow these instructions. It has been argued that the need for openness became necessary with the introduction of the free mandate.[16] As a consequence, outsiders wanted to know what happened in parliament, and they wanted to control what their representatives were doing. In Cramer's opinion this link can be witnessed, in particular, in Sweden, but also in the UK, France, the Netherlands and Germany.[17]

Openness of the legislative decision-making process is a result of the idea of the "Rechtsstaat." [18] All western democracies abide by the principle of parliamentary openness. As far as public meetings are concerned, almost all constitutions prescribe the publicity of plenary meetings of parliament (both chambers), but with the possibility to sit in closed sessions in particular circumstances.[19] In contrast, the rules regarding committee meetings, which are rarely of a constitutional nature, vary widely.[20] In principle, the public may attend all committee meetings in

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[14] Ibid., p. 28-30. From 1790 the House of Representatives allowed unofficially the attendance of journalists, whereas the Senate opened its doors to the public in 1794. During the same period, a semi-official presidential magazine was launched, which for numerous years provided the American newspapers with parliamentary reports.

[15] Ibid., p. 31.

[16] This explanation is given by Cramer (1958), p. 8 and 31. Cramer wrote his dissertation about the emergence of the parliamentary press in Europe.

[17] Cramer observes that this link is very clear in respect of Sweden, as in the Swedish Constitution of 1772 a provision was enshrined which required representatives to act in independence, and for decisions to be made public. See Cramer (1958), p. 31.

[18] De Meij (1980), p. 418.

[19] Ibid.. See the Constitution of Belgium (Article 47), Netherlands (Article 66), Finland (Section 50), Denmark (Section 49), France (Article 33), Germany (Article 42 in respect of the House of Representatives, and Article 52 in respect of the Senate), Greece (Article 66), Italy (Article 64), Luxembourg (Article 61), Spain (Article 80), Sweden (Article 4, Chapter 2 of the Riksdag Act), Austria (Article 32 in respect of the House of Representatives, and Article 37 in respect of the Senate), Ireland (Article 15(8-1/2). Portugal has no constitutional provision, but the meetings of Parliament are public, see the website of the Portuguese Parliament at http://www.parlamento.pt). In the UK, the House of Commons, deliberates normally in public. It has, however, the right to secure privacy of its meetings and of its committees, see Wade/Bradley (1993), p. 229.

[20] Strøm (1998), p. 42-45. The Constitution of Finland prescribes that meetings of committees are in general not open (Article 66).

Ireland, the Netherlands [21] and the UK, while these committees are in a legislative mode. In Spain, although the public may not attend, committee meetings are open to the media, which makes them far from private. On the other hand, meetings in the remaining parliaments are in principle not open to the public.[22] It should be noted that in many cases mixed rules apply. For example, in Portugal, committees can decide to open up their meetings to the public, whereas in Greece, although the committee meets in private to consider legislation, meetings are opened at the initial stage, when the general orientation Bill is examined. The choice between public and private meetings obviously affects the members' informational advantages. Public meetings mean that party leaders can monitor the performance of committee members and enforce strict party discipline. Private meetings can give certain members an advantage as long as other members believe that important information resides behind closed doors.[23]

Only a few constitutions regulate the publicity or accessibility of parliamentary documents.[24] However, there is a general right to have access to documents of parliamentary institutions, in particular to those connected with the exercise of the Parliament's primary function as legislature. In fact, it is normally provided that all parliamentary documents must be published.[25] This means publication of all draft legislation, verbatim records of debates and the documents submitted to parliament.[26] In respect of access to documents of parliamentary committees, differences may exist among the provisions of the Member States.

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[21] In the Netherlands, since 1980, all committee meetings in the Second Chamber have been public. However, there are exceptions (including meetings dealing with committee letters or procedural matters). Meetings of the First Chamber are open to all members of Parliament but closed to the public. See Strøm (1998), p. 45.

[22] This is stated explicitly in Section 50 of the Finnish Constitution.

[23] Strøm (1998), p. 42.

[24] The Constitution of Finland prescribes in Article 50 that the Parliament must publish its papers, whereas, in the same Article it is stated that the minutes and other related documents of the Committee shall be made available to the public, unless a Committee for a compelling reason decides otherwise for a given matter. In Article 33, the French Constitution provides that a verbatim report of the debates shall be published in the Official Journal. In Article 64, the Italian Constitution provides that the Standing Orders determine the manner in which the workings of the Committees shall be made public. In the German Constitution, Article 42 determines that true and accurate reports on the public meetings of the House of Representatives and of its Committees do not give rise to any liability. A similar provision exists in the Austrian Constitution which mentions that no one shall be called to account for publishing true accounts of proceedings in the public sessions of the House of Representatives and its committees (see Article 33). This provision also applies to the Senate and its committees (Article 37).

[25] See also the Opinion of Advocate General (AG) Tesauro in Case C-58/94, *Netherlands v. Council* [1996] ECR I-2169.

[26] Curtin (1995), p. 392.

1.1.2.1.2 Administrative openness

Although legislative openness emerged in the 18th and 19th century, only Sweden recognised, as early as 1766, that democracy also requires openness of administrative actions. Indeed, most other European countries only reached the same conclusion two centuries later in the 1960s and 1970s. Underlying the extension of legislation on public access to administrative documents in many countries, was a changed vision of the political awareness of the citizen, and increased involvement of the executive as a result of the newly-established welfare state system (which had made the state a predominantly regulatory country).[27] Participation, political awareness and enhancing democratic control over the executive were repeated slogans.[28]

The need for administrative openness has been said to constitute another phase in the still-continuing democratisation process.[29] The desire for more openness has been explained by pointing to the democratisation spirit existing in the 1960s. The call for more democratisation is related to the shift in power between the citizens and the state. The powers of the executive/administration have grown enormously (see below), but also those of citizens with respect to the government. Citizens have an income and social security benefits, which makes them less vulnerable to manipulation. Moreover, they are more educated and possess numerous rights, etc. In this period, citizens have developed new ideas, which aimed at making them more conscious and assertive (aware). They had new visions about the state and their role in that state. Their views were directed against the mentality and paternalism of rulers, and aimed at involvement ("inspraak") and participation ("medezeggenschap"). The call for more openness should be considered against the background of these new ideas. In fact, in this period, for example, administrative procedures were introduced in the Netherlands which aimed at involving the citizen more in the decision-making process, especially at a local level. Another reason for administrative openness might have been the growing awareness that party government does not always respond to citizens' preferences.

But also the state had changed. After the Second World War, in all Western European democracies a shift of power from the legislative to the executive branch of government could be noticed.[30] The emergence of the Welfare State, with the increase of State interference and, thus, regulation in all areas of public life, meant that the parliament had increasingly to delegate legislative powers to the

[27] De Meij (1980), p. 418. The account which follows below draws heavily from a Report which was drafted by the Dutch Commission Biesheuvel in the light of the introduction of legislation on public access to documents in the Netherlands (Biesheuvel: Openbaarheid Openheid 1970).
[28] De Meij (1980), p. 418.
[29] Biesheuvel (1970), p. 3.

executive. As a result, parliament lost its power of control over that part of the legislation which it delegated. Moreover, more and more policy areas have been extracted from the control of the parliament due to internationalisation. It has been argued that the European Union is now involved in some way or another in every field of public policy. Currently, the most important decisions are no longer taken in parliament, but by the executive. As a consequence, at the very time the increase in the tasks of the executive made it most needed, the possibilities to parliamentary control of the executive have diminished.

Moreover, government itself has lost control over the administration. As a consequence of the increase in tasks, it is impossible for the minister, who is responsible for what happens at his department, to oversee everything that is happening.[31] It is clear that the practice of delegation has increased the power of the administration, while, at the same time, this power is to a large extent outside democratic control. This shift in power means that administrative openness, which according to constitutional theory should be achieved through the principle of ministerial responsibility, appears no longer sufficient (see above).[32] The core of the argument remains outside public parliamentary discussion, and the parliament often only has the power to confirm or to reject a decision.

Ministerial responsibility, as the sole device for keeping the government accountable, seems to have become inadequate.[33] It has been argued that the executive has to be made more accountable. The Dutch (government) Committee Biesheuvel, established to examine the introduction in the Netherlands of access to documents legislation, pointed out that openness of the administration, for example, through legislation on public access to administrative documents, would mean a correction of the shortcomings in the effectiveness of the principle of ministerial responsibility. It would make the exercise of democratic control by Parliament easier, and, at the same time, help ministers better to understand what is happening in their departments and to exercise control.[34] It would, further, allow the public to control the executive, and make the latter directly accountable to the public opinion. It is interesting to note that the same argument has been relied upon by the UK Government for many decades to oppose the introduction of legislation on public access to

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[30] See Craig/DeBúrca (1998) who point to the net-empowerment of the executive branch of government in the nation-state, p. 157. See further Biesheuvel in respect of the Netherlands (1970), p. 3-11: See Austin in respect of the United Kingdom, p. 395.

[31] See Biesheuvel (1970) in respect of the Netherlands, p. 18-19. See Austin in respect of the UK, p. 395.

[32] According to (Dutch) Constitutional theory, openness of the administration has to be assured through the principle of ministerial responsibility. As the parliament deliberates in public, the business of the government is discussed in public and all information supplied by the government will automatically come in the public domain.

[33] See in respect of the UK, for example, Turpin (1995), p. 70 ("ministerial responsibility has become a fiction"). See also Austin, p. 395. See in respect of Netherlands, Biesheuvel (1970), p. 20 ("ministerial responsibility is close to a public law fiction").

[34] Biesheuvel (1970), p. 22-23.

government documents. It has argued that such a law would harm ministerial responsibility and civil servant anonymity.[35] The UK Government has for a long time held the view that the UK Government is a good example of a democracy which functions well without greater freedom of information (see §2.3.3 and §3.2.1).

A more normative argument, despite having its foundations in the shift of power, is that because the most important decision-making organ of the State is no longer the parliament, but the executive/administration, the latter itself has to be opened up and to be made directly accountable to the people.

Today, it has been accepted in most Western countries that democracy requires that also the administrative process should also to a certain extent be open.[36] Except for Germany[37] and Luxembourg, the other European countries have all adopted rules at a constitutional or legislative level which grant citizens a right of public access to the documents of the public authorities. Sweden (1766),[38] Spain (1978),[39] the Netherlands (1983),[40] Austria (1987),[41] Portugal (1989),[42] Belgium (1994)[43], Finland (1999)[44] have introduced rules on public access at the constitutional level. Not all these constitutional provisions grant, however, a direct enforceable right of access to documents. The following Member States introduced (also or only) ordinary legislation: France (1978),[45] the Netherlands (1978),[46] Denmark (1985),[47] Greece (1986),[48] Austria (1987-1990),[49]

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[35] Austin, p. 396. See §3.2.1.
[36] Curtin (1995/1), p. 78.
[37] Recently also the Federal Government of Germany has adopted draft legislation on public access to government documents (published on the internet at http://www.bmi.bund.de). At the level of the Ländern, three countries have already adopted legislation on public access to government documents (Berlin, Brandenburg and Schleswig-Holstein), whereas others are working on it.
[38] See the Freedom of the Press Act 1766, Chapter 2 on the public nature of official documents. This is a constitutional law in Sweden.
[39] The general right of access to papers held by public authorities arises out of the principle of publicity of acts of the legislature, executive and judiciary enshrined in the third paragraph of Article 9 and Articles 80 and 105 and 120 of the Constitution. See AG Tesauro in *Netherlands v. Council*, op cit., p. 2169.
[40] Article 110 of the Constitution (following a revision in 1983).
[41] Article 20 of the Constitution (following a revision in 1987).
[42] Article 268(2) of the Constitution (following a revision in 1989).
[43] Belgium Constitution, Article 32 of the consolidated version of the Constitution, 17 February 1993. This Article was introduced when the Constitution was revised in 1993 (entered into force on 1 January 1995). See further "Wet betreffende de openbaarheid van bestuur," 11 April 1994.
[44] Under the heading of fundamental rights are mentioned the freedom of expression and the right of access to information, see Section 12 (former Article 10(2) of 17 July 1919 (following amendment in 1995)).
[45] Loi n° 78-753 du 17 juillet 1978.
[46] Wet openbaarheid van bestuur, Staatsblad 1991, 703.
[47] Lov No. 572, 19 December 1985 om offentlighed i forvaltningen.
[48] Law No 1599/1986, which subjects the right to numerous conditions and exceptions.
[49] Bundesgesetz vom 15 Mai 1987 über die Auskunftplicht der Verwaltung des Bundes und eine Änderung des Bundesministeriumsgesetzes 1986 (BGB1 1987/287, amended by BGB1 1990/357 and 447).

Italy (1990).[50] Portugal (1993)[51] and Ireland (1997).[52] The UK has also adopted, after decades of strife, a Freedom of Information Act (FOI) at the end of 2000.[53] Moreover, this issue has been recently under discussion in the Council of Europe, which is preparing a general concept for an FOI law (see §3.4.1).

The legislation adopted in the above-mentioned countries varies considerably in substance, and ranges from rather conservative to very progressive rules (for example, respectively, the former UK Code of Practice and the Swedish legislation). Differences regard the legal nature of the regulation, the objective, object of access, scope, recipients, forms of access, exemptions, procedural aspects, remedies and duties of officials in respect of information. The rationale behind the adoption of a public access law differs among the above-mentioned countries.

In Europe, the way to open up the central administration has been predominantly through the adoption of rules on public access to documents. In contrast, in the United States (US), the method of public meetings has also been used. In the US, there exist both at federal and national level "sunshine laws", which are "open meeting" laws.[54] The Sunshine Act of 1976 allows access to those agency meetings, the deliberations of which determine, or result in, the joint conduct or disposition of official agency business. One week before its convening, the meeting has to be publicly announced. Meetings may, however, be closed by a decision of a majority of the members on the basis of one of the exceptions provided for in the Freedom of Information (FOI). Unlike national "sunshine laws," the federal law does not require the keeping of minutes or verbatim transcripts of public meetings, but records should be kept of closed meetings. Where judicial review is sought in court for the decision to hold a meeting in closed session, the burden of proof is upon the agency in question. In addition to the "sunshine laws," there exists the Federal Advisory Committee Act of 1972.[55] One of the objectives of this law is to ensure that, whenever possible, advisory committee meetings are open to the public and accessible. Again, sufficient advance notice should be given of the meeting in the Federal Register, and any person, subject to reasonable restrictions is, allowed to attend, file a written statement or make an appearance. Moreover, the Act requires the keeping of detailed minutes, along with conclusions, which must be available for inspection and copying. With respect to the advisory committees, the FOI exceptions apply with some modifications. There are some closed sessions during advisory committee meetings, which

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[50] Legge di 7 Agosto 1990, n. 241, nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi. The right is not a public right, but only persons with a specific interest may request for documents.
[51] Law 65/93 of the Assembleia da República of 26 August 1993.
[52] Freedom of Information Act 1997 (Number 13 of 1997).
[53] FOI Act of 30 November 2000 at http://www.homeoffice.gov.uk/foi/foiact2000.htm.
[54] Birkinshaw (1996), p. 59-60.

are usually for discussion of proprietary information.[56] A quick and informal appellate procedure exists to challenge decisions.

1.1.2.2 The emergence of transparency and openness in international organisations

From its establishment, the European Community was an extremely closed and opaque organisation. Due to the absence of any serious challenges from outside to open it up, it remained like this for forty years. During that time, the Council met without exception behind closed doors and the legislative process was conducted in total secrecy in the absence of any duty to publish, for example, records/explanations of voting, minutes or other legislative documents. The Commission was not much better, and was viewed as a remote, closed and unaccountable bureaucracy.[57] All phases of decision-making, including the implementation (comitology) phase, were conducted in private and under strict confidentiality. Moreover, no rules existed providing for public access to documents, which would have made public scrutiny possible. This lack of transparency and openness is not so strange given the diplomatic methods classically employed by international organisations. Diplomacy is, by its nature, a fairly untransparent enterprise and does not take place in the sunshine. Part of the problem with the EU is that it is moving, in this and in many others respects, away from the classical model of an international organisation.

However, not all international organisations have suffered from a similar initial lack of transparency and openness. As early as 1834, open government was, for example, a feature of the Swiss Confederation.[58] This example was followed by two important contemporary international organisations: the United Nations (UN) and, in a lesser manner, the Council of Europe. It has been suggested that this open spirit might have been inspired by a feeling that some international organisations in the past had been undermined by excessive secrecy which lead to fear and disgust.[59] Another more direct motive might have been that more openness was a reaction to the "ambush" politics of the dictatorships defeated in 1945.[60] In the context of the UN, the Second World War did play a role in encouraging more openness. At the first session of the UN General Assembly, a proposal was tabled by the Latin American countries which led to a resolution urging

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[55] Ibid., p. 57-59. See extensively on this Act, the study conducted for STOA (European Parliament), "Transparency and Openness in Scientific Advisory Committees: The American Experience," European Parliament 167 327/Fin.St., October 1998 Luxembourg.
[56] Working Document of the Committee on Institutional Affairs containing recommendations on openness in the European Union, op cit.
[57] Lodge (1995), p. 345-346.
[58] See Curtin (1995), p. 396. The Swiss confederation was established by a treaty between the Swiss cantons.
[59] This happened to the German Bund, ibid.
[60] Ibid., p. 397.

ECOSOC to prepare a Convention on Freedom of Information. This proposal has been explained as constituting a reaction to wartime censorship.[61] The proposal regrettably did not lead to the adoption of a Convention on FOI (see Chapter 3.4.1).

From its establishment, the Rules of Procedure (RoP) of the General Assembly of the UN stipulate that the Assembly and its main committees shall meet in public, unless there are exceptional circumstances which require it to close the meeting.[62] The same rule, although without the requirement of the existence of exceptional circumstances, applies to other committees and subcommittees.[63] Also the ECOSOC and the International Court are also required to meet in public, unless they decide otherwise.[64] Despite the general rule that the Security Council has to hold its official meetings in public, it has, in recent years, been increasingly meeting privately or informally instead of in public.[65] It is often said that the important decisions of the Security Council (SC) are taken by the Permanent Members in private meetings, behind closed doors, before the formal Council meets. It is therefore important to note that the practice, and not just the formal rules, of an organisation need to be examined before one is in a position to ascertain how transparent and open such organisation actually is.

As far as access to documents is concerned, the records of the meetings of the principal organs of the UN are, as a general rule, published, although exceptions exist, for example, in respect of records relating to private meetings.[66] Publicity is also the rule in respect of the other documents produced by the principal bodies.[67] It should be noted that, for several years now, negotiations and debates have been underway in the General Assembly regarding the possible reform of the Security Council, and in this regard calls have also been made to make it more accountable, transparent and

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[61] Encyclopaedia of the United Nations (1990), p. 309.
[62] See the website of the United Nations, http://www.un.org/Depts/dhl/resguide.
[63] Rules of Procedure of the General Assembly, Rule 60/61.
[64] International Court, Rule 46; The Trustee Council also used to meet in public (it suspended its operations in November 1994), see Article 42 and 43 of its Rules of Procedure.
[65] See Rule 48 RoP Security Council, which provides for publicity of Security Council meetings, unless it decides otherwise. The informal meetings should not be confused with official private meetings as provided for by Rule 48 RoP. See Bailey (1988), p. 42.
[66] In respect of *public* General Assembly meetings, the verbatim records of the plenary meeting are published (also the summary records of committees), whereas in respect of *private* meetings a Press Release may be issued (Rule 61 RoP GA). In respect of *formal* Security Council meetings, the verbatim records of and the documents annexed thereto, shall be published (Rule 54), whereas in respect of *formal private* meetings a Press Release will be issued (Rule 55). No public records exist in respect of *informal private* meetings.
[67] The text adopted (resolutions and decisions) by the General Assembly and the Security Council are published, and so are the reports of committees.

democratic.[68] Since 1998, the general information supply of information within the UN has been scrutinised.[69]

The institutions of the Council of Europe (COE), which is a regional organisation, are not as open as the United Nations.[70] Like the General Assembly (GA) of the UN, the Parliamentary Assembly (PA) of the Council of Europe meets in public, and publishes records of its proceedings and all other documents. However, the committees are of the Council of Europe are less open than those of the UN. The COE committees do not, as a rule, meet in public, and the only texts which must be published are the reports adopted and the statements made.[71] In addition, the Council of Ministers is a very closed institution. The Council meets in private, unless it decides otherwise. Furthermore, it has complete discretion to determine what information shall be published regarding the conclusions and discussions of meetings held in private.[72] In November 1994, the Ministers' Deputies, however, took an important decision towards a more open information policy, which means that more documents are now published and that others are declassified quicker.[73] In September 1998, the Deputies adopted a procedure for granting public access to document which have not yet been declassified.[74] Excluded from this policy, however, are amongst other documents, minutes of the Ministerial sessions and records of proceeding of the Deputies and human rights cases. Access may further be refused if the documents are produced outside the General Secretariat, and the author has not given permission for it to be made available. Other exceptions regard documents related to unfinished documents, the protection of privacy and international relations.

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[68] See, for several members insisting on transparency: Press Release GA/9826; "Assembly continues consideration of Security Council reform and discusses permanent and non-permanent Council membership and use of veto," 17 November 2000. See also Press Release GA/9693; "General Assembly concludes consideration of Security Council reform," 20 December 1999.

[69] General Assembly Report of the SG 16 October 1998, A/53/509 (Questions relating to information). See Curtin (2000), p. 9.

[70] Information can be found on the COE' s website at http://www.coe.fr/cm.

[71] See, for the public character of the meetings of the Parliamentary Assembly, Article 35 of the Statute of the Council of Europe. The official reports of debates of the Parliamentary Assembly, as all official documents adopted by it, are published, see respectively Rule 30(1) and Rule 22(1) Rules of Procedure of the PA 1999. In respect of the private character of committee meetings, see the Rules of Procedure of the Parliamentary Assembly, Rule 47(3). In respect of its documents, see Rule 49(6) RoP PA 1999.

[72] Article 21 of the Statute of the Council of Europe. The same rule also applies in respect of the Deputies, see (implicitly) Article 9(c) of its own Rules of Procedure.

[73] Decision of November 1994 (http://www.coe.fr/cm/intro/idoc.1.html). Since that date decisions of the Deputies are published and the records of its proceedings, which remain confidential, are to be declassified after 10 instead of 30 years. In human rights cases, the records and decisions of the Deputies are confidential and declassified after 30 years. The confidential records of the biannual meetings of the Ministers are now declassified after 10 years, and after each meeting a Press Release is issued. Public documents of the Committee of Ministers are: the text adopted, the statutory reports, and the replies to parliamentary questions.

[74] See the Decision on access to documents of 15 and 18 September 1998, (CM(97)54, CM(98)81, GR-AB(98)10).

Finally, the Nordic Council must be mentioned. This body, which is composed of the representatives of the national government and the national parliaments of the five Scandinavian states, has from the start functioned in almost complete openness. In principle, its meetings and documents are open to the public, unless the nature of a matter requires a decision of the Council to the contrary (Article 6 of its Statute).[75]

In the recent decades, increased concern can be witnessed about the issues of transparency and openness in the context of various other international organisations, such as the World Bank, the International Monetary Fund (IMF) and the World Trade Organisation (WTO). In their first decades of existence, the first two organisations were highly secretive organisations, answering only to their member governments and providing little information to the public.[76] Since the 1980s, numerous Non Governmental Organisations (NGOs) have exercised pressure on the Bank to provide more information about its plans and policies claiming that this would help the Bank to do its job better. It was argued that, if development bank project planning and design were open and transparent, fewer disastrous projects would be approved and a greater opportunity to promote development alternatives would exist.[77] These pressures led a decade ago to the adoption by the Bank of a disclosure policy, which was revised in 1983. It appears that no international organisation has faced more demands to open up than the World Bank. The IMF is now starting to experience similar demands to provide information about its plans, policies, decision-making procedures and the effectiveness of its programs. Since early 1990s it has been disseminating more information about its activities.[78]

Despite its successful role in devising multi-lateral trade rules and advocating trade liberalisation, the WTO has been criticised by some as undemocratic and non-transparent.[79] Currently informal consultations on external transparency are taking place in the context of the WTO. After earlier discussions on internal transparency in the General Council, which resulted in improvements in the daily working environment, similar efforts are now being made to improve communications between the WTO and the public (external transparency).[80] At the Geneva Ministerial Conference in 1998, Ministers recognised the importance for enhancing public understanding of the benefits of the multilateral trading system in order to build support for it. They also reaffirmed the need to work towards this end and called for ways to improve the transparency of WTO operations. In this

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[75] See Curtin (1995), p. 399.
[76] Florini (1999), p. 22-26, at p. 22-23.
[77] Ibid., p. 23. See also Woods (2000), p. 826.
[78] Ibid., p. 25-26. See also Woods, ibid.
[79] See the Communication of Hong Kong, China (27 October 2000) submitted in the context of the informal consultations in the General Council of the WTO on external transparency.
At http://www.wto.org/search97cgi/s97_cgi?.
[80] See about internal transparency the WTO news items overview of October 2000 ("Internal transparency and the effective participation of members") at http://www.wto.org.

regard, several Member States have submitted communications at the end of 2000 in which they made a number of suggestions.[81] Most delegations mention the need to develop further the WTO website, and to strengthen the 1996 Derestriction Decision concerning access to WTO documents. It has been said that many documents concerning the WTO's core activities are not made available to the public in a timely manner. The suggestion has been made to take steps to derestrict certain documents quicker (for example, minutes of formal Council and Committee meetings), and to reclassify certain types of documents as non-restricted.[82] Furthermore, the US and the European Commission have proposed the holding of open meetings, although this proposal has, however, not been received positively by all delegations.[83] In the same line of ideas, Canada suggested to webcast its own interim Trade Policy Review meeting. Under the heading of external transparency, enhanced dialogue with the NGOs has also been discussed, although according to the delegations, this is primarily the responsibility of the members. External transparency can however facilitate this dialogue.[84] It has, nevertheless, been acknowledged that more can be done in respect of dialogue at the WTO level, for example, through the holding of symposia and seminars.[85]

The recent discussion on transparency and openness in international organisations must be seen in the context of the good governance agenda.[86] Good governance was placed on the agenda of many international organisations at the end of the Cold War, when calls for democracy and better government increased. As a result, many international organisations are now pressing governments around the world to increase standards of democratic representation, accountability and transparency.[87] With some delay they also started to question what good governance means for the way in which they are structured themselves and how they make and implement decisions.

International organisations are challenged in terms both of their legitimacy and their effectiveness.[88] Within the international organisation itself, its legitimacy may be contested by states who feel inadequately consulted or represented within organisations. Good governance can be applied to describe greater participation, accountability and fairness among states within

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[81] For example, European Community (2 October 2000), United States (10 October), Australia (12 October 2000), Canada (16 October 2000), Hong Kong, China (27 October 2000), Norway (1 November 2000). At http://www.wto.org/search97cgi/s97_cgi? (search term "transparency").

[82] For example, Australia has stressed the negative effect of keeping open meetings or webcasting them, see the Australian Communication, ibid.

[83] The United States has proposed to explore the idea of opening some of the WTO Council and committee meetings to observers, just as the plenary sessions of the Ministerial Conference have been opened to observers. The European Community has proposed the keeping of an annual open meeting of the WTO and, on a voluntary basis, to open up, for NGOs and parliamentarians of the country under review, the meetings of the Trade Policy Review Meeting. See respective Communications.

[84] See the Communication of the European Community, ibid.

[85] See, for example, the Communications of the United States, the European Community, Canada and Norway, ibid.

[86] Woods (1999), p. 39.

[87] Ibid.

[88] Ibid.

international organisations (international governance).[89] On the other hand at the global level, that is to say, the link between individuals, people, groups and international organisations, good governance means that institutions are challenged by non-state actors and domestic lobby, raising broader issues of global democracy.[90]

The democratic deficit that exists in the European Union, as a result of the widening of jurisdiction, has its parallels in several other international institutions, such as the IMF and the World Bank.[91] These institutions have put good governance on their agenda as they realise that their programmes need to be understood and perceived as legitimate, not just by governments, but also by a wider range of actors. Moreover, almost all international organisations have accepted the limitations of a purely state-centred system of representation in world politics, and hence many have opened up to some scope for participation by NGOs. In the 80s and the early 90s state-centred international politics based upon sovereignty was under attack. Since that time, the participation of non-governmental organisations has been encouraged, and concepts of global civil society have been developed.[92] There has been a tendency to move away from the older more state-centred views of international relations and towards a more global approach, and this new approach has made an important contribution to thinking about democracy at global level.[93] In particular, the rise of global civil society constitutes a great impetus for greater transparency and openness in international organisations.[94] As civil society grows, its demands for transparency will do too. It should be noticed that, in recent years, the new idea has emerged that civil society should be enabled to participate in the decision-making process and not only be consulted.[95] Obviously, this would require even greater, and more timely, access to information. Other positive factors for enhanced transparency at international level are the positive attitude of the United States (in those organisations of which it is a member) as well as the improvements in technology.[96] In particular, the possibilities that modern technology offers for the dissemination of information and communication are incredible, and constitute the future ticket for unlimited transparency and openness.

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[89] Ibid., p. 41. Woods 1999 Article treats with the issue of international governance in general. In a more recent Article (2000), he treats the issue of international governance, but only as far as the IMF and the World Bank are concerned, p. 823.
[90] Woods (1999), p. 41.
[91] Ibid., p. 57-58.
[92] Ibid., p. 41.
[93] Ibid., p. 40-41.
[94] Florini (1999), p. 30. See also Woods (2000), p. 827.
[95] Curtin (1997), p. 34-40. She explains concisely the rise of global civil society.
[96] Florini (1999), respectively p. 26 and p. 30.

Finally, it deserved mentioning that transparency and openness were also mentioned in the Code of Conduct adopted by the Council of the OECD on 23 April 1998.[97] The latter has adopted a set of 12 "Principles for Managing Ethics in the Public Service", of which the sixth principle stipulates that "the decision-making process should be transparent and open to public scrutiny." Thus, transparency and openness have also been emphasised in the context of achieving higher standards of conduct in the public service (good administrative behaviour). It should be noted that the function of transparency and openness differs to the context. In the context of managing ethics in the public service, the primary function of transparency and openness is public scrutiny and accountability, whereas in the context of global governance, its function is foremost to allow participation.

[97] See the Second Report of the Committee of Independent Experts on allegations regarding fraud, mismanagement and nepotism in the European Commission, p. 113. At http://www.europarl.eu.int/experts.

1.1.3 Concept and Terminology

1.1.3.1 Open Government

In this section, the concepts and terminology which underlie this study will be set out. Open government, as defined in this study shall further be set against other definitions of "open government" and "freedom of information."

For the present purposes the concept of "open government" is defined as follows:

"Open government": Government is open, when everybody has the possibility to acquire knowledge about government activities through the granting of access to meetings where public decisions are taken or prepared, and by making available decisions and documents (actively or on request) which underlie the decision-making process.[98]

Before looking in more detail at this definition a conceptual problem must be addressed. According to some authors openness means only public access to government documents, and not access to meetings. Three arguments have been put forward in support of this understanding. First, it has been noted that a lot of information is written down and can compensate for the lack of other sources. Information which is not somehow documented is hard to access after the event has taken place.[99] Secondly, it is relatively easy to formulate judicial rules and regulations that grant access to documents, and these rights can be tested in Court. Finally, rules and regulations on access make it hard for the government to manipulate the flow of information. These arguments are all true, but it should be stressed that not all information is documented, and there is always the danger of the "file behind the file." The effect of openness might lead to the situation in which officials do not write down everything as they know that it will be released. A further negative effect is that when written and oral information contradict, each other people will most of the time tend to rely on the written information, even though it might be wrong. Public meetings have an advantage over access to documents in that citizens can judge for themselves. It permits the public to know about the documents being discussed, but also about the nature of the discussion and the quality of the

[98] This definition is close to that of Curtin (1995), p. 393.

individual contributions that are made.[100] The interplay of ideas can be better understood by following discussions at meetings than by the mere studying of documents.[101] Of course the advantages of attending meetings, as explained above, depends to a large extent on the educational background of the particular citizen. No doubt there are large groups of citizens who are not able to make sense of, at times, the rather complex issues which are discussed. This indeed constitutes a problem, however, it does not constitute an argument against public meetings, but rather a necessity to make complex issues more understandable for the ordinary citizen.

Obviously, there are also counter-arguments to the opening-up of meetings which differ according to the organs/institutions under consideration.[102] The main argument is that, like the danger of the "file behind the file", there exists the danger of "the meeting behind the meeting." In general, there will always be the risk that decisions are no longer being taken in the open meeting, but in the corridors for the reason that officials/members cannot engage in free and frank discussions. This is one of the main arguments advanced against opening up the meetings of the EU Council, when it is acting in its legislative capacity (see §5.3.3.2).[103] The author does not share the view expressed above, i.e. that openness means only public access to documents. Public meetings constitute a different, but important, way to achieve openness in the decision-making process, and, therefore, constitute an aspect of the concept of open government.

Returning to the definition used in this thesis. In this definition open government constitutes a factual situation. However, open government has also been defined in the academic literature as constituting a legal situation: a complex of rights and duties.[104] This type of definition has been contested by Klinkers, as mixes up the "cause" and the "result." He argues that open government is a factual situation, which comes into being as a result of rules of positive law which prescribe open government, and because these rules are also observed in practice. Thus, positive law is one of the

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[99] See Sejerstedt in Larsson (1998), p. 46. Larsson, who agrees with Sejerstedt, gives his own summary of the arguments of the latter.

[100] Working document of the Committee on Institutional Affairs containing recommendations on openness in the EU, op cit., p. 8.

[101] See also Report on Openness within the EU, Committee on Institutional Affairs, Rapporteur Lööw, p. 20 (EP 228.441/fin).

[102] For example, in respect of Parliamentary committees, it has been argued that they turn committee meetings into potential advertising fora for committee members. The members might use the meetings for such re-election purpose as credit claiming, advertising and position taking. Moreover, open meetings are unlikely to foster inter-party compromise, see Strøm (1998), p. 42.

[103] Those supporting open Council meetings would counter this arguments by saying that many key-issues will take place in the corridor or in closed preparatory meetings, whether the main meetings are open or not, and that after a while people will stop playing to the gallery. See Report on Openness within the EU, Committee on Institutional Affairs, op cit., p. 20. See further §5.3.3.2.

[104] See, for example, the definition of Rooij/Niewenhuis in Klinkers (1974), p. 20. Translation is that of the author: "Open Government is the legal situation, created by positive law, which obliges the government to conduct certain acts in public, to take decisions and make them public, and to make accessible or available relevant documents."

causes of the result called "openness." The author shares the view of Klinkers.[105] She further would like to add that any government, which is sincerely committed to openness, should enact "open government" through legislation, as only in this way will citizens be assured of an autonomous legal right, with corresponding legal duties for the government, which cannot be changed without democratic consent (involvement of the parliament).

"Government" for the purpose of this thesis refers to both international and national authorities. The term is, however, limited to those branches of government that are involved in the policy-making process, i.e. the legislative- and the executive/administrative branch. The third branch of the government, the Courts, have been excluded from the research, as they are not supposed to be directly involved in the policy decision-making process, and because the philosophical arguments underlying the need for openness in respect of the Court differ from those advanced in respect of the other two branches of government.

In the literature, more widely drafted definitions of open government can be found than the one used in this research. For example, Birkinshaw defines "open government" as the right to have access to information, "to attend government meetings unless it is clearly not feasible, and to participate in the policy-making and consultation exercises, and rule-making carried out by government agencies, public authorities or government-sponsored bodies."[106] The definition used in this thesis is narrower as it comprises only the information aspect, and excludes from its scope the participation aspect. The reason for this is that the aspect of participation constitutes a topic in its own right, and justifies a separate doctoral thesis. Open government might also comprise, besides the issues of access to documents/meetings and participation, such aspects as the duty to draft documents in a clear way and the duty to explain information provided to the citizen.[107] These issues are, however, in this thesis brought under the term "transparency" (see beneath), as to reserve open government purely for the information aspect.

Another term which is frequently used in this field of law is "freedom of information." This notion has been used in many different ways, but it usually refers to the issue of public access to documents/information.[108] However, in some jurisdictions, for example, the US, it may also comprise the issue of opening up government meetings, their advisory bodies and their client groups to public scrutiny. In the UK, these two situations are often referred to as "open government."[109] Freedom of information may also involve access by individuals to files containing

[105] See similar Klinkers (1974), p. 19-21.
[106] Birkinshaw (1997), p.28.
[107] See Voorhoof (1991), p. 34. He notes that it might even be possible to bring the equal opportunity of citizens to get a job in public authorities under the concept of open government.
[108] Birkinshaw, (1996), p. 1. The definition is mentioned in Birkinshaw (1997), p. 28.
[109] Ibid.

information about them.[110] A completely different meaning is given to the term in international human rights instruments, in which it is usually defined as "the freedom to seek, receive and impart information and ideas through any media."[111] The author prefers to use the term "open government" to indicate all three distinct facets of openness rather than "freedom of information," as the latter term is very imprecise.[112]

1.1.3.2 Transparency

The discussion about openness in the decision-making process in the European Union takes place in the context of the wider debate on the lack of "transparency." Transparency, like subsidiarity, is a very imprecise term, which should be understood more as an expression of a political objective by the institutions than anything else.[113] Mather observes that the term "transparency" has become part of EU jargon to the extent that it tends to be applied in an "esoteric" fashion to the EU' s practices.[114] The EU has given it an individualistic interpretation, which, according to Mather, has made it easier for its actors to claim that they have achieved transparency.[115] It seems that often when one refers to transparency in the context of the Union, one refers to what the institutions do about it.

But can transparency be defined in more abstract and objective terms?[116] Literally, the term refers to the ability to see completely through something. In the words of Curtin, "transparency evokes an image of clear panes of glass through which sunshine (or light) can beam in an unrestrained

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[110] Ibid.

[111] Österdahl (1998), p. 38. In Chapter 1.2, she discusses extensively the definitions given by various authors of the term FOI, and its relationship with related concepts such as freedom of the press, opinion and expression.

[112] See also Bullinger (1985), p. 340. Although Bullinger makes his remarks in a different context (ECHR) than the context of this thesis, he prefers not to use the term FOI "since it is often used without a precise meaning or with different meanings."

[113] Curtin (1998/1), p. 4. Twomey (1996) notes that the notion of transparency is complicated by multiple layers of meanings and the varied contexts in which it arises, see p. 839.

[114] Mather (1997), p. 11.

[115] Ibid.. In Chapter 4 what the institutions understand under the notions "transparency" and "openness" will be explained. It will be shown that the Commission is interpreting openness in a wider fashion than that in which it is used for the purposes of this research. See also Piris (1994) who defines transparency as "clarity and openness," see p. 449.

[116] Twomey (1996) notes that some agreement exists as to what the principal elements of transparency are. He lists among those elements: "access to personal information, openness of the legislative process, consultation prior to enactment, consolidation and clarity of legislative instruments, publication of measures adopted and access of the individual to unpublished documents. He is not very clear amongst whom exactly this agreement exists. It is not clear whether he merely lists those elements which, according to the institutions and Member States, amount to transparency in the European Union, or whether he is trying to give a general conceptualisation of transparency (abstract fashion), see p. 838.

fashion."[117] Mather has defined three dimensions of transparency for the needs of a liberal democratic polity.[118] The first dimension is public access to information, which includes accessibility in practical terms (clear terminology and clarity of procedures). This first dimension she calls "openness." The second dimension of transparency regards letting the citizens know why and how decisions have been made so that those who have made them can be held accountable (access to the thinking behind decision-making). This second dimension should be applicable in every society that claims to be *liberal*. The third dimension is necessary for liberal *democracy*. This entails that the degree of transparency should be sufficient to empower the people, or those interested, to contribute to the decision-making process (effective popular access to the decision-making process). She notes that this aspect constitutes, however, more a function of transparency. It should be pointed out that what Mather defines as "openness" is wider than the definition of openness used (see above). Tentatively, one might explain transparent decision-making process as one which enables citizens to know who is responsible for what decision, and how the decision was reached; i.e. the decision-making procedure should not be so complicated that one cannot understand it. Further, the decision itself and the documents underlying the decision should be phrased in terms which are easily understandable (not too much jargon), and, in the case of public meetings, it should be possible to follow the discussion. Finally, the decision needs to be published and should be reasoned, and there must be the possibility of access to the documents underlying the decision-making process, or/and the meetings or deliberations (open government).

It follows from what has been said above, that transparency as a concept is wider than openness. It is possible to have a decision-making process which is open, but which lacks transparency. For example, people might have enough information about the government's decision-making process as they have access to government documents or meetings (openness), but because the process as such is so complex they do not understand how the decision was reached (transparency).[119] Another example is that the substance is so difficult that people cannot make sense of it, despite having access to meetings and documents.

[117] Curtin (1998/2), p. 108.
[118] Mather (1997), p. 9.
[119] See Lodge (1995), p. 365 and Larsson (1998), p. 40.

1.2 A brief introduction to the issue of open government in the European Union

For forty years, the European Union remained an opaque and closed organisation, without any serious challenges from outside to open up. Some signs of interest in the issue were shown by the European Parliament (EP) in the 80s, and by a few Member States during the Intergovernmental Conference (IGC) negotiations at Maastricht in 1990. The issue was, however, placed high on the political agenda only in the aftermath of the signing of the Maastricht Treaty. The Danish "No" to the Treaty, and the public debate which was subsequently triggered, revealed the public's concern about the lack of transparency and openness in the Union's decision-making process. The explanation for this sudden attention lies in the fundamental changes which the Community had undergone, and its democratic deficits, which were now so obvious that the lack of openness could not longer be ignored. After the issue was placed as a priority point on the political agenda, many measures have been taken to enhance openness, amongst which the opening-up of some Council meetings and the adoption of rules on public access to Council and Commission documents (the "Code of Conduct"). The trend towards openness has continued as a result of the continuous pressure of a number of forces, and certain negative events, such as the corruption scandal in the Commission. This scandal, which led to the Commission's resignation, highlighted again that openness remains the currency of accountable government.

The discussion on transparency and openness is not taking place in isolation, but is part of the wider debate on democracy and legitimacy within the European Union. The Union is suffering from a democratic deficit, of which the lack of transparency and openness constitutes just one aspect. Although, there is no doubt about the need to enhance democracy in the Union, there is no agreement in the literature as to what theory of democracy is the most suitable for the Union.

In the beginning, the issue of openness, and, in particular, access to documents, has been approached by the institutions in a rather non-fundamental fashion.[120] The institutions have treated the issue as an element of good administration, in order to increase public confidence in the administration and to generate public support (social legitimacy). The measures to open up the European Union have not been adopted out of the conviction that openness constitutes an essential element of democracy. However, in recent years, a more fundamental approach towards the issue in general, and, in particular, in respect of public access to documents, can be witnessed.[121] The principle of openness was enshrined in the Treaty on the European Union, together with the right of

[120] See also Curtin (2000), p. 11 et seq. See in detail §4.5.1.
[121] Ibid.. See in detail §4.5.3.

access to documents of the EP, Council, and the Commission (Article 255 EC). The right must be implemented within two years of the Treaty's entry into force (May 2001). In the interim period, i.e. prior to the implementation of Article 255, also the European Court seems also to have adopted a more fundamental approach towards the issue, and it seems that the right of access is gradually evolving into a fundamental right in the European context. This development is evidenced also by the recently-adopted Charter of Fundamental Rights in the Union, which, in Article 42, enshrines the right of public access to EP, Council and Commission documents. Besides being part of the fundamental rights debate, the right of access constitutes also an aspect of the debate on European citizenship. This right must be seen as a typical "European citizenship" right, as it allows citizens to be political beings.[122]

[122] Shaw (1997), p. 424. See also Curtin (1999), p. 73-74.

1.3 The Research Question

The general aim of this study is to contribute to an understanding of the concept of "open government" as applied in the European Union, by analysing it from a legal point of view.

The main research question can be formulated as:

How has the principle of open government been approached, implemented and applied in the European Union? To what extent might this principle play a more fundamental role in the future?

In order to be able to answer the main research question, and to achieve the general aim of the present study, the general context of the principle of open government needs to be set out. The concept of "open government" has been developed in the context of the nation-state. The purpose of Part I of the research, which is divided into three chapters, is to examine the emergence of open government at state level and the different contexts in which it is embedded, as this will add to our understanding of the issue in the European Union context. In the preceding paragraphs of the present chapter, the question as to when, and why at that particular moment, legislative and administrative openness emerged in the nation-state was addressed. This paragraph was followed by a brief examination of the appearance of the issue of open government in a number of international organisations.

Chapter 2 consist in an analysis of the indisputable link existing between openness and democracy in the nation-state. The availability of, and access to, information is essential for the functioning of any democracy, however conceptualised, as it constitutes the prerequisite for accountability and participation. However, different theories of democracy exist, ranging from elitist theories to more participatory forms of governance. The question which arises immediately is if there exists a link between the type of democracy on the one hand, and the extent of openness and the way in which it is to be implemented on the other hand? In Chapter 2, an attempt will be made to provide a satisfactory answer to this question. The main streams of democratic theory as far as their relation to citizen participation and openness is concerned, shall be analysed. It will be shown that the need for information is more pressing in those theories which put more emphasis on citizen participation than more elitist theories in which the role of the citizen is largely reduced.

However, democratic openness is just one legitimate objective of government, but others exist, amongst which, efficiency and effectiveness. Is it, nevertheless, possible to reconcile efficiency and effectiveness with the democratic demand for openness? This chapter shall conclude with a brief analysis of the tension which exists between open/democratic- and efficient/effective government.

The principle of open government, and, in particular, the right of public access to documents, has often been linked to the question of fundamental rights. In the literature, a number of philosophical arguments have been advanced to support the assertion that open government, and/or the right of public access to documents, constitute a fundamental right. What arguments have been raised in favour and against this assertion, and are they convincing? As the case for openness has also been based upon arguments of a less normative nature, these arguments shall obviously be discussed too. Following this normative part, the remaining part of Chapter 3 focuses on the developments in this field in positive law. How has the principle of open government, and in particular the specific facet of public access to documents, been approached (legally) in the Member States, the EU (introductory remarks) and within the context of the Council of Europe? Specific attention shall be paid to the case-law as regards access to information of the Court and Commission of Human Rights. Can it be concluded, on the basis of the entire analysis, that the right of public access to government documents constitutes a fundamental human right in making?

Moving from the state level to the European level, Part II consists of an analysis of the emergence of the issue of openness in the European Union, and places the issue in its wider contexts (Chapter 4). Preliminary to this research, an examination shall be undertaken into the different visions as regards to what kind of entity European Union is (§4.2). The European Community developed from a more "classical" international organisation into an organisation which might evolve in a political entity in its own right. But what exactly is its legal nature? It is necessary to treat this point first, as it explains why the European Union should be democratic and open (see Chapter 2). Moreover, the way in which the Union is categorised has consequences for the paradigm of open government to be applied in the Union. The following section (§4.3) regards the emergence of the issue of open government in the European Union. It will explain why the Union developed in such a closed way, when the issue emerged in the Union, and why at that particular moment, what were the motives behind the transparency measures, and what actions have been taken up to now.

The discussion about the lack of openness in the decision-making process of the European Union cannot be separated from the wider debate taking place in the Union about the its democratic and legitimacy deficit. As follows from Chapter 2, openness in the decision-making process is an

important element of democracy, as it enables people to participate and exercise control. The lack of openness and transparency constitutes only one element of the democratic deficit. In this section, the democratic deficit will be prevented, and its different elements will be individualised. It must be stressed that the deficit changes in content according to which model of democracy is used as a blueprint.

The early discussions on the democratisation of the European Union were conducted against the background of parliamentary democracy. In recent years, however, the debate has been enriched with the advancement of alternative (not necessary exclusive) models of democracy to the traditional parliamentary representative democracy of the nation-state. These models have been advanced in respect of the European Union as a whole or in respect of its different modes of governance. In particular, more deliberative/participatory theories have been defended as attractive models in theory and practice. These different models shall be discussed, but only insofar as their relation with open government and citizen participation is concerned. The objective is to show the implications of these theories for the extent of openness needed in the Union. Before these issues are taken up, a preliminary question, which is seldom raised in the literature, needs to be addressed first: why should the Union be a democracy (see §4.4.)?

Besides the above-mentioned democratic deficit, the European Union seems also to suffer from a popular legitimacy crisis. The exact causes of this crisis are difficult to pin down, but the democratic deficit is definitely amongst the central ones. This section will conclude with an analysis of the legitimacy crisis, and a discussion concerning the role of transparency and openness in this crisis. It must be stressed that transparency and openness, in particular, have been relied upon by the institutions in their attempt to solve the popular legitimacy crisis in the Union (see §4.4.).

In the final section of Chapter 4 (§4.5), the link between open government, and its specific facets, on the one hand and the fundamental rights and citizenship on the other hand will be examined. Initially, the approach taken by the institutions towards openness, in general, and public access to documents, in particular, was rather non-fundamental, but in recent years this approach is becoming more fundamental. What developments have taken place, and what are the forces behind the growing recognition of the fundamental status of the principle of open government and/or the right of access to documents? Obviously, this examination includes an in-depth discussion of the case-law of the European Court of Justice (ECJ) and the Court of First Instance (CFI) and the as regards access to documents. Has the ECJ and/or the CFI recognised the fundamental status of the right of access to documents? The right of access to documents has also been characterised in the

literature a number of times as a typical citizenship right, and has, as such, been recognised in the Charter of Fundamental Rights of the Union. This chapter concludes with an explanation of the concept of citizenship, and the reasons for considering the right of access to documents as a citizenship right.

In Part III, which is of an empirical nature, the implementation of the principle of open government in the European Union (different Pillars) and its application in practice shall be scrutinised (Chapters 5, 6 and 7). First, the rules regarding publicity of legal instruments, meetings and documents (active supply) will be examined (Chapter 5). A distinction will be made between those rules that aim at opening up the decision-*taking* phase and those regarding the decision-*preparation* phase. It includes, further, a detailed examination of the arguments advanced in favour and against opening up the meetings of the Council when acting in its legislative capacity. The main objective of this chapter is to discover which parts of the decision-making process (still) suffer from a lack of openness.

Chapter 6 focuses entirely on the distinct issue of public access to documents on request. The right of access to documents has been enshrined in Article 255 EC, and must be implemented within two years of the entry into force of the Amsterdam Treaty. Before examining the Commission's proposal in this respect, the current system of access to documents will be analysed. Answers will be provided to the following questions: what are the shortcomings of the current system on access, how are the rules applied in practice and what problems have emerged? In the same chapter, the way in which the Court and the Ombudsman have exercised their powers of review in access to document cases shall be scrutinised. In particular, the chapter will examine in what way these institutions have contributed to enhancing openness in the decision-making process.

Part III is concluded with a discussion of the new provisions on public access to EP, Council and Commission documents as laid down in Article 255 EC, and the Commission's legislative proposal implementing this provision (Chapter 7). In this discussion, the critical comments as expressed by civil society will be elaborated upon. The most pressing question is obviously whether the new proposal entails a step forward in respect of the current system, as claimed by the Commission, or a step backwards, as argued by civil society.

At the moment of closing this (empirical) research (31 December 2000), the process of drafting the new legislation on public access to EP, Council and Commission documents was still underway. After a very difficult, and partly secret process, the final version of the Regulation was adopted on the 30th of May this year.[123] Although this research does not include the final version of the Regulation, the drafting process has been amply documented. The chapter includes further enlightening discussions on principles and at times critical comments. Therefore, it remains a valuable contribution in order to understand fully the final text of the Regulation.

In the final Part IV (Conclusion) of the study, the threads will be summarised and the main research questions will be answered on the basis of the "tools" provided in the foregoing chapters.

[123] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, O.J. L 145/43, 31.05.2001. This Regulation shall be applicable from 3 December 2001 (Article 19).

2 OPEN GOVERNMENT AND DEMOCRACY

2.1 Introduction

"Democracy is the ruling of public affairs in public" [1]

It has been widely acknowledged in the legal literature that democracy requires transparency and openness in public authority decision-making. Indeed, as numerous scholars have asserted openness within the decision-making process constitutes an essential element of democracy.[2] In contrast, secrecy in government is a key feature of a totalitarian regime, and the first action of any dictatorship is to suppress freedom of information.[3] The need for openness has been explained by reliance on two different aspects of democracy: participation and control/accountability.

In the first part of this chapter, the principal strands to the argument that openness is an essential prerequisite of democracy, as advanced in the legal and democratic literature, will be scrutinised. Next, a detailed examination of the principal streams of democratic theory and the conceptual links with openness will be undertaken. From this analysis it follows that the availability of, and access to, information is essential for the functioning of any democracy, however it is conceptualised. Nevertheless, the extent of openness, and the way in which it is to be implemented, differs according the democratic theory one has in mind. It will be shown that the need for information is more pressing in those theories which emphasise citizen participation than in more elitist theories in which the role of the citizen is reduced.

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[1] Arena (1991), p. 504.

[2] See, for example, Voorhoof (1991), who observes that amongst the essential basic conditions for a political democracy are publicity, transparency, and the institutionalised visibility of the actions of the government, p. VII; According to Burkens (1994) publicity constitutes a requirement of democracy, p. 94; De Meij (1991) notes that publicity is a living condition for a democratic society, p. 29; Steenbeek (1980) observes that publicity is a basic requirement of democratic governance, while it is an indispensable means (aid) to assure the influence of the people over government, p. 9 (the above citations are translated by the author from the Dutch). See further, Batmorey and McWilliams (1977) who refer to Bloustein, who stated that the free and open circulation of ideas is an essential element of democracy, p. 3; Turpin (1995) observes that "openness is a vital aspect of democracy," p. 468; Curtin, for example in (1995), p. 391.

[3] Cross (1953), p. 14.

2.2. The rule of law and the publicity of general rules

Before considering the relation between open government and democracy in general, it should be observed that the requirement of publicity in respect of rules of a general nature does not follow from the principle of democracy, but from the fundamental principle of "the rule of law" (principle of legality). The rule of law, which is the foundation of any Western democracy, requires that "the law which governs human affairs must be accessible in advance to those whose conduct it purports to regulate. Without access to laws citizens cannot assert what their rights and duties are, and consequently they cannot regulate their conduct in accordance with those rules."[4] Countries based on the rule of law are therefore required to publish laws.[5] In those countries, the requirement of publicity applies in general also to delegated legislation.[6] More controversial is the publicity of quasi-legislation. Administrative authorities frequently make rules without statutory authority, which are intended to regulate the way in which statutory or other discretionary powers will be exercised. These are rules of administrative practice, not of law, and are commonly described as administrative quasi-legislation or policy rules. They may be expressed as broad principles, standards or guidelines, or may be prescribed in specific detail the terms upon which action will be taken.[7] In the literature, support can be found for publishing quasi-legislation on the basis of the same considerations which require the publishing of legislation. Clearly a person can no more make his conduct conform with a secret guideline or manual than with an unpublished law.[8] The rule of law requires, further, that laws be clear. If laws are to be an effective and reliable guide to conduct, it is evident that they should be clear. It has been argued that this is one of the most essential ingredients of legality.[9]

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[4] Fox (1979), p. 185.
[5] See also Turpin (1995), p. 67.
[6] See, for example, in respect of the United Kingdom, Section 2 (1) of the Statutory Instruments Act 1946 which provides for the publication of statutory instruments. Most delegated legislation takes the form of statutory instruments: see Turpin (1995), p. 329. See, for the Netherlands, Articles 88/89 of the Dutch Constitution and "De Bekendmakingswet" (Publicity Act) of 4 February 1988, Staatsblad 18.
[7] Turpin (1995), p. 344-349.
[8] Fox (1979), p. 181 and 195. Fox discusses, in Chapter VIII, the problem of "secret laws" (quasi-legislation), and comes to the conclusion that, on the basis of the rule of law and ministerial responsibility, "secret laws" ought to be published: see p. 177-247. See also Konijnenbelt (1994), p. 506.
[9] Turpin (1995), p. 67.

2.3 Democracy as the foundation of open government

2.3.1 General

The need for openness in a democracy has been explained in the legal/democratic literature by reliance on two different elements of democracy: participation and control/accountability. The argumentation found in the legal literature remains, however, rather superficial and most academics do not seem to have a particular democratic theory in mind. Sometimes they build their argumentation on the ideal of democracy, but mostly their starting point is democracy as it actually exists in the West, i.e. liberal representative democracy.[10] Moreover, the majority do not discuss the need for legislative and administrative openness in democracy separately, but treat these issues together or explain only the necessity of administrative openness for democracy. The fact that legislative openness is not discussed as such is logical given the fact that it constitutes a well-established element of representative democracy since the 18th and 19th century, and is thus no longer in discussion. Instead, administrative openness is a relatively new concept for most countries, as it emerged only in the 1960s and 1970s.

Whereas the argumentation in the legal literature as to why democracy requires openness is rather superficial, in the literature on democratic theory it is very hard to find any reference at all. In contemporary democratic theories, especially in liberal theory of democracy, there is little consideration of the question as to why democracy demands an open system of government.[11] In liberal theories often no more than a brief reference is made to the need for information for a democracy to function. An exception constitutes the notorious political scientist Dahl, who has elaborated on the link between access to information in both ideal and liberal representative democracy in a more comprehensive theoretical fashion (see §2.3.5.). The reason for this "omission" is, that a tacit assumption exists, especially in modern liberal democratic theory, "that a transparent system of government is basically desirable, and only regrettable, temporary measures require tampering with the democratic principle of the free flow of information."[12] Thus, no explicit reference is made to this need since it is obvious that democracy requires openness in the decision-making process. Given what has been said above, it is not surprising that greater stress is put on the need of enlightenment and information in more participatory theories of democracy (see §2.5.3.).

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[10] Most Member States of the European Union have a parliamentary democracy, although some have a form of presidential democracy with restricted, though essential, parliamentary functions, as in France. See Ress (1994), p. 158.

[11] Sartori notes that the problem of visibility is overlooked by the Realist camp and aggravated by the Idealist camp, see (1987), p. 244. He warns of the danger of hampering responsible behaviour, instigation of image selling or the leading of decisional paralysis, etc., p. 244.

[12] Galnoor (1977), p. 278.

2.3.2 The argument based on democratic participation

The need for openness has been defended in terms of citizens' need to have access to official information to formulate their opinions, to vote intelligently, to be involved in public debates and in the formation of the public opinion, and to participate through petition/referendum or in other ways (by joining political parties or organisations). Participation requires a timely availability of, and access to, information regarding the decision-making process, i.e. *before* a decision is taken.

The need for openness has, in the first instance, been justified by the fact that citizens need information to formulate their opinions. It has been stressed that the freedom to formulate one's opinion about public matters is a fundamental aspect of any democratic state. A democratic state should be responsive to the preferences of the people, but this is only possible if they have the opportunity to formulate freely (not centrally influenced) a political opinion and to make choices. In order to formulate their opinion freely, they need to have access to relevant information.[13] In a liberal democracy, these opinions are primarily expressed through the vote.

Sartori points out that elections have a pre-voting background. He observes that voting might be the mechanical guarantee of liberal democracy, as people can replace those governors which have not fulfilled their task satisfactory, but:

> the substantive guarantee is given by the conditions under which citizens get information about the manner in which decision-making takes place and is exposed to the pressure of opinion makers. Ultimately, the opinion of the governed is the real foundation of all government. If this is so, then elections are the means to an end, the end being a "government of opinion," that is, a government responsive to, and responsible towards, public opinion.[14]

He stresses further that "the whole edifice of democracy ultimately rests on the relative fairness, impartiality, or correctness of the information delivered to the public."[15]

Numerous scholars share the opinion that democracy is not limited to the expression of an occasional vote, but that participation is an essential element of democracy. Burkens points out that a democratic system demands more than a periodic casting of votes. He considers it a norm that any polity should satisfy, and a reality, despite being not fully realised. The daily management of public business is fed by a continuous influx of wishes and criticism, from individual citizens as well as from numerous interest

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[13] De Swaan (1966), p.
[14] Sartori (1987), p. 87. See also Weinberger (1996), p. 252. "If democratic voting is to be reasonable it has to be based on appropriate information available to the electorate."
[15] Ibid., p. 102.

groups, which, together, constitute public opinion. The press plays an important role in expressing public opinion. Public policy is conducted against this background.

In the literature, much emphasis is put on the citizen's participation in the formation of public opinion, which constitutes an important power factor in society. In liberal democracies, the participation of most citizens, in between elections, is restricted to their role in the formation of public opinion; only a few actually participate directly.[16] Public opinion in a democracy comes about as a result of public deliberation, which, in its turn, takes place in a parliamentary democracy in parliament and in civil society. The Bundes verfassungsgericht in the *Brunner* case explained this relationship, and the link with transparency and openness, very well. It stressed that democracy functions through wide-spread public deliberation, which leads to the formation of public opinion which serves as the basis for public action. In the words of the Court:

> Democracy, if it is not a merely formal principle of accountability, is dependent on the presence of certain pre-legal conditions, such as the continuous debate between opposing forces, interests and ideas, in which political ideas also become clarified and change course and out of which comes a public opinion which forms the beginnings of political intentions. That also entails that the decision-making processes of the organs exercising sovereign powers and the various political objectives pursued can be generally perceived and understood.[17]

The link between discourse and information has also been emphasised by Weinberger. He notes that the "the formal rules of voting and holding elections are not by themselves sufficient for granting the realisation of democratic ideals, they must be accompanied by an effective system of discourse about political and social questions, by transparency of public relations and by appropriate access to relevant information."[18]

The link between participation and publicity was made in a more general fashion, by Advocate General Tesauro of the European Court of Justice in *Netherlands v Council*. He observed that only if there is appropriate publicity of the activities of the legislature, the executive and the administration, is it possible for there to be effective, efficient supervision, through public opinion, of the operations of the governing organisation, or indeed for genuinely participatory models to evolve as regards relations between the administration and the administered.[19] In this respect, public access to documents is very important for all

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[16] Burkens (1970), p. 36. See also Barber (1984), p. 221. He notes that Western liberal democracy appears to be, first and foremost, a system of control and accountability, and not of participation. Accountability is the central element of representative democracy ("thin democracy"). "Thin democracy" he observes destroys participation and has a weak view of citizenship.

[17] See Bundesverfassungsgericht in *Brunner* case (1994), CMLR 57, 87. p. 252.

[18] Weinberger (1996). See also Eriksen (2000), p. 47. Those with a deliberative vision of democracy stress the need for discussion in a democracy (see §2.5.3).

[19] Advocate-General Tesauro in Case C-58/94, *Netherlands v. Council* [1996] ECR, p. I-2178.

those groups that want to influence the government or legislature concerning certain policies or decisions to be taken, but which do not have privileged access to government information.

The requirement of openness has also been deduced more strictly from the principle of "equality", which underlies every vision of democracy. Political equality has been said to exist when every citizen has an equal opportunity to participate in political life and to try to achieve power. De Swaan concludes, from this, that citizens should have the equal opportunity of access to the facts in order to formulate their opinions.[20] Secrecy, which confers a position of power on a few inside government, is thus in violation with the principle of equality. He stresses that participation is not obligatory, but nevertheless there must be an opportunity to participate and a possibility to have access to information. From a democratic point of view, openness is in the interest of the citizen in his role as political actor. For those who consider democracy to be a desirable situation, this interest constitutes at the same time a norm at which to aim.

The degree of openness required depends on the intensity of participation. Those merely taking part in the public debate or voting as such, would seem to require less openness than is the case if one wants actually to participate or influence the decision-making process. In order to influence a decision, access is necessary to all the relevant documents underlying the decision-making process. However, the fact that in modern democracies not much people actually participate, does not seem to be a good argument for a low degree of openness. If one considers that participation constitutes an essential feature of (any) democracy, however imperfectly realised, then there should be as much openness as possible to allow those who may decide one day to participate to have the means to do so.

2.3.3 The argument based on democratic accountability and control

The need for openness in a democracy can also be defended on the grounds that it is necessary for the exercise of control and accountability.[21] It should be mentioned that the concept of accountability does not derive from democracy, but from liberal constitutionalism. However, it assumes a particular importance in democracies. There is no democracy without accountability. In democracies, the meaning of accountability "involves the idea that those who exercise power, whether as governments, as elected representatives, or as appointed officials, are, in a sense stewards, and must be able to show that they have exercised their powers and discharged their duties properly."[22] According to the constitutional theory of liberal parliamentary democracies, parliament is directly accountable to the electorate, whereas the executive branch of government is (indirectly) accountable to the electorate on which it depends

[20] De Swaan (1960), p. 9.
[21] See for example, Voorhoof (1991), p. IX; Maarseveen (1969), p. 10; Steenbeek (1970), p. 42. Arena (1991), p. 504. Curtin, for example in (1996), p. 75.
[22] Robertson (1985), p 2.

(responsible government), through parliament. The latter can dismiss the government of the day. Ultimately, the government is accountable to the people through elections.

It is obvious that without adequate knowledge of what is happening in parliament, citizens cannot control their representatives and keep them accountable, and the same is true in respect of the supervision and control of the government by the parliament or the citizens. In order to be able to scrutinise and evaluate the policies, actions, and decisions of the government, the parliament or/and the citizens need to know who has taken what decisions and actions, and how and why they were taken. Those exercising power cannot be held accountable and responsible if they have the exclusive possession and control of the information upon which decisions, policies and actions are based. Without this information, neither the parliament nor the people can effectively control whether the government has acted properly, and has not instead arbitrarily, corruptly, abused its powers or failed to abide by their wishes (or to balance the interests equally [23]). The tool of ministerial responsibility to keep the government accountable has appeared in practice insufficient for this end. Open government, i.e. access to documents/information held by the government, would allow the parliament to exercise its legislative and control function more effectively, firstly, because it would not be dependent only upon the supply of government information from the government itself, and secondly, because public opinion, which parliament should take into account and on which it depends, can then be formed independently from the goodwill of the government.[24] Finally, without open government the opposition is disarmed, as it cannot effectively keep the government in check.[25]

This argument, based upon control and accountability, has often been the main argument for the introduction of legislation on access to administrative documents in many countries (less participation). For example, in the Canadian Federal Green Paper, the element of control and accountability was considered to be the primary aspect of liberal democracy:

> Open government is the basis of democracy. It is an essential consequence of the extension of the franchise to all adult citizens. For a democratic society is one in which the exercise of governmental power is undertaken not by an elite according to its own precepts, but by an executive accountable to the public itself for the goals of the government action and the effectiveness of the government

[23] See Dahl in §3.5. The equal balancing of interests is an aspect of democracy.
[24] See Ivester (1977), p. 116.
[25] See Turpin (1995), p. 468. Opponents to open government (read rules on public access to government documents) argue that it will damage the principle of ministerial responsibility and civil servants anonymity. Governments argue that since the minister is alone responsible to the parliament, and where necessary should shoulder the blame, he alone must make, or have ultimate control over the making of all decisions, including decisions as to the disclosure of the information. It would undermine ministerial responsibility of parliament, if the courts or any other body had the power to require disclosure of documents or information by the executive. Compulsory disclosure of information would further remove from civil servants the shield of anonymity necessary for the retention of their political neutrality, without which the administration could not impartially serve successive governments of different political colour. These arguments have been the main ones which have been advanced in the United Kingdom over

performance in their achievement. Democratic government must be government acceptable to the citizens collectively. To ensure that it is acceptable, there must be a political system to establish that government is accountable. Effective accountability (the public's judgement of the choices taken by government) depends on knowing the information and options available to the decision-makers. Assessment of government depends upon a full understanding of the context in which decisions are made.[26]

Whereas participation requires access to detailed information before policies/decisions and actions are adopted, *ex-post facto* accountability consist in the judging of these actions after they have been taken.

2.3.4 Structural democracy argument

Another argumentation, often found in the American literature, is based on the idea of self-government. American scholars argue that the people's "right to know" is implicit in the structure of a self-governing system, such as the American one.[27] Because the people are sovereign, they are the fundamental source of all government power, and, therefore, have an inherent right to know what their government is doing.[28] This argumentation differs from that based upon accountability and participation, as the latter is based upon "need" whereas the former is based upon the structure of the system (see further §2.6).

2.3.5 The link between democracy, enlightenment and information

Dahl is one of the few political scientists, who has elaborated on the link between access to information in both ideal and liberal representative democracy in a more comprehensive theoretical fashion. In his book, *Democracy and its Critics* Dahl describes the five criteria of the ideal democratic process of government: effective participation, voting equality at the decisive stage, enlightened understanding, control of the agenda and inclusion.[29] The criteria are based on several assumptions, which he sets out beforehand. The most important one is that of "autonomy," i.e. that people are able to govern themselves. The five criteria

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the past decades for refusing attempts to adopt legislation on public access to government documents. See Austin, p. 396-397.

[26] Fox (1979), p. 2.

[27] The "right to know" includes the right of the public to receive information from a willing communicator without government interference and the public's right to obtain or have access to government information even when the government is unwilling to communicate the information. See Beers (1992), p. 184. See also the definitions of Ivester (1977), p. 109, and Emerson (1976), p. 2.

[28] Ivester (1977), p. 116 and Emerson (1976), p. 14-15. See, similarly, Wijnbergen (1968), p.13. According to Klinkers, this argument is not so much a democracy-based argument, but seems to be based more on a particular philosophy of the state (1974), p. 27-28.

are ideal standards. Dahl points out that the perfect democratic government, i.e. one that governs in accordance with the ideal democratic process (a process which meets all the criteria), might never exist in the real world. As one of the criteria for having an ideal democratic process, he mentions "enlightenment." In order to become enlightened, according to Dahl, each citizen should have adequate and equal opportunities for discovering and validating (within the time permitted by the need for a decision to be made) the choice on the matter to be decided that would best serve the citizen's interests.

He notes that it would be: foolish, and historically incorrect, to assert that enlightenment has nothing to do with democracy. It would be foolish "because democracy has been conceived as a system in which "rule by the people" makes it more likely that people get what they want, or what they believe is best, than alternative systems like guardianship in which an elite determines what is best. But to know what it wants, or what is best, the people must be enlightened, at least to some degree."[30] This argument appears also to combine an efficiency aspect alongside the democratic aspect, since open government would make for better decisions. As regards the democratic aspect, classical theories of democracy have stressed the importance of the means for an informed and enlightened *demos*, such as discussion and education. In fact, democratic theorists, such as Rousseau, who had a participatory vision of democracy, have emphasised the importance of civic virtue etc..

Dahl notes that this criteria implies "that alternative procedures for making decisions ought to be evaluated according to the opportunities they offer citizens for acquiring an understanding of means and ends, of one's own interests and the expected consequences of policies for interests, not only for oneself but for all other relevant persons as well."[31] This requirement provides guidance for what shape the institutions should have. He notes that this criteria makes it hard to justify procedures that would 1) "cut off or suppress information which, were it available might well cause citizens to arrive at different decisions, or that it would give citizens much easier access than others to information of crucial importance: or that would present citizens with an agenda of decisions that had to be decided without discussion, though time was available, and so on."[32] Dahl observes that many of the current political systems operate according to the worse not the better procedures. No doubt, our current democracies fall short of this ideal. However, against this ideal, the degree of democracy in real world decision-making procedures can be measured.

The relation between our representative democracy and the ideal democratic process is described by Dahl as follows. Western liberal democracy is often defined by listing procedural conditions that must be present for a modern political democracy to exist. According to Dahl, Western liberal representative democracy exists if the following seven institutions are present: elected officials, free and fair elections, inclusive suffrage, right to run for office, freedom of expression, *alternative sources of information*,

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[29] Dahl (1989), p. 106.
[30] Ibid., p. 111-112.
[31] Ibid., p. 112.
[32] Ibid..

associational autonomy (italics added).[33] These institutions are necessary, but not sufficient, to the highest feasible attainment of the ideal democratic process. He then notes that alternative sources of information are necessary to become enlightened, for effective participation, control of the agenda and inclusion. Citizens should have the right to seek out alternative sources of information, and these must exist and are to be protected by law.[34]

[33] The Dahl's list is the most generally accepted listing of the procedural conditions that must be present for a modern political democracy to exist. But there are other listings: see, for example, Bobbio in *Encyclopaedia of Democracy* (1995).
[34] Dahl (1989), p. 221.

2.5 Different democratic theories: open government and participation

2.5.1 General

The availability of, and access to, information is essential for the functioning of any democracy, however conceptualised.[35] According to Sartori: "the house of power be a house of glass."[36] However, the extent of openness, and the way in which it is to be implemented, differs according to the democratic theory one has in mind. In a direct democracy, openness is the logical result of the fact that the people are the government. Consequently information should be in the possession of all. On the other hand, in a representative democracy, the people do not decide the issues themselves. In other words, they react more than act, and consequently openness becomes a precondition for participation and control.[37] Different theories of democracy exist, emphasising each different aspects of democracy. Below, the main streams of democratic theory, as far as their relation between citizen participation and openness is concerned, will be analysed. It will be shown that the need for information is more pressing in those theories, which emphasise citizen participation, rather than more elitist theories in which the role of the citizen is reduced. It is necessary to explain some of these theories in certain detail, as they have been advanced in respect of the European Union. In recent years, the debate on the democratisation of Europe has been enriched with the advancement of alternative theories of democracy to the traditional liberal parliamentary representative democracy of the nation-state. The application of these theories to the European Union is addressed in §4.4.2.3.2..

2.5.2 Liberal theories of democracy

Various theories exist which describe in detail how representative liberal democracies work and function, for example, Schumpeter's competitive elitism, Dahl's polyarchy and Sartori's revised theory of democracy ("liberal theories of democracy"). In this section, the main streams of liberal democratic theories will be analysed and the conceptual links with openness (elitism, pluralism, corporatism etc.) examined. Schumpeter's theory of elitism will be treated in more detail, as elitist theories are based upon his theory, whereas pluralist theories share certain aspects of his theory.

In Schumpeter's democratic theory of "competitive elitism,"[38] in common with other elitist theories of democracy, the case for openness loses its significance.[39] Schumpeter rejected the "classical theory of

[35] Curtin, (1998/1), p. 2.
[36] Sartori (1987), p. 244.
[37] See Larsson (1998), p. 41.
[38] Schumpeter (1943).

democracy," which he defined as: "that institutional arrangement for arriving at political decisions which realises the common good by making the people itself decide the issues through the election of individuals who are to assemble in order to carry out their will." In his opinion, there exists no common good, which everybody can agree on. In the absence of a common good, no general will can emerge. In his opinion, people do not hold definite and rational opinions, instead their opinions are often "manufactured." Given his low estimation of the intellectual capabilities of the people, citizens are assigned a very limited role in democracy.

He reduces democracy into a method, that is, "an institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote." In this theory, democracy does not mean that the people actually rule, but only that the people have the opportunity to accept or reject the men who are to do the deciding. This should be achieved in a democratic way. The democratic method consists of free competition amongst political leaders for the vote of the electorate. The vote of the people serves to legitimise subsequent political actions. "In this theory, political participation is not an integral element of democracy at all."[40] The people's role is limited to the periodic vote for leaders.[41]

In this theory, which is only a small step removed from a technocratic vision of democracy (a vision which is both anti-liberal and anti-democratic), the availability and access to information is obviously not a major concern. What is required for this type of democracy to work is enough information in order to vote. As the emphasis is on *ex-post facto* accountability, and not on public control during the decision-making process or actual participation, it would be enough that people have access to information after decisions have been taken. They need to know who has taken what decisions, how and why. But openness has to be operationalised mainly between limited actors; the elite and political parties.[42] The competitive elite model has been criticised on many points. It has been argued that Schumpeter has misinterpreted the classical democratic vision, and, in particular, the reduced role of democracy has been criticised on normative grounds (participation is not sufficiently valued).[43]

Elitist theories of democracy are based upon Schumpeter's model of democracy. Elitist theorists were of the opinion that decisions in society are always made by a minority of the populace who dominate the

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[39] See also, Galnoor (1977), p. 19: "At the very least, the theory of democratic elitism reduces the role of the people, and with it, concern to understand and protect the people's right to know." See also Craig (1999), p. 35. He notes that in a Schumpeterian elite model, issues, such as transparency, participation, citizenship etc., largely cease to be of democratic concern given the operative definition of democracy.

[40] See Craig (1998), p. 58-59.

[41] The electorate should respect this division of labour existing between themselves and the politicians they elect. They should not withdraw confidence between elections, and, once they have chosen their politicians, political action becomes the business of the latter. This means that the electorate should refrain from trying to instruct their representatives about what they should do. Not only should formal ways of instructing be refrained from, but also less formal attempts such as, "the practice of bombarding them with letters and telegrams." See Schumpeter (1943), p. 295.

[42] Larsson (1998), p. 41. He mentions also interest groups, but in an elitist account of democracy intermediary groups are not considered.

[43] See, for example, Pateman (1970), p. 18. Bachrach (1967).

majority. They backed up their vision by referring to behavioural studies which showed that the level of citizen participation in politics was low, that society was in fact governed by the interested and the elite, and even that too much participation could have negative effects.[44]

In Schumpeter's theory of democracy, almost no attention is paid to "intermediary groups, such as community associations, religious bodies, trade unions and business organisations, which cut across people's lives and connect them in complex ways to a variety of types of institution."[45] Pluralists share the view of Schumpeter that what distinguishes democracy from non-democracy are the ways in which political leaders are selected, but they do not agree that power is concentrated in the hands of a competitive elite. According to this theory, liberal democracy generates many power centres, which are non-hierarchically and competitively arranged. Power is a process of endless bargaining between numerous groups representing different interests, such as trades, business, political ideas etc., citizens can belong to one or more groups. Governmental decisions are the result of the government trying to mediate and adjudicate between the competing demands of often relatively small groups, which try to influence government.[46] Thus, political decisions are not made by a single majority or by a single minority, but by minorities. It is not said, however, that all interests are likely to be fully satisfied. However, no group would wield excessive influence. The theory focuses on elections and interest groups as the mechanism through which citizens can control their political leaders. The fact that many citizens are inactive as shown by empirical studies is not considered as a problem. A degree of inaction might even contribute to the stable continuity of the political system. It is therefore concluded that democracy did not require a high level of involvement by all citizens; indeed it could work well without it. Thus, given the limited role played by the citizens in this theory (the majority only votes), the question of openness seems not really to constitute an issue of democratic concern. In this theory, a system of open government is necessary to achieve genuine pluralism, i.e. participation by all kind of groups in the decision-making process. Openness shall be operationalised, in particular, between the elite, political parties and interest groups. In practice this could mean that due process rules are adopted, which would allow all those interested to participate in an equal way in the decision-making process. These rules must also regulate the equal access to information (see further §4.4.2.3.2.).

Classical pluralism, as outlined above, has been criticised on many grounds and has dissolved into numerous competing schools and tendencies. It was presented as an empirical theory, describing the institutions and practices of democracy of the West, but in the end it also became a new normative theory. Neo-pluralism discovered that interest groups cannot be treated as equal, and the state cannot be regarded as a neutral arbiter among all interests.[47] Not only are there strong inequalities of social and economic resources (among which information and control of information) which distort participation as political equals, but the state is constrained to act favourably in respect of private enterprises and corporate powers

[44] Craig (1998), p. 58-59. He provides a short account of elitist theory of democracy.
[45] Held (1996), p. 186.
[46] Dahl (1956).

as they provide for economic growth and stable development. As a result, "the business corporation wield disproportionate influence over the state and, therefore, over the nature of democratic outcomes." A system of open government is necessary to overcome the inequalities in respect of information. However, the value of having such a system is diminished, because of the reduced possibilities for all kind of groups to participate. What is the value of having access to information, if, in the end, you cannot exert influence over the decision-making process (there are no opportunities to participate effectively)?

Another method of decision-making in liberal democracy, which has emerged, is called "corporatism". This is the institutional arrangement whereby public policy results from the relations between the government elite and the leaders of key organised interests, mainly business associations and trade unions. "In return for direct channels of bargaining with state officials (a representational monopoly) leaders of key organised interests are expected to deliver support for agreed policies and, if necessary, keep their own members firmly in line."[48] Negotiations have become more formalised, "although most of the discussions between parties takes place informally, behind closed doors and out of public view."[49] In corporatist democracies, representative political institutions are side-stepped by a decision-making process based on tripartism. Parliamentary or territorial representation is no longer the primary way in which interests are expressed and protected, but extra-parliamentary processes have become the place for decision-making. Finally, the scope for participation by representatives, let alone by ordinary citizens, has diminished greatly. Political participation has become the privilege of a few important interest groups, to the exclusion of others ("organisational elites").[50] Corporatism constitutes another force, which deprives the ordinary citizen of any substantial control over social, economic and political affairs.[51] It should be stressed, however, that most of the issues which have been the subject of tripartite arrangements have concerned macroeconomic policy. In this theory, a system of open government would seem to loose in importance given the fact that those who make the decisions have already access to information, whereas those who don't, are excluded from the decision-making process.

A few lines need to be dedicated to consociational democracy. This type of democracy can be found in sharply segmented societal sectors, such as countries such as the Netherlands and Austria. Functionality and stability of these countries has been explained by the behaviour of the political elite which control/lead fragmented social segments. Consociational theorists try to demonstrate "how in all successful consociational democracies, normal traditional political fora were bypassed and substituted by fora in which the leaders of all social segments participated, and compacts were arrived at, disregarding the principle of majority rule and using instead consensual politics. Competitive features are removed and co-operation sought."[52] Two requirements for successful functioning of consociationalism are, that the elites must be able to carry their own segments along, and that there should be wide-spread approval of

[47] Held (1996), p. 203.
[48] Ibid., p. 215.
[49] Ibid.
[50] Ibid., p. 216.
[51] Ibid., p. 219

the principle of government by an elite cartel.[53] A problem, which has been identified, is that some elites have often weak internal democratic structures of accountability and control. Calls for transparency and accountability can be, and usually are said to weaken the ability of the elite to represent effectively in the external context.[54] Another relevant problem is that it excludes social forces which are not so recognised, such as new minorities.

In sum, the above-mentioned theories share a common understanding of participation as not being a central element of democracy. Moreover, some theories even consider participation as normatively unattractive. Information flows will be foremost between elite, political institutions and particular interest groups. Citizens' participation is limited to the vote (elitist), or eventually by taking part in the formation of public opinion. As has been explained, to vote one needs first to formulate an independent opinion, which requires that people are enlightened to a certain extent. Thus, even though these theories make (ex-post) accountability the central element, open government is still necessary as the prerequisite for the formulation of opinion and will.

2.5.3 Participatory democracy, republicanism and deliberative democracy

In the 1960s, more participatory theories of democracy were advanced as a critical response to the procedural liberal theory of democracy.[55] The democratising element is not sought, as in liberal theory of democracy, in the "passive procedural participation" (voting), but in the participation by the citizens in decision-making process itself.[56] According to participatory theorists, an equal right to self-development can only be achieved in a participatory society, "a society which fosters a sense of political efficacy, nurtures a concern for collective problems and contributes to the formation of a *knowledgeable* citizenry capable of taking a sustained interest in the governing process."[57] Participatory theorists usually seek to reform representative systems and to combine them with certain elements of direct democracy, for example, the direct participation of citizens in the regulation of the key institutions of society, including the workplace and local community.[58] Obviously direct democracy requires access to and the availability of information before decisions are made. Participatory theories of democracy stress in fact the need for well-educated and informed citizens.[59] Democracy is not so much rule by the masses, as governance by educated citizens.[60]

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[52] Weiler (1998/1), p. 17-20, on p. 18.
[53] Ibid., p. 19.
[54] Ibid., p. 20.
[55] See, for example, Pateman (1970). See also Held (1996), who has constructed a model of participatory democracy, drawn from central elements of Poulantzas, Macpherson and Pateman (1970), p. 262.
[56] Curtin, (1998/1), p. 3.
[57] Held (1996), p. 262.
[58] *Encyclopaedia of Democracy* (1995), p. 923.
[59] *Encyclopaedia of Democracy* (1995), p. 923. See, for example, also Held's own theory, (1996), p. 290. One of the key features of his theory is the direct participation in central and local administrative services and self-management

In the 1980s, there was also a revival of republicanism and the advent of a new conception of democracy called "deliberative democracy." Both theories require input from the bottom.[61] The republican model of democracy has its historical roots in renaissance Italy.[62] The object of the republic was the pursuit of the common good. Democratic deliberation had to be designed to achieve the public interest rather than narrow sectional interests. This objective could only be realised if there was an institutional balance in the political ordering. The political structure had therefore to provide for a balance between different interests, which presented different sections within civil society. The political balance should at the one hand, prevent tyranny of one group over the other, which would constitute an extreme example of sectional self interest, and, on the other hand, it should help to "ensure a deliberative democracy within which the differing constituencies which made up civil society would be encouraged to treat their preferences not simply as givens, but rather as choices which were open to debate and alteration."[63] Thus, people or groups might have preferences, but these are not fixed and can be changed through the political process. The idea is that, through discussion, the citizens can leave their preferences and try to find the common good.[64] Central themes of republicanism are citizenship, civic virtue and participation.[65] This is in contrast with the elitist-pluralist vision, in which preferences are self interested, and enter the process as fixed factors, and are not shaped by it.[66] In both visions of democracy, there exists no common good that is separate from the preferences of individuals or groups in society (the aggregation of political preferences).[67] In the elite vision, the common good is the outcome of elite competition, whereas, in the pluralist vision, it amounts to the outcome of fair procedures of interest representation and group bargaining. Given this procedural view of the common good, the deliberative element of civic republicanism is not part of the pluralist conception.[68] The pluralist ideal is a political process, which reflects the true distribution and weights of social interests.[69]

Republicans want to combat factionalism, in particular, by securing and insulating "public processes of orderly political deliberation and efficient achievement of publicly declared ends."[70] The strategy of republicanism is to strengthen those institutions, alternative to secondary organisations, that are able to consider and act on the common good and to encourage those in power within such institutions actually to engage in such considerations in their actions. "The hope is to increase the degree to which deliberation about and action on the common good proceeds autonomously from the pressures of particular

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of socially-owned enterprises, etc.. In his model, he stresses the "open availability of information to ensure informed decisions in all public affairs," see p. 290.
[60] *Encyclopaedia of Democracy* (1995), p. 923.
[61] Craig (1999), p. 41.
[62] See, for an account of the historical roots of republicanism, Craig (1990), p. 315 (Chapter 10).
[63] Craig (1999), p. 38.
[64] See Curtin (1998), p. 13-14.
[65] Craig (1990), p. 328.
[66] Curtin (1998), p. 12.
[67] Craig (1999), p. 34.
[68] See Cohen/Rogers (1995), p. 28.
[69] Ibid.
[70] Ibid., p. 22.

interests."[71] Although republicans recognise the value of associations in public deliberation and the formulation of policies to the benefit of all, they have been assigned a secondary role in this model of democracy. For various reasons, republicans want to separate public deliberation as far as possible from group influence.[72]

In elitist and pluralist visions of democracy, legitimacy emanates from the aggregation of votes cast by secret ballot (majority vote).[73] In "deliberative democracy", arguing, not voting or bargaining, is the currency of democracy.[74] Deliberative democracy is based on similar intellectual lines as civic republicanism.[75] It has been argued that aggregation of preferences is not enough to legitimise political decisions. A majority vote does not amount to "the will of the people," but to that of the winners.[76] According to the deliberative vision of democracy, discussion is essential for reaching binding decisions. Discussion is, however, part of every model of democracy (precedes voting).[77] It is "an effective means to represent preferences and to compensate for asymmetric information and contribute to better decisions."[78] Deliberation is a way to gather private information in order to make rational means-end calculations, and to become enlightened. But the claim on behalf of deliberative democracy is that public communication is needed to legitimise outcomes *vis-à-vis* the citizens. "Only deliberation can get political results right, as it entails the act of justifying the results to the people who are bound by them."[79]

Effective citizen participation in the social dialogue is a central aspect of this type of democracy.[80] Deliberation shapes the identity and interests of citizens in ways that contribute to the formation of a public conception of the common good.[81] People are seen as capable of changing their individual preferences as a result of rational arguments in deference to overall fairness and the common interest of the collectivity.[82] Deliberative democracy locates popular sovereignty "in the anonymous and dispersed forms of communication in civil society (in the public spheres) combined with institutionalised discourses within the formal political complex."[83] The public sphere "is a common space for free communication secured by legal rights to freedom of expression and assembly."[84] Conditions for the existence of such a public sphere are: inclusion, freedom, equality, participation and an open agenda. There are many public spheres, which foster democracy as they enhance the possibilities for popular participation in opinion formation. In these spheres, "problems are identified, solutions articulated, thematised and dramatised in

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[71] Ibid.
[72] Ibid., p. 24-25.
[73] Eriksen/Fossum (2000), p. 17.
[74] Ibid., p. 49.
[75] See Curtin (1998), p. 16.
[76] Eriksen/Fossum (2000), p. 17.
[77] Ibid., p. 47.
[78] Ibid.
[79] Ibid., p. 48.
[80] See Curtin (1998), p. 16.
[81] Eriksen/Fossum (2000), p. 18.
[82] Curtin (1997), p. 54.
[83] Eriksen/ Fossum (2000), p. 52.
[84] Ibid.

such a way that they become relevant for parliamentary bodies."[85] Popular sovereignty is to be secured by both the interplay between free and open debate within the non-institutionalised publics and institutionalised debates within representative bodies-parliament.[86]

In the model of deliberative democracy, the institutions are also important, and "participation from the bottom takes place within and through the framework of a governance structure which facilitates such a discursive process."[87] Citizen participation or participatory democracy, is conceived as a method of informing, but not necessarily determining the process of representative government.[88]

Deliberative democracy is often advocated as being complementary to representative democracy. "The attempt is rather to rediscover the importance of deliberation in representative democracy amongst the citizens, amongst citizens and representatives and amongst the representatives themselves, and to maximise the potential of representative democracy."[89]

It is difficult to separate republicanism from deliberative democracy. In republican theory, emphasis is put more on the top-down structures. The representative organs should be organised in such a way that they deliberate on the common good, and the institutional balance should be maintained. Furthermore, in deliberative democracy, attention is paid to the top-down structures. However, the idea is more that participation from below takes place within and through the framework of a governance structure which facilitates a discursive process.[90] In deliberative democracy it is the dialogue, that should contain the chasing of private interests and emergence of factions. Another difference regards the central role assigned in deliberative theory to civil society for widening the public debate and for the emergence of the common good, which is not the case in republicanism[91]

It therefore follows that the ability to participate in the social dialogue (republicanism and deliberative democracy) or in the actual taking of decisions (participatory democracy) depends to a large extent on the availability and accessibility of information. Only if the (active) citizen has information about the issues under discussion can he take part, in an informed way in the dialogue, which might evolve into public opinion, and take informed decisions. Information is the precondition for deliberation and decision-taking. The function of openness in these theories is foremost to allow participation. The operationalisation of open government is also different in more participatory theories, as those theories require information *before* the decision is taken given their emphasis on the participatory role of the citizens.[92] Instead, in liberal theories of democracy, which emphasise the (ex-post) accountability aspect,

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[85] Ibid., (extract from Habermas), p. 54.
[86] Eriksen/Fossum (2000), p. 55.
[87] Curtin (1998), p. 99.
[88] Eriksen/Fossum (2000), p. 23.
[89] Curtin (1997), p. 55.
[90] Curtin (1998), p. 100.
[91] See, in particular, the deliberative model applied by Curtin in respect of the Union; see §4.4.2.3.2.
[92] See Curtin (1999), p. 74. She observes that deliberative democracy emphasises the fact that a significant objective of openness in democratic government is to enable participation in the deliberative process itself by means of effective access to the deliberative process and voice within it.

the need for information before a decision is taken becomes less important. Accountability is foremost about judging the why and how of decisions which have already been taken.

2.6 The extent of openness in democracy

If one justifies the need for openness by referring to its necessity for the functioning of democracy, than the extent of openness will depend on the people's need for information, which will depend upon how fully and actively they are to participate in the governing process.[93] This depends on the particular model of democracy, which one has in mind. However, if one relies on the structural democracy argument, i.e. the people are sovereign, then all government information would, in principle, fall within "the right to know" as there are no outsiders.[94]

In Western liberal democracies, openness is never absolute. The extent of openness is limited by other legitimate objectives of government such as being efficient and effective.[95] The relationship between democracy and efficiency has been explained by Boyce. She notes "that if inefficiency leads to the complete breakdown of a system of government, it results in the destruction of democracy, since absence of government cannot be equal to self-government by the people." Thus, she concludes that it can be sustained that, even in democratic terms, a balance should be made between democracy and efficiency.[96] She notes further, that this balance is largely to be decided arbitrarily, and depends on particular interpretations of democracy as well as on value judgements with regard to political efficiency and political participation. There are people to whom democracy means, in the first place, popular participation, whereas to others it means primarily the promotion of the common good. The first emphasises the input side, whereas the second is more concerned about the consequences of democracy, i.e. the way in which policy outputs affect the citizens. Boyce notes that there are only a few democratic theorist who are of the opinion that participation is of almost no importance as long as the output serves the general good, but that there is fierce dispute over the relative importance of democratic input *versus* democratic output.

On the basis of what has been said above, it can be concluded that the extent of openness must be limited if the government's measures would otherwise become inefficient. It should, however, be noted that the efficiency argument has also been used to argue in favour of more openness (see Chapter 1 (Sweden), and §3.2.2.).

All legislation on public access to documents contains exceptions to the right of access in order to protect the public interests (such as security, defence, monetary policy, combat of crime). These exceptions are included to protect the efficiency of government actions. Besides exceptions to protect public interest, there are also exceptions which protect the private interest, such as information provided by business to the government. These exception are based (indirectly) on the efficiency argument. For example, if the

[93] See Ivester (1977), p. 151-152.
[94] Ibid., p. 153.
[95] Boyce (1993), p.460-461.
[96] See, similar, De Swaan (1966), p. 10. See also Westlake (1998), p. 130 (effective government *versus* democracy)

government were to reveal its technical ways to combat crime than these tactics might become ineffective, or if it were to release to the public business information, supplied on request in the context of the development of government policy, such information would not be forthcoming the next time. The efficiency argument seems also to underlie the possibility for representative organs and government bodies to close their public meetings.

2.7 Concluding observations

The arguments, on which basis a certain level of openness in the decision-making process can be defended are manifold (see Chapter 3). In this chapter, one of the most fundamental arguments, the argument based on democracy, has been analysed in detail. It was shown that any type of democracy requires a certain level of openness in the decision-making process of the government. Only with sufficient access to and availability of information can citizens exercise control over those in power, keep their governors accountable or/and participate in the decision-making process. Moreover, only with a sufficient degree of openness can parliaments fulfil their role of control and public forum function more satisfactory. It was further explained that the extent of open government depends on the model of democracy which is embraced. In deliberative models of democracy, the function of open government is in particular to allow citizens to participate in the decision-making process, which means the need for timely and accurate information before decisions are taken. Instead, in liberal democratic theories, the citizens have not been assigned a central role in democracy, their role is often achieved simply by exercising the vote, and perhaps by taking part to a certain extent in the public debates. The central element of democracy is (ex-post) accountability, which means that the function of open government is foremost to allow citizens to judge the policies/actions and decisions of government. Ex-post accountability requires access to information after decisions have been taken. In particular, elitist theories, assign to the citizens a very small role in the political process, and democracy is reduced to a mere voting-system. However, even in this theory, a certain amount of information will be needed, as voting has a pre-voting background (see §2.3.2).

It should be highlighted that democracy is only one objective of government, the other being efficiency. This means that open government, although necessary for democracy, might find limits in the need for efficiency. All legislation on public access to government-held documents contains, therefore, exceptions to the general rule of openness in order to protect public and private interests. For the same underlying reasons, constitutions or ordinary legislation allow the legislator or government bodies to close their meetings to the public. The relation between democracy-efficiency is especially important in respect of the European Community, since much of its "make-up and functioning is justified in terms of efficiency, not democracy."[97] In particular, the European Council of Ministers has relied heavily on the efficiency argument, for example, to object to calls for opening up its debates when acting as a legislator, or in respect of requests for access to its documents (see Chapter 5).

[97] Boyce (1993), p. 460. See also Westlake (1998), p.130. He notes that, in respect of the EC, there is another relationship and that is between democracy and integration. He asks the question whether it is better to have some level of integration in a particular area, which from a democratic point of view is (institutionally) unsatisfactory, or no integration at all? He refers in this respect to the Third Pillar.

3 OPEN GOVERNMENT AND FUNDAMENTAL RIGHTS

3.1 Introduction

In the preceding chapter, the link between democracy and the principle of open government was scrutinised in detail. It followed that openness in the legislative and administrative decision-making process is an essential aspect of any democracy, however conceptualised. The principle of open government and, in particular, the right of public access to government documents, has also been explained from the point of view of fundamental rights. Open government and/or the right of access to documents has been said to be necessary for the exercise of certain fundamental rights, especially freedom of expression and information. Some academics conclude on this basis that open government and access to documents constitutes a fundamental human right. This aspect has also been defended on the basis of the democracy-argument. In §3.2.1 the arguments which have been advanced in favour and against this assertion in the literature will be analysed. Besides these highly normative foundations, a number of more pragmatic arguments in favour of open government and/or the right of access to documents have been advanced. These arguments shall be discussed in §3.2.2.

Despite the support in the literature for the claim that the right of access constitutes a fundamental human right, so far, only Sweden and Finland of all Member States of the European Union (EU) have recognised this status. This right has neither been enshrined in the European Convention on Human Rights and Fundamental Freedoms (ECHR), nor has it (yet) been recognised by the European Court of Human Rights as implicit in the freedom of expression clause (Article 10 ECHR). In other words, the view of Sweden and Finland has remained an isolated one and is not shared by the other Member States nor by the Court of Human Rights. Nevertheless, there seems to be a growing awareness of the importance of the principle of open government and the right of access to documents both at a state as well as an international level. This is, in particular, shown by developments in the (candidate) Member States of the European Union, as well as the Union itself. But also the political institutions of International Organisations have placed more emphasis in their legal documents on the importance of open government and the right of access to documents for democracy. As far as the case-law of the European Court of Human Rights is concerned, some positive developments in the field of access to information can be noticed. In the second part of this chapter, the legal approach taken towards open government, and in particular, access to documents, in the Member States, the European Union (introductory remarks) and in the context of the Council of Europe will be examined. In the conclusion to this chapter, the question whether the right of access to documents is gradually evolving into a fundamental human right will be addressed.

3.2 Open government and fundamental rights in the legal doctrine

3.2.1 Arguments against and in favour of the assertion that open government, and the right of access to documents, constitute a fundamental human right

In the legal literature, a number of philosophical arguments have been advanced as to why the principle of open government is of a fundamental nature, and, in particular, why the right of public access to documents held by the government constitutes a fundamental human right. There are, in particular, two main arguments upon which this assertion has been based.

The first argument is based upon the principle of democracy. It has been said that open government and/or the right of access to documents constitutes a fundamental right as it is essential for the functioning of any democracy. In the preceding chapter, it was shown that open government and access to documents are necessary for citizens to participate, to exercise control over government and to hold those in power accountable. It has been argued that even in the absence of any provision obliging public authorities to conduct their affairs in public, this duty can be derived from the democratic principles on which the nation-state is based.[1] It must be observed, however, that many authors see in the democratic principles the foundation of open government and public access to documents,[2] but not so many state *explicitly* that open government and/or the right of public access to documents constitutes a fundamental human right on this ground.[3]

Secondly, it has been asserted that open government and, in particular, the right of public access to documents, constitutes a fundamental right as it is necessary for the exercise of other fundamental rights, in particular the right to freedom of expression and information. The right to freedom of expression is one of the essential foundations of any pluralistic democracy. Its main theoretical justification lies in the fact that it enables citizens to participate in a democracy.[4] Individual freedom of expression is an intrinsic element of the free formation of public opinion on political issues.[5] It has been observed that whereas in

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[1] See De Meij (1980), p. 420. He makes this observation in respect of the Netherlands. See further Curtin (1999), p. 73. See also the opinion of Advocate-General (AG) Tesauro in respect of the European Union in *Netherlands v. Council* (28 November 1995), Case C-58/94, [1996] ECR I-2169, §19. This case shall be treated in detail in §4.5.2. In the opinion of the AG, the basis of the right of access to official documents can be found in the democratic principles which are enshrined in the Preamble and in Article F of the Maastricht Treaty. This right already existed in the Community legal order before the adoption of rules on access to documents by the Council.

[2] See Chapter 2 for references of those authors.

[3] Those who do are, for example, Curtin (1995/1), p. 80 and p. 104; Ragnemalm (1999). Advocate-General Tesauro stated in his Opinion that the right of access is increasingly clearly a fundamental civil right. The foundation of this right, he asserts, is found in the democratic principles. See his Opinion issued in *Netherlands v. Council*, op cit.., §16-19. Also the Netherlands and the European Parliament (EP) view the right of access to documents as a fundamental right with its foundation in the democratic principles. See *Netherlands v. Council*, op cit.. This case is treated in detail in §4.5.2.

[4] Barendt (1987), p. 20.

[5] Bullinger (1985), p. 345.

the past the right to freely express sentiments and thoughts was considered sufficient, today there is also the wish to be able to formulate these before expressing them.[6] Obviously, individual opinions can only be formed in an intelligent way if there is access to information.

Besides explaining the principle of openness from freedom of expression, it has further been explained by reference to other rights which enshrine the idea of democratic participation, such as, the fundamental right to take part in the government of one's country, directly or through freely chosen representatives (the right to vote), the right of freedom of the press and the right of freedom of assembly and association.[7] Open government constitutes an indispensable requirement for the exercise of these fundamental rights. On the basis of this close relation, it has been concluded that open government constitutes a fundamental right. For example, Klinkers considers open government as an aspect of the freedom of the press, and argues in favour of enshrining the principle explicitly in that specific fundamental right.[8] In the opinion of De Meij, open government must be considered as a classical fundamental human right as it concerns a right aimed at participation.[9] *Qua content*, he considers it to be related to the right to vote and to the right of freedom of expression. According to De Meij, it constitutes an aspect of the right of freedom of expression and information.

Similar arguments have been made in respect of the right of public access to documents, which constitutes a specific facet of the principle of open government.[10] As is the case with the right to open government, the right of access is in general not viewed as an independent fundamental right, but as an aspect of another fundamental right.[11] According to Klinkers, for example, the right of public access to documents constitutes an aspect of the right of freedom of the Press.[12] However, most of the time the right has been said to constitute an aspect of the right of freedom to information, which is in itself a corollary of the right to freedom of expression. The most well-know example of the close link between the right of access and the fundamental rights of freedom of expression and freedom of the Press is offered by Sweden. The Fundamental Freedom of the Press Act 1799, which is part of the Swedish Constitution, includes, in Chapter 2, the public's right of access to official documents. Article 1 of Chapter 2 stipulates that "in order to encourage the free exchange of opinions and the enlightenment of the public, every Swedish subject shall have free access to official documents." This rationale shows that public access is

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[6] Klinkers (1974), p. 43.

[7] Steenbeek (1970), p. 43-45. See also Maarseveen (1969), p. 10. Steenbeek links open government to a number of classical fundamental human right, whereas Klinkers regards in particular the principle of open government as indispensable for the exercise of the fundamental right of freedom of the press and that of freedom of assembly and association, (1974), p. 39.

[8] Klinkers (1974), p. 42-48.

[9] De Meij (1980), p. 420.

[10] Ragnemalm (1999), p. 810. See also Curtin, who agrees with Ragnemalm, (1999), p. 73. They conclude that the right of access to documents constitutes a fundamental right as it is necessary for the exercise of other rights, in particular the freedom of information and expression.

[11] Lammes is an example of an author who regards the right of access as an independent fundamental right. He stressed that public access to documents is necessary for the exercise of fundamental rights, and belongs to the classical realm of fundamental human rights. He argued for enshrining this independent right in the Dutch Constitution alongside the classical human rights, such as freedom of expression, freedom of association and assembly and the right of petition. Cited by Klinkers (1974), p. 136.

closely connected to freedom of information and expression.[13] The Constitution of Finland, under the heading of fundamental rights, enshrines the right of freedom of expression and the right of access to information in one and the same article. This shows the close connection between the two, although, the latter is not seen as an aspect of the former.[14] The link between the right of public access to documents and the right of freedom of expression and information has, in particular, been made in respect of the European Convention on Human Rights. It is claimed that the right of access is now implicit in the freedom of expression clause as laid down in Article 10 ECHR. Similar links have been made in the American literature in respect of "the right to know" and the First Amendment.[15]

The importance of labelling a right as fundamental lies in the enhanced protection offered against violations of such rights. Fundamental rights will usually be laid down in the constitution of a state, which means that they can only be amended following the heavier amendment procedure which applies to constitutions. Limitations to fundamental human rights are more strict than in case of ordinary substantive rights, and the conditions under which limitations are allowed are usually enshrined in the constitution. Certain human rights do never allow limitations, for example the right not to be tortured, whereas others do, for example the right of freedom of expression or the right of freedom of assembly. Members of the Council of Europe must guard that restrictions to fundamental rights which are protected by the ECHR fulfil the conditions as are laid down in the respective fundamental right clauses. In respect of the right of freedom of expression and information as enshrined in Article 10 ECHR, this means that limitations to the exercise of this right must be prescribed by law and be "necessary in a democratic society" in order to protect public and private interests (see Article 10(2) ECHR). The Court has developed two concepts which should help to interpret the limitations laid down in the freedom of expression clause, namely the concepts of "margin of appreciation" and "proportionality."[16]

Not everybody shares the view that open government and/or the right of public access to documents constitutes a fundamental human right.[17] First of all, one might not agree with the argument that because it is necessary for the exercise of other rights or for the functioning of democracy, it necessarily follows that it amounts to a fundamental right. Indeed, the argument that the right of access is essential to democracy and, hence constitutes a fundamental right, has been questioned. Davis observes that it is not at all sure that a fundamental right to live in a democratic society or to vote exists.[18] He argues that if one accepts this, then it would seem logical that there cannot exist a fundamental human right of public access to documents on the sole ground that the latter is essential to democracy. He relies upon the theories of

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[12] Klinkers (1974), p. 47-48.
[13] Österdahl (1998), p. 338.
[14] See Article 12 of the Constitution of Finland (amended in 1999).
[15] See Ivester (1977), p. 118.
[16] The proportionality test entails that the means are proportionate to aim pursued. The concept of "margin of appreciation" leaves states a degree of discretion as to how to implement the Convention rights, and how to interpret them.
[17] See Davis (1999), p. 2. For example, Kabel and Barendt have expressed doubts as regards the fundamental right status of the right of access to documents (see more ahead).
[18] Davis (1999), p. 4-7.

Raz and Gewirth regarding the question when a right constitutes a fundamental human right. He warns that, for example, Europe and North America may band together in international accord and designate certain fundamental rights (such as right to live in a democracy, to vote or to have access to documents), but unless they are able to claim that these rights truly have fundamental status by means of convincing philosophical arguments, they risk creating a situation in which certain people will be said to enjoy a fundamental human right, not because they are human, but because they happen to be citizens or residents of a European or North American state. It does not seem necessary to address the democracy argument given the fact that in Europe the right to democracy clearly exists.[19] Moreover, the danger Davis warns for does not seem to be very realistic.

In his article, Davis addresses a number of arguments which have been put forward in the literature against the claim that public access to documents is necessary for the functioning of democracy and/or constitute a fundamental human right. Below, these objections will be analysed and commented on.

Barendt argues that the electorate should not go in search of information to exercise their right to vote.[20] He notes that the government in a democracy has a moral duty to inform the public about public affairs and, therefore, there is no need to claim such a novel right against the democratic state in order for the latter to function as a democracy. This argument can be debunked rather easily as it cannot be expected from the government that it supplies sufficient, accurate and timely information.[21] It goes without saying that reliance on the release of information by the government itself, as the only way to get information, is dangerous as it is the latter itself which determines what it shall release, in what form and at what time. The possibility of concealing or manipulating the truth is much greater (see Chapter 1). By granting citizens access to documents, they can choose the information they want to see, and form an opinion based upon the crude material itself (or more probably after the media and/or civil society has elaborated upon it). Thus, public access allows them to exercise democratic control.

Davis questions, however, whether scrutiny by the general public is the best guard against corruption. He observes that certain facts might fall under an exception provided for in the public access legislation, and, in this way any wrongdoings could be easily concealed. To ensure that matters which are traditionally outside the public domain (national security) are less vulnerable to corruption, he is of the opinion that the introduction of an Information Tribunal, with extensive investigative powers, might be a better solution than control exercised by the general public. He further points out that citizens in general would not make use of their right of access and, although journalists and academics probably would, he notes that the former are not always free from bias and the latter does not always reach a wide enough audience if they succeed in uncovering something that the public should know about. The last two arguments seem rather weak. It is true that the press is not always free from bias, but by revealing certain facts, even if set in the wrong light, a debate can be started which might in the end reveal the truth. As regards academics, they

[19] Moreover, Öberg has pointed to another philosophical justification on which basis the link between the *human* status and public access might be forged. This justification will be treated at the end of this paragraph.
[20] Barendt (1991), p. 21-22.

can always knock on the door of single Members of Parliaments (controlling the executive is one of the main tasks of Parliament), which can take the matter further. The right of public access to documents is further valuable for its preventive effect.[22] One of the main reasons for the introduction of rules on public access in Sweden is to ensure that the public authorities are aware that they operate under the public eye, which greatly contributes to the prevention of corruption and maladministration.[23] Although this argument has an element of efficiency (prevention of waste of sources as a result of democratic control), it is also linked to democracy as people only rarely support corruption. In the opinion of Davis, this is however not enough, and he refers again to the introduction of an Information Tribunal. Moreover, he argues that if the state is corrupt, then public access will not solve this problem and will not reveal the truth. He points to the observations made by Birkinshaw, who refers to the problem that freedom of information might create even greater secrecy: "the spectre of the file behind the file, the meeting behind the meeting and the state behind the state."[24] It might further lead to a paperless society, i.e. a society in which only the minimum is written down.[25]

Another objection against the need for rules on public access to documents is offered by the classic British sceptical perspective, which argues that rules on public access to documents are not necessary, since British democracy has functioned for so long without it. Outside Sweden it has often been sustained that other countries do not need rules on access to documents as the principle of ministerial responsibility applies to the whole administration, whereas in Sweden this principle is much more limited.[26] It should be stressed that elements in the British government, however, leak systematically. Moreover, democracy is of course not only about democratic control, but also about public debate and participation. The British democracy is, perhaps, rather elitist and based upon trust between the governed and the governors. This contrasts with the Swedish type of democracy, which is more participatory, and there exists a healthy mistrust of democratically-elected officials.[27] In other words, the need for access to and availability of information is greater in the latter type of democracy than in the former. However, by providing the tools for enhanced democratic control and a more participatory democracy, i.e. open government, democracy can only become stronger.[28]

The above conclusion seems to be enfeebled to a certain extent by empirical data which reveal that the right of public access to documents is often not used for the purpose of participation, but for other goals. Mackaay observes that the United States FOI legislation is used in particular by commercial interests

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[21] See similarly Davis (1999), p. 8. See also §1.1.1 above.
[22] Ibid., p. 9.
[23] See speech given by Laila Freivalds, Ministry of Justice of Sweden at the seminar on the principle of publicity, transparency and public access to documents in the EU, Trier Academy of Law, Stockholm 16-17 September 1996. She also observes that it has actually made the Swedish administration more efficient.
[24] Davis (1999), p. 11. Birkinshaw (1996), p. 49.
[25] Birkinshaw, ibid.
[26] See De Meij (1966), p. 99. See also Chapter 2.3.3..
[27] Österdahl (1998), p. 337. She notes that the Swedish law is based upon the premise that power always corrupts, even in a democracy (...).
[28] On "thin" and "thick" democracy, see Barber (1984). See also Chapter 2.

seeking to gain competitive advantages, which is hardly related to the participation of citizens in government.[29]

This objection is real and seems difficult to rebut. It can, however, be argued that the need for this legislation exists so as to provide those, who may decide one day to participate, with the necessary tools to do so. Of course those who participate, mainly large private interest groups, may have access to all the documents relating to the issues under discussion via informal channels. However, access to documents legislation creates the opportunity in particular for smaller public and private interest groups, which lack these contacts, to have access to the same material.

Davis lists a number of other empirical observations which might be advanced by the sceptic in order to suggest that democracy functions well without public access rules. Amongst these, he mentions the argument that whilst admitting that public access could stimulate public awareness and debate of important issues, it could be argued that this is the job of the opposition and the press. This is, however, a rather elitist vision. Moreover, the latter two would only seem to benefit from a right of public access to documents to fulfil this task. Another objection is that the people seem to have sufficient information available to them to express themselves, and, therefore, it is not clear as to why people need to have access to the minutiae of government to express themselves. In order freely to form an opinion upon "objective" information, citizens need public access to documents. Interest groups obviously require public access to documents to form a well-founded opinion, and to participate, whereas the Press, as the intermediary between the government and the citizens, requires access to documents to furnish more detailed and accurate information which they are probably not going to get if they only can rely upon the information services of the government. Of course, they are not free from bias, but with a right of access to documents plurality is more likely to come about, and in its turn plurality of the press must guarantee a certain amount of objectivity.

Davis mentions moreover the danger that public access might be negative for democracy, instead of being of value to it. Whereas supporters claim that it increases efficiency and the quality of decision-making (see next paragraph), opponents argue that it decreases administrative efficiency and note that officials, who feel watched, might not want to take risks and innovative decisions.[30] It might further lead to excessive mistrust, as people might think that they cannot trust those in power if they do not have the possibility to look over their shoulders (and perhaps not even then). As a result, democracy might be viewed in the end as the best of a poor range of options, instead of the best available system of government. The latter argument is another important aspect, though it is not related to the fundamental rights as it refers to transparency as a trust-building device.

It can be concluded that public access to documents is essential to modern democracy and, in particular, for a more participatory/deliberative type of democracy to evolve. The question remains, however,

[29] Mackaay (1992), p.173.
[30] Birkinshaw (1996), p. 49.

whether the mere fact that a right is essential to democracy and to the exercise of freedom of expression makes it a fundamental human right? Not all authors share this view. For example, Barendt acknowledges that freedom of expression is not worth much unless citizens have some right to acquire information (better informed speech). However, he observes that on this basis other rights should also be accepted such as education and travel.[31] The argument does not, therefore, support the enactment of rights to obtain government information generally. In his opinion, these rights are justified because of the need for an informed public, able in particular to make intelligent electoral and political choices. He doubts whether this is a fundamental human right, although it is recognised to some extent in most Western democracies for utilitarian political reasons. It can be pointed out that the fundamental right to freedom of expression, as justified by democracy, is also utilitarian or consequential in nature.[32] However, this freedom has also been defended by the argument of the right to self-fulfilment, which does not seems utilitarian in form.[33] Kabel seems of the opinion that this right can never constitute a fundamental right. He observes that the right of access, directly related as it is in most cases to a fundamental end (freedom of the press, disclosure of laws, democracy, clarity of judicial proceedings), apparently seems not an end in itself and, therefore, problems with it being a fundamental right will always remain.[34]

If one is not convinced that the argument of democracy and/or the freedom of information offer a convincing philosophical justification for accepting the fundamental status of public access to documents, then this status might be accepted by reference to the philosophical argument of Popper. Popper's argument has been advanced by Öberg, which sets it out as follows:[35] Popper has argued that political thought should accept from the start the possibility of bad government. Popper poses the question as to whether we should prepare for the worst leaders, and hope for the best. In his opinion, this leads to a new approach to the problem of politics. Instead of answering the question who should rule, the question of how to organise political institutions so that bad or incompetent ones can be prevented from doing too much harm. According to Popper, all citizens are to a certain extent responsible for their government, even if they do not exercise the power. Popper argues that the exercise of this co-responsibility requires freedom of expression, freedom of access to information, freedom of the press as well as many other freedoms. However, this theory seems in the end to lead again to democracy. If citizens discover that the government is bad, than they need a mechanism to replace it and to create another government. In the West, this mechanism is democracy.[36]

It seems that the literature offers a number of philosophical arguments on which grounds the fundamental nature of the right to open government and/or the right of public access to documents can be accepted. In the author's view, the fact that open government and the right of access to documents are a necessary

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[31] Barendt (1992), p. 21.
[32] Barendt (1987), p. 20-21.
[33] Barendt (1987), p. 14. Freedom of expression is also justified from the argument of the free discussion for the discovery of the truth (more utilitarian in nature).
[34] Kabel (1991), p. 164.
[35] This argument has been put forward in Öberg (2000), p. 1.
[36] This argument was raised by Davis in the EFIL discussion group.

precondition for the functioning of democracy constitutes a convincing philosophical justification for the acceptance of its fundamental human right nature. The right of access to documents seems to constitute a feature of current times. It has been said to constitute just another step in the still continuing process of political democratisation (see Chapter 1).[37] It has also been characterised as a third generation right, together with environmental rights. Whether open government and/or the right of access to documents actually constitutes a fundamental human right depends upon its recognition as such in the national or international legal order (see §3.3 and 3.4).

3.2.2 Other arguments in favour of open government

3.2.2.1 Preliminary remarks

Besides the philosophical arguments which have been discussed in the preceding paragraphs, other less normative, more pragmatic arguments in favour of open government and, in particular, the adoption of a right of access to documents, have been advanced by Member State governments and in the legal literature. Most times, the case for open government and the right of access to documents is based upon a combination of arguments, both philosophical and pragmatic.

3.2.2.2 Rechtsstaat

The principle of open government and the right of public access to documents have been justified upon the basis of the idea of the *Rechtsstaat*.[38] In particular, openness has been said to increase the possibilities of the citizen to detect unlawful behaviour by the administration and to appeal to the Court.[39] For example, the argument based upon the Rechtsstaat underlies the introduction of the principle of open government in the Dutch Constitution.[40] According to the government, this principle enables citizens to gain insight into the preparation of policies and in the data underlying adopted policies. As a result, citizens would have enhanced possibilities to get legal protection (before or after a decision has been taken) against the administration.[41] According to the Dutch government, it concerns a principle of the democratic Rechtsstaat and, therefore, it belongs in the Constitution.

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[37] Biesheuvel (1970), p. 3.
[38] Steenbeek (1970), p. 49.
[39] Damen (1980), p. 3.
[40] See also Akkermans/Koekoek (1992), p. 971.
[41] Maarseveen (1969), who explains the desire for more openness from the idea of the Rechtsstaat (amongst other reasons), in the sense that openness enhances the possibilities of preventive legal protection, p. 2-3.

3.2.2.3 Good administration

The right of public access to documents has also been said to constitute a principle of good administration.[42] Sound or proper administration lie at the heart of every democratic state based on the "rule of law" (Rechtsstaat). There are only a few Member States' systems which expressly refer to the term good administration.[43] The reference to this term is not to indicate an independent legal standard of good administration, but it has the function of a general notion describing a set of particular standards of proper administrative practice. Amongst such principles, procedural principles, such as the right to be heard, the duty to reason and *the right of (party) access to information*, and substantive principles such as proportionality and legal certainty are mentioned. The rationale behind "procedural good administration" (first category of principles) is on the one hand to achieve rationality and efficiency and on the other individual protection.[44]

There is, however, a problem in defining the general right of access to information as a principle of good administration, as the latter principle regards the relation between the administration and the individual, whereas the former right regards the relationship between the government and the citizen with a democratic role.[45] The right of public access must thus be distinguished from the right of the parties to be heard in affairs concerning them, and to be in that connection, informed of relevant matters or to have access to relevant files. Whilst, it is clear that the right of public access may be of use in an affair between the citizen as a party in proceedings with the administration (see also the general argument based upon the Rechtsstaat). It might not be clear how far the right to be heard goes in a special case: someone who claims to have a legal interest in a case, but is neglected by the authorities, could always make use of the general right of access to documents. However, this is not the main rationale behind the rules on public access.[46]

In the European Union, the right of public access to documents was also initially viewed by, for example, the Court of Justice and the Ombudsman, as an aspect of good administration. This approach is clearly less fundamental than the one based upon democracy or fundamental rights, which covers the citizen in its role as a democratic citizen and not simply in his relation to the administration (see further Chapter 4.5.1).

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[42] Ibid., p. 11.
[43] Nehl (1996/1997), p. 47-48.
[44] It is build upon the rationale generally governing (administrative) procedural law, see Nehl (1996/97), p. 23 and further.
[45] Klinkers (1974), p. 29.
[46] See Herlitz (1958), p. 54.

3.2.2.4 Efficiency-related arguments

3.2.2.4.1 Public control and the prevention of misuse of power

It has been argued that citizens in a democracy ought to be informed about the operations of the executive, while it is feared that any government which is allowed to work in secrecy will abuse the powers entrusted to it.[47] "Secrecy is a cloak for arbitrariness, inefficiency, corruption and other vices of power."[48] Mill and Bentham warned against the danger of secrecy. According to the latter, "secrecy being an instrument of conspiracy, ought never to be a system of regular government."[49] The public control argument constitutes one of the main reasons underlying the public access to documents regime in Sweden. Given the fraud and accountability scandals in a number of Member States of the European Union, it is not surprising that this argument is emphasised, alongside others, in countries which have only recently adopted rules on access to documents.[50]

3.2.2.4.2 More quality in administration

Herlitz notes that "in every step an authority takes, it feels that it is under public control, under the imminent danger of having its steps discussed and criticised." Publicity is on the mind of all officials and makes them anxious to act in such a way that they will not be exposed to criticism.[51] In other words, publicity may lead to better decisions, not only because of the public's contribution to the decision-making process, which, due to publicity, can be more informed, but also, and perhaps even more so, because the decision-makers know that they are acting in the public view.

Klinkers argues that the function of openness lies in the creation of a mutual understanding between the citizen and the administration through the supply of information, through communication and by involving citizens in the administration. One of the sources of lost time and money in any administration is the enormous distance which often exists between the citizen and the administration. An increase in mutual understanding leads to an increase in the level of acceptance and this will work in favour of efficiency in the long run and/or improve the quality of the administration.[52]

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[47] March (1987), p. 2.
[48] Birkinshaw (1997), p. 29.
[49] Bentham cited by March (1987), p. 2.
[50] Curtin (2000), p. 8.
[51] Herlitz (1958), p. 56.
[52] Klinkers (1974), p. 79-80.

The opposite argument, that efficiency requires secrecy, has also been advanced in the literature. This argument has, however, been rebutted with regard to the British system. It has been argued that it is, at the very least, not proven that the British system of confidential government is more effective and less wasteful than others.[53] As has been explained in Chapter 2 the extent of openness might be limited if it would lead to inefficient decision-making. A balance must be found between the two elements, as both, i.e. democracy and efficiency, constitute legitimate objectives of government. In the European Union, the efficiency argument is one of the main reasons asserted against opening up the deliberations of the Council of Ministers (see §5.3.3.).

3.2.2.5 Legitimacy-related arguments

First of all, publicity increases democratic legitimacy as it allows individuals and the media to debate the decisions in public before they are taken.[54] Transparency and openness enhance legitimacy further, as they allow the public to know who has taken what decisions, and how, and information is provided on the basis of which people can evaluate government policies (public scrutiny/control and accountability).[55] Another argument, which is closely related to the legitimacy of the exercise of power, is that secrecy leads to distrust and fear on the part of the public: "if one does not have access to the full facts one can easily imagine the worst."[56] It is assumed that there will be greater confidence in the authorities if the latter is working in the full glare of publicity. A political system which is open, understandable and allows citizens to join in the process has a better chance of being accepted by its citizens.[57] In fact, in the EU, this has been one of the main reasons underlying the introduction of rules on public access to documents (see §4.5.3.).

3.2.2.6 Disequilibrium of power

Finally, public access to documents has been defended on the grounds that it helps to redress the disequilibrium of power between the individual and the state. The state has the command over a wide field of information. However, the private organisation or the individual, from whom all kinds of information is demanded by the State, can only himself obtain access to equivalent information from the

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[53] Michael (1979), p. 5.
[54] Freivalds, op cit.. This is one of the basic reasons for the introduction of rules on public access to documents in Sweden.
[55] Craig (Harlow), p. 52. See also Turpin (1995), p. 317. See also Dehousse (1998), p. 9.
[56] Rowat (1965), p. 480.
[57] See also Steenbeek (1980). He also notes that "legitimation durch verfahren" due to publicity can be enforced, p. 10. See also Ress (1994), p. 166.

State with difficulty or not at all.[58] This argument has been mentioned already under the democracy argument. Burkens refers to the old adage that "knowledge is power," which he considers to be especially relevant with regard to official documents. He stresses that the decision to make documents public or not in certain circumstances can be of enormous political significance.[59]

[58] Marsh (1987), p. 4.
[59] Burkens (1969), p. 34.

3.3. The legal approach taken towards open government, and its specific facets, in the EU Member States, the new Applicant States and the European Union

3.3.1 The EU Member States and the new Applicant States

The fact that various philosophical arguments exist asserting the fundamental character of open government, and/or the right of public access to documents, does not mean that such a right actually exists in the national or international legal order. Whether a state, or a group of states, recognises a right as fundamental depends on the socio-cultural and political background.[60] Human rights are, however, the product of history and of human civilisation and as such are subject to evaluation and change.[61] Existing fundamental rights are evolving over time and new elements may be added, but also new fundamental human rights may be created.

As current law stands, none of the EU Member States has recognised in its constitution a fundamental right to open government in general. The Netherlands has enshrined the principle of open government in its Constitution, but, this principle is only of a declaratory nature and does not grant any rights to citizens. It has to be implemented through ordinary legislation, which then creates judicially enforceable rights. In spite of considerable support in Dutch legal literature for the view that it constitutes a fundamental human right, the government refused to include the right in any of the existing fundamental rights or to recognise it as a fundamental right in its own right.

Almost all Member States guarantee in their constitution public access to the plenary meetings of Parliament (see §1.1.2.). There seems, therefore, to exist a constitutional right of the citizen to attend, in principle, parliamentary meetings. Furthermore, all Member States provide in general for access to legislative documents, although differences exist regarding the extent of access and the way in which those documents are made accessible. It might thus be concluded that a right of access to legislative documents in European public law exists.

As far as access to government documents is concerned, all Member States, except for Germany and Luxembourg, have adopted legislation which grants citizens a right of access to government documents.[62] After decades of struggle, the UK finally adopted an FOI Act last November. It was preceded by Ireland, which introduced legislation on FOI in 1997. In Germany the government has just adopted a draft Federal FOI Act, whereas at the level of the Ländern Brandenburg, Schleswig-Holstein and Berlin are already in

[60] Birkinshaw (1996), p. 80.
[61] Van Boven (1982), p. 49.
[62] See for references, §1.1.2.1.2.

the possession of FOI legislation.[63] Despite this however, only Sweden and Finland have recognised the right of access to documents as a fundamental human right in their respective legal orders. The fact that this right has a constitutional basis in a number of Member States underlines the importance attached to it.[64] The isolated position of Sweden and Finland might be broken in the near future. Developments are underway in the Netherlands, to include the right of access to official documents in the human rights chapter of the Dutch Constitution.[65]

Whereas the Dutch are considering the legislative way to elevate the status of the right of access to that of a fundamental human right, this can also be done through the courts. The latter often have the power to adapt the content of rights to changes in society, or even create new rights, which is often quicker than changing legislation. Assertaining whether the courts of the Member States have recognised the right of access to documents or meetings as implicit in other fundamental rights, and in particular, the right of freedom of expression and information, would require detailed scrutiny of all relevant case-law, which is unfortunately beyond the scope of this thesis.[66] If one looks at the case-law of the European Court of Human Rights, it appears that this interpretation is not easily accepted (see §3.4.3).

Not only have almost all EU Member States adopted legislation which grants citizens a right of access to government documents, but other Members of the Council of Europe have also recently adopted or are in the process of adopting rules on access. The candidate States for membership of the EU are working hard in this field, no doubt with a view to their future accession to the Union. Some Members have adopted rules on access to documents at a constitutional level. For example, in the Czech Republic freedom of information (FOI) is enshrined in Art. 17(5) of the Charter of Fundamental Rights and Basic Freedoms. The Law on Free Access to Information was adopted on 11 May 1999. Poland, Bulgaria and Hungary have also enshrined the right of access in their respective Constitutions.[67] The latter two countries have both adopted FOI legislation,[68] whereas in Poland a group of non-governmental organisations have drafted an FOI Bill which they would like to present to Parliament as a civic-initiative.[69] Furthermore, Romania is currently preparing legislation on freedom of information,[70] and the government of Bosnia

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[63] The draft FOI Act has been published on the website of the Federal Ministry of Home Affairs on the 6th of June 2001, at http://www.bmi.bund.de. Also in other Ländern proposals for FOI Acts are being discussed.

[64] On the fundamental human right status of the right of access to documents in Sweden and Finland, see §3.2.1.

[65] See the Report regarding the 6th meeting of the (CoE) Group of Specialists on Access to Official Information, Report DH-S-AC (2000) 7 of 26 January 2001.

[66] Barendt notes that it is rare to find judicial acceptance of rights of access to information under free speech clauses (freedom of expression) both at national and international level. See Barendt (1987), p. 112.

[67] Article 61 of the Polish Constitution provides for a FOI right and mandates that the Parliament enacts a law setting out this right. See further Article 41(2) of the Constitution of the Republic of Bulgaria (13 July 1991), and Article 61 (1) of the (amended) Hungarian Constitution (1989).

[68] The Bulgarian Parliament adopted the Bill last year (June 2000). Hungary has a combined freedom of information and data protection act: Act LXIII of 1992 on the Protection of Personal Data and the Publicity of Data of Public.

[69] Poland does not have any specific regulation dealing with procedural issues related to freedom of information, and as a result decisions of administrative officers concerning public access to information are frequently arbitrary and impossible to control. See for more detail the Press Freedom Monitoring Center at http://www.freepress.org.pl/english/index.htm.

[70] See "Article 19", a London-based Freedom of Information watchdog, which has found both strong points and weak provisions in the draft of the Romanian Law on Free Access to Information.

and Herzegovina has just approved its Freedom of Access to Information Law which was prepared by the OSCE.[71] It is also important to mention that Norway has broadened its Freedom of Information Act, and has now proposed putting the principle of access to official information into its Constitution.[72] These developments demonstrate that there is clearly a broader affirmation of the citizen's right of access to documents in Europe at large.

3.3.2 The European Union

The issue of transparency and openness in the decision-making process has become of increased concern in the context of international organisations (see §1.1.2.2.). A number of international organisations and, in particular, the European Union, are facing demands to open up and become more transparent. In the next chapter, the emergence of open government in the EU, and the general context of this process, are the subject of a detailed analysis. A few general observations regarding the approach taken towards open government and access to documents in anticipation to this analysis must, nevertheless, be made at this stage. The initial approach towards the issue of open government in the EU can be characterised as non-fundamental, in particular, in respect of public access to documents. Openness and transparency were seen as an aspect of good administration and not as an essential element of democracy. As a result of this vision, measures to open up the decision-making process have been taken in the form of "soft law." However, recently a more fundamental approach has in evidence. This is shown first of all by the inclusion of the principle of openness and the right of access to European Parliament, Council and Commission documents in the Treaty of Amsterdam (see respectively Article 1 TEU and Article 255 EC). Article 255 EC requires that the principles and limits to the right of access are laid down in secondary legislation adopted in accordance with the co-decision procedure. The right of access to documents has further been enshrined in the European Charter of Fundamental Rights (Article 42), which was adopted by proclamation of the institutions at the Nice European Council in December 2000.[73] The right of access has, however, not been placed with the fundamental freedoms, but under the heading "citizen's rights." Although the Charter does not as yet have any binding legal status, which might have influenced the willingness to include certain rights, it constitutes another sign that this right is increasingly seen as fundamental in the European context. These developments might further provide impetus for the European Court of Justice to recognise the right of access to documents as a general principle of Community law. The European Parliament (EP) as well as Advocate General (AG) Tesauro, have already

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See at http://www.ijnet.org/Archive/2000/9/8-64756.html#top.

[71] See for more detail at http://www.privacyinternational.org/issues/foia/.

[72] See the Report regarding the 7th meeting of the (CoE) Group of Specialists on Access to Official Information, Report DH-S-AC (2001)4 of 24 April 2001.

[73] O.J. C 364/8 (2000).

stressed that this right is closely linked to democracy and constitutes a fundamental principle of Community law.[74]

[74] See the Opinion of AG Tesauro in the *Netherlands v. Council*, op cit., §16-19. See, for the EP's opinion, the judgement of the same case, §18-19.

3.4 Open government, and its specific facets, within the framework of the Council of Europe

3.4.1 The vision of political institutions on open government and access to government documents

At the level of the law of international organisations, a broader affirmation of the citizen's right of access to information can be witnessed.[75] In several recommendations and resolutions, the political institutions of the Council of Europe, i.e. the Parliamentary Assembly and the Committee of Ministers, have stressed the need for adequate information for the people in a pluralistic democracy and repeated calls have been made for the adoption of rules on public access to government information. Such rules, it is said, would further likely strengthen the confidence of the public in the administration and constitute a check on corruption and waste of public funds.[76] In the above-mentioned documents, the right of access to documents has also been linked with the freedom of expression and information as laid down in Article 10 ECHR (see in detail §3.4.2). For example, in Recommendation 854 (1979), the Parliamentary Assembly called upon the Member States to adopt legislation granting citizens a right of public access to documents.[77] The Committee of Ministers is of the opinion that Member States should enact rules on public access to government information. In Recommendation (81) 19, the Committee of Ministers set out the basic principles of the right of public access to government information which should guide the Member States in their law and practices.[78]

In December 1994, the Committee was called upon by the participants of the Fourth Ministerial Conference on Mass Media Policy, to prepare a binding legal instrument implementing the right of access to government information.[79] The Group of Specialists on FOI, working under the aegis of the Steering Committee on Mass Media, started the work, preparing the ground for the newly-established Specialist Group on FOI which started its deliberations in 1997. Under the authority of the Steering Committee for Human Rights, this Group has the task to examine the options for preparing a binding legal instrument (FOI Act) or other measures embodying basic principles on the right of access of the public to information held by public authorities.[80] For a long time, the Group has worked on elements without

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[75] Ibid., §16.
[76] See in particular, Recommendation 854 (1979) of the Parliamentary Assembly of 1 February 1979, and Recommendation (81) 19 of the Committee of Ministers of 25 November 1981.
[77] Recommendation 854 (1979) of the Parliamentary Assembly of 1 February 1979. See Voorhoof (1991), p. XII.
[78] Recommendation (81) 19 of 25 November 1981. It should be noted that there is a weak point in the listing of the principles, as the preamble provides that one or more of its principles may be modified or excluded in the interests of the vague concept of "good and efficient administration." See similar March (1987), p. 1.
[79] See the Opinion of AG Tesauro in *Netherlands v. Council*, op cit., §16.
[80] In so doing the Group shall in particular take into account the principles contained in Recommendation (81) 19 (op cit.), and the legal developments in the field of access to information, both in the Member States of the Council

taking a decision on the final legal form of the instrument, and for practical reasons, it decided to set out the elements in the form of a draft recommendation. At the final stage of the drafting process, the Group has opted for a non-binding recommendation to the Member States on freedom of information. The Group should finish the final version of the recommendation in September 2001. The Preamble, states why rules on access to documents are so important; the reasons given coincide largely with those cited above.

In contrast with these rather belated developments in the Council of Europe, in the context of the United Nations (UN) efforts to adopt a Convention on Freedom of Information began very early. At the first session of the UN General Assembly, the Latin American states tabled a proposal, in Resolution 59/1 which recommended that ECOSOC should prepare a FOI Convention.[81] A draft Convention was adopted by the Conference on FOI held in Geneva in 1948, which was revised by an *ad-hoc* committee of the General Assembly in 1951. Between 1959-1961, the Preamble and four articles of the Convention were approved, but the remaining articles of the draft Convention have never been considered nor approved.

More recently, the importance of the right of access to documents for democracy, in particular for participation, has further been stressed in various UN reports. In these reports the right of access has also been linked to the fundamental rights. For example, in his 1997 Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression, the Special Rapporteur of the UN Commission of Human Rights highlighted "the important link between the ability of people, both individually and collectively, to participate in the public life of their communities and country, and the rights to freedom of opinion and expression, including freedom to seek and receive information."[82] He recommended that "future discussions on implementation of the right to development takes full account of the need for all Governments to fully promote and protect the rights to freedom of opinion and expression and to seek and receive information. These rights are fundamental prerequisites to ensure public participation, without which the realisation of the right to development, as a prerogative of people rather than States, will remain in jeopardy." It is interesting to see how the right to seek information is linked to public participation, which is essential to achieve the final objective of development. This link seems to offer another philosophical argument on which grounds the fundamental nature of the right to open government, and/or access to documents/meetings might be asserted. In his subsequent Report (1997), the Rapporteur treated in more detail the right of access to information, which he conceives in a wide sense,

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of Europe and at the European level. See the terms of reference of the (CoE) Group of Specialists on Access to Official Information. See DH-S-AC (98)1. It is worth mentioning that the reports were initially classified as restricted. Since the fourth meeting this classification has been dropped. The reports can be requested at the Secretariat of the Group.

[81] See *Encyclopaedia of the United Nations* (1990), p. 309.

[82] See the Report of the Special Rapporteur, Mr. Abid Hussain, pursuant to Commission on Human Rights Resolution 1996/53 (Promotion and Protection of the Right to Freedom of Opinion and Expression), E/CN 4/1997/31 of 4 February 1997.

i.e. access to information through public meetings or access to records (on request or active supply).[83] In respect of the right of access to information held by the Government, he observed that this right must be the rule rather than the exception. He stressed the importance of access to Government-held information for democracy and public participation in the governance of the country, as well as its positive effect on accountability. Finally, he is also of the opinion that there must be a general right of access to certain types of information related to "state activity", for example, meetings and decision-making fora must be open to the public wherever possible. In this context, he recommended the continuation of the trend of broadcasting the debates and proceedings of certain assemblies that has been observed in a number of democracies. It is interesting to note that the rapporteur also points to the fact that too much information is classified by government, and to the necessity of a rule which allows journalists not to disclose their sources.

In sum, from these documents it becomes clear that, at international level, there is a broader affirmation of the citizen's right of access to documents, which has been based in particular upon the democracy argument.

3.4.2 The interpretation of Article 10 European Convention on Human Rights

Except for Article 6, which guarantees the publicity of Court meetings and the public announcement of judgements, the European Convention on Human Rights does not contain any other provisions on public access to government information (records) or meetings. In other words, the Convention does not guarantee a certain level of openness which should exist in the (legislative/executive) decision-making process of the government.

Article 10 ECHR stipulates that "everybody has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers (...)." Whereas the freedom to "seek" information has been mentioned in Article 19 of the UN International Covenant on Civil and Political Rights,[84] this right was deliberately left out in Article 10 ECHR, as Member States feared that this would entail a corresponding duty on their part to provide information.[85] Despite this omission, the right of access to documents, or the right to "seek" information, has been said to be implicit in the right of freedom to receive and impart information as laid down in Article 10 ECHR.[86] This vision relies on an encouraging trend in the case-law

[83] See the Report of the Special Rapporteur, Mr. Abid Hussain, pursuant to Commission on Human Rights Resolution 1997/26 (Promotion and Protection of the Right to Freedom of Opinion and Expression), E/CN 4/1998/40 of 12 January 1998.
[84] International Covenant on Civil and Political Rights and Optional Protocol, New York, 19 December 1966, entry into force: 23 March 1976.
[85] Österdahl (1992), p. 57. See also Malinverni (1983), p. 448, and Voorhoof (1991), p. XI.
[86] For references of academics who share this view, see Klinkers (1974), p. 137. See in general Malinverni (1983), p. 449-450.

in this respect (see §3.4.3). Meanwhile the opposite view has been defended, i.e. that the right to "seek" is not implicit in Article 10 and/or that this right does not contain any duty on the part of the government to provide information.[87] Barendt observes that "the paradox of the argument that FOI is implicit in, or an essential condition for, freedom of speech (integral aspect of freedom of speech or of expression) is that its recognition might compel government or some other institution to speak, when it does not want to; and that could be said to be an interference of that body's right of silence."[88] He agrees with the refusal of the ECHR to derive an enforceable right to government information from the terms of Article 10 ECHR.[89] This argument seems not without force; moreover, it could be argued that reading a right to information into Article 10 ECHR goes against the wording of that article.[90] Another argument is that the jump from the freedom of the one (to search or ask) to the duty of the other (to answer) is not logical.[91] In other words, even if the right to "seek" is implicit in the freedom of expression clause, this would not automatically mean that it entails a corresponding duty on the part of the government to provide the information.[92] The same argument has been made in respect of Article 19 UN International Covenant on Civil and Political Rights which contains the right to "seek."[93] This reasoning does not seem very convincing, as the right to "seek" for information/documents without a corresponding duty on the government to provide the information/documents, would not be of much use. In fact, the UN Rapporteur also seems of the opinion that the right of access constitutes an aspect of the right to "seek." In his above-mentioned Report of 1997, he notes that the right to seek, receive and impart information imposes a positive obligation on states to ensure access to information, in particular, with regard to information held by the government in all types of storage and retrieval systems, including film, microfiche, electronic capacities and photographs.

The opinions of political institutions of the Council of Europe differ in this respect. Both the Consultative Assembly and the Committee of Ministers have called for the inclusion of the right to "seek" in the freedom of expression and information clause.[94] The two political institutions appear divided as to the content of this right, which is not surprising given their different roles.[95] Whereas the Assembly seems of the opinion that the right entails a duty to provide information on the side of the government,[96] the

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[87] For examples of authors who share this view, see Klinkers, ibid. See also Malinverni (1983), ibid.
[88] See Barendt (1991), p. 21. See also Barendt (1987), p. 112.
[89] Barendt notes that it is rare to find judicial acceptance of rights of access to information under free speech clauses (freedom of expression) both at national and international level. This can be partly explained by the fact that claims are made against an unwilling speaker, upon whom it is sought to impose a duty to disclose information. See Barendt (1987), p. 112.
[90] See also Judge Lorenzen of the ECHR, Report regarding the 6th meeting of the (CoE) Group of Specialists on Access to Official Information, op cit..
[91] See De Swaan in Klinkers (1974), p. 145.
[92] See Klinkers (1974), p. 142.
[93] See Österdahl (1992), p. 57.
[94] The Committee of Ministers has proposed an additional Protocol to enshrine the right "to seek" in Article 10 ECHR. See Malinverni (1983), p. 448. See also Cohen-Jonathan (1998), p. 206.
[95] Cohen-Jonathan (1998), ibid.
[96] For example, the Consultative Assembly in a Resolution of 1970 stated that "the right to freedom of expression shall include the freedom to "seek", receive, impart, publish and distribute information and ideas, and that there shall be a corresponding duty for public authorities to make available information on matters of public interest within

Committee of Ministers appears to reject this view.[97] In its Declaration on Freedom of Expression and Information (1982), the Committee clearly distinguished between two objectives which it wishes to achieve.[98] On the one hand, this would be everyone's right to express himself, to *seek*, receive and impart information and ideas under the conditions laid down in Article 10 ECHR, whereas, on the other hand, it seeks *to pursue an open information policy in the public sector, including access to information*, in order to enhance the individual's understanding of, and his ability to discuss freely, political, social, economic and cultural matters. Thus, the right to "seek" seems not to include the obligation to provide information, and is separated from the right of public access to government information.[99] Despite this distinction, it should be stressed that this policy is considered by the Committee as an essential element to achieve freedom of expression and information.

3.4.3 The rulings of the European Court and Commission of Human Rights concerning the right of access to information

3.4.3.1 Public access to information under Articles 8 and 10 ECHR

The European Court of Human Rights has frequently stressed in its case-law the importance of information in a democratic society.[100] However, so far the Court has not interpreted Article 10 ECHR as imposing a positive obligation on states to provide access to information they hold.[101] The right of freedom to receive information has remained confined to information which others are willing to impart. The Court has not deliberated on the question whether the freedom to receive information also implies a right of public access to government information which the government is not willing to communicate.[102] In respect of this matter, three cases are of particular relevance, i.e. the *Leander*, *Gaskin* and *Guerra*

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reasonable time-limits." See Resolution 428(1970) of 23 January 1970 on Mass Media and Human Rights. In the related Recommendation 582 (1970) on Mass Communication Media and Human Rights (same date), it proposed that Article 10 ECHR should be extended by expressly securing the freedom to "seek" information with a corresponding duty on public authorities to make information available on matters of public interest subject to appropriate limitations. The Recommendation was, however, not acted upon. See also Recommendation 1407 (1999) concerning the media and democratic culture. The Assembly recommended that the Committee of Ministers gives assistance in drafting clear guidelines for public access to information.

[97] See comments of Beers (1991), p. 192-194.

[98] See Declaration on the Freedom of Expression and Information which was adopted by the Committee of Ministers on 29 April 1982.

[99] See also an earlier document of the Committee mentioned in Malinverni (1983), p. 450.

[100] See, for example, *Sunday Times*, Judgement of 26 April 1979, Series A, Vol. 3.

[101] It seems that the Court has accepted in a *non-published opinion* that the right to seek is implicit in Article 10 ECHR. See Cohen-Jonathan, (1980), p. 206. However, as will follow from the next paragraph, it has not yet recognised this right as implicit in Article 10 ECHR in the published case-law.

[102] See Freedom of Information, response by JUSTICE to the government's consultation paper on draft Freedom of Information Legislation, July 1999, p. 1. This paper concerns the UK FOI draft Bill (Cm 4355). See Beers (1991), who observes that the Court has neither acknowledged nor excluded a right of public access to government

cases.[103] As far as positive rights of access to information exist under the Convention, these have been derived by the Court from Article 8 ECHR concerning the respect for private life, family life and home.

The *Leander* and the *Gaskin* cases concerned *party* access as distinct from *public* access, namely, access to information about the applicants themselves contained in public authorities' registers or files.[104] In these cases, the public authorities refused the requests for access to government information. In *Leander*, the Court observed that "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 ECHR does not, in circumstances such of 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." Given the fact that it regarded a matter of personal access, the Court considered the matter under Article 8 ECHR. The Court observed that the storing of information relating to Mr. *Leander's* personal life in a secret police register, and the release of such information, which were coupled with a refusal to allow Mr. *Leander* an opportunity to refute it, amounted to an interference with his right to respect for private life as guaranteed by Article 8 ECHR. However, it concluded that this interference was however justified in a democratic society, and, therefore, there was no breach of Article 8 ECHR. The Court reached the same conclusion in respect of Article 10 ECHR in the *Gaskin* case. However, in this case, the Court upheld the applicant's claim under Article 8 ECHR. The Court observed that persons in the situation of Mr. Gaskin have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development (§49). The right to receive this information was protected under Article 8 ECHR. The Court concluded that the system in Britain to decide upon requests for this kind of information was not satisfactory, and failed to secure respect for Mr. Gaskin's private and family life.

The *Leander* and *Gaskin* case are of a limited scope as they treat only the problem of access to personal data. The Court seems, therefore, to have acted correctly by considering those issues under Article 8 ECHR instead of Article 10 ECHR. The latter right is granted to everybody; moreover the purpose of personal access does not seem to coincide with the rationale of freedom of expression.[105]

As far as *public* access to information is concerned, two opinions exist in which the Commission seems to have recognised a positive obligation on the state to provide access to information. In these opinions it is recognised that Article 10 ECHR secures a right of public access to government information which is generally accessible under the domestic law of a Member State. One decision concerned the Austrian

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information pursuant to Article 10 ECHR, p. 196. See also Voorhoof (1991), p. XI; Birkinshaw (1997), p. 34; Lafay (1997), p. 47.

[103] *Leander*, Judgement of 26 of March, 1987, Series A No. 116; *Gaskin*, Judgement of 7 July 1989, Series A No. 160. *Guerra and others v. Italy*, 19 February 1998, (1998) 26 *EHHR*.

[104] Beers (1991), p. 196.

[105] It should be noted that the Commission has, however, recognised that the freedom to receive information might entail a right to have access to information, from an unwilling speaker, if that information is of particular personal importance. See Beers (1991), p. 195-196. Beers comments that it would be incorrect to recognise a right of party access in the context of Article 10 ECHR for the reasons mentioned in the text to this note.

Social Security Act, which grants public access to the computerised legal information system on social security law.[106] In this case, the Commission accepted the existence of a right of access under Article 10 ECHR, based upon the general accessibility of the information by domestic law, moreover it also considered whether the domestic conditions on public access interfere with the freedom to receive information under Article 10 ECHR. The Commission found that the technical facilities of the information system were adequate, and, therefore, Articles 10 and 14 had not been violated. Beers argues that thus an *indirect fundamental right* of access exists which is dependent upon a domestic rule or practice of public accessibility.

Positive obligations on the state to provide access to information regarding the specific area of the environment have been recognised by the Court in *Guerra* under Article 8 ECHR, and also by the Commission under Article 10 ECHR. In this case, the applicants, who lived near a polluting chemical factory, complained that the Italian authorities had failed to take steps, as was required by Italian Law, to provide information about the risks and how to proceed in event of a major accident (see §39). They asserted a breach of Article 10 ECHR.

The Commission observed that Article 10 imposes on states first a negative obligation of non-interference in the free exchange of information, but positive obligations might also exist to ensure a right to receive information.[107] It concluded, that Article 10 of the Convention places the State under an obligation, not only to make environmental information accessible to the public, but also to collect, process and disseminate information, which, by its very nature, is not directly accessible and which cannot be known to the public unless the public authorities act accordingly (§49). The Commission goes thus further than providing access, also recognising a duty to inform.

In support of this conclusion, the Commission made important observations as to the nature of the right of access to environmental information, and the extent of Article 10 ECHR. It noted that "the current state of European Law, of which the European Community and Italian provisions at issue in the present case constitute a significant example, confirms that public information is now an essential tool for protecting public well-being and health in situations of danger to the environment (§ 43)." Next, it referred in §44 to the Resolution of the Parliamentary Assembly of the Council of Europe relating to Chernobyl, which refers to the risks associated with the production and use of nuclear energy in the civil sector but also to other matters, it states that "public access to clear and full information (...) must be viewed as a *basic human right.*[108] This Resolution shows that, in the eye of the Commission, "a body of opinion is developing, at least on the European level, which seeks to obtain recognition for the existence of a *fundamental right* to information in the field of industrial or other activities dangerous to the environment and well-being of individuals."[109] It considered that "in the interdependent fields of the protection of the

[106] Decision *X v. Austria*, Decision of April 13, 1988. Application No. 10392/83. The above account of the Decision is of Beers as it regards an unpublished Decision, ibid.
[107] It draws an analogy with Article 8 ECHR jurisprudence, see §41.
[108] See Resolution 1087 (1996), see §33 of the Report, op cit.. Italics added by author.
[109] Italics added by author.

environment, of public health and of the well-being of individuals, Article 10 should be interpreted as granting an actual right to receive information to persons from sections of the population which have been or which may be affected by an industrial or other activity dangerous to the environment (§47)." The Commission thus recognised the existence of a right to information in the field of environmental protection (§48).[110] It justified this interpretation of Article 10 ECHR by referring to the raison d'être of a right to information, namely that it is necessary in order to provide effective protection for rights covered by other provisions of the Convention (§45 and §48). The protection afforded by Article 10 ECHR has, according to the Commission, a preventive function with respect to potential violations of the Convention in the event of serious damage to the environment. Article 10 ECHR comes into play even before any direct infringement of other fundamental rights, such as the right to live or to respect for private and family life, occur (§46).

It should be noted that access to environmental information, when available and the duty to collect information of the type involved and inform the public thereof, was required by Italian law.[111] The whole problem was that the Italian government had failed to fulfil the latter obligation of informing the public. As the Commission did not state that the obligation to make environmental information accessible, and the duty to collect and disseminate environmental information of the type involved, exists under Article 10 as these duties are provided by domestic law, it seems that these duties also exist under Article 10 in the absence of such duties in domestic law. If this view is correct, than this might lead to the conclusion that any country which has no system of access to environmental information, and has no duty to collect/disseminate environmental information of the type involved, would violate Article 10 ECHR.[112]

The Court was more cautious in its ruling. It reiterated that the freedom to receive information prohibits a government from restricting a person from receiving information which the other is willing to disclose (*Leander*), but it held that that freedom cannot be construed as imposing on a state, in the circumstances of the present case, a positive obligation to collect and disseminate information of its own motion (§53). Article 10 was, therefore, not applicable.

Next, it considered the case under Article 8 ECHR. It noted that severe environmental pollution may effect an individual's well-being and prevent him from enjoying their home in such way as to affect his private and family life adversely (§60). Given the fact that the state failed to provide the applicant with the essential information necessary for assessing the risks of living in his town, the State did not fulfil its positive obligation to the effective protection of the applicant's right to private life and breached Article 8

[110] See for the same conclusion Cohen-Jonathan (1998), p. 207.
[111] A right of public access to certain environmental information exist under Italian Law. The duty to inform the public is regulated in Italian law by DPR 175/88 (dangerous factory) which implements EC Directive 82/501/EEC.
[112] See also Beers' reasoning, which is however not related to this case, but to *Gaskin* (1991), p. 199-200. He argued that there might be a positive obligation inherent in an effective respect for the freedoms of Article 10 ECHR. In brief, he argues that a domestic system might not be in conformity with the principle of proportionality, if it denies the public a general right of access to government information as a matter of practice without considering the question whether such denial is really necessary in a democratic society for the protection of public and private interests. He comes to this conclusion by drawing an analogy with the *Gaskin* case.

ECHR. The Court thus recognised a right to environmental information under Article 8 ECHR, but went further and also recognised an obligation for governments to seek to inform.[113]

It should be stressed that this ruling did not close the door for an eventual recognition of a right of access under Article 10 ECHR. This can be deduced from the sentence "in the circumstances of the present case," which is mentioned in §53.[114] Judge Palm was more explicit in her concurring opinion, joined by five other judges. She noted that "I voted with the majority in favour of holding that Article 10 of the Convention is not applicable in the present case. In doing so I put strong emphasis on the factual situation at hand not excluding that under different circumstances the state may have a positive obligation to make available information to the public and to disseminate such information which by its nature could not otherwise come to the knowledge of the public. This view is not inconsistent with what is stated in §53 of the judgement. But also concurring/dissenting opinions seem not adverse to the recognition of a right to information in Article 10.[115] It is further interesting to note that two other judges in their concurring opinions regret that the Court did not rule upon the applicants allegation that Article 2 (the right to live) had been violated. In fact, a right to information concerning environmental information or other information which is essential to protect one's own life, could have also been construed under this article.[116]

In *McGinley and Egan*, the Court recognised a positive obligation on the part of the government to provide access to information under Article 8 ECHR.[117] In this case, the applicants wanted to have access to documents which would enable them to assess radiation levels in the areas in which they were stationed during atomic tests. This case regards the right to have access to information and not the right to be informed as was the case in *Guerra*. The Court ruled that "where a government engages in hazardous activities, such as those at issue in the present case, which might have hidden adverse consequences for the health of those involved in such activities, respect for private and family life under Article 8 ECHR requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information" (§101). The Court observed that the applicants, involved in pension proceedings, had the possibility to ask for the documents under the rules of the Tribunal, but had not made use of this procedure. Therefore it came to the conclusion that there had been no violation of Article 8 ECHR. Instead the Commission found a violation of Article 8 ECHR as it considered that the Rules of the Tribunal were not adequate to obtain the documents. Moreover, it was of the opinion that the applicants had a right to access the documents independently of any proceedings (§129-§132).

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[113] See, for the same conclusion, Cohen-Jonathan (1998), p. 208 and 214.
[114] Ibid., p. 213.
[115] See Judge Jambrek. See also the concurring opinion of Mr. Thór VilHjálmsson. He agrees in principle with the conclusion and the arguments of the majority of the Commission. This means that 8 out of 20 judges sitting on this case seem not opposed to the recognition of a right to information in Article 10 ECHR.
[116] See Judge Jambrek who observes that the protection of health and physical integrity is as closely associated with the right to live (Article 2) as with the respect for private and family life (Article 8). He thinks that it is time for the Court's case-law on Article 2 to start evolving, to develop the respective implied rights, articulate situations of real and serious risk to life, or different aspects of the right to live. See also Judge Walsh.
[117] *McGinley and Egan v. UK*, 9 June 1998, 27 (*EHRR*), p. 1.

In sum, the Commission seems to have accepted the existence of an indirect fundamental right of access to information under Article 10 ECHR. Moreover, it interpreted Article 10 as granting an actual right to information to persons from sections of the population which have been or which may be affected by an industrial or other activity dangerous to the environment. Up to now the Court has not accepted the existence of a general right of access to information under Article 10, but has instead accepted that there may be positive obligations on the state to provide information which is necessary to secure the effective protection of other rights such as guaranteed under Article 8 ECHR.[118]

The Court's opinion has implications for systems on public access to documents in the Member States of the Council of Europe. All these systems provide for exceptions to the right of access to information. The exemptions as such, or the way in which they are applied in practice, might lead to violations of the provisions of the Convention. If an exception prohibits disclosure of information, which is, however, necessary to secure the effective protection of other rights guaranteed by the Convention, this might amount to a violation of, for example, Article 8(1) ECHR, if the prohibition is not necessary in a democratic society in the interest in national security (...), as required under Article 8(2) ECHR. As pointed out by JUSTICE, class-exceptions risk,[119] in particular, violating the Convention, since information which falls in the class described is automatically precluded from disclosure (blanket ban). In that case, there is no balancing between the interest in disclosure and the harm caused by disclosure. As a result, the balancing test required by Article 8(2) has not been performed. Instead, exceptions which contain a simple or substantial harm test, risk in a minor way violating the Convention, as only information the disclosure of which inflicts harm on the protected interest may be refused. The exceptions which might in particular lead to violations of the Convention are those relating to national security and investigations (proceedings) into violations of law.[120] For example, the information which was asked in *Guerra* regards the type of information which governments often obtain through regular investigations (checks up) or by proceedings started against a polluter.[121] In this case, it is not enough for the government to verify whether the information falls under the exception of investigations, in addition it must check if the refusal is necessary in a democratic society as required by the Convention.

As a result of the case-law of the European Court of Human Rights, it is necessary to check the provisions of the draft Community Regulation on public access to EP, Council and Commission documents, before it comes into force, for its compatibility with the Convention. Furthermore, after its entry into force, the institutions must be vigilant not to violate the Convention when applying the exceptions to the right of access in practice.

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[118] See JUSTICE, op cit., p. 3.

[119] Class exceptions are those which exempt information merely because they belong to a particular class (for example, legal opinions).

[120] See JUSTICE, op cit. JUSTICE examines the compatibility of certain provisions of the UK draft FOI legislation with the Convention, taking into account the Court's case-law in this respect. It comes to the conclusion that certain provisions of the draft UK FOI legislation risks violating in practice certain provisions of the Convention.

3.4.3.2 Public meetings

As far as public meetings are concerned, the Commission ruled that Article 10 ECHR does not grant a right on every person to attend any meeting he may wish to. Beers argues that this ruling does not exclude a right of public access to a particular kind of meeting under the freedom to receive information, if such a meeting is generally accessible under domestic law. He thus draws an analogy with the Commission's rulings in public access to documents cases as discussed above.[122]

[121] Ibid., p. 7.
[122] Beers (1991), p. 198-199.

3.5 Concluding observations

Despite the existence of several convincing philosophical arguments upon which basis the fundamental human rights nature of open government, and, in particular, access to information can be and has been asserted in the literature, this status has in general not been recognised in positive law in Europe. Only Sweden and Finland, of all EU Member States have recognised the right of access to information as a fundamental human right. Neither has the ECHR accepted the existence of a general right of access to information from the freedom of expression clause as laid down in Article 10 ECHR, though it has made steps in the direction of limited access rights in specific circumstances. Human rights are, however, the product of history and of human civilisation, and as such are subject to evaluation and change. It may, therefore, well be that in the future the fundamental human rights status of the right of access to documents will be accepted more widely.

Legal developments inside and outside the EU show that there is a broader affirmation of the right of access to documents. Except for Germany and Luxembourg, all EU countries have adopted rules, sometimes at a constitutional level, which grant citizens a right of public access to documents of the public authorities. Last year, after a struggle of decades, the UK finally adopted an FOI Act. It was preceded by Ireland, which had already adopted its Freedom of Information Act in 1997. Important developments are also taking place in Germany, where at federal level the government has recently adopted a draft FOI Act. Moreover, at the level of the Ländern, already three countries have introduced FOI legislation, whereas others are currently working on it. That human rights are a feature of time is shown by the developments in the Netherlands, where it has been proposed to include the right of access to official information in the Human Rights' chapter of the Dutch Constitution.[123] Outside the EU, but inside Europe, major developments are taking place in this field of law. A number of Members of the Council of Europe have recently adopted, or are in the process of adopting, rules on access to documents, which often have a constitutional basis (see §3.3.1.).

The issue of transparency and openness in the decision-making process has been given increased attention in the context of international organisations. In the European Union, a much more fundamental approach towards the issue of open government, and access to documents can be witnessed in recent years. The right of access to documents has been inserted in the EC Treaty (Article 255), and has further been enshrined in the European Charter of Fundamental Rights (Article 42). Despite the non-binding legal nature of the Charter, the fact that the right has been included constitutes another sign that it is increasingly seen as fundamental in the European context. The European Court of Justice has, to date, not yet recognised the existence of a fundamental principle of access to documents in the EU. On the other

[123] See the Report regarding the 6th meeting of the (CoE) Group of Specialists on Access to Official Information, op cit..

hand, the AG is more direct, and has stated that the right of access to information constitutes "increasingly clearly a civil fundamental right."[124] According to the AG, the right of access to documents has its foundation in democracy, and constitutes a general principle of Community law. This vision is also shared by the European Parliament.

There is, further, a broader affirmation of this right in the legal documents of international organisations. In various resolutions and recommendations of the political institutions of the Council of Europe, but also in reports of the UN, the importance of this right for a pluralistic democracy has been stressed, and repeated calls have been made for the adoption of rules on access to documents. The right has also been linked to the fundamental rights of freedom of expression and information. Within the context of the Council of Europe, a Group of Specialists is preparing a (non-binding) Act on Freedom of Information which is directed in particular at those Members which are currently planning or drafting legislation on access to documents.[125]

In sum, the legal developments, at state, EU and international level, indicate that the attitude towards open government and, in particular, the right of access to documents is changing. More support can be found for the vision that open government, and/or the right of access, are necessary for one or more of the philosophical reasons discussed in this chapter. It seems that the right is slowly evolving into a fundamental human right. This situation might encourage the judicial recognition of a fundamental human right of access to information in the future. The case-law of the European Court of Human Rights and, in particular, that of the Commission, seems already to be developing in this direction. However, the interpretation that the right of access to information is implicit in Article 10 ECHR is not without difficulty, as was shown in this chapter. Therefore, it might be more suitable to opt for the legislative method, and to incorporate explicitly the right to "seek" into the freedom of expression clause as laid down in Article 10 ECHR. According to Judge Lorenzen (DK) of the European Court of Human Rights, it is unlikely that Article 10 ECHR will be interpreted more broadly in the future, as this would be contrary to the wording of this Article.[126] However, he acknowledged that the concept of human rights develops and that it is not excluded that a general, basic right of access to information could be incorporated into the ECHR in the future. Support for the legislative way can also be found in the political institutions (see §3.4.2.).

The acceptance of the fundamental status of the right of access to documents is important, as this makes restrictions to the right of access more difficult. Furthermore, it would mean that Member States must check that any restriction on this right is necessary in a democratic society for the protection of public and private interests as required by the Convention. Despite the fact that the ECHR has not recognised the right of access to documents as implicit in Article 10 ECHR, the case-law, as it currently stands, has implications for systems on public access to documents in the Member States of the Council of Europe.

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[124] See the Opinion of the AG in the *Netherlands v Council* case, op cit.. See further §4.5.2.
[125] See §3.4.1.

All these systems provide for exceptions to the right of access to information. As has been explained in this chapter, the exceptions or the way in which they are applied in practice, might lead to violations of provisions of the Convention.

[126] See the Report regarding the 6th meeting of the (CoE) Group of Specialists on Access to Official Information, op cit..

PART II: THE PRINCIPLE OF OPEN GOVERNMENT IN THE EUROPEAN UNION

4 ANALYSIS OF THE EMERGENCE OF OPEN GOVERNMENT, AND OF ITS CONTEXT, IN THE EUROPEAN UNION

4.1. Introduction

The European Union, as it exists today, is the fruit of an incredible evolution from an a-typical international organisation into a highly sophisticated international entity. It is within this evolution that the answers to many problems which the Union is facing today lie. The fundamental changes which the European Community (EC) has undergone, in particular, as a result of the Treaty of Maastricht and the birth of the EU, explain why such issues as democracy, legitimacy and openness have become so important in the European context. However, in the literature there is no agreement as to what is the exact legal nature of the Union. This question is, nonetheless, important for present purposes as it might have consequences for the model of openness which should apply to the Union. If the Union is, for example, viewed as a nascent European state, it could be argued that a particular model of openness existing in a certain Member State might be applied to the Union. If not, a particular model of openness, tailored on its specific institutional features, might be defended.[1] In §4.2, the evolution of the Union will be sketched and the different academic visions regarding the legal nature of the European Union (EU) will be briefly discussed. In the subsequent section (§4.3), the emergence of the issue of openness in the Union will be treated in detail. Questions, such as, why the EU evolved in such a closed way, and when did openness emerge, and why at that particular time will be answered.

In §4.4, the issue of openness will be placed in its context. The whole discussion on openness and transparency is part of the wider debate which is going on in the EU about the democratic deficit(s) and the crisis of legitimacy. The lack of openness and transparency is one of the elements which makes up the democratic deficit. It has further come to play an important role in resolving the popular crisis of legitimacy of which the Union seems to suffer. In this section the democratic deficit(s) and the crisis of legitimacy shall be set out as far as is necessary for placing the principle of open government in perspective. In recent years, the debate on democratising the Union has become much richer with the advancement of alternative, not necessarily exclusive, models of democracy to the traditional parliamentary representative democracy of the nation-state. In

[1] See Curtin (1998/1), p. 6.

particular, attention will be paid to the more deliberative/participatory theories, as it is in these theories that openness plays an important role (see Chapter 2).

In the final section (§4.5), the approach taken by the institutions towards the issue of openness, and, in particular, public access to documents will be examined. Whereas in the foregoing chapters, it has been asserted that openness in the decision-making process of the government is fundamental for the functioning of any democracy, and by extension the European Union, this view is not reflected in the initial approach taken by the institutions towards this issue. From the beginning, the issue of openness, and in particular access to documents, has been treated in a non-fundamental fashion, not only by the Council and the Commission, but also by the Court(s). However, in recent years, a more fundamental approach can be witnessed, and the right of access seems to be evolving gradually into a fundamental right. The right of access to documents, which enables citizens to participate in the political process and to exercise control, is also part of the debate on giving content and meaning to "European citizenship." The relationship between the right of access and citizenship will be discussed briefly at the end of this chapter.

4.2 The EU: a highly sophisticated international organisation

4.2.1 The legal nature of the European Community

The European Coal and Steel Community (ECSC) and the European Economic Community (EEC) and Euratom, collectively the EC, were created by international treaties, and therefore constitute international organisations.[2] Since its establishment, the EC has undergone significant changes, and with each fundamental change it has moved further away from the standard international organisation.[3] The more standard type of international organisation is predominantly intergovernmental in nature, although it may possess also some supranational aspects.[4] The most fundamental characteristics of an intergovernmental organisation are: first, the decision-making powers are exercised by representatives of governments, with organs composed of independent persons of the Member States, expert committees or parliamentary assemblies having only an advisory function. Secondly, in important matters, members cannot be bound against their will. The international organisation's objective is collaboration between governments, and it is not superior to them.[5] The exercise of powers is not withdrawn from the sovereignty of the Member States. Only a few international organisations are allowed by their constitutions to take external binding decisions, and in such cases the decision can only bind the members where it has been approved unanimously.[6] In case of conventions, which is the most common instrument under which external binding decisions are made, ratification in the Member States is necessary for the decision to become legally binding. Another difference is that most international organisations do not have parliamentary or judicial organs which perform advisory and judicial tasks.[7] Apart from governmental contributions, all international organisations have, however, their own resources, but these are moderate.[8] Finally, it should be stressed that most international organisations are further established to perform specific functions, whereas some might discuss any matter they see fit or any topic not belonging to some specifically excluded field (general or political organisations).[9]

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[2] See Schermers/Blokker (1997), §58-§62. See also Lauwaars/Timmermans (1994), p. 20.
[3] The story about the fundamental transformations of the EC since its establishment up to now has been documented extensively, and must by now be familiar to all. There is thus no need to dwell on it further. See Weiler (1991) for a detailed analysis of this period and the (three) stages of transformation which occurred, p. 2431.
[4] Ibid., § 62.
[5] Ibid., §59.
[6] Ibid., §59 in combination with §1320.
[7] Ibid., §700.
[8] Ibid., §561.
[9] Ibid., §63-64.

The EC is much more than the above-described standard type of international organisation. The differences between the EC and international organisations are the result of the more far-reaching objectives of the former in respect of the latter, which was not mere co-operation but originally economic integration. In order to achieve this objective, the Member States created an organisation (EC), which has its own institutions, personality and legal capacity, and, in particular, real powers derived from a limitation of sovereignty or a transfer of powers from the State to the Community.[10] The Court ruled that by creating the EC, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.[11] The EC created a new autonomous legal order, which constitutes an integral part of the Member States' legal systems and which their Courts are bound to apply.[12] On the basis of this legal order, the European Court of Justice (ECJ) adopted two fundamental principles: direct effect and supremacy. Certain Community law (regulations and decisions) can impose obligation and confer rights on individuals, which can be invoked in court (direct effect). Moreover, in case of conflicts, Community law has precedence over national law irrespective of the date when the latter was adopted (supremacy).

As mentioned above, the members of most international organisations have not given up their sovereign powers to the international organisation. Most organisations do not have the power to take external binding decisions, and if they do, these decisions will bind the Member States and not the individual. Moreover, principles of international law do not require that rules of international law apply directly within the national legal order, nor that these rules have precedence over rules of national law.[13] The legal order of the Community is a cohesive unity, whereas that of international organisations is much looser. Moreover, the Member States cannot be bound against their will, as is the case in the EC through the application of the majority vote (default-procedure in many policy areas). The EC is further particular because of the wide material scope of its powers (extended again by the Amsterdam Treaty). Given its rule-making powers in a wide area, judicial and parliamentary control is obviously very important. The EC possesses an effective system of judicial review as a result of the compulsory powers of the Court of Justice. Member States can, without their permission, be brought before the Court, and if they do not abide by the judgement they can be fined/sanctioned. Important for the compliance with Community law is the fact that national courts may request, and sometimes are obliged to request, a preliminary ruling from the European Court. In this way, they can decide on the legality of a national act, and the correct interpretation of Community law is assured. The EC has further a parliament, which plays an important role in the policy decision-making process (the material scope of the co-decision procedure was further

[10] See Case C-6/64, *Costa v ENEL* [1964] ECR 585.
[11] Ibid.
[12] Ibid.
[13] See Schermers/Blokker (1997), §1144.

enhanced with the Amsterdam Treaty). Finally, the EC possesses its own income, which makes it financially autonomous from its Member States.

Some of the characteristics which distinguish the EC from international organisations in general may also appear in other international organisations. The uniqueness of the Community, however, lies in the combination of all above-mentioned characteristics.[14] Thus, it can be concluded that the EC is more than an international organisation; but what its exact legal nature is not clear.[15] The Court has never expressed its opinion about the EC's legal nature. This is in fact difficult to determine given the fact that the EC is still in evolution.

With Amsterdam, significant substantive and institutional changes were made again to the EC. For example, new tasks were laid down in Article 2 EC, a new non-discrimination provision, conferring legislative powers to the Community, and a new title on Employment were inserted (Article 125-130). A major part of the Third Pillar was further transferred to the Community Pillar. Another important change constituted the introduction of a general "differentiated integration" clause, which allows for closer co-operation between Member States (Article 11). It should be noted that the Third Pillar also has a closer co-operation provision (Article 40). Furthermore, Title VII TEU contains a general closer co-operation provision. This concept, examples of which could be found already in the Maastricht Treaty, undermines however the uniformity and cohesiveness of the EC legal order.[1] As far as the decision-making procedure is concerned, the co-decision procedure was extended to a much wider range of Community policies and has been simplified. The co-operation procedure is practically used only in respect of the EMU, whereas the consultative procedure has been introduced in some of the new provisions. These changes have led to a reinforcement of the EC's supranational character. The Treaty of Nice regarded primary amendments to the structure of the EU in the light of enlargement (the so-called "leftovers" of Amsterdam). The three key-issues were the size and composition of the Commission, the weighting of votes in the Council and the introduction of more qualified majority voting. In respect of the latter issue, which is very important to protect efficiency in an enlarged Union, the result has been meagre. Other major issues which have been addressed are, for example, the composition of the European Parliament (EP), the institutional changes to the Court of Justice and the Court of First Instance. Furthermore, amendments have been made to the appointment procedure of the Commission and the role of the President of the Commission was strengthened role, which makes the President a kind of prime minister.

[14] The characteristics, which are summarised in the text above, are based on the list provided by Lauwaars (1994), p. 21. These characteristics have been elaborated upon in this thesis, and some new ones were added.
[15] Curtin (1993) has stressed the "unique sui generis nature of the EC," p. 67.

4.2.2 The legal nature of the European Union

4.2.2.1. The structure of the European Union

The European Union was created in 1992 with the adoption of the Maastricht Treaty and is founded on the EC (i.e. the three existing Communities) and supplemented by the two newly construed pillars: Common Foreign and Security Policy (CFSP) and Common Justice and Home Affairs (CJH). The new pillars remained outside the Community institutional and legal structure. They were, however, "not entirely disconnected from the Community, since, although they essentially entailed the Member States acting together on an intergovernmental basis in these areas of policy, to some extent they involved the Community institutions, and, in particular, the Council."[16] As they were essentially inter-governmental in nature, parliamentary and judicial control was minimal.[17] The pillar structure was the result of the differences between those who wanted to see political integration through the EC (supranationalists), and those who preferred not to limit national sovereignty any further (intergovernmentalists). It has been argued that this solution reflects the reluctance of some Member States to see the development of the Community as a political body.[18]

The basic aims and principles of the Union have been set out in the common provisions (Articles 1-6, ex-Articles A-F TEU). Article 1 TEU lays down the aim of creating "an ever closer Union among the peoples of Europe." The Union has its own objectives, and its actions should according to the common provisions be governed by the principle of subsidiarity, respect for national identities, human rights and democracy.[19] The Union shall further be served by one single institutional framework.[20] According to Article L of the final provisions, the Court does not have jurisdiction over the common provisions. The final common provisions determine further that new members can only become members of the European Union. Finally, it should be noted that the citizens of the Union have been accorded citizenship of the Union strangely enough through the EC Treaty.[21]

With the Amsterdam Treaty, some important changes were made to the TEU. First of all, the common provisions were modified. In particular should be mentioned the addition of the principle of openness in Article 1 (ex-Article A) and the amendments to Article 6(1) (ex- Article F), which now declares that the Union is founded on respect of fundamental rights, democracy and the rule of

[16] See Craig/De Búrca (1998), p. 28. See Article 3 TEU.
[17] Curtin (1993), p. 25.
[18] Dehousse (1994), p. 9.
[19] See Article 1 and 6 TEU.
[20] Article 3 TEU.
[21] Article 8 EC.

law. Respect for these principles has also been made a condition of application for membership of the EU (Article 49 TEU). Moreover, Article 6(2) determines that the Union shall respect the fundamental rights. This article has been made justiciable by Article 46 TEU. An important substantive change is the incorporation of a substantial part of the subject matter of the Third Pillar into the body of the Community Pillar.[22] The new Pillar is not covered entirely by the Community procedures, but is characterised by a mixture of Community (supranational) and Third Pillar (intergovernmental) features. The role of the EP and the ECJ are more circumscribed than under most of the rest of the EC Treaty. The new Third Pillar has instead features of the Community procedure, insofar as the EP and the ECJ have now been given a restricted role.[23] The EP has been given a consultative role in the decision-making process, and the ECJ has now been given jurisdiction over certain measures adopted under this Pillar.[24] The structure and institutional involvement in the Second Pillar remained largely unchanged. The role of the EP has not changed at all, and the Court is still not given any jurisdiction under this Pillar. With the Treaty of Nice, some amendments were introduced to the TEU, in particular, in respect of the Second Pillar, but the Pillar structure of Maastricht was left untouched.

4.2.2.2. The debate

The Maastricht Treaty changed the constitutional structure of the Union in such way as to provide the constitutional basis for the evolving polity at the European level.[25] Obradovic noted that the new entity, which was created by the Maastricht Treaty, has the quality of an emerging political system.[26] Everling has observed that "the Union does not signify a fixed end station, but rather an intermediate phase in the gradual and dynamic development of a political unity, of which the form and shape are to a large extent open."[27]

Is the European Union moving towards statehood ("federation")? An indication in this direction is the fact that the Union, with the Maastricht Treaty, has acquired the deepest symbols of statehood; citizenship, foreign policy and defence.[28] But, on the other hand, the term "federal" which appeared in the draft Treaty on the EU was replaced by the "ever closer Union" phrase, leaving the end of the

[22] See EC Title on free movement of persons, covering visas, asylum, immigration, and judicial co-operation in civil matters (Article 61-69).
[23] The new Third Pillar is titled: Police and Judicial Co-operation in Criminal Matters (PJCC).
[24] See Craig/De Búrca (1998), p. 44.
[25] Obradovic (1996), p. 208.
[26] Obradovic (1996), p. 193, and p. 207-209. See also Wallace (1993), who has noted that the debate on the political union that surrounded the Treaty of Maastricht was precisely about the shift from policy to polity, p. 101.
[27] Everling cited by Heukels/De Zwaan (1994), p. 202.
[28] Mancini (1998), p. 33.

Union undefined.[29] Until two or three years ago, there was very little support for the vision of the EU as a would-be-state. Not only was this vision rejected by elites and in judicial and academics circles, but also by many non-elite constituencies.[30] According to Weiler, the lack of support finds its reason in the fact that there seem to be few votes in it.[31] Mancini, former judge of the ECJ, was one of the few who have recently defended this vision.[32] He noted that insisting on defining the Union "as an international organisation and describing all that does not fit well with this definition as "frills and rhetoric's" is much like trying to push the toothpaste back into the tube."[33] He noted that if any further integration is to continue and "if, in the course of this march, the peoples of Europe are to preserve the constellations of values informing their ways of life, then Europe needs those well-established institutions and procedures which only statehood can provide."[34] In other words, Mancini argued that statehood with all its institutions and procedures is necessary for a democratic Europe. This argument, which constitutes his main argument in support of statehood for Europe, is rejected by Weiler. The latter observes that the mechanisms and institutions that currently exist in the Union could guarantee the kind of democracy many would like to see in the EU, and that there is vast room for improvement.[35] The vision of the Union as a would-be-state has gained a bit more support in recent years, as appears from speeches given by prominent politicians as regards the model of governance for the Union during the IGC 2000, as well as from the wider general public debate on "the future of European Union", which was launched at the final stage of the IGC in Nice in December 2000. In his speech of 12 May 2000, the German Minister of Foreign Affairs, Fischer, has expressed himself in favour of a "federation" for the Union.[36] He suggested a European Parliament with two chambers, and an executive which could be formed by the current European Council or by taking the actual Commission structure as a starting point. There should further be a Constitution which clearly defines the competences of the Union and of the nation-state. Similar ideas have been suggested by German Federal Chancellor, Schröder, who proposed a European system of the separation of powers between the European Parliament, the Council and the Commission taking full account of the principles of democratic legitimacy, efficiency and transparency.[37] The Commission should develop in a strong European executive, and the rights of the European Parliament should be strengthened by expanding the scope of co-decision and giving

[29] Craig/De Búrca (1998), p. 26.
[30] Weiler (1998), p. 47.
[31] Ibid., p. 43.
[32] Mancini (1998), p. 29.
[33] Ibid., p. 31.
[34] Ibid., p. 39.
[35] See Weiler for a critical analyses of "the case for statehood," which had been made by Mancini (1998), p. 43-62. In respect of the democracy argument and the problems highlighted by Mancini, Weiler observes that Mancini has never explained how and why statehood would solve them, and why they could not be solved without a State.
[36] See speech given by J. Fischer at the Humboldt University in Berlin titled "From Confederacy to Federation. Thoughts on the Finality of European Integration."

it full budget sovereignty. In keeping with its role, the Council of Ministers, where it is a legislator, should become a European chamber of states. The position of Fischer has led to many reactions, among which that of President Chirac, who would prefer to create a group of states that must take the lead with the support of a separate secretariat.[38] Jospin also objected to the German idea of a federation, and instead supports the idea of a "federation of nation-states" (this term was used by Chirac).[39] This is not the federation as is meant by Fischer, but entails a gradual controlled process of sharing competences or transferring competences to the Union level. It may be clear that the French will not remain alone in their objections to the German idea of a federation for the Union.

If the vision of the Union as a would-be-state is rejected, what then is the legal nature of the Union?[40] Discussion in the academic literature about the exact legal nature of the EU has not led to any consensus in this respect amongst legal scholars. Instead many different opinions have been advanced. It would go beyond the scope of the present research to treat all the different visions in detail, but some general remarks can be made in this respect.[41] The vision which is shared by many academics is one of "the EU as an international organisation or entity sui-generis, alongside the Communities, but denying its unitary character."[42] The Union is often described as a "temple", with the common provisions constituting the roof above the three (relatively) independent Pillars, and with the final provisions serving as the common floor. The common elements give only some ordering of the Pillars. In this vision, the autonomous supranational legal orders of the EC remains to exist side by side the two intergovernmental Pillars.[43]

The discussion has deepened in recent years and some more refined visions have been put forward.[44] The two opposite views which have been advanced in the literature are on the one hand, the view that the EU does not exist as a subject of international law, and, on the other hand, that the EU is an international organisation with its own structure and competences.[45] According to the first

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[37] "Closely Involving Citizens and Parliaments", Declaration by the Federal German Chancellor G. Schröder (14/06/2001).
[38] Speech given by J. Chirac to the Bundestag in Berlin on 27 June 2000. See further De Zwaan (2001), p. 5.
[39] Speech given by L. Jospin of 28/05/2001 titled "On the Future of an Enlarged Europe."
[40] See, for example, Shaw (2000), p. 23. She considers it unlikely that the Union will ever become a state in the conventional sense. She sees it as a rather ill-defined polity. See also De Zwaan (2001), p. 303.
[41] This paragraph draws heavily on Curtin/Dekker (1999).
[42] See Curtin/Dekker (1999), p. 84. In note 1, several legal scholars which adhere to this view are listed. For example, Heukels/De Zwaan (1994) note that "the newly established Union is a separate entity of integration and co-operation, which in fact overarches the aforementioned three Pillar structure. In fact, the Union may be characterised as being erected around, but nevertheless legally separate from, the mainly intergovernmental Pillars and the supranational Communities as such." Later they characterise the Union structure as *sui generis*, (1994), p. 200. See also Müller/Graff (1994), who note that the Second/Third Pillar and the common roof are of the same legal nature, namely international public law, but they are different from the legal order of the EC, p. 495. Wessel (1997) concludes that the fact that the Union differs to a large extent from the international organisations one is familiar with in international institutional law, has led many to conclude that the Union is *sui generis*, (1997), p. 109.
[43] Curtin/Dekker (1999), p. 84.
[44] Ibid.
[45] Ibid.

view, the EU stands for traditional mechanisms of international law based on negotiations between states as contracting parties and not as members of an organisation. It has no legal status, no legal capacity to act, and no organs.[46]

The other group sees the EU instead as an international organisation. "They consider the EU as an international legal unity with a single legal regime which knits together the three pillars. In their view one legal regime of the EU exists which governs, in a vertical way, the three pillars as legal sub-orders of the Union, including the European Communities, which still comprises three different sub-organisations with their own special competences, rights and duties."[47] Curtin and Dekker also have tried to explain the legal system of the Union from the concept of international organisations. They come to the conclusion that the Union is an international organisation with a unitary legal regime. They reject, however, the more far-reaching unity thesis which has been defended by Bogdandy, who has argued that the Union and its legal regime have been fused with that of the Communities. He considers the Union as one single legal person (the EC has ceased to exist as an independent organisation, as the EU has absorbed it).[48] Instead Curtin/Dekker defend the vision of the Union as a layered entity, an international organisation sheltering several other organisations, such as the EC. The common and final provisions are applicable to all three pillars. However, at the same time, the EC keeps its own legal regimes with their own legal particularities. Moreover, the EC, and also the CJHA (Common Justice and Home Affairs) shelter other legal persons. Their extensive examination of the legal practice of the EU seems to support the unity of the legal structure of the EU. They refer, in support of their thesis, to the way in which the institutions have applied in practice the general principles of the Union, which should guide the institutions in their activities. In particular, the way in which the institutions have implemented the principle of access to documents is supportive. The institutions have never excluded Second and Third Pillar documents from the policy of public access to documents (see §6.2.2.2.). Also the Court and the Ombudsman have reviewed decisions of the institutions refusing access to documents concerning the Second and Third Pillar, despite the fact that they have no jurisdiction in matters falling in these Pillars (public access to documents was considered to be an EC matter). Moreover, the Amsterdam Treaty supports the unity thesis further, as the principle of openness in the Union has been enshrined in Article 1 TEU, and the right of public access to documents was laid down in Article

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[46] Ibid., and 92-94. Schermers argues that the EU has no international legal personality of its own, and, therefore, it has no status, and thus does not exist in international law. He notes that in its external relations the Union uses the legal personality of the Communities, or agreements by the collective Member States. See similarly Dehousse (1994), p. 8. Wessel (1997) instead comes to the conclusion that the Union enjoys international legal personality, see p. 128. The Union has not been accorded legal personality with the Amsterdam revisions to the TEU, as certain Member States and the Commission were strongly opposed. See Craig/De Búrca (1998), p. 39. However, legal personality of an international entity can derive from an explicit provision in the constitutional treaty or can be an implicit attribution, see Wessel (1997), p. 112-113.

[47] See Curtin/Dekker (1999), p. 85 (they identify the authors of this vision).

[48] See Bogdandy (1999). "The terms Communities and Pillars of the EU do not demarcate different organisations but only different capacities with partially specific legal instruments and procedures."

255 EC. The latter right applies also to Second and Third Pillar documents (see respectively Article 28 and 41 TEU).[49] In the end, they define the Union as "a highly sophisticated layered international organisation, harbouring beneath its outer shell various autonomous and inter-linked entities with their own specific roles and legal systems."[50]

The author shares the idea of the Union as an international organisation sheltering other organisations, which keep, however, their own legal regimes. This has several implications for the operationalisation and the degree of openness in the Union. The consequence of this view is that any comparison with the Member States' systems of open government, although fruitful, should take into account the fact that the EU is not a state and thus may require a system of open government which is tailored to its specific institutional features. This prevents the blind copying of a particular model of openness which applies in a particular Member State, to the Union. For example, the Union has a special relationship with the Member States, which might have consequences for the content of exceptions (see further Chapter 7). Moreover, any comparison between standard international organisations and their systems of open government with that of the Union, should equally be undertaken with caution. As follows from above that the EC/EU is moving increasingly further away from the standard international organisation. Given the high level of integration and the fact that the EC directly usurp sovereign powers, its democratic deficit has been growing. This is not the case with other international organisations, in which the public realm of politics remains within the boundaries of the state (see §4.4.2.1). Openness in the decision-making process in the EC plays, therefore, a much more fundamental role than in other international organisations, and would thus seem to require a higher degree of openness.

[49] See Curtin/Dekker (1999), p. 124-126.
[50] Curtin/Dekker (1999), p. 132.

4.3 The emergence of open government in the European Union

4.3.1 Why did the European Community evolve in such an opaque and closed way?[51]

From its establishment, the Communities' decision-making process was conducted in a closed and opaque manner (see Chapter 1.1.2.2). The first most obvious reason for the lack of openness and transparency in the Community's institutional structure lies in the fact that the ECSC and the EEC/Euratom were not about democracy. The ECSC was created in 1951 with the aim of establishing a common coal and steel market, and to attempt to achieve greater peaceful co-operation and trust between the Member States, in particular between France and Germany, after the devastating Second World War. Monnet, the drafter of the plans for the ECSC, was a federalist, but he was also aware that there was not much support for federalism (political union) in Europe.[52] He took, therefore, a more functional approach towards integration, and preferred to achieve integration in Europe by proceeding sector by sector, and favouring elite supranational institutions (High Authority) over more political institutions.[53] The new ECSC was a functional organisation, with the emphasis not on political accountability but on technocratic administration. Democracy and legitimacy were left to the nation-state.[54] In this approach, the involvement of organised interests was more important than the involvement of uninformed citizens. The citizens were not considered at all in this enterprise. All that was needed was, in the end, their popular support. Those who favoured the technocratic strategy, amongst them Monnet, were of the idea that the fostering of economic welfare by the creation of an effective administration would lead to this popular consent.[55]

With the failure of the Treaty on the European Defence Community in 1953, which led to the shelving of the plans for a European Political Community (EPC), the moves towards integration were not completely stopped, although it was clear that integration had to go more slowly.[56] The compromise which was struck in the Treaty of Rome was the same as that of the ECSC: "enlightened administration on behalf of uninformed publics, in co-operation with affected interests

[51] The four main explanations given in this analysis for the closed and opaque nature of the institutions are from Westlake (1998), p. 127-133. These explanations have been further elaborated to a certain extent in this thesis.
[52] Boyce (1993), p. 467.
[53] Craig/De Búrca (1998), p. 10.
[54] Wallace/Smith (1995), p. 139-140.
[55] Ibid., p. 144.
[56] The plans for the EPC had reached the stage of a draft Treaty for a European Federation, see Craig/De Búrca (1998), p. 10.

and subject to the approval of national governments."[57] The EEC Treaty avoided the political aims of the earlier draft EPC Treaty, and focussed on economic integration, with its main aim the establishment of a common market. Concern about the democratic nature of the EEC, and its legitimacy, were being expressed already in the 70's and the 80's, but a profound debate was started, at particular, in the beginning of the 1990's as a result of the constitutional changes brought by Maastricht.[58]

Another explanation for the opaque and closed nature of the Union has been sought in the "incremental and organic way" in which the Union has evolved. This has been possible due to the adoption of a framework Treaty and not a finished constitutional agreement, which has enabled the Member States to combine their resources and cede their prerogatives in a gradual and consensual fashion. In fact, the EC has been said to resemble "a journey to an unknown destination."[59] However, an unintended consequence of this evolutionary method has been the negligence of such issues as transparency and openness. These issues were simply overlooked, due to the focus of the Member States on the integration process itself. It has been argued that this negligence might not have occurred in such an extreme way, if the EP had managed to acquire more powers in the early 1960s.

A third explanation for the lack of transparency and openness lies in the methodology. The Council and Coreper have developed over decades several mechanisms and techniques, according to which they take their decisions such as, the continuous search for consensus, the avoidance of formal votes unless explicitly required, "constructive abstentions," statements in the minutes, package deals, and generalised solidarity. These diplomatic mechanisms and techniques are, however, only effective in an environment in which secrecy and confidentiality are the rule. The Council's Rules of Procedure have from the start provided for its meetings to take place in private, and for the confidentiality of its decision-making process (see §5.3). In accordance to his vision of the High Authority as a supranational policy-making body, Monnet promoted several measures, which aimed to prevent interference of the Member States with the workings of the High Authority and its nationalisation. These measures, which remain today in respect of the Commission, are the principle of collective collegiality, meetings in private, confidential discussions and decision-taking by simple majority. These provisions are inter-linked to preserve collegiality in practice the Commission has to meet in private, and, moreover, its discussions must be covered by the principle of confidentiality (see §5.5).

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[57] Wallace/Smith (1995), p. 143.
[58] In 1979 this led to the direct elections for the EP. See further the EP Resolution on the democratic deficit, O.J. C 187/229, 17-06-1988. In this Resolution, it called for the Council, when acting as a legislator, to meet in public.
[59] See Kirchner (1994) p. 253. The real author is Andrew Shonfield.

The opacity of the Commission's policy-preparation process was aggravated by the absence of a public debate on policy initiatives. This constitutes the fourth explanation for the lack of transparency and openness in the Community. In the Member States, the government tends to present its policy initiatives first to the national parliament, which tries to hold the former to account in a public debate. This debate will be widened as a result of the presence of the media. A similar public debate could not, however, be started at European level due to the lack of powers of the EP. This situation has been improved now given the enhanced powers of the EP (see §4.4.2.2.). The Commission had to rely on consultation with the permanent representation and organised interest groups, in line with the technocratic approach, already mentioned. Nor were the national parliaments very helpful in this respect, as until 1986 at least they treated Community affairs as an aspect of foreign instead of internal affairs.[60] Launching a public debate remains difficult at a national level, as national parliaments are often badly or belatedly informed.[61]

The EC could only develop in such a closed and opaque way as it did, due to the citizens' lack of interest in the integration process and the EP's lack of powers. The lack of citizen's interest was related to the stage of the integration process. Most subjects of integration were of an economic nature, and did not affect the citizens directly. This explains, at least partly, why the Community has always tended to be the preserve of political and economic elites. As long as the citizens did not see themselves as being directly affected by European decisions, they were willing to accept uncritically the decisions of the elites, and as long as the integration did not cause too much harm no one was worried about its development. Integration was exclusively a matter for the elites. The latter had only to convince the citizen that integration was a good thing.[62] In fact, in this period there was support for integration. There was no pressure from the public to become involved in the integration process, which could have led to a change in the technocratic and closed way of decision-making. Moreover, as mentioned already above, given its lack of powers, the EP could do no more than issuing Resolutions calling for more openness in the decision-making process.[63] For more than 30 years, until the early 1990s, relying on the citizen's "permissive consensus", decisions could be taken in the above-mentioned way.[64]

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[60] They had further problems in understanding who to hold to account, when, and how, as a consequence of the way in which the institutions had evolved, and its powers have been distributed. Westlake (1998), p. 132.
[61] See Dehousse (1995), p. 121.
[62] See Obradovic (1996), p. 192.
[63] In two Resolutions adopted in 1984 and 1988, it underlined the need for the adoption of legislation on public access to documents. See respectively Resolution of 24 May 1984 in O.J. C 172/176 and Resolution of 22 January 1988, in O.J. C 49/174. See also the EP Resolution on the democratic deficit, op cit.
[64] Obradovic (1996), p. 192.

4.3.2 When did the interest in openness emerge, and why at that particular moment?

If the EC had remained predominantly a limited economic international organisation, this lack of transparency and openness would probably not have become the problem it did in the early 1990s. The Community, however, has undergone fundamental changes, and it has evolved into a highly sophisticated international entity.[65] These gradual changes did not of course go totally unobserved by the people and in the academic literature. The success of the common market project and the charisma of the Commission President Delors enhanced the visibility of the Community.[66] The profile was further raised by the growth in Community competence beyond the economic into social issues, which affect large groups of citizens. An ever-growing number of citizens have thus gradually become aware of the fact that they could be affected by decisions taken in Brussels. "As the visibility of European politics increased, the question of the Union's legitimacy became more acute."[67] Moreover, with each increase in competences in other subject areas, the lack of democratic accountability of the Council was reinforced. In fact, literature appeared in the late 1980s, which questioned the Union's democratic credentials and its legitimacy.

The only body which had expressed in that period concern about the democratic deficit and the lack of openness was the EP. However, the Commission, despite its calls for more transparency and openness since the launching of the common market programme did not show much inclination to open up.[68] In 1990, the Resolution on access to environmental information (1990) was adopted, which applied only to the Member States.[69] However, the Commission promised to adopt a proposal to introduce the same standard of transparency in the Community institutions, although no action followed. It took until 1998 for the EC to adopt special rules on access to environmental information through its accession to the Aarhus Convention (see §6.3.3.2.). Besides not taking any action to open up, the Commission was moving in the opposite direction, as is shown by the *Zwartveld* case.[70] In 1998, the Court of Justice had to order the Commission to supply the documents from its archives to the Dutch investigative magistrate, which had requested this information in the context of a Dutch fraud investigation. This ruling of the Court can be seen as a first step towards more openness.[71] Moreover, during the 1990 IGC, the Commission was in the process of preparing a regulation on the security measures applicable to classified information

[65] In Weiler's opinion, this transformation occurred in three distinct phases, (1991), p. 2408.
[66] Dehousse (1995), p. 120.
[67] Ibid., p. 121.
[68] Lodge (1994), p. 344.
[69] O.J. C 158/56 (1990).
[70] Case C-2/88, [1990] ECR I-3365.
[71] Curtin (1995), p. 418.

produced or transmitted in connection with EEC or Euratom activities. This proposal was, however, stopped in the EP which criticised it heavily.[72]

The first concern of Member States as regards the lack of openness was heard during the 1990 IGC, and some Member States came with suggestions in this respect.[73] Denmark, and the EP, called for certain public Council meetings, but this issue was not addressed at all during the negotiations.[74] Instead, the Dutch government put forward a proposal to introduce a new Article 213*bis* providing a legal basis for the introduction of a regulation on access to information held by the institutions and organs of the Communities.[75] The Dutch proposal, which was supported by Denmark and Portugal, was, however, not taken up, and instead a Declaration prepared by the Commission was attached to the Treaty to the effect that the Commission had to look into the matter. Declaration 17 committed the Member States to transparency in the following terms:[76]

> 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 submits no later than 1993 a report on the measures to improve the public access to the information available to the institutions.

Despite this transparency clause, the whole IGC has been criticised for the secretive way in which it has been conducted.[77] By the adoption of Declaration 17 the issue of openness was placed on the political agenda, but it was not until after the signing of the Maastricht Treaty that the issue was put *high* on the agenda.

As a result of the fundamental changes made by Maastricht, a new entity was created, with the quality of an emerging political system.[78] The fundamental changes, which the Community had undergone, and its democratic deficits, were now so obvious that the lack of openness could not longer be ignored.[79] The closed and technocratic way of decision-making, which had reigned for

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[72] See §6.3.4.2.1.

[73] The issue of transparency and openness was mentioned by Denmark and the Netherlands in their documents leading up to the IGC or during it: see Corbett (1993), p. 159 and 182. It should be stressed that it appeared also as possible discussion point in the Report of the European Council: see Report of the Foreign Ministers on the need for Treaty changes for Political Union, 25-26 June 1990.

[74] Corbett (1993), p. 161. The EP and the Conference of Parliaments called both for the Council to meet in public when acting as a legislator, see p. 21 and 200. See also the Resolution on the IGC in the context of the Parliament's strategy for European Union, 11 July 1990 (Martin II Report), p. 116.

[75] Van Poelgeest (1992), p. 124-125.

[76] Declaration 17 has been attached to both the EC and Union Treaty, which means that the principle of openness applies to all three Pillars. Curtin notes that it is not clear why this Declaration was attached to both Treaties, see (1993), p. 44.

[77] Curtin (1993), p. 18.

[78] Obradovic (1996), p. 193. See Wallace (1993), p. 100-101.

[79] Jenssen (1998), 190.

four decades clearly did not suit the Union as a nascent political entity. This was in fact highlighted by the ratification of the Maastricht Treaty and by the public debate, which surrounded it. The Danish "No" to the Treaty, and the public debate, which it subsequently triggered, revealed the public's concern about the lack of transparency and openness in the Union's decision-making process.

Whereas the ratification of the Single European Act went fairly smoothly, the same cannot be said in respect of the Maastricht Treaty. The popular profile of the Community, which had risen progressively as a result of the success of the common market programme, was raised enormously by the TEU. This was partly a result of the further extension of the Community's competences beyond the economic sphere, but also because of the fact that the Treaty had to be subjected to referenda in three different Member States, which obviously led to extensive media coverage in those countries.[80] The Treaty served as a revelatory mechanism, as for the first time the public was offered the opportunity to make its views known.[81] The Danish "No" to the Treaty expressed in the referenda on 2 June 1992, triggered a widespread public debate on the Treaty in the Member States. Ratification problems did not, however, only occur in Denmark, but were also seen in France, the UK and Germany. It appeared from the problems surrounding the ratification, and from the public debate, that citizens were not satisfied with the EU, felt alienated from its institutions, and had lost confidence in it.[82] The lack of popular support seemed to indicate the existence of a crisis of (popular/social) legitimacy.[83] It is difficult to determine what the exact causes were of this crisis, but the lack of openness and transparency was identified as one.[84]

4.3.3 Transparency and openness as part of the active political agenda

Less than one month after the Danish "No" vote, the European Council met in Lisbon on the 26-27 June 1992, and committed itself to enhancing transparency.[85] In a section of its conclusions, entitled "A Union close to its citizens," it emphasised the need for greater transparency in decision-making and a reinforced dialogue with citizens. This commitment was the response of the European Council to the concern expressed in this regard by the Danish people, and as highlighted in the public debate on Europe.[86] A large part of the proceedings of the next European Council in Birmingham (16 October 1992) was devoted "to reassuring a concerned public by focussing on

[80] De Búrca (1996), p. 350
[81] Dehousse (1994), p. 121.
[82] The Commission Report for the Reflection Group, p. 38.
[83] De Búrca (1996), p. 350. See also Dehousse (1995), p. 121.
[84] De Búrca (1996), p. 350. See below §4.4.3.
[85] EC Bulletin, 12 June 1992, p. 11.

'transparency, subsidiarity and democracy."[87] The EC acknowledged that the European Union could only move forward with the support of the citizens, which could obviously not be taken for granted anymore considering the problems surrounding the ratification process. They promised to make the Union more open, to ensure a more informed public debate.

The public dissatisfaction seemed in particular to have been directed at the secrecy of the Commission.[88] At the above-mentioned European Council summits, the Heads of State and Government asked the Commission to make itself more accessible; to reduce the Euro-speak in its proposals and to enhance access to documentation, implying that it was more difficult to acquire information from the Commission than from other national administrations.[89] The Commission was asked to complete its work on improving public access to the information available to it and the other institutions by the beginning of 1993.[90]

The Commission responded shiftily to the promises made in Lisbon and Birmingham and adopted two packages of measures to enhance transparency and openness.[91] It set out its transparency measures in two Communications issued on 2 December 1992, one on an open and structured dialogue between the Commission and special interest groups[92], and the other on increased transparency in the work of the Commission.[93] The transparency package aimed at increasing general awareness of Commission policies by giving advanced information about initiatives and broader opportunities to participate ("early warning" measures). It included the publication of the legislative and the annual work programme (the latter in October) and a range of measures regarding the dissemination of information, such as classifying documents of public interest under the COM rather SEC heading and publishing a list of COM documents in the O.J.[94] Furthermore, it

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[86] Corbett (1993), p. 69. See the conclusions of the Birmingham summit (16 October 1992), EC Bulletin, 10-1992, p. 9.
[87] EC Bulletin, 10-1992, p. 9.
[88] Lodge (1995), p. 346.
[89] Lodge (1995), p. 348.
[90] See Birmingham conclusions, op cit.
[91] See Peterson (1995) for a detailed analysis of the Commission's transparency packages, p. 473.
[92] "An open and structured dialogue between the Commission and special interest groups" (2 December 1992). SEC (92) 2272 final.
[93] See SEC (92) 2274 final. It should be noticed that the definition of "openness" adopted by the Commission is much wider than the one used in this thesis. Under the heading of openness, the Commission treats all kind of measures relating to provision and practical access to information. The author would categorise most of them under the heading of transparency. These measures are probably treated under the heading openness, as they serve in order to make participation possible in the policy-process. In fact, the Commission aims at increasing the opportunities to participate in the decision-making process (especially of interest groups). The participation element is another aspect of open government, which however, has been excluded from the definition of open government underlying this thesis.
[94] Other measures consisted of making Commission documents more rapidly accessible to the public in all Community languages, more publicity to databases such as Celex, Rapid. The Commission further promised to continue its work done in the area of consolidation and constitutive codification of legislation, which would make legislation more accessible to the public.

C sought wider ranging advice from interest groups on certain key proposals at an early stage.[95] The above-mentioned measures were particularly aimed at those members of the public who follow the Community affairs more closely. In respect of the public at large, another approach had to be followed (see Communication of June 1993 below).

At the next summit held in Edinburgh on 12 December 1992, the European Council confirmed its commitment to a more open and transparent Community.[96] It adopted a package of measures to increase transparency and openness, which had been carefully negotiated by the foreign ministers in response to a request in this regard made at Birmingham. This package aimed at convincing the Danes that things were changing in the EC,[97] and responded to the public concern about this issue as expressed in the public debate. In a second referendum held on 18 May 1993, the Danes voted in favour of both the Maastricht plus the Edinburgh agreement. The transparency package consisted in several themes. As far as they regarded openness (as defined in this thesis), the Council promised to hold public debates on relevant Presidency or Commission work programs, and regular open debates on major issues of Community interest. Major legislative proposals were be subject to a preliminary open debate in the relevant Council.[98] Moreover, it provided for the publication of the records of vote and explanations of vote when a formal vote is taken in the Council. Under the heading "Information on the role of the Council", many different measures were adopted, for example the publication of the common positions established under the procedure of Article 251/252 (ex-189b/189c) EC Treaty and the explanatory memorandum accompanying them.[99]

As late as May 1993, the Commission issued a first Communication on access to information, in which it stressed the importance of Declaration 17. It noted that improved access to information will be a means of bringing the public closer to the Community institutions and of stimulating a more informed and involved debate on Community policy matters, and at the same time public

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[95] This measure should be read in combination with the communication on an open and structured dialogue between the Commission and special interest groups', op cit.. The way in which this advice can be sought is, for example, through earmarking such proposals in the annual work and legislative programme, increased use of Green papers and a notification procedure.

[96] See also the EP Resolution on the conclusions of the European Council meeting (16 December 1992). The EP in a Resolution expressed its satisfaction about the improvements made in respect of transparency and openness, but criticised the lack of openness in the legislative process, O.J. C 21/105, 25.01.92. See for the European Council meeting, EC Bulletin, 12-1992, p. 9.

[97] The Danish political parties welcomed the Edinburgh package, and emphasised in particular the transparency package which would lead to more openness in EC decision-making in the future (other elements of the package regarded, for example, the specific arrangements for Denmark and subsidiarity). See Laursen (1992), p. 73-76.

[98] Denmark introduced the holding of televised public meetings. See Lodge (1995), p. 346.

[99] Most of the other measures were "media friendly devices to make it easier for reporters to understand what was occurring and to report back accurately on it," see Westlake (1995), p. 148. The Council further agreed to improve general information on its role and activities. Next it demanded that new Community legislation be drafted in a simpler and clearer way, whereas existing legislation had to be made more readily accessible through consolidation or codification. The first request led to adoption of Council Resolution of 8 June 1993 on the quality of drafting of Community legislation, the objective of which is making Community legislation

confidence could be increased.[100] In order to implement the Maastricht Declaration, the Commission had undertaken a comparative survey on existing access to information policies in the Member States and in some third countries. This survey had, however, not been based on an independent research into the matter, but information seems to have been taken from an earlier research undertaken in another context.[101] It was very superficial at least in respect of some countries. However, it convinced the Commission that further steps had to be taken to establish a general framework for granting access to documents. The Commission proposed an inter-institutional agreement laying down the fundamental principles and a minimum set of requirements. It subsequently set out these basic principles and requirements upon which it intended to elaborate further. It invited the other institutions to co-operate in the development of the policy. In a second Communication of 2 June 1993 (258), the Commission expanded further on these basic principles, which served as a basis for discussion with the other institutions.[102] In the same Communication the Commission set out the progress made in the implementation of the measures mentioned in the two Communications of December, and outlined new measures designed to improve its relations with the general public. It considered the development of its information and communication policy as very much linked to the achievement of openness.[103] In 1994 it adopted a package of ten measures in the field of its information and communication policy.[104]

At the meeting in Copenhagen, the European Council invited all institutions to ensure that the principles of subsidiarity and openness were firmly anchored in all spheres of Community activity and fully respected in the day-to-day operations of the institutions. It promised to continue the process of creating a more open and transparent Community.[105]A few months later the institutions reaffirmed in an inter-institutional Declaration on democracy, transparency and subsidiarity (25 October 1993), their attachment to the implementation of transparency, and recalled the measures, which they had already taken in this direction.[106] The EP, further, made known that it had amended its Rules of Procedure so as to confirm the public nature of meetings of its committees and of its plenary sittings.[107]

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more accessible (O.J. C 166/1, 17.6.93.). Furthermore, new communication technologies had to be used in order to achieve more rapid transmission of material.

[100] COM (93) 191 final, 5 May 1993, O.J. C 156/05 (1993).

[101] Curtin, (1995), p. 421.

[102] COM (93) 258 final, O.J. C 166/04 (1993). See annex II.

[103] Ibid., and Agence Europe, 6168, 11 February 1994.

[104] See the Commission's policy on openness, progress report. Memorandum from the President and Mr. J de Deus Pinheiro to the Commission. SEC/9335/93 EN. See about these measures Peterson (1995), p. 473.

[105] See the Conclusions of the Copenhagen European Council (21/22 June 1993) under the heading "A Community close to its citizens," Presidency Conclusions, p. 89-90 (Bulletin 1993).

[106] See Declaration of 25 October 1993. See Annex I, O.J. C 329/133, 17.11.93.

[107] Ibid.. The EP has amended its Rules of Procedure on 15 September 1993.

After having worked on the issue of public access to documents separately in the previous six months, the Council approved in its meeting of 6 December 1993, the Code of Conduct on public access to the institution documents. The date was linked to the fact that, at this meeting the Rules of Procedure had been changed in the light of the Maastricht Treaty, further changes stemming from the conclusions of the Edinburgh European Council as regards openness needed to be incorporated.[108] A majority of the Member States was in favour of adopting the Code of Conduct through the Council's Rules of Procedure. The Dutch voted against both the adoption of the Code of Conduct and the Rules of Procedure, as they did not consider that this issue could be regulated through internal rules (see §4.5.2.1.1.). The Council and the Commission implemented the Code through separate Decisions of respectively 20 December 1993 and 8 February 1994.[109] The Code is an inter-institutional instrument between the Council and the Commission. The fact that only two institutions were part of the Code would seems to be a restrictive interpretation of Declaration 17, which mentioned improving public access to the information available to the institutions.[110]

4.3.4 The move towards openness

After the adoption of the Code of Conduct the trend towards more openness continued. The issue remained on the Community agenda as a result of a combination of factors. First of all this was the consequence of the continuous pressure for more openness from the EP, Denmark, the Netherlands, journalists and academics.[111] Other factors which favoured the trend were: the establishment of the Ombudsman; the progressive attitude towards openness of some high-ranking officials of the Commission (Secretary-General Williamson); technology advances; and the accession of the new Nordic Member States which are particularly attached to the principle of openness.[112] Sweden and Finland, before entering the EU, issued separate Declarations in which they stressed the importance of openness.[113] Moreover, the creation of parliamentary committees of inquiry has also been an

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[108] The Dutch, Danish and Greek delegations voted against the revised Rules of Procedure. See the draft EP Report on openness in the Community, Document PE/207.463.

[109] See Code of Conduct concerning public access to Council and Commission documents, O.J. L340/41 (1993); Council Decision 93/731, O.J. L340/43, (1993); Commission Decision 90/94, O.J. L46/58, (1994).

[110] Guggenbühl (1998), p. 15.

[111] Westlake observes that the trend towards more openness did not start with the Danish No (Declaration 17 had already been adopted), which he admits had, however, an important impact on the move towards openness, but already before. He notes that the process of change was cumulative and complex. Since the EP gained a role in the legislative process, this process was rendered more open. Moreover, with each increase in power, this process is further opened up, see Westlake (1998), p. 134.

[112] Ibid., p. 136.

[113] The Swedish Declaration states: "Open government and, in particular, public access to official records as well as the constitutional protection afforded to those who give information to the media are and remain fundamental principles which form part of Sweden's constitutional, political and cultural heritage." This Declaration was issued because Sweden was very concerned about the reconciliation of their constitutional provisions with community rules which are less generous in this respect. The Member States (12) responded

important development. Through such inquiries a lot of information comes into the public domain and insight is gained into the inner workings of the policy-making process. This was shown, for example, by the BSE affair, which gave insight into the committee system, including the comitology committees, and the Commission itself. In the end, the scandal led to the adoption by the Commission of measures to enhance transparency and openness in the Scientific Committees. Scandals, such as the BSE and the Salmonella bacteria cases make the citizens aware of the existence of Brussels, and the direct impact that Brussels-made policies have on their lives. These scandals attract public attention, and, with it, the calls for more public accountability, i.e. openness and transparency, grow. The embarrassing discovery of fraudulent practices in the Commission, which led to its resignation, has undoubtedly caused a general boost for more openness and transparency in the Union.[114]

During the period between 1994 and 1999, a variety of measures have been taken to enhance openness, most of them were taken by the Council.[115] In particular, the Council has been under pressure to enhance openness in the legislative process. In response to the Danish Memorandum on legislative openness, it adopted in 1995 the Code of Conduct on public access to the minutes and statements made in these minutes when it is acting in its legislative capacity. Complaints about the lack of openness in the Third Pillar in comparison to that of the First Pillar was addressed by the Council in March 1998. The Council did, however, not touch upon the issue of public debates when the Council is acting in its legislative capacity. It further adopted a public register in January 1999. In turn, the Commission, after the BSE scandal, adopted a number of provisions which aimed at opening up the many committees assisting the Commission in the policy-making and implementation phase. Furthermore, the European Ombudsman (EO) has managed, through the system of complaints about access to documents and his powers to initiate own-initiative inquiries, to enhance the degree of openness in the Union. The most important achievement was the adoption of rules on public access to documents by nineteen institutions and bodies as a result of the EO' s own-initiative inquiries into this matter. Besides the above-mentioned procedural and administrative measures to enhance openness, amendments have been made by the Amsterdam Treaty which should provide for greater openness. Since Amsterdam, the principle of openness has replaced, at least on paper, the principle of secrecy which applied in the Community for more than four decades. Article 1 TEU has been amended and stipulates that the decision-making process

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that they had taken note of this Declaration, but that they took it for granted that Sweden, as a Member of the Union, would fully comply with Community law in this respect. The Finnish Declaration got no response at all. It stipulates: The Republic of Finland welcomes the development now taking place in the Union towards greater openness and transparency. In Finland, open government, including public access to official records, is a principle of fundamental legal and political importance. The Republic of Finland will continue to apply this principle in accordance with its rights and obligations as a member of the European Union." See Final Act, O.J. C 241/397, (1994). See further, Öberg (2000), p. 6.

[114] See further §5.5.1.

[115] Most of these measures are discussed in Chapter 5.

shall take place as much as possible in the open. Moreover, the issue of public access to documents has been constitutionalised through the inclusion in the TEU of the right of access to documents of the European Parliament, Council and Commission (Article 255 EC). The principles and limits to this right, which constitutes a special implementation of the general principle of openness, must be laid down by co-decision procedure within two years of the entry into force of the Amsterdam Treaty (see, for details Chapters 1, 7 and the Conclusion to this thesis).

4.3.5 The motives behind the transparency and openness initiatives

At the beginning of the transparency debate, public dissatisfaction was foremost directed against the Commission, which was seen by the people as "an autocratic, unaccountable, invisible, faceless, distant, unresponsive Eurocracy that dictated policy to the Member State governments and was impervious to the public's desire for openness."[116] At several European Council summits, the Commission was instructed to open up and make itself more transparent. In particular, it was argued that there was a lack of information in regard of the Commission. The Commission responded to the demands to make itself more transparent and open by taking, in particular, measures to improve the accessibility of information for the public and those interested in either participating in funds/programmes or influencing the legislative process (see §4.3.3.).[117] In turn, the Council also took several transparency and openness measures, which, however, did not provide for any real openness in the legislative process. These measures might create the illusion but not the practice of transparency and openness.[118] According to Lodge, the real problem was not so much the Commission, which was more accessible and open than many national administrations, but the Council, which enacts legislation in private and whose policies are often obscure.[119] She argued that the Member States, by focussing on the lack of transparency and openness in respect of the Commission, tried to divert attention from their own lack of openness when they meet as the Council. However, by placing transparency and openness on the political agenda in the end also the Council's position and practices have been questioned. In fact, soon after the adoption of the Code of Conduct on public access to documents in 1994 demands were made for increased legislative openness in the Council.

Transparency and openness have been placed on the political agenda, and implemented by the institutions, as it was seen as the primary means of increasing the "social legitimacy" of the

[116] Lodge (1995), p. 346.
[117] Ibid., p. 360. In particular, through the adoption of rules on public access to documents and by improving the Commission's information and communication policy.
[118] Ibid., p. 356.

Union.[120] It appeared that the dominant institutions, the European Council, the Council and the Commission, were of the opinion that by increasing transparency and openness the dissatisfaction with, and the alienation from, the EU would diminish, and the Union would become more popularly acceptable.[121] This follows in particular from the Conclusions of the various European Councils. This lack of openness was considered as one of the primary causes for the feeling of alienation for the EU institutions which had manifested itself in Europe.[122] The institutions' idea behind the transparency policy seems to have been to popularise rather than to democratise the Union.[123] In particular, the Commission seemed of the opinion that the Union lacks in popularity partly because of insufficient information (information deficit).[124] It saw in improved access to information a means for bringing the public closer to the Community institutions as well as a way of stimulating a more informed public debate on policy matters, and, at the same time, enhancing public confidence. In other words, in the opinion of the Commission increasing information will reduce the dissatisfaction with the Union.[125] As will be explained in the next section, the popular crisis of legitimacy is, however, much more complex, and in order to be resolved more than merely remedying the lack of transparency and openness needs to be done. Herein lies also another explanation as to why transparency and openness have been taken up. Enhancing legitimacy through transparency and openness is easier than dealing with other elements of the democratic deficit, which require fundamental decisions as regards the Union's future form of governance (see further §4.4.2.3.).

The above explanation, i.e. that the motive behind transparency and openness was to combat the social legitimacy crisis, does not explain why Declaration 17 was adopted. This Declaration, which placed the issue of openness on the political agenda, was already adopted before the crisis manifested itself openly (and which placed the issue *high* on the agenda). It is not clear whether the Declaration was adopted to satisfy the Netherlands, or whether all Member States were convinced that democracy requires openness, not only at the national but also at the European level. It seems, however, more probable, given the growing scepticism about integration, that the primary reason for its adoption was to increase the citizens' confidence in the Union. This objective is mentioned

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[119] Ibid., p. 348. According to Williamson, the Secretary-General of the Commission, the Commission is one of the most open public services in the world. See Peterson (1995), p. 490.

[120] Legitimacy has both a social and normative aspect. The social aspect is rooted in popular consent. See the definition of De Búrca (1996), p. 349. See §4.4.2.1. about legitimacy and its different aspects.

[121] See Mather (1997), p. 9. See the Conclusions of the various European Councils.

[122] Dehousse (1995), p. 124. Weiler (1997), p. 150-151.

[123] Mather (1997), p. 9.

[124] Similarly Héritier, who notes that the idea behind the transparency package is to create support for European policies by disseminating information about them: see Héritier (1999), p. 27. See COM (93) 191 final, 5 May 1993, O.J. C 156/05 (1993). See further the measures to improve the communication and information policy in respect of the public (Pinheiro Memorandum), op cit.. Lodge (1995), p. 360. The Member States (European Council and Council) might have been of the same opinion. They had accused the Commission for being too closed.

in the Declaration itself. The adoption of Declaration 17 has been explained by pointing to the momentum for Monetary Union. The Member States' would have adopted the Declaration because of awareness of the consequences that the introduction of the Monetary Union would have on their citizens.[126] This policy would naturally require their active support. It seems thus that the adoption of Declaration 17 was primarily aimed at generating popular support and increased confidence.

In the literature, some internal motives have also been identified for the implementation of transparency. For example, Peterson argues that the Commission's motives were originally political and aimed principally at exposing "the addiction of the EU national governments to secrecy within the Council of Ministers."[127] Whereas in 1995, it was transformed into an administrative exercise to deal with the Commission's management problems. Peterson notes that the transparency exercise started a process, which should have been conducted long ago, of imposing stronger internal disciplines on the Commission.[128] The reform of the Commission was boosted by the fraud and maladministration affairs in 1999 (see for more detail §5.5.1.).

The initial motives behind the transparency and openness initiatives lead to the conclusion that transparency and openness were not seen by the institutions as fundamental aspects of a liberal democratic polity. In fact, Mather doubts whether the measures taken by the institutions can assuage the popular dissatisfaction, given the fact that there is a discrepancy between the way transparency is interpreted by each institution on the one hand and the public on the other.[129]

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[125] It seems that some feel that the information deficit has been ineffectively confronted by an information overload. Lodge (1995), p. 361.
[126] See Westlake (1998), p. 133.
[127] See Peterson (1995), p. 473.
[128] Ibid., p. 490.
[129] Mather (1997), p. 110.

4.4 Open government, the democratic deficit(s), and the crisis of legitimacy

4.4.1 Introduction

The purpose of this section is to place the issue of transparency and openness in context. The lack of transparency and openness constitutes one of the democratic shortfalls from which the Union is said to suffer. After having discussed why the Union should be democratic in the first place, the different shortfalls will be examined. As these gaps in democracy differ according to the democratic theory that is applied to the Union, a short analysis will also be given of the different models of democracy which have been advanced in respect of the Union. The second part of the section places the issue in the context of the debate on legitimacy. After the different elements of the legitimacy crisis have been individuated, an analysis will follow of the way in which this crisis has been addressed. It will be shown that the issue of transparency and openness has been taken up primarily as it constitutes the cheapest solution to enhance popular support for the Union, as it does not pre-empt more fundamental decisions on the future of the EU architecture.

4.4.2 Democracy in the European Union

4.4.2.1 Why should the European Union be democratic?

In Chapter 2, it has been argued that open government is essential for the functioning of any democracy, however conceptualised. The argument in respect of the Union could, thus, run as follows: If the Union wants to be seen as democratic, its decision-making process should be open to a considerable extent. What, however, still needs to be explained is, why the Union should be democratic. It has been widely acknowledged in the literature that the Union, and before it the Community, suffers from a democratic deficit(s), and the different aspects of this have been elaborated upon endlessly. The question which, however, has seldom been raised is why the Union should be democratic at all? In §4.2, it was explained that the Union in this thesis is not seen as a nascent nation-state, but as an highly sophisticated international organisation. Why should this international organisation abide by democratic principles, and why is the democratic deficit such a problem in respect of the Union, whereas this is not the case in respect of other international organisations?

In respect of the last question, it should be observed that internationalisation in general has led to more executive empowerment to the detriment of parliamentary organs.[130] This so-called democratic deficit, has, however, been much stronger at EC level, given the fact that the EC directly usurps national legislative power. As a result, "the decision-making previously within the purely national domain has been partly taken out of the public realm of politics and transferred to the European level decision-making by virtue of the shift in the locus of decision-making to the European level."[131] This is the effect of the special legal order of the Community (see §4.2). Given the high level of integration, the democratic deficit has been growing over the last decades.[132] Other international organisations do not directly usurp national legislative powers like the EU does, and thus the public realm of politics as such has remained within the bounds of the nation-state.

The democratic foundation of the Union has been asserted in the Amsterdam Treaty, which now stipulates explicitly in the preamble that the Union is founded upon democratic ideals (Article 6 TEU). But why should the European Union be democratic at all? Weiler is one of the few authors who gives, although belated, an answer to this question. The most fundamental and obvious reason is that democracy is considered to be the best system of decision-making. He observes that other systems would in our prevailing political culture be unacceptable and politically-illegitimate:[133] unacceptable, because democracy protects such values as freedom, justice and equality, and illegitimate because democracy is seen as a condition for the long-term stability and acceptability of the European polity. In addition to this answer, he comes up with two other reasons which are rooted solely in the peculiarities of European integration. The first reason lies in the corrupting legitimating effect of the success of the European project on both the citizens and on the very meaning of democracy. He observes that each time after an IGC, the European construct is approved by parliaments and citizens without any serious challenge to its questionable means, i.e. feeble democratic character. This represents, in his opinion, the invasion of the market mentality into the sphere of politics, in which citizens become the consumers of political outcomes rather than active participants in the democratic process. He notes that "legitimisation through accomplishment, professionalism and results becomes, thus, the surrogate for democratic process and democratic legitimisation."[134] In fact, this mentality we see currently also being advocated in the literature. For example, Joerges and Neyer argue that closed deliberations of civil servants meeting in comitology committees should be preferred given the quality of their dialogue and the merits of their outcomes. This obviously makes citizens or their representatives at best partially informed consumers of such "deliberative paradise."[135] The second response given by Weiler to the

[130] See §4.4.2.2.
[131] Curtin (1997), p. 41-42.
[132] Ibid.. See also Boyce (1993), p. 458.
[133] Weiler (1999), p. 5.
[134] Ibid., p. 7.
[135] Curtin (1999).

above-mentioned question is that "non-democracy" according to him destroys the principle of tolerance and respect which is at the core of the polity. The Community is unique as, despite the fact that it is lacking the bond of nationhood, it can take binding decisions against the will of a Member State. But if these decisions are not taken through the democratic process it might damage the willingness of Member States to be bound to such decisions.

Another question which needs to be treated briefly here is whether the Union can indeed become a true institution of democracy given the absence of a *demos*. According to the German Constitutional Court in the *Brunner* case, the European Union cannot become a democracy as there is no "Volk."[136] The latter concept refers to a *demos* in ethno-national terms. Obviously no European *demos* in this ethno-national sense exists. Moreover, this does not even seem to be a goal, given the fact that the Treaty speaks of a closer Union among "the peoples" of Europe.[137] Weiler argues that the *demos* can, however, also be conceived on other grounds, namely based on "shared values, a shared understanding of rights and societal duties and shared rational intellectual culture which transcend ethno-national difference."[138] If one takes this alternative view then the Union might in fact become a real institution of democracy.

4.4.2.2 The democratic deficit(s)

The lack of openness and transparency constitutes only one element of the democratic deficit. This element was brought into focus in the aftermath of the ratification of the Maastricht Treaty (see §4.3.3.). For the purpose of this research it is not necessary to dwell extensively on each element of the democratic deficit; it is sufficient to explain the current debate briefly, the *main* features which, as identified in the academic literature, will be set out below. This account draws heavily on that of Weiler.[139]

First of all, democracy, in the sense of individual empowerment, is diminished at EU level as a result of enlargement of the membership of the polity, which reduces the capacity of each individual to influence the decision-making process. At the same time, it increases the distance between those in powers and the citizens as a consequence of the adding of a new layer of governance. This problem of "inverted regionalism," leads to a diminishment of democracy and undermines the Union's legitimacy.[140] Moreover, even if the EU did address the democratic deficit

[136] Weiler/Haltern/Mayer (1995), p. 12.
[137] Weiler (1998/1), p. 23.
[138] Weiler/Haltern/Mayer (1995), p. 19.
[139] Weiler (1998/1), p. 3-9.
[140] Ibid., p. 3.

by copying the democratic institutional structure of its Member States, this situation would remain.[141]

The "classical" democratic deficit consists in the weakening of the legislative branch in favour of the executive branch of the State (also called the "executive dominance issue"[142]). The Council, composed of the executive branch of the government, is the principal legislator in the Community, but it is not subject to any form of parliamentary control. Many of the powers transferred from the Member States to the Union are of a legislative nature, which before were held by the Member States' parliaments. The loss of powers by the national parliaments has, however, not been counterbalanced by any increase in powers of democratic control to the EP, which, according to the EP itself, could only be achieved by extending its responsibilities.[143] This deficit needs to be reduced to proper just proportions, as this problem is not confined to the EU, but exists also at the national level wherever governments dominate the legislative process as well. In other words,, the problem would have existed even if decisions were taken still at the national level; the democratic deficit constitutes a "universal" problem of modern domestic politics.[144]

Enhancing the powers of the European Parliament would not solve the other deficits from which the EP suffers, and which prevents it from constituting an equal to its national counterparts. At the same time, national parliaments have great difficulties in exercising control over the Community decisional process. This is due, in particular, to the fact that the Council may take decisions by majority, which means that Ministers individually cannot be held accountable. The Maastricht Treaty reduced the democratic deficit to a certain extent by the introduction of the co-decision procedure, which makes the EP co-legislator. Moreover, the Amsterdam Treaty has reformed and expanded the application of the co-decision procedure. The EP has acquired an equal role, as almost all important Community legislation is now subject to the co-decision procedure. The lack of democratic accountability of the Commission has been addressed largely by the Maastricht Treaty.[145] The EP has received an important role in the appointment procedure of the Commission, as the College of Commissioners is made subject to approval by the EP (Article 214(2) EC). This process politicises the Commission to a greater extent, moving it further away of its technocratic origins.[146] However, unlike at the national level where parties have an important role in the designation of the government, EP parties do not have a similar role in respect of the Commission.

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[141] Ibid., p. 3-4. "Inverted regionalism" and its negative effect on legitimacy is, further, enhanced by three other factors, see p. 4.
[142] Craig/De Búrca (1998), p. 156.
[143] See EP Resolution on the democratic deficit in the European Community issued in 1988, op cit.
[144] Craig (1999), p. 25. See also Piris (1994), p. 462-463.
[145] According to Weiler (1993/1) this claim was "vastly overstated," p. 260. See Dehousse (1995), p. 122-123.
[146] Shaw (2000), p. 110.

The democratic deficit is composed of more elements than the "classical" democratic deficit as outlined above. An early identified problem of democracy regards the fact that the Council legislates behind closed doors.[147] This is in contrast with liberal democratic parliamentary regimes, in which parliaments legislate in public. This problem will be discussed extensively in §5.3.3. The problems in respect of the Council do not finish with this. The decisions in the Council are prepared extensively by Coreper, other senior level committees and working parties. Although the working parties do not have independent decision-making power, in practice they are the last arbiters in Council negotiations of around 70% of the legislative output.[148] The largest part of the legislative output has been decided at lower levels, which works like the Council behind closed doors. This phenomenon of legislation, decided by appointed civil servants, has recently been criticised as being undemocratic (unaccountable).[149] In fact, civil servants are not elected and made accountable to a representative body such as the EP. This criticism has been countered by the argument that civil servants, are accountable to their national ministers, which are in turn, at least in theory accountable to their national parliaments. Moreover, they do not have independent decision-making power, which rests with the ministers in the Council. The latter may at any time in the decision-making process reopen A-points decided at working party level.[150] It should be stressed, however, that this system is not so different from that at the national level, where Bills are drafted by the executive. This drafting-process is done by civil servants in the administration, with the final responsibility resting with the government. Is this not what happens in the Council?

The problem that the Council legislates in secret is one element of a wider problem which came to the fore during the ratification of the Maastricht Treaty, i.e. the lack of transparency and openness in the decision-making process in the Union. The democratic deficit was thus deeper than was initially thought.[151] The lack of transparency and openness is "at the root of the feeling of distance to which most citizens attest when speaking of the European institutions."[152] The Union is viewed by the citizens as remote and opaque, and they feel alienated from it. An important element of the transparency deficit was the information-deficit. This deficit was caused, amongst other things, by the absence of rules on public access to documents in the Union, which in its turn, constitutes an important aspect of the lack of openness in the Union. Other problems of transparency which were identified regarded, for example: the lack of transparency of the Council's committee system,[153] the

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[147] See the EP Resolution on the democratic deficit in the European Community issued in 1988, op cit.
[148] Hayes-Renshaw and Wallace (1997), p. 15.
[149] Ibid., p. 83.
[150] Ibid.
[151] Lodge (1995), p. 343.
[152] Dehousse (1995), p. 124.
[153] This system has been criticised for lacking completely in transparency. Besides the fact that they deliberate in private, only a few know exactly how many working parties exist at any one time. This is due to the fact that "they may be permanent, temporary or ad-hoc, and can meet at various intervals, ranging from weekly to six-monthly; they may even meet on a single occasion and then be disbanded. No official lists of these groups is available to the public; in any case, such lists become quickly obsolete, because the number

complexity of the legislative process (there were too many procedures (21)), the lack of transparency and openness at the level of enforcement (comitology committees) and practical problems of access to information (unfriendly databases, lack of consolidation of legislation etc.).

The feeling of alienation has, however, other causes apart from the lack of transparency.[154] For example, the EP cannot yet initiate a public debate on policy issues in the same way as national parliaments do, because of a combination of factors. The weak public forum function has been said to be caused by its lack of powers, the time and place of meetings, the language problems and the disinterest of the media.[155] Nor can the public debate be started by the national parliaments as they are often badly and belatedly informed (often after the legislation had been adopted or shortly before) about legislative proposals under discussion in the Council.[156] This situation is less acute now, as the Amsterdam Treaty extended the application of the co-decision procedure considerably. The lack of a political arena as exists at the national level is further the result of the absence of a European party-system and the lack of a wide European public sphere (i.e. existence of civil society).[157] Aggravating factors include, the fact that the Council legislates behind closed doors, and that the decision-making process at the European level tends to pay more attention to the technical aspects of a problem rather than its political aspects ("political deficit"). Dehousse comes to the conclusion that the European "political system is primarily viewed as a closed shop, with membership confined to experts espousing the defence of national or sectoral interests, and not as a political arena within which different conceptions of the public interest can be aired and discussed."[158]

Other democratic shortfalls have been identified in the academic literature, for example, the negative effect of enlargement on diffuse and fragmented national. At a trans-national level, it is much more difficult for those interests to organise themselves compared, for example, with big industry or organised labour. Moreover, even if organised they face another obstacle, i.e. the structurally weak EP, which is supposed to protect these interests.[159] Another shortcoming has been said to exist in respect of the level of implementation. Many important regulations (secondary legislation) are made by comitology committees, which are composed of specialists and national interest groups, and thus escape the traditional democratic channels of decision-making (EP and

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fluctuates frequently, owing to the large number of ad hoc committees which are created to deal with specific topics." Working parties are created by Coreper, and they have no legal status. See Hayes/Renshaw and Wallace (1997), p. 97.

[154] The added layer of governance has also increased the feeling of remoteness (see the above argument of Weiler). Alienation is not unique to the Union, as a general feeling of political alienation has been said to exist in most western democracies, see Weiler (1997), p. 150.

[155] Weiler (1998/1), p. 5.

[156] Dehouse, (1995), p. 121.

[157] Curtin (1997), p. 43. See also Weiler, (1998/1), p. 5; Eriksen/Fossum (2000), p. 44 and 52; D'Oliveira in Dehouse (1994), p. 147; Laffan (1996), "The politics of identity and political order in Europe," p. 93. This lack seems a problem, in particular, from a deliberative democracy point of view.

[158] Dehousse (1995), p. 125.

Council are excluded).[160] Again this argument should be kept in proportion, as the legitimisation of secondary norms seems to be a problem in all nation-states.[161]

The democratic criticism sketched above derive from a comparison with the representative democratic systems of the Member States, which are parliamentary systems. Some critics have sought to keep the problems identified in proportion, as it was clear that such problems are not confined to the Union but exist equally at the national level. It should also be noted that people often reason from the perspective that if the Union did not exist then decisions would be made at the national level. Given the fact that more and more problems require a trans-national approach, it would be more probable that without the Union, there would be some other form of international co-ordination in various fields. As pointed out by Craig, it is highly probable that such co-ordination would do less well in respect of such aspects as distance, executive dominance and transparency/openness.[162]

Thus, instead of consciously choosing a particular theory of democracy to apply to the Union, most authors write against their national background understanding of democracy and institutions (the nation-state).[163] This background serves as a normative criteria against which to judge the EU's operation. However, this comparison is not so logical, as the EU is not a nascent nation-state (see §4.2.2.2.). Why should the democratic institutions and procedures that exist at the national level be replicated at the EU level? There exist many different models of democracy, and it might be that a model other than that existing at Member State level, would be much better suited to the specific features of the Union. In fact, alternative models of democracy have been proposed for the Union, for example by Curtin, Craig and Sabel/Cohen (see §4.4.2.3.2). In conclusion, it should be observed that the application of different models of democracy means that the "democratic deficit," as outlined above, is not constant. For example, the lack of participation in the Union constitutes an important democratic shortfall if seen from a republican or deliberative democracy point of view (see Chapter 2 and §4.4.2.3.2).

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[159] Weiler (1998/1), p. 5-6.
[160] Craig (1999), p. 24. He calls this the "by-passing democracy" argument.
[161] Ibid., p. 25.
[162] Ibid., p. 27.
[163] Weiler (1998/1), p.8.

4.4.2.3 Different models of democracy applied to the European Union

4.4.2.3.1 Parliamentary representative democracy

The parliamentary representative democracy is the democratic model which remains the most widely used by political leaders and the institutions in respect of the European Union. As most will be familiar with its elements, this model can be discussed briefly.[164] All Member States have evolved forms of representative democracy (presidential or parliamentary democracy), where the sovereign people are represented by a freely and regularly elected autonomous institution, i.e. a parliament. "In a parliamentary system, the parliament is directly legitimised by and responsible to the people, whereas the executive is responsible to parliament and thus only indirectly to the people."[165] In order to safeguard democracy, power should not be monopolised in the hands of one institution but must be divided among several branches of government in a system of checks and balances. In our democracies therefore, a distinction is made between the legislative, executive and judicial branch. The parliament is the main legislator, and possesses the right to initiate legislation. Legislation is however only one aspect of the parliament's work; an equally important task is its exercise of control, setting the framework for democratic responsibility and accountability. For this task it has various powers, such as the right to question ministers and the power of inquiry. The executive on the other hand has the task of developing policies and, most of the time, drafting legislative proposals. It further has the task of implementing adopted policies and legislation.

Until recently, the question whether the Union should evolve into a parliamentarian democracy or a looser market polity was never openly debated. Probably as a result of the differences in opinion between the Member States in this respect, only incremental constitutional changes towards a democratic polity have taken place.[166] Thus, at every IGC the powers of the EP have gradually been increased, for instance by the introduction of co-operation and co-decision procedure, powers to censure the Commission, and the right of inquiry. Most changes which have been made since the SEA go in the direction of a parliamentary system. However, other constitutional changes, for example moving towards a bicameral legislature, granting the right of initiative to the EP or directly electing the members of the Commission would seem to require an explicit choice for this model. Albeit belatedly, the choice of government system is now for the first time being openly discussed as part of the debate on the future of the European Union, which was launched at the Nice summit in December 2000 (see §4.2.2.2.).

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[164] See Ress (1994) about parliamentary democracy in the Union, p. 159.
[165] Ibid.
[166] Héritier (1999), p. 271.

4.4.2.3.2 Other models of democracy

In recent years, the debate on democratising the Union has become much richer with the advancement of alternative not necessary exclusive models of democracy in contrast to the traditional parliamentary representative democracy of the nation-state. These models have been advanced in respect of the Union as a whole, for example, by Curtin, or in respect of its different modes of governance, for example, by Weiler and Joerges/Neyer. In particular, more deliberative/participatory theories have been defended as attractive models in theory and practice. In Chapter 2, different theories of democracy were analysed as far as the relationship between citizen participation and openness was concerned. The purpose of this section is to shown which of these models have been advanced in respect of the Union, why, and what this means for openness.

Different theories of democracy have been advanced in respect of particular modes of governance. These theories have been based upon Weiler's theory of the three different modes of governance existing in the Union, and upon his vision that there is no theory of democracy which satisfactorily captures all models of governance.[167] He distinguishes between the supranational (the EC), the intergovernmental (in particular, the Second and Third Pillar), and the infra-national mode (comitology process).[168] As far as transparency is concerned, Weiler notes that the level differs according to the mode of governance. Thus, at the supranational level the degree of transparency of the decision-making process is medium to low, whereas that of the other two modes is low.[169] The fact that transparency is low under the intergovernmental mode is related to the fact that decisions are reached through diplomacy, which requires secrecy to be successful. The lack of transparency at the infranational level results from the fact that this level operates outside parliamentary channels and outside party politics, because of its managerial, functional and technocratic bias.[170]

In Weiler's opinion, the supranational process is best captured by a Schumpeterian competitive elite model of democracy (supranational process) or aspirationally at least to a statal federal type of pluralist democracy.[171] Instead, the intergovernmental and the infranational process come closer respectively to consociational and neo-corporatist models of democracy.[172] It would be impossible to explain here the ground upon which Weiler comes to his conclusion, but some reflections on what his vision means for the role of the citizen and openness must be made. None of the three

[167] Weiler (1998/1), p. 3-31. See also Weiler /Haltern/Mayer (1995).
[168] Ibid.
[169] Ibid. See schedule on p. 13.
[170] Ibid., p. 21. See also Craig (1999), who notes that the lack of transparency is attendant upon decision-making which is conducted outside the normal political process, p. 43.
[171] Weiler (1998/1), p. 20.
[172] Craig has questioned the consociational model of democracy, which according to Weiler, provides a good framework to discuss the intergovernmental mode of governance, Craig (1999), p. 30-32.

models assigns a central role in the decision-making process to the citizens, and consequently the need for transparency and openness becomes less important.

A number of objections can be made in respect of the accuracy of the Schumpeterian model as best capturing the reality of the supranational mode of governance. How does one, for example, explain the growing interest shown at the European level in enhancing transparency and openness in the decision-making process (in all Pillars)?[173] In a Schumpeterian model, transparency, participation and citizenship cease to be of democratic concern given the operative definition of democracy. This is in fact one of the points which has been used by Craig to reject the accuracy of Weiler's thesis. He notes that cynics might answer the above question by saying "that it is all window-dressing to placate the populace lest they become restive,"[174] but setting this reasoning aside, he does not see other reasons which explain why there should be such attention. Initially the attention for transparency might have been explained as constituting mere window-dressing, however, this does not seem to be the case anymore. The issue has evolved, and is now clearly seen by a number of Member States, and increasingly by the institutions and public opinion at large as an indispensable element of enhancing democracy in the Union.[175] Nor does Craig find evidence in the Reports submitted to the IGC 1996 that the Member States are attached to such vision. Instead, they express concern about democracy and legitimacy which makes little sense in an elite model of democracy. Another reason why Craig rejects this model, is that, in the Schumpterian (and pluralist) model, no common good exists which is separate from the preferences of individuals or groups within society, whereas in the EC there is a conception of the common good which is independent from competition between individual state preferences.[176] In this respect, he points to the fact that the Commission has always seen itself as the guardian of the public interest as laid down in the Treaties, and has used its right of initiative to reach the Treaty goals. Another point he makes regards the fact that in the EU's elite plays an important role, as in all national political systems, but this does not make those systems Schumpeterian (see §2.5.2.). Finally, he comes to the argument that a democracy needs a *demos*. As the *demos* in an ethno-national sense does not exist in the Union, he shares the view of Weiler to conceive the *demos* in the Union as a supranational civic, value-driven *demos*. In this way, the Union can become a real democracy. The problem is that the Schumpeterian model frustrates this conception, as the elite model is thin and arid, and is

[173] Craig wonders why in fact so much attention was paid to such issues as transparency, participation and citizenship in the institutions' Reports to the IGC 1996 and prior high-level documents: see Craig (1998), p.62. See also Chapters 5 and 7 in respect of the IGC 1996.
[174] Craig (1999), p. 62.
[175] See the documents of the Member States and institutions submitted in view of the IGC 1996 negotiations (see Chapter 5 and 7). Moreover, see the public debate that was triggered around the ratification of the Maastricht Treaty, which revealed the public concern about the lack of openness and transparency.
[176] Craig (1998), p. 60-64.

based upon assumptions which run counter to those in the civic sense of *demos*. Finally, he considers the model normatively unattractive.[177]

Craig suggests a republican model of democracy for the EU in respect of the supranational level as in his opinion this model is attractive normatively and fits the empirical data.[178] Central to the republican model is the institutional balance and the achievement of a common good through deliberation. In this theory, the citizens are assigned a participatory role in the political process. According to Craig, this model fits the reality rather well, as there is some concern about the protection of the institutional balance in the EC, there is a conception of the common good, which is defended in particular by the Commission, and there is enhanced attention to such issues as transparency, participation and citizenship. These are all characteristics of a republican model of democracy (see Chapter 2). In particular, the attention paid to transparency and openness is crucial for the type of involvement of the citizenry in the business of government desired by a republican model of democracy (bottom-up democracy). In the end, Craig notes that obviously the seventeenth-century republican model cannot apply unmodified in modern times, and has to be re-modelled somehow to apply to the Union. It has further not yet been fully realised, but there is empirical evidence that it could evolve along this line.

Curtin has defended a deliberative model of democracy for the Union as a whole.[179] She argues that more deliberative political processes can be introduced in the various modes of governance featuring in the EU (bottom-up democracy). She observes firstly, that this model does not exclude the application of other models of democracy, and secondly, it does not mean that it can only be construed within a particular mode of governance.[180] In particular, she stresses the important and significant role which civil society can play in widening and expanding the scope of the public debate at EU level.[181] She draws on Habermas, who has stressed the link between the theory of deliberative democracy, civil society, and the need of a politicised public sphere.[182] "In the deliberative model, public interest groups seek the politicisation of issues or to build upon their prior politicisation by public opinion in order to make them accessible to input from a range of actors. Institutionalised opinion and will-formation processes of the demos thus depend on supplies

[177] Ibid., p. 59.
[178] His empirical data he derives foremost from the institutions' reports which have been submitted in the context of the ICG 1996, and some other important documents.
[179] See also Cohen/Sabel (1997).
[180] Curtin (1998), p. 8.
[181] Ibid., p. 9. Civil society has been defined by Curtin as "organisations of non-profit interest groups which form to assert interests and causes outside state-based and controlled political institutions, which constitute networks of action and knowledge and which can be regarded as constituting in some sense a civic space. It embraces, but is not restricted to NGOs and some element of "public interest" as opposed to the defence of a purely private (commercial) interest is required", see p. 5.
[182] Ibid., p. 20.

coming from the informal contexts of communication found in civil society."[183] From the deliberative process within the public spheres, a public interest (common good) emerges.

According to Curtin, the deliberative model of democracy has a special role to play in reducing the democratic deficit at the EU level (executive dominance and alienation feeling). In the Union, public deliberation takes place in the EP, and, to a lesser extent, in the national parliaments.[184] The EP's public forum function is, however, compromised for various reasons.[185] At the European level, furthermore, a European public sphere is lacking, which is one of the main reasons that there is nothing like a European-wide discourse which might result in a European public opinion.[186] According to Curtin, however, a process of rehabilitation of a non-governmental civic space at the European level has started.[187] More deliberative democracy requires as a preliminary that timely and accurate information be available, so that citizens or civil society can take part in the public debate as to what the public interest on specific topics might be.[188]

Recently, a more participatory type of governance has also been advanced in respect of the comitology process.[189] The demand for more openness and transparency in these committees must be seen in the light of a more pluralist vision of democracy. In this vision, the starting point is that participants are not supposed to look for a common good, and are expected to act in the defence of limited interests. Taking into account these facts, authors advocate the adoption of due process rules. These would allow all those interested to participate in an equal way in the decision-making process. In the end the legitimacy of the comitology process would be enhanced. Dehousse suggests empowering all the parties affected by comitology decisions to express their concerns before the relevant Committees. He wants to achieve this through the proceduralisation of openness (in the widest sense of also including the possibilities to participate), possibly through the introduction of a "notice and comment" procedure (Administrative Procedural Act). This would allow for a wider variety of inputs before decisions are made. Openness, in the sense of information, and transparency are essential conditions for the forming of opinions on the issue under consideration (precedes participation). Bignami, Craig and Vos/Joerges have also expressed themselves in favour of a "notice and comment" procedure.[190]

4.4.3 The crisis of legitimacy

[183] Ibid., p. 20-23. (extract from Habermas)
[184] Ibid., p. 49.
[185] Weiler (1998/1), p. 5.
[186] Curtin (1997), p. 56.
[187] Ibid., p. 56-57.
[188] Curtin (1998), p. 67.
[189] Dehousse (1998 WP).
[190] See Bignami (1999), p. 38; Vos, Craig (1998), p. 53-54. See for further references and a discussion of this issue, the final Conclusion of this thesis.

4.4.3.1 General

The debate on the legitimacy of the Union is of a very recent date. During the first three decades, the question of legitimacy was never considered to be a major political issue by those in power. It has been argued that, in this period, the Community's legitimacy was indirect, as it derived its legitimacy from the democratic character of the Member States who had established it.[191] In most Western states, the exercise of state power is legitimised through the democratic process. This process makes that the Government rest supposedly on the consent of the citizens, who support in general the values on which the state is founded. "Thus, legitimacy has both a social aspect, in terms of being rooted in popular consent, and a normative aspect, in terms of the underlying values on which such consent is based," for example, fundamental rights and the rule of law.[192]

The public debate surrounding the ratification of the Maastricht Treaty, and the disappointing referenda outcomes in Denmark and France, demonstrated the existence of a substantial level of public opposition to the Union. The lack of popular support seemed to indicate the existence of a crisis of legitimacy. Clearly the "permissive consensus" for the Union project of the early decades could no longer be presumed. What exactly the causes of this crisis are is not easily determined. De Búrca notes that it might be caused by "dissatisfaction about the inadequate and undemocratic institutional and constitutional structure of the Union, an objection to its underlying market value and thus also dissatisfaction with its specific policies or, perhaps more fundamentally, a growing distaste for the entire process of European integration."[193] Moreover, external elements may have had an impact on the crisis, like dissatisfaction with domestic politics or the general disillusionment in government systems.[194]

In the academic literature, the legitimacy crisis has been analysed and different explanations have been given for its existence. These have been sought more in the institutional than substantive sphere.[195] The crisis seems to consist of various elements. It should be kept in mind that how the legitimacy crisis is perceived and how it should be addressed depends upon one's characterisation of the Union. The Union is not a state and, therefore, legitimacy may be attained other than through

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[191] Dehousse (1995), p. 121. See also Wallace/Smith (1995) who note that democracy and legitimacy were left in the hands of the Member States at least for the time-being, p. 139.
[192] De Búrca (1996), p. 349. See for a definition and the different elements of legitimacy, Beetham (1991), p. 15. See also Weiler (1993), p. 19. The latter distinguishes between two components of legitimacy, social (with an additional substantive component) and formal.
[193] De Búrca (1996), p. 351-352.
[194] Ibid. See also Shaw (1998), p. 81.
[195] De Búrca (1996), p. 352, and 355.

copying the democratic structures that exist in the nation-state. Thus, one's vision of what kind of political entity the Union is determines the normative legitimacy problem.[196]

At one end, there is the more intergovernmental vision of the Union. Dehousse concluded from the difficulties surrounding the Maastricht Treaty that the indirect legitimacy of the Community no longer appeared appropriate to the citizens, given the development of the Community activities.[197] He suggests that the legitimacy of the Union rests on a dual basis, deriving partly from the Member States and partly from its own structures. As the EU is not a state it is argued, the democratic legitimisation, which exists in states, does not have to exist in the Union. Instead, those with a more federal vision of the Union, argue that legitimacy is to be found exclusively at the European level in the Council and the EP. Obviously for them, the increase of the EP's powers is fundamental. Others see the Union as a new political entity or as a mixture of different political models, which leads to different suggestions as how to provide legitimacy.[198]

4.4.3.2 Different elements of the legitimacy crisis

In the literature often the legitimacy crisis has been equated with the issue of democratic deficit,[199] the assumption being that an increase in the powers of the EP would reduce the democratic deficit, and thus resolve the legitimacy crisis. The EP, because it is directly elected, and therefore publicly accountable, is seen as the depository of legitimacy. The two premises underlying this assumption have been challenged by various scholars.[200] The first assumption, the undisputed legitimising capacity of the EP, has been questioned by pointing to the many weaknesses of the EP: the lack of interest of the citizens in the EP, the fact that the EP is not constituted as a representative of the European electorate, lack of public debate, the fact that European elections are dominated by the national political agenda and finally the absence of true European parties. The second assumption

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[196] Ibid.. She briefly sets out the different ways which have been advanced to legitimise the Union, and which depend on the different categorisations of the EU, p. 352-354.

[197] Dehousse (1995), p.121. De Búrca notes that "since the Member States lose much of the power which is transferred to the EU, their internal, constitutional structure can, at best, constitute only an indirect source of legitimacy of Community power," (1996), p. 325. Wallace (1993) mentions that if the EC is defined as essentially a policy-generating process only, then the issue of legitimacy could be argued to rest with the participating governments. If the EC is defined as a partial polity this indirect scheme seems in her opinion not adapted anymore (implicitly), p. 101. This scheme of indirect legitimating suffered, however, from many flaws: see Dehousse, (1995), p. 119-120, and Obradovic (1996), p. 201-202. Dehousse points out that for this scheme to work three assumptions are required. As integration has proceeded the assumptions have become increasingly unrealistic.

[198] See, for example, Weiler/Haltern/Mayer (1995) and the three modes of governance (supranationalism, intergovernmentalism and infranationalism). See also Weiler (1998/1). See further Dehousse (1998) on the legitimisation of the comitology process.

[199] Weiler (1993), p. 12.

[200] See Obradovic (1996) for a discussion of remarks made by various scholars which challenge those assumptions, p. 203.

is that the legitimacy problem can be reduced to the debate on maintaining democratic accountability over the exercise of power in the Union. The view being that, if the powers of Parliament were to be enhanced, which means increased capacity to exercise its control and legislative functions, the legitimacy problem would be solved (classical democratic deficit argument). However, not everybody agrees that by resolving the accountability problem, the legitimacy deficit will disappear.

In fact, the legitimacy crisis is much more complex, and other reasons exist that contribute to this crisis. As already explained, the democratic deficit is composed of more elements than the "classical" democratic deficit. Moreover, a number of academics, among which Weiler and Wallace,[201] argue that the primary reason for the legitimacy crisis is not the democratic deficit, but the acceptance of the new European boundary.

Weiler explains that a large part of the European electorate accepts only "grudgingly" the notion that crucial areas of public life should be governed by a process in which a national voice becomes a minority one that may be overridden by a majority of representatives from other European countries." According to Weiler, in theoretical terms there is still no legitimacy in the notion that the geographical boundaries of this decision making process must now be European, not national.[202] He agrees that, if the Community is to take further steps on the road to European Union, it needs to be strengthening its democratic structures, and that central to such a process would be the increase of the EP's powers. However, he stresses that even a "beefed-up EP" would not necessarily solve the legitimacy crisis as the primary reason lies in the redefinition of the European polity and not in the accountability issue.[203]

What then makes citizens accept the boundaries of the new polity in which the majority principle should apply (democracy)? According to Weiler, this will be determined by long-term factors such as political continuity, social, cultural and linguistic affinity, and a shared history. He points out that citizens normally accept the majoritarian principle to a polity to which they feel they belong. Similarly Obradovic notes that the key problem facing the European Union is that it simply lacks a myth capable of mobilising popular support to a level which would enable citizens to transfer allegiances to the EU.[204]

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[201] According to Wallace (1993) the debate on the political Union is about the shift from *policy* to *polity*. This shift means that the questions concerning political identity, loyalty and affiliation attached to the Union level of governance becomes vital, p. 100-101.
[202] Weiler (1993), p. 23 and (1993/1), p. 257.
[203] Ibid., p. 24 and (1993/1), p. 258.
[204] Obradovic (1996), p. 210.

4.4.3.3 Transparency and openness: an easy way to enhance legitimacy

After Maastricht, the legitimacy crisis was primarily addressed by focussing on three major issues: transparency, democracy, subsidiarity. At various European Council meetings, under the heading "A Union close to its citizens", the Heads of State and Government agreed that the Union must be made more open and transparent. Moreover, they would like to see the dialogue between the national parliaments and the EP strengthened, national parliaments should be more closely involved in the Communities' activities, and decisions must be taken as closely as possible to the citizens (implementation of the subsidiarity principle). These devices should reduce the existing feeling of alienation and strengthen the citizens' confidence in the Union. Transparency and openness enhance legitimacy, as it allows the public to know who has taken what decisions, and how, and information is provided on which basis people can evaluate government policies (public scrutiny/control and accountability).[205] The more transparent and open a decision-making process is, the more people are willing to accept decisions, even unpopular ones.[206]

Enhancing legitimacy through the device of transparency and openness is easier than dealing with other elements of the democratic deficit(s). Addressing the classical democratic deficit, and the public accountability of the Council, requires agreement as to what kind of government system the Union is and should become. Openness was relatively a cheaper solution as it did not require more fundamental decisions on the future of the Union's architecture. Lodge has observed that cynics might conclude that the transparency and openness efforts are no more than symbolic, as they provide "an easy means for evading the contentious political choice of moving towards a bicameral legislature and public Council accountability."[207] Transparency and openness can be implemented largely without any such choice, at least initially, as, in order to know how far these issues must be taken, and how they must be implemented, a choice is required. It seems further an issue on which everybody can agree, as, in the end, it can mean everything, and it shows the governors' good intentions towards the public.

Given the fact that no decision has yet been taken as to whether the Union polity should become more of a parliamentarian democracy, or a looser market polity, there seems no choice but to concentrate on existing practical elements of democratic control and attempts to create citizens support to enhance the legitimacy in the Union, including democracy-enhancing factors such as transparency and openness.[208] In fact, it seems that the Commission, in view of the modest

[205] Craig (1998), p. 52. See also Turpin (1995), p. 317. See also Dehousse (1998), p. 9.
[206] Ress (1994), p. 166.
[207] Lodge (1995), p. 366.
[208] Héritier (1999), p. 269. Grønbech- Jensen (1998), observes that transparency and openness might constitute a less ambiguous way to address the legitimacy crisis p. 186.

prospects of constitutional reform, has taken action to enhance democratic support through such measures as transparency and openness.[209]

At the 1996 ICG, the issue of legitimacy, although not identified as a priority on the agenda, appeared as a central theme in the Reflection Group's Report and in those of the institutions. The main task for the IGC, it seems, was to bring the Europe closer to the people. It must be noticed, first of all, that this IGC, in comparison to earlier IGCs, was characterised by much more transparency. Many of the negotiation documents and position papers of the Member States and the Presidencies, as well as draft Treaty proposals were made available.[210] A good example, is the ample access that was provided to documentation regarding the drafting of Article 255 EC concerning the right of public access to EP, Council and Commission. The IGC was also for the first time lobbied on a large scale by civil society.

The proposals made to bring the citizen closer to the people centred again around the three themes mentioned above, as well as a fourth theme: citizenship.[211] The Amsterdam Treaty has, in respect of each of these issues, made some progress, amongst which can be mentioned the extension of the co-decision procedure, the reduction of the unanimity vote in the Council, the renumbering of the Treaties, the provisions on openness, and the right of access to documents. Other issues which are positive signs are the inclusion of new competences on employment, the enhancement of environmental provision, the non-discrimination and fundamental right provisions. However, according to Shaw, there is not much hard evidence that the Amsterdam Treaty has passed or could have passed the legitimacy test, as the legitimacy debate continues to be focused on the institutions and the Treaty provisions, instead of on the citizens themselves.[212] Bringing the Union closer to the citizen and to combat the feeling of alienation further requires that citizens are more involved in the decision-making process and that they can take part in the public debate on European issues. One would, thus, have expected more concern for the participation of citizens in the decision-making process, as increased participation can enhance democracy and legitimacy in a number of ways.[213] Nonetheless, participation of citizens in the decision-making process has received very little

[209] Ibid.. See also §4.3.5 concerning the motives behind transparency and openness.
[210] Shaw (2000), p. 83-84.
[211] De Búrca (1996), p. 350.
[212] Shaw (1998), p. 84.
[213] In terms of input, legitimacy will be enhanced as citizens are more likely to accept decisions in which they have been involved, whereas in terms of output, measures which are finally enacted will be better for taking account of the views of those who are affected and who have expertise. See Craig (1998), p. 54-55. Pernice doubts whether traditional models of legitimacy in a parliamentary system are sufficient in the multilevel structure of the EU. He argues that new kinds of legitimacy through participation and proceduralization, involving interested and informed groups and organisations more closely in the decision-making process seems to be necessary. This would overcome the feeling of remoteness, and lead to a European political discourse, which is the foundation of a democratic system. Moreover, it is also the foundation for the development of a European identity, see (1999), p. 741.

attention in the Reports submitted by the major institutions in view of the 1996 ICG.[214] Recently, the Commission has been paying more attention to these issues, which is shown, for example, by the preparation of its White Paper on enhancing democracy in the European Union.[215] It is working among other things on improving/enhancing the means for citizens to participate actively in the public dialogue on European issues (see Chapter 8). Given the fact that the Amsterdam Treaty seems to have failed in enhancing legitimacy, one might have expected the next IGC in 2000 to have involved the citizens more closely. Despite the technical nature of the main agenda points, it would have been possible to pay more attention to, for example, the consequences of enlargement, defence issues or the modifications as regards the judicial system in the Union. But in fact the Nice IGC did nothing to create more support by the citizens for the European project, and has been given a very negative press. The Irish rejection of the Nice Treaty, therefore, cannot have come as a great surprise. On the positive side it should be mentioned that at Nice a debate about "the future development of the EU" was launched in the light of the revision of the Treaties in 2004, with the idea that everybody, ranging from representatives of national parliaments, representatives reflecting political opinions (political, economic and university circles), civil society, and all others can participate. It has been said in the academic literature that this type of discussion is a sign that the traditional state-dominated IGC processes as the means for Treaty change may not survive in its current shape and might be replaced or accompanied by more open and deliberative type of processes.[216] This debate, which should lead to a better informed and opinionated public, seems to constitute a better basis for the holding of referenda in the Member States, or could eventually replacing them.

[214] See Craig (1998), p. 54-55.
[215] See for all documents relating to the drafting of the White Paper titled "Enhancing Democracy in the European Union," http://www.europa.eu.int/comm.governance/index_en.htm.
[216] De Búrca (2001), p. 138. Lessons might be drawn from the drafting process of the European Charter on Fundamental Rights. See further the final Conclusion to this thesis.

4.5 Open government: fundamental and citizenship rights

4.5.1 A non-fundamental beginning

The whole approach towards the issue of transparency and openness in the European Union in the initial period prior to the entry into force of the Amsterdam Treaty can be characterised as non-fundamental, in particular, with regard to the issue of access to documents. First of all, the motives behind the introduction of these measures, as was explained in §4.3.5, was to strengthen public confidence in the administration and to enhance public support for the Union. Openness and transparency in the decision-making process were initially seen as an aspect of good administration and not as an essential element of democracy.[217] As far as access to documents is concerned, this view has been stressed by the Court in its case-law, and by the Ombudsman.[218] The Court ruled in the *Netherlands* case that "so long as the Community legislator has not adopted general rules on the right of access held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their powers of internal organisation, which authorises them to take appropriate measures in order to ensure their internal operation in conformity with the interests of *good administration*."[219] This initial non-fundamental approach was criticised, in particular, by the Netherlands (see §4.5.2.1).

Given the view that openness was an aspect of good administration, it was seen as an issue which could be left for internal regulation. Prior to Amsterdam, all measures to open up were indeed introduced through voluntary changes made by the institutions to their own internal rules. It must be stressed that the institutions did not have much choice, as there was no alternative legal basis. The "internal" mode was the method in respect of the adoption of rules on public access to documents, but also in respect of rules on the publicity of acts or certain documents relating to the legislative process (see respectively Chapter 6 and 5). In particular, legislative openness, which lies at the heart of any Western parliamentary democracy, was only addressed as late as 1995. Legislative openness was enhanced to a certain extent through some amendments to the Council's

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[217] The wording of Declaration 17 stressed, however, the democratic credentials of the right of access to documents, see §4.3.2.

[218] See the Ombudsman' s own initiative inquiry into the existence of rules on public access to documents held by other institutions and bodies than the Council and the Commission, (616/PUBAC/F/IJH). The Ombudsman, recalling the Court's judgement in the Netherlands case, concluded that in relation to request for access to documents, Community institutions and bodies have a legal obligation to take appropriate measures to act in conformity with the interests of good administration (see §6.6.3.2). Public access to documents has further been mentioned by the Ombudsman in its Code of Good Administrative Behaviour, and in the final Code of Good Administrative Behaviour adopted by the Commission (see §5.5.1).

[219] §37 of the Court's ruling in Case C-58/94, *Netherlands v. Council* [1996] ECR I-2169. Italics added by author.

Rules of Procedure. In other words, all measures regarded just a more rigorous exercise of the institutions' discretion, which they had voluntarily imposed upon themselves. The view that public access could be left for internal regulation was also endorsed by the Court in the *Netherlands* case. In access to documents cases, the Court has exercised only a marginal judicial review. It set rules as regards the exercise of discretion and the appropriate procedures to be followed. A more substantive review was hardly undertaken (see §6.6.2.2.5). Despite the fact that in various cases the fundamental nature of the right of access to documents was stressed, the Court has up to now not recognised such a right as a general principle of Community law.

The non-fundamental approach taken is, furthermore, demonstrated by the way in which the institutions initially have at times applied the Code of Conduct and their respective access Decisions. The institutions have, for example, interpreted certain aspects of the Code of Conduct in a rather conservative manner, and initially certain types of documents have been refused not because of their actual content, but because they belong to particular category of documents (blank refusal). This latter approach has led to cases being brought before the Court and to the Ombudsman (see §6.6.). In recent years, a change in attitude can, however, be noticed.

This non-fundamental approach might be seen as the consequence of the functionalist and pragmatic nature of the Treaties (see § 4.3.1). The process of spill-over has led to the gradual transfer of sovereign powers to the EC/Union, and has stayed out of the purely "economic" field into other related areas such as environment and social policy.[220] This process has in the end fuelled the debate about political union, and, with that, questions about democracy and legitimacy have emerged. Given this background, the application of the principle of democracy in the Union has not been so obvious, which in turn might explain the non-fundamental approach taken. However, the high level of integration in the Union of today requires the full application of the principle of democracy and, thus, open government in the Union context (see also Article 6 TEU).

[220] Shaw (2000), p. 21-22.

4.5.2 Does a fundamental right of access to documents in the European Union exist?

4.5.2.1 The case-law of the European Courts

4.5.2.1.1 The Court of Justice

The fact that the issue of public access to documents has been left for internal regulation by the institutions has been widely criticised. The inter-institutional Code of Conduct was adopted through the Council's Rules of Procedure. As the Rules of Procedure were adopted by simple majority voting, this voting rule also applied for the adoption of the Code.[221] Considering that openness is an essential element of democracy, it does not seem appropriate to deal with this issue by simple majority voting. In fact, the fundamental nature of the principle of access, at least from a democratic point of view and/or fundamental rights, and the need for proper legislation granting citizens a judicially-enforceable right of access in the Union, has been stressed both in the literature and in the case-law.[222]

Already in the first access to document case, the breach of the fundamental principle of Community law of public access to documents of the institutions was put forward.[223] The CFI did, however, not decide the case on this plea but on a narrower ground put forward by the applicant. The fundamental nature of the issue was again stressed in *Netherlands v Council*.[224] In this case, the Netherlands challenged the legal basis of Council Decision 93/731 on access to Council documents (Article 22 Rules of Procedure (RoP), and ex Article 151 EC). It argued that the very purpose of the rules laid down in this Decision is to create rights in individuals, and therefore, they may not be adopted on the basis of provisions authorising the Council to adopt measures relating to its internal organisation and functioning. The Dutch had therefore voted against both the adoption of the Code of Conduct and the Rules of Procedure.[225] The Netherlands observed that since openness of decision-making process constitutes an innate feature of any democratic system and the right to information, including information in the hands of public authorities, is a *fundamental right of the individual*, it considers (associating itself with the EP observations, see below) that determining the

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[221] Article 151(3) Treaty of Maastricht read "The Council shall adopt its Rules of Procedure"(meaning by simple majority).
[222] See, for theoretical underpinnings, Chapters 2 and 3.
[223] Case T-194/94, *Carvel & Guardian Newspapers Ltd. v. Council* [1995] ECR II-2767, §36.
[224] Op cit.
[225] In order to please the Dutch, who feared that the Code would deprive the Dutch Parliament of its more generous national constitutional rights, the Council attached a statement to the Code in which it notes that the

procedures, conditions and limits for public access to documents of the Community institutions cannot be left to the discretion of each institution, but must be a matter for the normal legislative processes provided for in the Treaty and should be accompanied by the necessary guarantees as to the effectiveness of the relevant right.[226] The EP stressed that the principle of openness of the legislative process, and access to legislative documents, constitute essential requirements of democracy, and therefore these issues cannot be treated as organisational matters purely internal to the institutions. As this is exactly what the Council did, the latter exceeded its powers under Article 151 EC (new Article 207). It observed furthermore that the requirement of openness constitutes a general principle common to the constitutional traditions of the Member States. Moreover, it categorised the right to information, of which access to documents constitutes the corollary, as a *human right* recognised by various national instruments[227]

As already explained, legislative openness, in the sense of publicity of plenary meetings of the Parliament and of documents relating to the legislative process, constitutes an important aspect of parliamentary democracies.[228] As the EP rightly points out, legislative openness can be considered as a general principle of Community law based upon the constitutional traditions of the Member States. It is, therefore, strange that in all other cases, which have been brought before the Court, the parties have not asserted this principle.

Like the EP, Advocate-General (AG) Tesauro also sought the basis of the right of access to documents in the democratic principles, which constitute one of the cornerstones of the Community edifice, as enshrined since Maastricht in the preamble and Article 6(1) (ex Article F) of the EC Treaty. He noted that in the light of the changes which have taken place in the legislation of the Member States, i.e. most Member States have adopted legislation on public access to documents, the right of access to official documents now constitutes part of that principle. He also found support for his conclusion in the law of various international conventions. In the end, he concluded that the right of access to information is *increasingly clearly a fundamental civil right*.[229]

It should be recalled that, according to well-established case-law, fundamental rights form part of the Community legal order as general principles of law.[230] The Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot upheld measures which are incompatible with the fundamental rights recognised by the constitutions of the Member States. Furthermore, international treaties for the protection of human rights on which the Member States

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Code neither alters the existing practices nor the obligation of Member States' Governments towards their parliaments. See Curtin (1995), p. 424.

[226] See §6 of the Opinion of Advocate General Tesauro (28 November 1995) in *Netherlands v Council*, op cit.

[227] See §18- 19 of the Judgement in *Netherlands v Council*, op cit.

[228] See Chapters 1 and 3.

[229] See the Opinion of the AG, op cit., §14-16.

[230] See the *Second Nold* case (4/73), [1974] ECR 507 and *Hauer* (44/79), [1979] ECR 3746.

have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community Law. Article 6(2) (ex Article F) EC Treaty, as modified by Amsterdam, constitutionalised the above-mentioned case-law, and provides that "the Union shall respect fundamental rights as guaranteed by the ECHR, and as they result from the constitutional traditions common to the Member States, as general principles of Community Law."

In its judgement the European Court of Justice (ECJ) noted that there is a progressive affirmation of the individual's right of access to documents held by public authorities. In this respect, the Court referred to the fact that the domestic legislation of most Member States now enshrines in a general manner the public's right of access to documents held by public authorities as a constitutional or legislative principle, and to the affirmation at Community of the importance of that right (in particular in Declaration 17). It noted that it was in order to conform to this trend that the Council deemed it necessary to amend the rules governing its internal organisation, which had hitherto been based on the principle of confidentiality. However, "so long as the Community legislator has not adopted general rules on the right of access held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their powers of internal organisation, which authorises them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration" (§37). The Court categorised Decision 93/731 as an internal measure, but one which has legal effect against third parties (§38).

According to the author, the Court did not reach the conclusion that a general principle of public access to official documents in the Union exists, albeit that it set out the facts upon which it should have come to this conclusion.[231] A sufficient legal basis existed at the time of the ruling upon which it could have recognised the existence of a general principle of Community law, namely the majority of Member States has adopted rules on public access to documents, a number at constitutional level, moreover, the importance of this right for the functioning of a democracy has been highlighted in a number of documents of the political institutions of the Council of Europe (see §1.1.2.1.2 and 3.4.1.). Whereas the ECJ can recognise already upon these external sources the general principle of access to documents, it must be stressed that there exists another reason for the need to recognise this right which comes from inside the Union.[232] The right of access to documents has its foundation in the principle of democracy (Chapter 2), and this latter principle constitutes one of the cornerstones of the Union (see Article 6 TEU). This argument has been advanced by the AG, but also the Netherlands and the EP see in the principle of democracy the foundation of the right of access to information (see above).

[231] See Ragnemalm (1998), p. 827. He is also of the opinion that the findings of the Court necessitated the recognition of the right of access in the Community legal order.
[232] See also O'Neill (1998), p. 428.

Despite these strong legal foundations, the Court did not pursue its reasoning to the end, and therefore, the principle is not yet part of positive Community law.[233] The judgement has been widely commented in the academic literature, which appears to be divided on the point as to whether the Court recognised the existence of a general principle of public access to documents.[234] However, considering the Court's activism in recognising the existence of general principles in the Community legal order, it can be safely concluded that, if in the opinion of the Court, such a principle existed, it would have stated this expressly. Why did the Court not recognise the right of access as a general principle of Community law? It might be that the Court left this question in the air, as it wanted to initiate an academic discussion on this point. Another reason for its hesitation could have been the fact that the ECHR has not yet recognised the existence of such a right as implicit in one of the fundamental freedoms. Nehl infers from the general trend in the ECJ' s case-law towards incorporating the basic values enshrined in Article 10(1) ECHR, that the Community legal system will evolve in the same direction as the ECHR system does in this respect.[235] A much simpler explanation would be that there was no need for the Court to be activist, as it could promote access to documents without any further action, so why should it bother?[236]

4.5.2.1.2 The Court of First Instance

The case-law on public access to documents of the Court of First Instance seems to differ from that of the Court as regards the existence of a right of access. The CFI seems first of all to have recognised the existence of "the right" of public access to documents. In *Carvel*, the CFI observed that Council Decision 93/731 is "the only measure governing citizens' rights of access to documents' (§62).[237] In the next case, *WWF*, the CFI noted that "although Commission Decision 94/90 is, in effect, a series of obligations the Commission has voluntarily assumed for itself as a measure of internal organisation, it is nevertheless capable of conferring on third parties legal rights which the Commission is obliged to respect (§55)."[238] In *Interporc I*, the CFI is more explicit, as it observed "that Decision 94/90 is a measure conferring on citizens a right of access to documents held by the Commission (paragraph 46)."[239] In subsequent cases it referred back to above-mentioned cases.

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[233] See also Lafay, who notes that "(...) la Cour de justice n'en pas reconnu l'existence, alors que l'occasion lui en etait donnee dans l'affaire, Pays-Bas c/ Conseil," see Lafay (1997), p. 49.
[234] See Öberg (1998) for an account of the different opinions of academics in this respect, p. 3.
[235] See Nehl, (1996/7), p. 74-75.
[236] See also Chiti (1996), who argues that the Court's short cut is the result of "a genuine lack of interest for the matter," p. 569.
[237] *Carvel & Guardian Newspapers Ltd. v. Council*, op cit.
[238] Case T-105/95, *WWF v. Commission* [1997] II-313.
[239] Case T-124/96, *Interporc Im- und Export GmbH v. Commission* (Interporc I) [1998] ECR II-231.

The above-mentioned judgements give the impression that this right is created by the Decisions themselves. The question which poses itself is whether it is possible for these Decisions to create a substantive right of public access to documents. In his Opinion to the *Netherlands v Council*, the AG explained that the Council Decision 93/731 sets out to formalise and make public the practice followed by the Council when it examines applications for access to documents by making the changes necessary in order to make its work genuinely accessible to the public (§18). The Decision constitutes a measure for the organisation of its internal operation and does not, in itself, create any individual right to information. The basis of such a right should be sought, according to the AG, in the democratic principles and existed before the adoption of the Code of Conduct and the Access Decisions (§19, see above). The contested acts are confined to organising the operation of the institution in the light of that right. He added that the scope of the measure could not have been otherwise, as in that the very legal basis selected for their adoption shows that this, and no other, was the objective pursued (§20). In other words, if the scope would have been the creation of an substantive right, the Decision would have been based upon the wrong legal basis and the Court should have annulled it.[240] However, the AG noted that according to the case-law, rules of procedure may have external effect. According to settled case-law, third parties have the right to require the Council to comply with rules which it has imposed upon itself (§20).[241] The Court of Justice seemingly followed the AG' s opinion, as it found that the Council was empowered to adopt rules on access to documents by virtue of its powers of internal organisation adopted in the interest of good administration (§37). It noted that the fact that Decision 93/731 has legal effects *vis-à-vis* third parties cannot call into question its categorisation as a measure of internal organisation. The author agrees with the AG, in that Decision 93/731 cannot confer citizens any substantive right of access to documents.[242] The right of access, to which the CFI refers, regards a *limited right*, i.e. a right which is subject to the conditions laid down by the Code of Conduct and the Access Decisions.[243] It is at the discretion of the Council (and Commission) to change its Access Decision, as it has actually done in the past and also recently (see §6.2.2.2.2). Of course after Amsterdam this will no longer be possible, as the conditions to the Treaty right of access will be laid down in secondary legislation (see Article 255 EC).

If the locus of a substantive right of public access to documents cannot be created by the Decisions themselves, what then constitutes the basis of such a right? Is there any evidence in the case-law that the CFI implicitly recognised the existence of a general principle of public access to information in the Union? Applicants and intervenors, among which the EP, in access to document cases have numerous times put forward the plea of breach of the fundamental principle of

[240] Öberg (1998), p. 4.
[241] See also Besselink (1996), p. 172.
[242] See Leeuw De (1997), p. 348.
[243] See Chiti (1996), p. 371 and 373.

Community law of public access to the documents of the EU institutions, but the CFI has never decided explicitly a case upon this plea.[244]

Some authors have pointed to various rulings of the CFI, which support the vision that the latter acknowledged implicitly the existence of a general principle of Community law of public access to documents.[245] For example, in *Journalistenförbundet*, the CFI observed that "the objective of Decision 93/731/EC is to give effect to the principle of the largest possible access for citizens to information with a view of strengthening the democratic character of the institutions and the trust of the public in the administration."[246] In *Hautala*, it stressed that the basis on which the Council adopted Decision 93/731/EC must be born in mind for the purpose of interpreting Article 4 (exceptions) of that Decision. It held that that Article 4(1) must be interpreted in the light of the principle of the right to information and the principle of proportionality.[247] Although these rulings might in fact give the impression that the CFI has acknowledged implicitly the general principle of access to documents, others seem to refer not to a fundamental general principle, but to the principle of the widest possible access as laid down in the Code of Conduct and the Decisions.[248] For example in, *Van der Wal*, the CFI observed that "Decision 94/90 is a measure granting citizens a right of access to documents held by the Commission (...). The exceptions to that right must be construed and applied strictly, in order not to defeat the application of the general principle laid down in the Decision."[249]

Instead, in *Interporc II*, the CFI seems (at first sight) to reject the existence of a fundamental general principle of public access to documents in the Union.[250] The CFI relied on the judgement of the Court in *Netherlands v Council*, in which the latter ruled that, as long as the Community legislature has not adopted rules of a general nature, the institutions must determine their own rules on access to their documents (§38, see above citation). In the light of that judgement, the CFI held that, "so long as there is *no rule of law of a higher order* according to which the Commission was not empowered, in Decision 94/90, to exclude from the scope of the Code of Conduct documents of

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[244] See, for example, Case T-174/95, *Svenska Journalistenförbundet v. Council* [1998] ECR II-2289, §88; Case T-14/98 *Hautala v. Council* [1999] ECR II-2489, §43.

[245] Öberg is of the opinion that the CFI recognised a general principle of public access to documents. He refers to several cases of the CFI, among which *Interporc I*, op cit. (§49), and *Svenska Journalistenförbundet*, op cit.. See Öberg (1998), p. 4-5. In a more recent article, he refers exclusively to *Hautala* (see note beneath), op cit., see Öberg (2000).

[246] See *Svenska Journalistenförbundet*, op cit., §66.

[247] See *Hautala*, op cit., §87. The CFI referred to Declaration 17 and the conclusions of the European Council in Copenhagen, the AG's Opinion in *Netherlands* and its own ruling in *Svenska Journalistenförbundet*. The Council has appealed the judgement of the Court on the grounds that the CFI wrongfully held the decision on public access to Council documents to confer a right of information. The Council also contests that Article 4(1) of that Decision should be interpreted as requiring the Council to consider the question of granting partial access to its documents. See Case C-353/99 P, O.J. C 333/20.

[248] Paragraph 1 of the Code of Conduct stipulates that "the public will have the widest possible access to documents."

[249] See Case T-83/96, *Van der Wal v. Commission* [1998] II-545, §41.

which it is not the author, the authorship rule can be applied."[251] The phrase "the rule of law of a higher order," seems to refer to a fundamental general principle of Community law. It does not seem to refer to general legislation on access to documents as this would not amount to rules of a "higher order." It might thus be argued that the CFI implicitly rejects the existence of such a fundamental principle.

Thus it can be concluded that as long as the right of access to documents as laid down in the Amsterdam Treaty has not been implemented, there exists no substantive right of access to documents, but only a limited right, subject to the conditions laid down by the Code of Conduct and the Access Decisions. Neither the ECJ nor the CFI have recognised the existence of a general principle of public access to documents in Union.

4.5.2.2 The European Ombudsman's opinion as regards the existence of a general principle of public access to documents

Although the Court is the highest authority in the interpretation of Community law, it is interesting to see whether the European Ombudsman (EO) has expressed his views on the existence of a general principle of public access to documents in the Community legal order.[252] First of all, it should be pointed out that the EO would not or could not state that there is, or is not, a fundamental principle, without the Court having made an explicit ruling in this respect. To do so would amount to "law-making," which is the informal competence of the Court. As mentioned above, the Court has not decided on the existence of this principle and preferred to leave this question in the middle. Having all this in mind, the only way to find out something about the views of the EO in this respect, is by searching for signs in his decisions. Two complaints give the impression that the EO does not consider that there is a fundamental principle of public access to documents in the Community legal order. In one of the first complaints about access to document, the EO noted that " the EC Treaty does not contain a provision on transparency, nor is there any general rule applicable to all Community institutions and bodies granting a general right of public access to documents."[253] In a more recent Decision he observed that "in the absence of more general rules concerning general information, existing rules on access to documents could provide an appropriate

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[250] See Case T-92/98, *Interporc Im- und Export GmbH v. Commission* (Interporc II) [1999] ECR II-3521, §66.

[251] See about the authorship rule, §6.2.3. The authorship rule entails that access can only be obtained to documents of which the Commission is the author.

[252] The author thanks Peter Bonnor (Phd-researcher at the EUI, Florence) for his explanation about the limits of the EO's powers in general and in the field of public access to documents in particular.

[253] See EO Decision on complaint 709/9.7.96/TC/IRL/KT against the Commission, Annual Report 1997, p. 250.

surrogate to decide on citizen's request for information sent to the institutions."[254] Clearly these citations are vague, but one might argue that they show that the EO would never over step the line *vis-à-vis* the Court. Moreover, from these citations and the silence of the EO in respect of the existence of a general principle, the cautious conclusion might be drawn that in the opinion of the EO such a general principle does not exist. Obviously, a review body which has made one of its missions "transparency" would not remain silent if it thought such a principle existed. Thus, the EO has not remained silent on this point, as sustained by some authors,[255] instead he seems to reject the existence of such a principle.

4.5.2.3 The importance of the recognition of a fundamental right of access to documents

The recognition of the existence of a general principle of public access to documents in the Union is important as this will entail a substantive standard of transparency against which the Access Decisions of the institutions (and other bodies) and the individual decisions refusing or granting access to documents can be tested. As explained by the AG *Netherlands v Council*, a decision of the Council to refuse access, albeit taken in full compliance with its self-imposed rules of public access, would have to be regarded as unlawful if it resulted in fact in a negation of the essential substance of the right of information.[256]

4.5.3 Towards a more fundamental approach to openness

4.5.3.1 The principle of openness

The first step towards a more fundamental approach to the whole issue of openness was taken at the 1996 ICG. This time the issue of transparency and openness constituted a central issue on the agenda, and it was discussed in the context of enhancing the legitimacy of the Union in the eyes of the citizens (see the section on legitimacy, §4.4.3.4). As far as openness is concerned, the Council and the Commission in their respective Reports to the Reflection Group summarised the measures which they had taken so far, and/or criticised each other for lacking in openness.[257] Instead, detailed

[254] See EO Decision on complaint 586/3.5.96/MCA/ES/JMA, Annual Report 1998, p. 48.
[255] Öberg (1998), p. 8.
[256] See §21 of the Opinion of the AG in *Netherlands v Council*, op cit.
[257] De Búrca (1996), p. 368. See the Commission Report for the Reflection Group (IGC 1996) and Council Report on the functioning of the Treaty of the EU, Brussels 1995.

proposals on openness were submitted by those Member States with strong traditions of open government (see §7.2).

The Treaty of Amsterdam enshrines the principle of openness in Article 1 TEU, which has been amended in the following sense: "This treaty marks a new stage in the process of creating an ever closer union among the people of Europe, whereby the decision-making takes place, as much as possible, in the *open* and in which decisions are taken as closely as possible to the citizens" (italics added by author). This principle is applicable to all the activities of the institutions and bodies of the EU (all Pillars). A positive point is that the article mentions openness and not the vague term "transparency", which amounts more to a political objective rather then a precise legal principle. The principle of openness was not intended by the Member States to have any direct effect,[258] and to create in itself a legal obligation on the part of the institutions and bodies to act as openly as possible. It seems to be essentially declaratory, however, it shows that openness is the aim and not secrecy.[259] If the general principle does not create rights and obligations, it is clear that in order for the general principle not to remain a mere promise, judicially-enforceable rules are required which confer on citizens the right of access to documents/meetings.[260] This is not to say that the principle has no legal value whatsoever. The Court can interpret acts of the institutions and bodies of the Union in the light of this general principle.[261]

4.5.3.2 The gradual recognition of a (horizontal) fundamental right of access to documents in the European Union

The 1996 IGC led also to the inclusion of the right of public access to EP, Council and Commission documents and some provisions concerning enhanced publicity of legislative documents.[262] The general principles and limits to the right of access to documents must be determined by the co-decision procedure within two years of the entry into force of the Treaty of Amsterdam (see Chapter 7). It is positive that the right has been granted not only to citizens, but

[258] As the Court has no power over this article and, therefore, cannot determine whether it has direct effect, the opinion of the Member States is determinant (look at the preparatory documents).
[259] See HC Select Report (Sixth Report of 31 July 1997), p. 38. See also Curtin (1999), who observes that Article 1 TEU possibly expresses an "object and purpose" of the Treaty, within the meaning of Article 18 of the Vienna Convention on the Law of the Treaties, p. 72.
[260] See similar Ragnemalm (1998), p. 811. He observes that "in the absence of judicially enforceable rules which confer on European Citizens a general right of access to documents held by public authorities and which are limited by strict, clear and precise grounds of public or private interests in order to protect justified interests of confidentiality, there is no substance in the promise of increased openness" (translation of Öberg (1998), p. 11). Some Member States derive the right of access from the principle of openness, which would mean that it is not necessary to include this right explicitly in the Treaty.
[261] See also Curtin (1998), p. 16.
[262] In Chapter 7 the IGC negotiations regarding the right of access to EP, Council and Commission documents (as laid down in Article 255 EC) shall be treated in detail.

also to any natural and legal persons residing or having its registered office in a Member State. However, the decision to place this right in the chapter regarding "provisions which are common to several institutions," rather than in the part dealing with citizenship, as was proposed by some Member States,[263] or in that of the general principles, reflects more the vision that access to documents is still a matter of good administration which can be left to internal regulation rather than a fundamental democratic right of the citizen. This impression is reinforced by the fact that the issue of public access to documents has not been completely taken out of the internal sphere of the institutions as is shown by Article 255(3) and in particular 207(3) EC.[264] This inference is not supported by the other articles, such as Article 1 TEU which includes the principle of openness.[265]

The recognition of the existence of a general principle of public access to documents in the EU by the Court has not lost its importance now that the Amsterdam Treaty has enshrined the right of public access to documents in the Treaty itself. This right exists only in respect of the three main institutions, leaving two institutions and many other bodies outside its scope. This provision is not in accordance with the Declaration 17 and the Court's case-law, which both mention the adoption of *general* rules on access. As a result there will thus not be a horizontal uniform system of access to documents in the Union (see Chapter 7 for more comments). The fact that no right of access to documents exists in respect of other institutions and bodies does not mean that they do not have to adopt access rules. The Ombudsman has issued Recommendations to nineteen institutions and bodies requiring them to adopt rules on public access to their documents; failure to do so would amount to maladministration (see in detail §6.6.3.2.). Most of these institutions and bodies have adopted rules on public access to their documents.

Thus, in the absence of *general* rules on public access to documents applicable to all institutions and bodies of the Union, the recognition of the existence of a general principle of public access to documents by the Court, which would cover all other decision-making institutions and bodies operating in the Union, remains of particular importance. Furthermore, as has been explained above, the recognition of a general principle would mean that the Court has a substantive standard against which to measure the content of the future Regulation on access to EP, Council and Commission documents, and the individual decisions on requests for access made under this

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[263] See the Dutch proposal on public access to documents, 15 April 1996 (new Article 8e or f); Italian and Austrian joint proposal, 3 October 1996 (new Article 8c).

[264] See Curtin (1998/2), p. 111-112. Article 255(3) stipulates "each institution referred to above shall elaborate in its own rules of procedure specific provisions regarding access to documents." Article 207(3) reads "The Council shall adopts its rules of procedure. For the purpose of applying Article 255(3), the Council shall elaborate in these rules the conditions under which the public shall have access to Council documents. For the purpose of this paragraph, the Council shall define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater access to documents in those cases, while at the same time preserving the effectiveness of its decision-making process . In any event, when the Council acts in its legislative capacity, the results of votes and explanations of vote as well as statements in the minutes shall be made public "

[265] Curtin (2000), p. 14.

Regulation. In case the principles and limits to the right of access are be drawn too strictly and negate the individual's *fundamental* right of access, the general principle would take precedence over the secondary legislation.[266] Thus, the Court must uphold the individual's fundamental right of access, although, this right is not unlimited and the Court must at the same time ensure the existence of effective and reasonable exceptions to protect the overall interest of the Community and the institutions.[267]

It might be that the Court shall recognise in the near future, the existence of a fundamental right of access to documents on the basis of its case-law concerning general principles. As already stressed above, there exists a strong legal basis for recognising this general principle. This legal basis has only become stronger with the Amsterdam Treaty. The Treaty strengthens further the importance of the principle of democracy by, for example, the amended Article 6(1) TEU which declares that the Union is founded on respect for human rights, democracy, and the rule of law, and by making respect for these principles a condition for application for membership of the EU under Article 49 TEU.[268] Furthermore, the fact that the right of access to documents has been enshrined in the Amsterdam Treaty shows that Member States agree on the importance of this right.

Some changes in the attitude of the Courts seem to have occurred already during the interim period, the period prior to the implementation of Article 255 EC. A gradual evolution of the general right of access to information into a fundamental procedural right seems to be taking place.[269] Curtin refers in support of this assertion in particular to the *Hautala* case.[270] She notes that the CFI's reference to the principle of the right to information was done in a manner that seemed to indicate that it considered this in fundamental terms, and linked it moreover to its democratic credentials. But also in other cases, such as *Rothmans,* the Court seems to be taking a more fundamental approach.[271] The Court might further be encouraged to adopt such a fundamental right by several developments which are taking place inside and outside the Union (see Chapter 3). For example, since Amsterdam, Ireland and the UK have also adopted rules on access to documents. Moreover, the European Charter of Fundamental Rights, which was adopted in December 2000 at the European Council summit in Nice, may give further impetus to this process. The public's right of access to EP, Council and Commission documents has been laid down in this Charter.

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[266] O'Neill (1998), p. 430.
[267] Ibid. This requirement was laid down by the Court in *Nold v Commission*, op cit.
[268] O'Neill (1998), p. 429. Further can be mentioned the new Article 7 TEU which provides that if the Council finds a "serious and persistent breach" by a Member State of principles set out in Article 6(1), the Council may suspend some of that State's rights under the Treaty (modified again with the Nice Treaty). Also can be pointed to the extension of the Court's jurisdiction to Article 6(2) TEU concerning fundamental rights.
[269] Curtin (2000), p. 14.
[270] Ibid.
[271] This case shall be discussed in §6.2.3. In this case the Court rejected the Commission's reasoning that comitology committees are not part of the Commission.

4.5.4 The European Union Charter of Fundamental Rights

The Heads of the Member States agreed at the Cologne European Council held on 3 and 4 June 1999, to establish a Charter on fundamental rights in order to "make their overriding importance and relevance more visible to the Union's citizens."[272] A body, known as the Convention, was set up to prepare this Charter. The body was composed of representatives of the 15 Member States, one representative of the Commission, and members of both the EP and the national parliaments.[273] At the informal European Council in Biarriz of 14 October 2000, the Heads of State or Government gave their unanimous agreement to the draft Charter, which was adopted by proclamation of the EP, Council and the Commission at the Nice European Council in December 2000.[274]

At the ICG in Nice, the European Council observed that the question of the Charter's legal force will be considered later, as had already been decided at the Cologne meeting. The Charter thus does not amount to a legally binding instrument, but is only a solemn political declaration. It appeared that too many countries were opposed to the idea of a binding Charter, and its insertion in the Treaty.[275] However, from the start, the proceedings of the Convention were directed towards producing a text, "as if" it were to be incorporated in the Treaties, leaving the final choice to the European Council.

The Charter brings together the rights which are scattered over a range of national and international instruments, and enshrines the essence of the European *acquis* regarding fundamental rights.[276] Most rights amount to mere codification, whereas a few are new, for example the right to good administration. In respect of the principle of "universalism," the rights set out in the Charter are generally given to all persons, irrespective of their nationality or residence. This position is different for the rights that are most directly bound up with citizenship of the Union, which are only given to citizens, and for certain rights that are related to a particular status. In the Charter, all rights are enumerated around five major principles: human dignity, fundamental freedoms, equality, solidarity, citizenship and justice.

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[272] See Conclusions of the Cologne European Council.

[273] The rules on the composition, method of work and practical arrangements have been set out in the Annex to the Presidency Conclusions following the Tampere European Council on 15 and 16 October 1999.

[274] See O.J. C 364/8 (2000).

[275] Instead the EP, the ECOSOC and the Committee of Regions supported a mandatory Charter incorporated in the Treaties. The same call was made virtually unanimously by the representatives of civil society at the hearings organised by the Convention. See COM(2000) 644 final.

[276] The Charter reaffirms the rights as they result from the constitutional traditions and international obligations common to the Member States, the TEU and Community Treaties, the ECHR, the Social Charters and the case-law adopted by the ECJ and the ECHR (see preamble). See COM (2000) 644 final.

Article 42, under the heading of "citizen's rights", enshrines the right of access to EP, Council and Commission documents.[277] The wording is identical to that of Article 255 EC, which is the source of this right. During the proceedings amendments have been submitted which aimed at extending the right of access for beneficiaries ("anybody"), the institutions in respect of which it is exercised ("EU institutions and subsidiary bodies"), type of documents ("information"), documents ("held by"). Certain amendments aimed to include in the Article a reference to the possible restrictions on the exercise of this right.[278]

From the start, there was doubt about the placing of this right, i.e. should this right be placed with the fundamental freedoms, such as the freedom of expression, or in the part relating to citizens only?[279] The right has not been proclaimed as a universal fundamental right, applicable to anybody, but as a fundamental right which arises because one is a member of the EU polity. The documents relating to the meetings of the Convention, as published by the Council's secretariat, do not reveal anything about the discussions concerning the right of access, one can only guess why the right was enshrined in the end under "citizen's rights." This might be the result of the fact that the aim of the Charter was not to create new rights, but only to bring all existing rights in one single instrument. As the right of access is not granted to everybody, and does not apply to all institutions and bodies, it might be that it was thought to be more appropriate to place the right under the citizenship heading. However, the right is not given to citizens only, but also to natural and legal persons residing or having its registered office in a Member State (as several other citizenship rights). This of course blurs the distinction between universal fundamental rights and citizenship rights. Another explanation might be that neither the ECHR has yet recognised the existence of such a right as implicit in one of the fundamental freedoms, nor the ECJ as a general principle of law (see §3.4.3.). Nevertheless, it is positive that the right has been linked explicitly to European citizenship, as this link was not made in the Amsterdam Treaty (§4.5.3.2.). By adding this right in the list of citizenship rights this new concept starts gaining some substantial content and meaning (see next paragraph).

The Charter does not extend in any way to the right of access to documents as enshrined in Article 255 EC. Nonetheless, the fact that the right has been mentioned in the Charter as a fundamental right might encourage the Court to recognise the existence of an horizontal fundamental right of access covering all institutions and bodies.

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[277] See Convention document No. 50, which sets out the draft Charter of Fundamental Rights as finally agreed by the body and submitted to the European Council in Biarriz.

[278] In this context, it should be noted that in Article 52 is determined that the rights recognised by this Charter, which are based on the Community Treaties or the TEU, shall be exercised under the conditions and within the limits defined by those Treaties.

[279] See Convention document No. 8, 24 February 2000. See also Convention document No. 17, 20 March 2000. In Convention documents No. 28 and 37 the right is still mentioned with the civil and political rights (Article 18). The latter document identifies who has submitted amendments to this article, and the subject. In Convention documents No. 45 and 46 the right is listed under the heading "citizenship" as Article 40.

4.5.5 Open government and citizenship

The concept of European citizenship has been introduced by the Treaty of Maastricht with the aim of bringing the European Union closer to its citizens and to reduce the social legitimacy crisis. At Amsterdam, a few amendments were subsequently made, but the concept remains underdeveloped. It has been stressed that citizenship of the Union is complementary and does not replace national citizenship. Each person who holds the nationality of a Member States is a citizen of the Union (Article 17 EC). Unlike citizenship in the nation-state, European citizenship is not founded upon a feeling of belonging, i.e. an identification with Europe.[280] A person is a European citizen because he/she possesses the nationality of a Member State.[281] The rights and duties of the European citizens are defined in Article 17 EC, but also rights and duties to be found elsewhere in the EC Treaty are included (Article 17(2) EC).[282] European citizenship is construed around the right to free movement. This right, mentioned explicitly in Article 17 EC, is however a right which the citizens already possessed. Except for some new rights, in particular in the political sphere, citizenship covers a new name for a bunch of existing rights.[283] Craig and De Búrca question, therefore, strongly whether the introduction of a set of formal legal rights in the Treaty is sufficient to give citizenship any meaning.[284]

The concept of citizenship means generally the membership of a political community, be this the Greek *polis*, the Roman empire or the territorial nation-state.[285] In modern times, there are as many concepts of citizenship as there are distinct political communities.[286] In most countries today nationality is synonymous with citizenship.[287] A general liberal definition is provided by Held, according to whom "citizenship has meant a reciprocity of rights against and duties towards, the community. Citizenship has entailed membership, membership of the community in which one lives one's life. And membership has invariably involved degrees of participation in the

[280] Citizenship is linked to the nation-state and nationality. The sense of belonging to (identity with) a nation-state, which is a primary element of citizenship, is constituted on ethno-cultural grounds. The other primary element is the granting of rights (and imposing of duties). See Shaw (1997 WP).
[281] There is much discussion about how to construe European citizenship and alternative concepts of citizenship have been advanced. See Shaw (1997 WP). See further D'Oliveira (1994), p. 147.
[282] For example, various authors consider the fundamental rights included in the notion of Union citizenship, for example, D'Oliveira (1994), p. 133-134 and Shaw (1997), p. 417. D'Oliveira notes that it depends upon the notion, the concept of citizenship, a partly ideological, political, contextual concept, where the line will be drawn between rights belonging to citizenship and other rights, and where these rights (and duties) may be found. See for the right of public access to documents beneath.
[283] See D'Oliveira (1994) for a discussion of the rights mentioned in Article 17 EC, p. 135-141.
[284] Craig/De Búrca (1998), p. 725.
[285] Preuß (1995), p. 269.
[286] Ibid., p. 271. See also Shaw (1997) who sets out some of the conceptualisations of citizenship, p. 420.
[287] Preuß (1995), p. 269.

community."[288] "Full" membership of a nation-state means acquiring civil and political rights (first generation) and social rights (second generation), but it also entails the imposition of duties (tax, military service).[289] Recently, third generation citizenship rights have also been defended, such as environmental rights. The first generation of rights was created under liberalism, with the emphasis on individual freedom and autonomy and not of active participation, as in the Greek *polis*.[290] This emphasis remained also after the democratisation of the liberal nation-state (mid-1800s). Political freedom in the liberal democracy was defined largely as a negative freedom for the citizen from state oppression.[291]

As follows from the foregoing paragraphs, open government is necessary for the exercise of control, political accountability, and to participate in the political process. In other words, open government allows the democratic citizen to be a political being.[292] It allows him or her to take part in the political process of the polity to which he or she belongs. The right to open government (which needs further implementation) can thus be viewed as a citizenship right. The link between open government, and in particular the right of public access to documents, and (EU) citizenship has been made by various academics.[293]

For example, D'Oliveira observes that the "the political dimension of EU citizenship is underdeveloped.[294] The instruments for participation in the public life of the Union are lacking as this public life itself, as distinguished from the public life in the member states it is virtually non-existent (...)."[295] The absence of a political arena has been discussed in the context of the democratic deficit(s) (see 4.4.2.2.). Clearly open government has a fundamental role to play in addressing this underdeveloped political dimension of citizenship. Shaw notes that the creation of a right to open government would address considerably the considerable lacuna currently existing

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[288] Held cited in Shaw (1997 WP). His definition, which is based on Marshall, does not explain the relationship between citizenship and (national) identity, which is the other primary element of citizenship.
[289] See Shaw who cites Marshall (1997 WP).
[290] See Sartori (1987), p. 380. In the ancient Greek city-state (*polis*) citizenship meant in the first place the active and virtuous participation in the affairs of the community. It was, however, not restricted to this meaning and the status of the citizen led also to many distinctions (discriminations) in social life. The status of citizen was further not inclusive, as only those which were male, virtuous and had time to dedicate to rule the polis were considered citizens. Self-government of the *polis* required that the citizen devoted himself completely to the public service (active citizens). See Preuß (1995), p. 269.
[291] Sartori (1987), p. 380.
[292] Curtin (1999), p. 73. See also Alston and Weiler (1999 WP), who note: "transparency affects the quality of citizens as political beings. Without effective transparency, political responsibility, political control and true exercise of political rights and duties are all inhibited or impaired," p. 53.
[293] See Craig/De Búrca (1998), p. 724; Curtin (1999), p. 73-74; Curtin (1995/1), p. 104; Armstrong (1996), p. 586; Twomey (1996), p.838; Shaw (1997), p. 424, and 430-438.
[294] D'Oliveira (1994), p. 147. Marshall has defined the political element of citizenship as "the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body. The corresponding institutions are parliaments and councils of local government." See Shaw (1997 WP).
[295] Ibid.

with regard to the "political" rights of EU citizens. She calls this right a "concrete citizenship-type right."[296].

In the Amsterdam Treaty, the right of access to documents was not placed in the Citizenship Chapter, but in that regarding provisions common to the institutions. Despite this placement, it seems that the right can still be viewed as a European citizenship right, as it follows from Article 17 EC that the rights and duties can also be found elsewhere in the Treaty. In fact, De Búrca lists the right of access to documents as a citizenship right.[297] This status has also recently been acknowledged in the EU Charter of Fundamental Rights (Article 42).

[296] Shaw (1997), p. 424. Twomey notes that the Court in *Carvel* (op cit.), by ruling that the Code of Conduct on access to documents are provisions with legal substance has given some substance to the meaning of European citizenship. See Twomey (1996), p. 838.
[297] De Búrca (1998), p. 724.

4.6 Concluding observations

Transparency and openness are relatively new issues in the Union, as they first appeared only in the 1990s. Before that date, the Community was a closed and opaque organisation, which did not involve its citizens at all in the ever-continuing integration project. There are many reasons why the European Union evolved in such a closed way, the most important of which is that the Community was of course not about democracy but about economic integration. If the Community had remained the limited economic international organisation of the 1950s, the lack of transparency/openness would probably not have become such a problem as it did in the 1990s. However, the Community has undergone various stages of fundamental change, the latest was being the Maastricht Treaty which created the European Union. The Union, as it exists today, constitutes a highly-sophisticated entity, but there is no agreement among legal scholars about the exact legal nature of the Union. The isolated vision that the Union constitutes a would-be state, has recently gained some support, as appears from speeches of prominent politicians made in the context of the wider public debate "on the future of the European Union." Besides the Union as a would-be state, it is also viewed as an highly sophisticated international organisation with its own structure and competences. For the purpose of this thesis, the Union is considered as a layered international organisation with a unitary legal regime. It is a layered international organisation as it shelters other international organisations, such as the EC, which keep their own legal regimes. The unity is provided by the common and final provisions, which are applicable to all three Pillars.

Despite the fact that there is no agreement as regards the exact legal nature of the Union, the latter has been accused of suffering from a democratic deficit(s). This deficit is composed of multiple elements of which transparency and openness constitute only one. Despite the recognition in Declaration 17, and in the academic literature, of the close link between transparency/openness and democracy, the initial approach of the institutions towards this issue was not based on the view that these issues constitute an essential element of democracy. Transparency and openness have been placed on the political agenda as they were seen as the primary means of increasing the social legitimacy of the Union. Measures adopted in this field aimed at increasing public confidence in the administration and creating support for the Union. Addressing the legitimacy crisis through the devices of transparency and openness is also a relatively cheaper solution, as it does not require the making of more fundamental decisions as regards the future of the Union architecture. In conformity with this non-fundamental view, the issue was initially regulated by the institutions through voluntary amendments to their internal rules. In recent years, however, a more fundamental approach can be noted. The principle of openness has been enshrined in Article 1 of the TEU, and functions as a guiding principle for all Union activities. Moreover, citizens have been granted a

Treaty right of access to EP, Council and Commission documents (Article 255 EC). Openness in the decision-making process is thus gradually evolving into a fundamental principle, whereas, at the same time, a gradual evolution of the right of access into a fundamental right is taking place.

To date, the Court has not recognised the existence of a general principle of access to documents in the Union, although a strong legal foundation for the recognition of such a right does exist. Today, almost all Member States have adopted rules on access to documents, sometimes at a constitutional level. Moreover, the importance of this right has been stressed in numerous documents of the political institutions of the Council of Europe. Besides these external legal sources, the impetus[298] for the recognition of this right comes from within the Union. The Union is founded on the principle of democracy (Article 6(1) TEU), and, as has been shown in Chapter 2, the right of access to documents constitutes an essential element of democracy.[299] Although the Court has not yet recognised the existence of a fundamental right of access to documents as a general principle of Community law, it has taken in the interim period a more fundamental approach towards the issue and has linked this right to its democratic credentials. The right of access to documents has further been enshrined in the non-binding EU Charter of Fundamental Rights, which has recently been adopted at the European Council in Nice (December 2000). This might constitute another impetus for the Court to recognise the general principle of access to documents.

To address the issue of openness from the standpoint of democracy seems the right approach. However, it should be stressed that the function of openness, the extent and the way in which it is implemented, differs according to the model of democracy that is applied (see Chapter 2). The debate on democracy in respect of the Union has in recent years deepened. Besides parliamentary representative democracy, other inviting models of democracy from a normative point of view have been advanced in respect of the Union as a whole or in respect of certain modes of governance. For example, Curtin suggests a deliberative model of democracy for the whole Union, whereas Craig has advanced a republican model in respect of the supranational mode of governance. Whilst these models, however, do not replace representative parliamentary democracy, they can be developed alongside that model. Both models require a high degree of openness. Besides the case for making the Union more deliberative and/or republican, other models of democracy have been advanced as best capturing the features of a particular mode of governance. In sum, the choice of model of democracy for the Union or in respect of certain modes of governance will have significant effect on the way in which openness must be addressed.

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[298] See O'Neill (1998), p. 429.
[299] This is also the opinion of AG Tesauro in *Netherlands v Council*, op cit.

Part III: THE IMPLEMENTATION OF OPEN GOVERNMENT IN THE EUROPEAN UNION

5 RULES ON PUBLICITY OF LEGAL INSTRUMENTS, MEETINGS AND DOCUMENTS

5.1 Introduction

In this chapter, the rules on publicity of legal instruments, meetings and documents (active supply) shall be examined in respect of the three main EU institutions. Besides a general account of the rules on open government, and thus the extent of openness in the European Union, certain themes will be examined in more detail given the fact that they have been identified as problematic. First of all, the lack of openness and transparency in the Third Pillar has been criticised, and since 1995, calls have been made to open up this Pillar to scrutiny. In 1998, the United Kingdom (UK) Presidency introduced a number of initiatives to extend openness in the Third Pillar.[1] Openness was further enhanced by the Amsterdam Treaty, and as a result of the Council's amendments to its Rules of Procedure in 1999 (subsequently changed in 2000).[2] Openness in the Third Pillar will not be dealt with in a separate paragraph, but remarks in this respect will be made throughout this chapter.

Another problem, which was identified by the European Parliament (EP) as early as the 1980s, is the fact that the Council legislates behind closed doors. This situation is viewed as problematic by those who are of the opinion that the European Union should become a parliamentary democracy (bicameral system). Up to now, this issue has not been addressed, which might be explained by the fact that any move in this respect entails a clear decision as regards the democratic system which should apply to the Union. As has been explained in Chapter 4, there is, as yet, no agreement on this point. Legislative openness has, however, been achieved through the adoption of rules on publicity of documents relating to the legislative process. Behind the adoption of some measures enhancing the extent of legislative openness was the Memorandum issued by Denmark in 1995 concerning legislative openness in the Council.[3]

Finally, the committees which assist the Commission in the preparation and implementing phase of the policy-process have been accused of being extremely closed and opaque. This lack of transparency and

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[1] See the UK Presidency Conclusions of 19 March 1998 on openness and transparency in the activities of the Council acting in the field of Title VI of the TEU (6067/98).

[2] The Rules of Procedure were changed again in June 2000. However, as far as openness is concerned only a few changes were made, including some restructuring of articles. The major changes have been made by the 1999 Rules of Procedure, which changed considerably those of 1993. In the present chapter references are to the 2000 Rules of Procedure (where these rules constitute a modification of the 1999 rules, this will be mentioned explicitly, and likewise if no reference is made this means that they are the same as 1999). See Rules of Procedure 1993 of 6 December 1993, O.J. L 304/1, 10.12.93; Rules of Procedure 1999 of 31 May 1999, O.J. L 147/13, 12.06.1999; Rules of Procedure 2000 of 6 June 2000, O.J. L 149/, 23.06.2000.

[3] Danish Memorandum issued in February 1995, which led to the Council's Conclusion on transparency of 29 May 1995 (7481/95).

openness was only finally addressed by the Commission a few years ago, not least as a result of such affairs as BSE and salmonella bacteria. Certain committees have now become models of transparency and openness.

5.2 Publicity of legal instruments

5.2.1 First Pillar Acts

As explained in Chapter 2, the publicity of legislative acts is not based on democracy, but on the principle of the rule of law. This principle, which is the foundation of any Western democracy, requires that the law must be accessible in advance to those whose conduct it purports to regulate. As the European Union is founded on the rule of law (Article 6(1) TEU), this requirement also applies in respect of the legislative acts of the Union.

The EC Treaty contains various provisions regarding the publicity of secondary Community legislation. Secondary law can take the form of regulations, directives, decisions, non-binding recommendations and opinions (Article 249 EC).[4] The EC Treaty has always required regulations of the Council and the Commission to be published before they could enter into force (Article 254(2) EC). At Maastricht, this duty was widened, and the same article now requires also the publication of directives of those institutions which are addressed to all Member States (Article 254(2) EC). Such directives were, in practice, already frequently published, but without any legal obligation to do so.[5] The article has been widened in another sense, as it now requires also for the publication of regulations, directives or decisions that have been adopted by the Council and the EP jointly according to the co-decision procedure (Article 254(1) EC). In both cases, the acts will enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication. Other directives and decisions take effect upon notification to those to whom they are addressed (Article 254 (3) EC). Although not strictly required, these acts are usually published in the Official Journal.[6] No obligation to publish exists in respect of recommendations and opinions.

Besides implementing the publicity obligations as laid down in the EC Treaty (see above),[7] the Council's Rules of Procedure (RoP) also sets out additional publicity rules. As far as the EC/Euratom Treaty is concerned, Article 17 requires the publication of the following acts: those referred to in the first paragraph of Article 163 Euratom Treaty; the common positions adopted by the Council in accordance with the co-decision and co-operation procedure and the reasons underlying those common positions;[8] conventions

[4] These acts can be adopted by the Council, the Commission and by the Council and the EP jointly.
[5] Usher (1998), p. 142. See also Weatherill/Beaumont (1995), p. 137.
[6] Lauwaars/Timmermans (1994), p. 100. The Council has bound itself through its Rules of Procedure to publish these instruments, including recommendations, see Article 18(5) 1993 Rules of Procedure and Article 15(2d) 1999 Rules of Procedure.
[7] Article 15 Rules of Procedure requires for the publishing of the acts referred to in Article 254(1) and 254(2) EC.
[8] It should be noted that a common position adopted by the Council after the first reading of a proposal is not a final act, but an intermediate step within the legislative process, and has, since 1994, therefore been published in the C

signed between the Member States on the basis of Article 293 of the EC Treaty (ex-Article 220), and international agreements concluded by the Community. In respect of directives other than those adopted by co-decision and addressed to all Member States, decisions other than those adopted by co-decision, recommendations and opinions, Article 17(2d) determines that they shall be made public, unless the Council or Coreper decide otherwise (simple majority). Opinions have been added to Article 17 with the revision of the Rules of Procedure in 2000. Article 17(2d) constitutes an improvement in respect of the 1993 Rules of Procedure, which required an unanimous Council decision for these acts (excluding opinions) to be published.

The Rules of Procedure of the Commission determine that the Commission shall take the necessary steps to ensure official notification and publication of Commission instruments in the O.J. (Article 15 EC).[9] The Rules do not provide for additional publishing duties other than those mentioned in the Treaty. In the Treaty, there is no obligation to publish in respect of instruments adopted by the EP, except for those which it adopts jointly with the Council in the context of the co-decision procedure. However, the EP traditionally always acts through resolutions, which are published in the C series of the Official Journal.[10]

Besides the above-mentioned Treaty acts, there are a host of other acts, often not binding, such as memoranda, communications, recommendations, deliberations, programmes, guidelines and resolutions, declarations, inter-institutional agreements and Codes of Conduct, etc. [11] In the absence of any Treaty duty to publish them, they are sometimes published and sometimes not.

Finally, the category of soft legislation must be mentioned. "Soft legislation" is often used by the Commission to present its interpretation and to develop its policy, without having to ask the consent of the Union legislature or that of the Courts.[12] "Soft legislation" has been defined by Snyder as " rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effect."[13] The Commission often has described these instruments as "co-ordination principles", guidelines", "codes", or "frameworks."[14] Soft legislation has no binding force, but can have legal effects. It sometimes has formal similarities with legislation, as it may be reasoned and published in the O.J. like legislation. It has been argued that, to be binding, soft legislation must be reasoned according to Article 190 of the EC Treaty.[15] Although no legal duty to publish soft legislation exists, there are good reasons for publishing this type of rule (see §2.2.).

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series of the O.J. See Deckmijn (1996), p. 18. The publication duty was part of the commitments made at the Edinburgh European Council to increase openness, 12 December 1992, EC Bulletin, 12-1992, p.9.

[9] See Rules of Procedure of the Commission of 17 February 1993, O.J. L 230/15, 11.09.93.

[10] Recommendations and declarations are made through resolutions, and legislative amendments are always appended to a legislative resolution.

[11] "They have no binding legal effect unless, despite their nomenclature, they meet the criteria laid down in the Treaty for binding Community acts", see Lasok/Bridge (1991), p. 155.

[12] Evans (1998), p. 28.

[13] Ibid. See Snyder (1993), p. 32.

[14] Evans (1998), p. 29.

[15] Ibid., p. 30.

5.2.2 Second and Third Pillar instruments

The Council's Rules of Procedure set out additional publicity requirements in respect of Second and Third Pillar instruments.[16] Under the 1993 Rules, a decision to publish joint/common positions, joint actions adopted on the basis of Article J2, J3 and K3 (respectively Articles 14, 15 and 31), measures implementing joint actions, or any measures implementing K3 conventions had to be taken by the Council unanimously when the said instruments were adopted. However, under both Pillars, instruments often have been used which do not strictly have a formal basis in Title V and VI.[17]

In the beginning, under the Third Pillar, non-binding instruments such as resolutions, conclusions and recommendations were predominantly used.[18] These instruments are not subject to any publicity requirements, but they have in practice been published in the Official Journal, although inconsistently.[19] In November 1995, the Council decided that it would publish in the O.J. acts and texts adopted on Asylum and Immigration matters.[20] During 1996, there was a rapid increase in the adoption of formal Third Pillar instruments. All conventions and joint positions, and all but one joint action, were published. It was mainly the non-binding measures, and such matters as reports (which under the First Pillar are mainly prepared by the Commission and are published as COM documents) which were not published.[21]

The Amsterdam Treaty has extended transparency and openness in respect of the Third Pillar. First of all, transparency and accountability have obviously been greatly enhanced for those Justice and Home Affairs (JHA) issues which have been brought within the competence of the EU, but less so for those which have remained in the Third Pillar.[22] In respect of the communitarised issues, the normal Community legislative procedures apply, with a special procedure for a transitional period of five years. During this period, the Council shall decide by unanimity, and after consultation of the EP, on initiatives issued by the Commission or a Member State.[23] Logically, the rules on publicity of the EC Treaty and the more generous information practices should also apply in respect of the communitarised issues. Moreover, the stronger position of the EP will also lead to more transparency and openness. A further positive point is

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[16] Before Amsterdam, Second Pillar instruments consisted of common positions and joint actions. After Amsterdam, these instruments remained, but a new instrument, "common strategies," was added: see Article 13 TEU (ex-Article J.3). The instruments provided for under the former Third Pillar were joint positions, joint actions and conventions, whereas under the new Third Pillar they are common positions, decisions, framework decisions (directive without direct effect) and conventions: see Article 34(2) (modified ex-Article K(6)). These decisions and acts do not form part of Community law, but constitute public international law, see UK House of Commons Select Report (Sixth) of 31 July 1997.

[17] Peers (1996), p. 643.

[18] Monar, p. 2. See JHA web site, http://ue.eu.int/jai.

[19] Correspondence with Mr. S. Peers. For example, right up until 1999, some adopted resolutions have not been published.

[20] See Decision of 23 November 1995, O.J. No C 274/, 19.09.96.

[21] Correspondence with Mr. S. Peers.

[22] De Boer, p. 26.

[23] Title IV EC (ex Title IIIa). Title VI TEU is the new Third Pillar (ex- Article K).

that the Rules of Procedure now require the publication of initiatives emanating from the Member States, unless the Council or Coreper decides otherwise.[24]

As far as the new Third Pillar is concerned, the publicity obligations have been strengthened by the Amsterdam Treaty. Following proposals submitted by the Danish and UK Governments, a Declaration (9) on Article K 6(2) (Article 34(2) TEU) was adopted. This Declaration provides for the publication in the Official Journal of draft Third Pillar initiatives and acts adopted by the Council thereunder in accordance with the relevant Rules of Procedure of the Council and the Commission.[25] In accordance with Declaration 9, the Council's Rules of Procedure now require for the publication of framework decisions, decisions and conventions[26] referred to in Article 34(2) of the TEU Treaty. Third Pillar common positions are published, unless the Council or Coreper decide by simple majority otherwise (Article 17(2-c)). This rule also applies to Third Pillar initiatives presented by the Member States pursuant to Article 34(2) TEU (Article 15(2-b)). Before Amsterdam, there was no rule requiring the publication of initiatives, and they seem never to have been published in the O.J. on the Council's own initiative.[27] This is, of course, in contrast to proposals made by the Commission under the First Pillar, which are in principle published as COM documents.[28]

Two remarks must be made in this respect; first, the Council has not interpreted Declaration 9 in the sense that acts and initiative must always be published. The fact that a simple majority is enough to prevent publication of initiatives and common positions is problematic. One would hope that this possibility will not be used in practice, especially as proposals under the Third Pillar emanate most of the time from the Member States or the Presidency and not from the Commission (which publishes as a rule its formal proposals in the Third Pillar as COM documents).[29] Since March 1998, proposals have been made public

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[24] See Article 17 (2)(a) RoP. During a transitional period of five years, the Commission has to share its right of initiative with the Member States, see Article 67 EC. Publication of Member States' initiatives is however subject to delays. Correspondence with Mr. S. Peers.

[25] See the Danish Proposal of 6 September 1996. See the letter sent by the UK government to the Dutch Presidency on 29 May 1997.

[26] Article 17(1-d and e) RoP. Under Article 18(4) 1993 RoP Conventions had already to be published.

[27] Correspondence with Mr. S. Peers.

[28] When a *draft* proposal is approved by the Commission, a summary Press Release is issued in the form of an IP (Information for the Press) or P (Information memo). Public access can also be obtained on the same day on the Internet (http://europa.eu.int). When the full text of the proposal is translated into all the official languages, a process that can take from one to six weeks or more, it is issued as a COM document in mimeograph form. About 80% of the proposals are published in the O.J. C series, but only the draft legislative text, as the explanatory memorandum is not reproduced: see Deckmijn (1996), p. 15. Amendments also come in the O.J. C Series: see paper of the Delegation of the European Commission to the US, "The EU. Researching the EU," (1995-1997), p. 9. The proposal consists of several parts: an explanatory memorandum and the proposed legislative text. A statement on the financial implications must accompany a draft. A statement as to their impact on small and medium sized companies, and a justification in terms of subsidiarity. See Evans (1998), p. 26.

[29] "As Third Pillar proposals often evolve gradually and informally from the Member States rather than as formal Commission proposal, the Council will have to determine at what point the initiative should be published. If the publication of the Third Pillar proposal in the OJ is to have any practical significance for interested third parties, then it must take place at the earliest possible stage of the legislative process to enable interested parties to consider the proposal and make submissions either to the relevant Government Department directly or to their national parliaments", House of Commons Select Report (Sixth report) of 31 July 1997, p. 35. Third Pillar initiatives are published, though with delays. The Council has often discussed them substantively for months before publishing them. Correspondence with Peers.

in anticipation of the coming into force of Declaration 9.[30] The simple majority rule seems less problematic in respect of common positions, which are often not binding and could be compared with non-binding instruments adopted under the First Pillar, which are also often not published.

The publication of measures implementing the decisions referred to in Article 34(2) of the TEU, and any measures implementing conventions drawn up by the Council in accordance with Article 34(2) TEU depend on a decision taken by the Council/Coreper on a case-by case basis (Article 17(4c)).

The Rules of Procedure (1999/2000) have remained largely the same in respect of the Second Pillar. Thus, an unanimous Council/Coreper decision is required for the publication of common strategies, joint actions and common positions referred to in Article 12 TEU (Article 17(3) RoP). This implies that any single Member State can object to and prevent publication of Common Foreign and Security Policy (CFSP) decisions. However, as far as is known, all formal instruments have been published in the L series of the Official Journal.[31] Under the new Rules of Procedure, a simple majority decision is now sufficient to make public measures implementing joint actions, and any decision adopted on the basis of a common strategy as provided for in the first indent of Article 23(2) TEU. Initiatives of the Member States under the Second Pillar are not published on the Council's own initiative. Some proposals emanating from the Commission have appeared as COM documents.[32] Despite the fact that formal Second Pillar instruments are in practice published, the publicity rules need to be revised as a matter of principle. The above-mentioned instruments have legal consequences in the end and therefore should be published like First Pillar instruments. To this day, under the Second Pillar, the European Union still continues to make far more use of informal instruments than it makes of common positions and joint actions. Most opinions of the EU concerning CFSP issues are not presented in one of the prescribed forms, but as Declarations.[33] Declarations and statements are often published in the EU Bulletin, and conclusions agreed at meetings of the General Affairs Council are included with Press Releases of the General Affairs Council.[34] Other informal decisions have also been issued, but these have not always been published.[35]

It appears from the above discussion that formal legal instruments adopted under one of the three Pillars are all subject to publicity requirements. The publicity requirements in respect of the instruments adopted under the new Third Pillar are moving closer to those of the First. Since the Amsterdam Treaty, all formal legal Third Pillar instruments and initiatives are as a rule published. Given the fact that the formal instruments are now more used than before, this change also constitutes an important improvement in

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[30] See the Presidency Conclusions of 19 March 1998 on openness and transparency in the activities of the Council acting in the field of Title VI of the TEU, op cit.
[31] Wessel (1999), p. 333.
[32] Peers (1996), p. 612. This was the case in 1995 and 1996; in 1997 the Commission did not make proposals. See the YEL for further details regarding 1998 and 1999.
[33] Peers (1996), p. 611, 643. See, for further details regarding the other years, the respective yearbooks. The average of Declarations is one almost every three days, whereas formal CFSP instruments are used 14 or 15 times a year. See Wessel (1999), p. 110- 114 and 126.
[34] Peers (1997), p. 660 (note 6). See also Wessel (1999), p. 185.
[35] Informal decisions are issued, for example, for systematic co-operation and convergent and concerted actions, Wessel, ibid., p. 108-110.

practice. The restrictive rules on publicity of 1993 concerning formal Second Pillar instruments have not been changed, and to publish common strategies, joint actions and common positions an unanimous Council decision is still required. However, in practice all formal Second Pillar instruments are published, as are (informal) Declarations. Since 1995, Council acts and lists of instruments adopted in the JHA and CFSA field, are published as an Annex to the Annual review of the Council's work. The Council further provides for a database containing a monthly list of Council acts (legislative and other acts), with a reference to those items that must be published or which it has decided to make public (i.e. statements, results of vote etc).[36] After a complaint being made to the Ombudsman about the fact that the Council did not keep a list of measures adopted under the Third Pillar, the latter set up a database which includes texts adopted under this Pillar.[37] The inclusion of Third Pillar measures in the database constitutes one element in the Council's efforts to enhance the transparency and openness in the Third Pillar.[38] A similar database has been set up in respect of the Second Pillar.[39]

[36] The database can be found on the internet at http://ue.eu.int/en/acts. An identical paper version also exists.

[37] See Decision on complaint 1055/25.11.96/STATEWATCH of 08-10-98. The Council has adopted the Recommendation of the Ombudsman, in which he stressed that the keeping of adequate records is a basic principle of good administration. He urged the Council, which stated that it keeps a list of Third Pillar measures, to make this list available to the public on request. See at http://ue.eu.int/jai. Peers notes that the database contains formal and non-formal instruments, but is definitely not complete. Correspondence with Peers.

[38] Presidency Conclusions of 19 March 1998 on openness and transparency in the activities of the Council acting in the field of Title VI of the TEU, op cit.. The other measures promised by the UK Presidency regarded the making public of calendars of the K4 Committee and other JHA working groups (on the Council's website, see above), more press briefings, making public a progress report at the end of each presidency on JHA affairs, one open debate in JHA matters during each Presidency and the making public of proposals in the JHA field.

[39] See at http://ue.eu.int/pesc. It includes formal and non-formal instruments.

5.3 The Council of Ministers

5.3.1 Introduction

In 1951, when the European Coal and Steel Community was founded, the Rules of Procedure of the Special Council contained a provision which stipulated that meetings of the Special Council were not to be public, unless the Council decided, by simple majority, otherwise.[40] This Rule was subsequently reproduced in the Rules of Procedure of the EEC Council.[41] However, the Rule was tightened and a decision to keep public Council meetings had now to be taken by unanimity. Until 1993, no public meetings were ever held.[42] Not only did the Council meet in private, but its deliberations were also covered by the principle of confidentiality. After four decades, in accordance with the commitments made at the 1992 Edinburgh European Council, the Rules of Procedure were changed so as to provide for the first time for certain public debates and exceptions to the principle of confidentiality of the Council's deliberations. The process of opening up continues and has led to another revision of the Rules of Procedure (1999) in order to incorporate the new provisions on openness as set out in the Amsterdam Treaty.

5.3.2 Rules on public meetings

Article 5(1) Rules of Procedure: "Meetings of the Council shall not be public, except in the cases referred to in Article 8."

Article 8(1) determines that the Council shall hold public debates on the six-monthly work programme submitted by the Presidency and, if appropriate, on the Commission's annual work programme. These policy debates shall be held in the General Affairs Council and the Economic and Financial Affairs Council, and shall be the subject of public retransmission by audio-visual means (Article 8(3)). The Council or Coreper may also decide by qualified majority, and on a case-to-case basis, that some of its other debates will be subject to public retransmission, where they concern an important issue affecting the interests of the Union. Issues or specific subjects for such a debate may be proposed by the Presidency,

[40] Article 5(1): Rules of Procedure of the Special Council of the ECSC (1952-58). These Rules were never formally published, see Westlake (1995), p. 129.
[41] Article 3(a) of the provisional Rules of Procedure of the Council of Ministers of the EEC (1958-1979). Again these Rules were never formally published, see Westlake (1995), p. 130. See Article 3(1) of the final adopted Rules of Procedure of the Council (1979).
[42] Ibid., p. 125.

which has the prerogative, by any member of the Council or by the Commission. Article 8(2) stipulates that at least one debate must take place on an important new legislative proposal.

When the Council holds a public debate, the public is not, like is the case in national parliaments and the EP, actually admitted to the meeting rooms where the debate is taking place. They have to watch a transmission of the proceedings in a separate room (in the Press Centre).[43] The indicative list of public meetings, which is approved by the Council at the beginning of each six/monthly Presidency, is incorporated in a Press Release, whereas each public meeting is announced by the Press Office.[44]

Between 1993 and the first half of 1995, twenty-three public debates were hold, most of which took place during the Danish Presidency (8 open debates). After the Danish Presidency, the number of open debates has diminished, and under the German Presidency debates were limited to the two compulsory ones.[45] Apart from the debates held under the Danish Presidency, they took place mainly in three Councils; General Affairs, ECOFIN and the Agriculture Council. The topics that have been subject to public debates regarded, in general, the presentation of the Presidency's work programme, provision of a general overview of the Economic and Monetary Union process, and the presentation by the Commission of its annual agricultural prices packages.[46] The public debates held so far have been criticised because they consisted of not very interesting performances by ministers reading from scripts, "providing a forum for political speech-making and "grandstanding" for their respective national audiences."[47] The Council is also not used to holding public debates on a regular basis, and they risk being viewed as an "unwelcome and unnecessary imposition on precious Council meeting time."[48] Public debates have further so far tended to be on subjects about which a consensus exists, as requests for public debates on other subjects have not gained the required unanimity.[49]

In 1995, Denmark issued a Memorandum in which it complained about the extent of legislative openness, including the few open debates that have been kept on important new legislative proposals.[50] It suggested that proposals for legislation coming from the Commission should be subject to an initial open debate in the Council. Moreover, it proposed to change the unanimity rule, which applied to decisions to hold public meetings, into simple majority as the former rule seemed to be one of the main causes of the low number of public debates.

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[43] Public Council meetings have never been transmitted on regular Television.
[44] See also the Council's website under transparency "public events."
[45] Denmark, 8 debates (2x ex-Article 6(1) (new Article 4(2) first indent) and 6x ex-6(2) (new Article 4(2) second indent), Belgium 4 (2x6(1)), Greece 3 (2x6(1)), Germany 2, France 6 (3x6(1)), Total 11x6(1) and 12x6(2)). Of these 12 (6(2)) debates 6 were held under the Danish Presidency and 6 under those of the four other countries. Article 6 was the former version of new Article 8 (1999 RoP).
[46] See also Westlake (1995), page 147.
[47] Curtin (1996), p. 85.
[48] Westlake (1995), p. 147.
[49] Commission Report for the Reflection Group, IGC 1996, May 1995, p. 39. See also Westlake (1995), who refers to the fact that it is Coreper that prepares the debates which will be subject to a public debate, and the latter works through consensus. This explains partly why the Council has kept only public debates on consensual issues, p. 147.
[50] In this Memorandum, Denmark made other suggestions for opening up the legislative process. For example, it called for the deletion of the escape clause on the publication of voting records, and that the records of the Council's legislative work should be open. See the Danish memorandum described in Westlake (1995), p. 154.

In May 1995, the Council responded to the Danish Memorandum by making certain promises, including holding more open debates on important matters affecting the interest of the Union or on major new legislative proposals.[51] This promise fell short of the Danish request and was disappointing from the perspective of legislative openness. Nor was the unanimity rule changed into simple majority as requested by Denmark. However, despite the requirement of unanimity, which was only changed in 2000, the number of open debates has risen to an average of almost nine per Presidency.[52] Debates have been kept in general on big general issues. More debates seem to have been held on subjects of general interest, like consumer affairs and environment.[53] Since March 1998, one debate per Presidency is also held in the JHA Council.[54]

Debates which have attracted many visitors are those concerning AGENDA 2000 (280 participants, 31-03-1998), the opening of the process of accession of the ten candidate countries (270 participants, 30-03-98) and the presentation of the programme of the Presidency in the field of ECOFIN (260 participants, 19-01-98). However, it is very difficult to say something about who attends these debates, as the statistics of the Council distinguish only between journalists and the public (including delegates and diplomats-members of missions of the EU). The term public is, however, not specified and thus includes all those who are not journalists (consultation firms, lawyers, academics, business men, etc.).

Since the coming into force of the Amsterdam Treaty, the Council has begun considering ways of improving public debates so as to keep the interested citizens better informed.[55] One consideration is broadcasting public meetings via webcam, as has been done by the EP in respect of hearings of the Commissioners. In this way anybody who is interested would be able to follow the debates at home.

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[51] Council Conclusions on transparency approved on 29 May 1995, op cit., p. 4-5. In its Conclusions, the Council mentioned measures to open up the legislative process which it had agreed upon. It stressed that the outcome of votes on legislative acts are made public as a matter of course, it promised to ensure that the press and the public are regularly and fully briefed prior to each meeting, and Coreper was instructed to consider the conditions under which public access to minutes of Council meetings could be facilitated (see respective paragraphs).

[52] Nine open debates were held under the Spanish, Italian, Irish and Dutch Presidencies, whereas under the Luxembourg Presidency 7, United Kingdom 9, Austria 10, Germany 6, Finland 10, Portugal 8, France 7. The average is 8.45 debates per Presidency since the second half of 1995.

[53] For example, the public debate on "Etat membres de l'introduction l'euro" (13-11-98), or on "sunete alimentaire" (3-11-97), or on "the future action in the field of public health" (30-04-98).

[54] In response to pressure to open up the Third Pillar to public scrutiny, the UK Presidency adopted in March 1998 several measures, among which the promise to keep one open debate under each Presidency in the JHA Council, op cit.. One open debate in the JHA Council was held under the Spanish Presidency (25-09-1995).

[55] This was noted in a letter of the Council sent to the author pursuant to certain questions about public meetings.

5.3.3 Public meetings when the Council acts in its legislative capacity

5.3.3.1 Towards public legislative meetings?

Until now open debates have been held only on general policy themes, but deliberations on legislative proposals continue to be conducted behind closed doors. The private meetings and confidentiality rule are not a problem in so far that the Council functions as an executive, as similar rules also apply to governments at the national level. Those who reason from a parliamentary democratic point of view have expressed concern about the fact that the Council, which remains the dominant institution of the Community/Union legislature, legislates in private and that its deliberations, initially, were entirely confidential. In every parliamentary democracy, the legislature makes decisions and votes on them in public, and its documents are published or are at least easily accessible (see §1.1.2.1.1.). Since the 1980s the EP called, not surprisingly, in numerous resolutions and reports for total legislative openness.[56] It has always been of the opinion that the Council when acting as legislature should be subject to the same obligations as any other legislative body.

Furthermore, it could be argued that the holding of public legislative meetings constitutes a general principle of Community law. All legislatures in the Member States legislate in public, in accordance with their Constitutions. In fact, this was also stressed by the Advocate-General in *Netherlands v Council* (§4.5.2.1). However, the European Court of Justice would probably never accept the existence of such a principle as this would entail the determination of the type of democratic model that should apply to the European Union. This would be a political decision falling within the exclusive competence of the Member States. Despite the fact that the Union, in certain aspects, is moving towards a parliamentary system, and that this model is most widely used by politicians and institutions, there is no agreement as to whether the democratic model, which should apply to the Union is the parliamentary model as exists in the Member States. Before the legislative meetings of the Council can be opened up, an explicit choice has to be made as to which model to adopt (see §4.4.2.3.).

Up to now, the legislative process has been opened up through access to documents and not through opening up meetings. Only as late as 1993 was the issue of public meetings discussed, at the Edinburgh European Council in the context of increasing transparency in the Council. The idea of opening up the Council's meetings when the latter is acting in its legislative capacity, was however supported by only

[56] For example, in 1984, in its Draft Treaty establishing the EU, the EP proposed a provision on public Council meetings (see note beneath). See also the EP Resolution regarding the IGC 1990 (11 July 1990). Further, the draft Report of three EP transparency explorers called for public meetings and publication of appropriate parts of the minutes, which in particular show how the members voted. See First Draft set of Recommendations on "transparency and democracy" submitted by Mr. Tsatsos, Mr. B. Donnelly and Mr. St. Pierre for the attention of the EP's delegation to the Inter-Institutional Conference (PE 210.692/A+B/rev.2). In general, the EP has called in

two Member States, whereas the majority of the Member States were in favour of limiting openness to certain debates. Therefore, it was decided to open up only some debates, but to exclude public access to the Council's deliberations on legislation as a principle. The issue was addressed again in the Danish Memorandum of 1995, but no action was taken by the Council (see preceding paragraph). A year later, the issue was taken up in a number of contributions to the IGC 1996. During the IGC, the EP[57] and some Member States, in particular Denmark and the Netherlands, expressed their concern about the lack of openness in the legislative work in the Council. They made suggestions to improve openness by holding public debates, when the latter is acting in its legislative capacity, and improved access to legislative documents.[58]

The most far-reaching proposal on legislative openness was submitted by the EP, which advocated total legislative openness when the Council is acting as a legislator. As far as public meetings are concerned, it proposed that where the Council is acting in its legislative capacity, its proceedings should be public (and its agenda binding), unless a specific, and duly justified, exception is decided by two-thirds majority.[59] In other words, the Council should, in principle, meet in public whenever it acts as a legislator, irrespective of the phase of the legislative process. This means that the negotiation phase should also be conducted in public. The EP, however, did not specify how it wanted to see this proposal implemented: through the Council's Rules of Procedure, or through a provision enshrined in the body of the Treaty itself?[60]

A more realistic proposal concerning public meetings was submitted by Denmark, which was the only Member State that addressed this issue in its proposals to the IGC.[61] It subsequently proposed the adding of a new Article 149 to the section of the Treaty dealing with the Council as an institution. This article would make the holding of public Council meetings only obligatory for the first reading of acts. In respect of subsequent proceedings, it would leave it to the Council itself to determine the conditions for access, which might be laid down in its Rules of Procedure. The Danish position comes close to that of the Netherlands in this respect.[62] Besides Denmark and the Netherlands, other Member States, among which

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numerous resolutions for the Council, when acting in its legislative (and budgetary) capacity, to debate and vote in public and for the records of vote, the minutes and the statements made in the minutes to be published.

[57] Besides the EP, the Commission also criticised the Council for lacking openness in its legislative function.

[58] The issue of legislative openness was mentioned explicitly in both reports of the Reflection Group. The final report (II) showed the divergence in Member States' positions in this respect. See the Progress Report of the Chairman of the Reflection Group on the IGC, September 1995, SN 509/95 (Reflection Group Report I) and the Report of the Reflection Group, June and December 1995, SN 520/95 (Reflection Group Report II).

[59] EP Resolution of 17 May 1995, O.J. C 151, 19.6.95; EP Resolution of 13 March 1996, O.J. C 96, 01.04.96.

[60] In 1984, the EP had already called for the Council to meet in public when acting in its legislative and budgetary capacity. In its Draft Treaty establishing the EU (1984), the EP proposed to amend the article concerning the Rules of Procedure of the Council. After the first sentence, which stated that the Council shall adopt its RoP by an absolute majority, it proposed to add a second sentence to the effect that: "these rules shall lay down that meetings in which the Council is acting as a legislator or budgetary authority shall be open to the public." See the EP's Draft Treaty on the European Union (1994), Article 24.

[61] See Danish Proposal on transparency of 6 September 1996.

[62] See the fourth Memorandum of the Dutch Government of 12 July 1995 on the institutional reform of the EU, p. 15. The latter expressed its support for holding Council meetings in public as far as possible when the latter is acting as a legislator. By "as far as possible," it means "that the debate on admissibility (the subsidiarity test) concerning every proposal should be open to the public, as should the final vote in the Council, including explanations of votes, while the *intermediate negotiating stage would remain closed to the public*" (italics added).

the Benelux countries[63], Finland[64] and Sweden[65], expressed their support for holding public meetings when the Council is acting as a legislator.

The issue of public meetings was discussed by various actors in debates and papers concerning the 1996 IGC, and the idea of opening up Council meetings of a legislative nature seems gradually to gain support.[66] In particular, the idea of keeping public debates for the first and final reading of legislative acts, with the negotiation phase carried out in private, has been advocated.[67] This would to a large extent correspond to the practice followed in legislative work of national parliaments.[68] The holding of public Council meetings was, however, never seriously discussed during the IGC negotiations.[69] Greater openness of the Council's work was discussed exclusively in the context of greater publicity of and improved access to documents relating to the legislative process.

5.3.3.2 Arguments in favour and against public legislative meetings

The resistance to opening up the Council's meetings is related to the way in which it works. Whereas those in favour of public legislative debates argue that ministers' actions and positions will become clearer, and that it would render them more accountable,[70] those against (among which Council insiders) point to the fact that opening up the Council debates to the public, when it is acting as a legislator, might

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[63] See the common Memorandum on the IGC submitted by the governments of the three Benelux countries (7 March 1996).

[64] Finland said it was prepared to accept the inclusion in the Treaties of a provision to the effect that the Council's decision-making in legislative matters be public when new regulations are being adopted: see Finland's points of departure and objectives at the IGC in 1996, Report to Parliament of 27 February 1996.

[65] In its Report to the Swedish Parliament (30 November 1995), the Swedish Government advocated more public debates in the Council to a much greater degree than is the case at present, and the public should have access to the records of proceedings. However, in its Working Document of 20 May 1996 it stated that it favours increasing openness by incorporating the general principle of access to documents in the Treaty rather then providing greater public access to meetings. It explained that this was not the best way to make the Union more open to its citizens as there must always be meetings in the decision-making process that are closed to the public. Otherwise, Member States' opportunities to discuss freely and to arrive at compromises would be jeopardised.

[66] See Curtin (1996), p. 99.

[67] For example, Ersboll. See Ludlow and Ersboll, Discussion Paper IGC 1996, "Preparing for 1996 and a Larger European Union, Principles and Priorities", 1995, Centre for European Policy Studies, p. 44. Dashwood proposed to televise the ministers' initial reactions to a Commission proposal as well as the final debate on measures, leaving the negotiation phase behind closed doors. This rule had to be laid down in a Declaration annexed to the Final Act of the IGC 1996 Conference, as, in his opinion, it concerns a matter, which affects the internal organisation of the Council. Curtin goes further, as she proposes to open up the deliberations and the voting/adoption/rejection of legislative measures. She notes that further consideration has to be given as to whether to leave the Council the possibility of closing its meetings in exceptional circumstances. See (1996), p.99.

[68] Curtin (1998/2), p. 117.

[69] Source: interview with Dutch Coreper member. It should be mentioned that the Italian Presidency came up with some options to amend Article 151(3) EC or to create a new article as to provide for increased legislative openness (see Note 10, 2 April 1996, CONF 3810/96). One of the options envisaged a new Article 151a EC concerning legislative openness. The proposed article would, among other things, stipulate that the Council *may* decide to allow debates to be broadcast to the public by audio-visual means or that "unless otherwise decided by the Council, acting by qualified majority, its debates *shall be* broadcast" (italics added). This idea did not re-appear in the Annex to the Italian Presidency's Report for the Florence European Council (18 June 96) nor in any "proposal" of subsequent Presidencies.

have a negative effect on the Council's efficiency and push its deliberations into other non-public places.[71]

The main reason put forward as to why the meetings of the Council cannot be opened up is that the Council works through negotiation.[72] Much EU decision-making occurs through negotiations which "take place among a quite small number of participants, where a degree of intimacy and mutual familiarity can be established, and where the terrain for cross-trading can be fairly easily identified."[73] Decision-making is furthermore multi-issue, as almost any area of public policy can be subject to the EU decision-making process. Decisions in the Council are made through delicate bargaining and compromise. Trust and confidence are preconditions for a successful outcome. Opening up the meetings would clearly harm this climate.[74] A former Council Member has noted that negotiations, by their nature, cannot be open to public view. The negotiator, i.e. the national minister, "needs to be able to take positions and change them in a way which would upset particular interest groups."[75] Public meetings would weaken his bargaining position. One very important feature of the Community's negotiation process is that the Council makes frequent use of so-called package deals. In a package deal, "a favour to a negotiating partner in one area may be repaid by a favour by that negotiating partner in another area."[76] The existence of package deals is one of the reasons why Council insiders hesitate to open up the Council's decision-making process, as this kind of deals requires confidentiality. "Moreover, package deals are rarely formalised and written out. Circumstances can be imagined in which it would be very difficult for a Member State to justify making concessions in one policy area, particularly if this has consequences for a particular interest at home, by reference made by gains in another policy area. Yet Member States are frequently called up to make judgements of this kind about where the best balance of their overall interest lies."[77] Governments are probably not keen to expose their manoeuvring to public scrutiny and might argue that this would reduce their effectiveness.[78] Thus, public meetings risk blocking the decision-making process and would probably push the real deliberations into the corridors.[79] As a consequence, public meetings would merely become occasions for the reading out of speeches.

Greater openness might also lead to a change in the nature of the Council, and could have negative consequences for the Council's efficiency.[80] At the moment, ministers discuss only B-points, that is to say

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[70] Westlake (1995), p. 163. Curtin, (1996), p. 98-99.
[71] Westlake, ibid., p. 147.
[72] Negotiation takes place when "actors with different goals, the advancement of which depends on a change in the behaviour of others, use a common framework to establish a joint outcome": see Wallace (1997), p. 245. The negotiation process has been analysed in academic literature about integration, and different analyses have been given of that process over time. See Wallace, who provides for an analysis of the Community method of negotiating, ibid., p. 254-55.
[73] Ibid., p. 248.
[74] Ibid., p. 18. See Jenssen (1998), p.192.
[75] Nicoll (1994), p. 192. See also citation in Westlake (1995), p. 147.
[76] Westlake, ibid., p. 119.
[77] Ibid.
[78] Wallace (1997), p. 68.
[79] Nicoll (1994), p. 192. See also citation in Westlake (1995), p. 147. Jacqué (1994), p. 32.
[80] Wallace (1997), p 290 and Westlake, ibid., p. 163.

points on which, at a lower level, no agreement has been reached. A-points, on which agreement has been reached, are normally not opened up in the Council of Ministers. There is no hard evidence, but Wallace argues that 85%-90% of the work done by ministers concerns A-points, of which around 70% having been settled at the working group level, and another 15-20% by Coreper. This leaves 10-15% to the ministers for substantive discussion as B-points.[81] The Council spend more time on textual negotiation than on general debate of principles or overall policy, which is left for informal sessions, or discussed over dinner or lunch.[82] There is no real debate. "Ministers speak not to convince or persuade but to reiterate or confirm. Reserves are lifted or maintained. Texts are agreed to or not."[83] This way of decision-making is due to pressure of time and language problems. According to Wallace, "the new discussion on transparency challenges established patterns of work in the Council, where public pressures are beginning to induce a different mode of discussion."[84] If Council meetings were opened up, this would obviously lead to a change in the way the Council works. Westlake notes that "ministers could no longer use codes and formulae. Discussions could not only be limited to areas of disagreement. All ministers would be under pressure to express their positions. These tendencies would add greatly to the length of Council meetings, which in turn would place greater pressure on ministerial time. Thus debates about 'democratising' the Council, or rendering its work more transparent, cannot be dissociated from the equally important debate about the Council's efficiency."[85]

The above discussion shows that opening up the Council's legislative meetings is not without problems. In particular, the risk of blocking the process and pushing deliberations in the corridor must not be underestimated. However, the general idea expressed by those in favour of public legislative meetings during the 1996 IGC, was to open up the first and the final stage of the legislative process and leave the negotiation phase closed. But even this idea is not problem-free, as it presumes that a distinction can be drawn between the Council acting in its negotiation mode (in private) and acting in its legislative mode (in public).[86] It is, however, hard for the Council to distinguish between these two modes, since negotiation is very much concentrated on the details of the legislative texts.[87] Furthermore a misunderstanding exists, as opening up the meetings of the Council would not amount to total legislative openness.[88] The decisions in the Council are prepared extensively by Coreper, other senior level committees, and working parties. Although the working parties do not have independent decision-making power, in practice they are the last arbiters in Council negotiations of around 70% of the legislative output.[89] The largest part of the legislative output has been decided at lower levels, which continue to work in camera. This phenomenon of legislation decided upon by appointed civil servants has been

[81] Wallace (1997), p. 40.
[82] Ibid., p. 41.
[83] Westlake (1995), p.163.
[84] Wallace (1997), p. 40.
[85] Westlake (1995), p. 163.
[86] Wallace (1997), p. 8.
[87] Ibid., p. 40.
[88] Westlake (1995), p. 147.
[89] Wallace (1997), p. 15.

criticised heavily as being undemocratic (unaccountable) and completely lacking in transparency (see §4.4.2.2.). In the light of the above-mentioned problems, and in the absence of an explicit choice for the parliamentary system in the European Union, public Council meetings, when the latter acts in its legislative mode, do not seem likely to be realised in the near future.

5.3.4 Rules on publicity of documents relating to the decision-taking phase

5.3.4.1 General

Article 6 Rules of Procedure: "Without prejudice to Article 8 and 9 and other applicable provisions, the deliberations of the Council shall be covered by the obligation of professional secrecy, except insofar as the Council decides otherwise." (simple majority)

Besides meeting in private, the Council's proceedings were, until 1993, completely subject to the principle of confidentiality. No provisions existed providing for the making public of records and explanations of votes, if a vote had indeed been cast in the first place since before the mid-1980s, voting was rare. Records of voting were kept, but were not made publicly accessible nor were they widely distributed to Member State governments.[90] Furthermore, no rule required for the publishing of minutes or statements made in the minutes. If published, however, minutes would not have revealed much as full minute writing was abandoned after the first enlargement (1973).[91] It is, therefore, very difficult to determine what happened in the Council before 1993. However, before the confidentiality principle was broken for the first time by the Edinburgh commitments and some light was shed on the Council's deliberations, those deliberations were not completely opaque. Some information about what was going in the Council came into the public domain through various channels.[92]

The exceptions to the principle of confidentiality of the Council deliberations are laid down in Article 6(2) and Article 8 and 9 RoP. The first article allows for Council documents, which have not been released to the public, to be produced on authorisation of the Council/Coreper for use in legal proceedings. Article 8 concerns the exception of public debates, whereas Article 9 lists the other situations in which deliberations are opened up. Depending on the type of decision-making process involved, different rules of publicity apply. In respect of the pre-Edinburgh situation, there is no doubt

[90] Ibid., p. 48.
[91] See Nicoll in Westlake (1995), p. 120.
[92] Westlake, ibid., p. 144-145. Information came free through Press briefings, "leaks," and through the authoritative accounts provided by the Magazine "Agence Europe" of the Council agendas and Council/Coreper meetings, which it obtained through anonymous sources.

that openness in respect of the decision-taking process, in particular of the legislative process, has been improved enormously.

5.3.4.2 The legislative process

5.3.4.2.1 The evolution of the rules on publicity

Article 9(1) Rules of Procedure: "where the Council acts in its legislative capacity within the meaning of Article 7, the results of votes and explanations of votes by Council members, as well as the statements in the Council minutes and the items in those minutes relating to the adoption of legislative acts, shall be made public."[93]

This article implements Article 207(3) of the Treaty of Amsterdam concerning the Rules of Procedure. Under the latter article the Council has to define the cases in which it is acting as a legislature, with a view to allowing greater access to documents in those cases, while, at the same time, preserving the effectiveness of its decision-making process. When the Council is acting in its legislative capacity, it has to publish at least the results of votes and explanations of voting as well as statements in the minutes. The above-mentioned articles (Article 207(3) EC and 9 RoP) do not contain anything new, but more or less constitutionalize the pre-existing provisions/measures on legislative openness and their implementation by the Council, i.e. the former Rules of Procedure (1993) and the Code of Conduct 1995.[94]

In accordance with the commitments made by the European Council in Edinburgh, the Council changed its Rules of Procedure in 1993 so as to provide, for the first time, for the publication of its records of voting and explanations of votes. These Rules required that when the Council was acting as a legislature, the results of votes were to be published, unless the Council decided otherwise (simple majority). When the Council was acting in its legislative capacity was determined by an Annex to the Rules of Procedure.[95] The exception to the rule of publicity of votes was deleted in the Amsterdam provision. The Council has

[93] See the database of Council acts at http://ue.eu.int/en/acts.

[94] See for further details in respect of the implementation of the existing measures on legislative transparency, the Second Council Report on the implementation of Council Decision 93/731/EC on public access to Council documents over 1996-1997 (June 1998), p. 6.

[95] According to the Annex, the Council was acting in its legislative capacity, when it adopted legally-binding rules on the basis of the relevant provisions of the Treaty. Deliberations leading to the adoption of internal measures, administrative or budgetary acts, acts concerning inter-institutional or international relations or non/binding acts such as conclusions, recommendations or resolutions were not regarded as legislative acts. Piris (1994) notes that in the Annex "no general definition of the Council's function as legislator was being provided, but simply an *ad hoc* definition specifically appropriate to the publication of votes," p. 472.

however never used this exception.[96] The Rules of Procedure listed other situations in which the records of vote had to be made public or could be made public at the request of one of the members (amongst others in the Second and Third Pillar).[97] When records of vote were made public, the Rules provided that the explanations of vote should also be made public at the request of the Council members concerned, with due regard to these Rules of Procedure, legal certainty and the interests of the Council (Article 5 RoP 1993). Since December 1993, the results and the explanations of votes regarding legislative acts have been systematically published in Press Releases.

The legislative process was further opened up by the Council through the adoption of a Code of Conduct concerning public access to statements in the minutes, and to the minutes in general when the Council acts as a legislator (October 1995).[98] The Code concerned items in the Council minutes relating to the final adoption of legislative acts (hereinafter "Code of Conduct 1995").[99] Whereas the EP, like any legislative body in Europe, publishes its minutes and verbatim reports in the Official Journal, this is not the case in respect of the other partner in the legislative process, the Council. Despite repeated pleas from the EP to the Council to publish its minutes and statements made in the minutes since the 1980s, this issue was only seriously addressed in 1995.[100] Important for the discussion on publicity of minutes and statements in the minutes was the Danish Memorandum concerning legislative openness, which called, among other things, for the automatic publication of the minutes of the Council acting as a legislator. In this period, the Council was accused of systematically refusing access to the minutes, under Article 4(2) of the 1993 Code of Conduct concerning access to Council and Commission documents, without considering the content of the particular document (see Chapter 6).[101] The Council responded to the Danish memorandum by instructing Coreper to examine the conditions under which public access to the minutes of Council meetings could be facilitated.[102] The examination focussed on the practice of making statements in the minutes, as it appeared that those statements constituted the main obstacle to the publishing of Council minutes.

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[96] In its Memorandum of 1995 Denmark pleaded for its abolishment, op cit.. In response to this plea, the Council promised not to use it.

[97] Records of votes had further to be published when the Council adopted a common position (Art. 189b/c EC), when votes were cast by the members of the Council or their representatives on the Conciliation Committee (Art. 189b EC); when the Council acted pursuant Title V and VI on a unanimous Council decision taken at the request of one of its members, and in other cases by Council decision taken at the request of one of its members. According to Mr. S. Peers, records and explanations of vote in the Second and Third Pillar have not been published regularly, but it is not clear how often there have been such votes or explanations of them: Correspondence with Mr. S. Peers.

[98] Code of Conduct on public access to the minutes and statements in the minutes of the Council acting as a legislator (2 October 1995), 10204/95 (Presse 271), p. 15-18.

[99] When the Council was acting in its legislative capacity was determined in the Annex to the RoP 1993.

[100] See, for example, EP Resolution of 1984 on publication of information by the EC. In this Resolution the EP called for the publication of explanatory declarations, O.J. C 172/177, (1984). See similar Resolution of 22 January 1988 regarding publication of minutes and statements in the minutes, O.J. C 49/174, (1988).

[101] See Case T-194/94, *Carvel & Guardian Newspapers Ltd. v. Council* [1995] ECR II-2767.

[102] Council Conclusions on transparency of 29 May 1995, op cit., p. 4-5. The minutes indicate as a general rule in respect of each item on the agenda: the documents submitted to the Council, the decisions taken or the conclusions reached by it, the statements made by it and those whose entry has been requested by a member of the Council or Commission (Article 9(1) 1993 RoP, Article 11 (1) RoP 1999).

For many years, statements of all types have been included in the minutes of the Council.[103] A leaked study of the Council's Legal Service in May 1995 mentioned that statements have developed in such a way that they now threatened to undermine legal certainty and that, in any event, they form an absolute impediment to the making public of Council minutes. The number of statements made was, according to the Legal Service, excessive (31 in respect of Data protection law), and their content could harm legal certainty.[104] The study revealed further the existence of another type of statement, those that are in contradiction with or add to the substance of the published legislation.[105] The Legal Service stressed that this type of statement should absolutely not be made. This type of statement reveals that the Member States have not been able to agree on the legislation at all.[106] Statements that contradict published legislation would seem to amount to the making of "secret" legislation. This phenomenon is obviously in violation with the rule of law, which the European Union should observe (see Article 6(1) EU Treaty (ex Article F)). Moreover, one partner in the legislative process, the EP, has not been kept informed about this type of statement. Thus, legislation that had been adopted by the Council and the EP jointly in one form, did not reflect the norm that was in reality agreed upon by Member States.[107]

At the end of 1995 the Council adopted the Code of Conduct on public access to statements and the minutes. The Code laid down a number of criteria and procedures for releasing both Council minutes and the statements included in the minutes. It determined, first of all, that the Council agreed to use statements in the minutes sparingly.[108] Statements relating to legislative acts would in principle be accessible, except in cases where the Council would establish that it did not have the simple majority required by Article 5 RoP 1999 (Article 6 RoP 2000) to wave the secrecy obligation (supposed agreement to release). In case

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[103] Statements or "entries in the minutes" can be made by the Council, the Commission or jointly, and by the Member States unilaterally or in a group. They constitute one of the devices used by the Council to "resolve or circumnavigate difficulties and disagreement." Others are, for example, marathons, loaded press briefings and wilful ambiguities: see Westlake (1995), p. 113-117. There are four different types of statements: promissory, predictive (including "intent"), interpretative and unilateral. The first three categories of statements all require unanimity and collaborative drafting. Finally, Member States may make unilateral statements, in which they express their opinion about what should happen. Statements have, according to the jurisprudence of the Court, no legal status. See Nicoll in Westlake (1995) for a detailed explanation of the different types of statements, p. 122-124.

[104] The above-mentioned practice of entering statements in the minutes can give rise to legal problems. In particular the risk of ambiguities or contradictions increases when several texts, for example, an explanatory considerans and an interpretative statement pronounce upon the same legal act. Interpretative statements could thus harm the legal certainty. Further, if they come to the knowledge of third parties, this might give rise to actions for damages based on the principle of the protection of legal expectations. It is clear from the above that any decision to make minutes available to the public would require somehow a revision of the above-described practice of entering statements in the minutes.

[105] Examples were given in the study of discussion between ministers of Member States, which have resulted in unpublished statements watering down published legislation or saying something different. See Helm S., in *The Independent* of 23 June 1995.

[106] *The Independent* wrote that "in order to secure approval of all 15 members it has been necessary to provide a range of secret opt-outs to take account of each country's separate interests." Without them probably there would be less agreement.

[107] The EP further pointed to the Commission's duty to supply information to the EP, which according to the latter also included statements (but it uses this device now itself in the minutes of the Conciliation Committee), see Nicoll in Westlake (1995), p. 125.

[108] For example, the Council bodies had to try to incorporate the content of projected statements as much as possible in the legislative act itself (recital or enacting terms), or to turn some of them into explanations of vote. Furthermore, contradictionary statements were not allowed.

of statements of one or more members of the Council, the latter had to seek the agreement of the author(s) before making them public.[109] Whether to make public the statements would be decided by the Council when adopting the legislation,[110] without prejudice to application of the Council Decision 1993 on public access to documents (which requires a simple majority to refuse access under one of the exceptions mentioned in the 1993 Code). In respect of the other items included in the minutes, the Code determined that when adopting the minutes of its meeting, the Council had to examine systematically the question of whether to make public the reference to documents[111] before it and the decisions taken or conclusions reached by it. Thus, a decision taken by simple majority was required.

The aim of making such examinations was to allow the widest possible public availability to its minutes, save in the exceptional cases where one of the reasons referred to in Article 4(1) Council Decision 93/731 on access to Council documents does not so permit (mandatory exceptions). The Code applied, however, only to items in minutes of Council meetings held after the date of its adoption. The existence of statements is indicated in the Press Releases, and those which the Council has decided to make public are available the same day from the Press Office of the Council's Secretariat General. The list and extracts of minutes which the Council has decided to make public can be consulted in the library (or be ordered via http://eudor.eu.com).

The Code of Conduct has been supplanted by the Council's Rules of Procedure (1999), but still applies as far as access to the minutes itself is concerned. In respect of the situation before the Amsterdam Treaty, the situation has been improved as statements in the minutes when the Council acts as a legislator are now published automatically.

Since December 1999, the Council has also published, on its website, the provisional agendas of all meetings of the Council and its preparatory bodies.[112] The list of items under discussion includes references to the documents considered in respect of those items. This list is available in advance of the respective meeting and is updated in case of any changes. Calendars of all Council meetings (not only legislative ones) are also made public on the Council's website.[113]

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[109] The Code did not grant the Commission the right to oppose to the making public of statements of which it is the author or co-author (Council-Commission statements). It is the Council who should take the decision on making those statements accessible or not. The Council seems to consider statements as part of its own property, because they are included in its minutes.

[110] The Group Antici or Mertens, which prepare Coreper meetings, will before indicate whether the act under consideration is a legislative act in the sense of the Annex.

[111] The decision to make minutes public does not mean that the documents referred to in the minutes will be available to the public.

[112] Council Decision 2000/23/EC on the improvement of information on the Council's legislative activities and the public register of Council documents. O.J. L 9, 13.01.2000.

[113] Council Conclusions on openness and co-operation in the field of information activities about the EU of 6 December 1998 (13314/1/98).

5.3.4.2.2 The definition of when the Council acts as a legislature

According to Article 7 RoP, the Council is acting in its legislative capacity, when it adopts rules which are legally-binding in or for the Member States by means of regulations, directives, framework decisions or decisions on the basis of the relevant provisions of the Treaties, with the exception of discussions leading to the adoption of internal measures, administrative or budgetary acts, acts concerning inter-institutional or international relations or non-binding acts (such as conclusions, recommendations or resolutions). This definition is wider than the one mentioned in the Rules of Procedure 1993, as the Council is now also acting as a legislature when adopting the main Third Pillar measures. As a result, all the items mentioned in Article 9 are also published as a rule in respect of the adoption of the above-mentioned Third Pillar instruments. Different rules apply in respect of Third Pillar conventions and common positions (see below). Under the former Rules of Procedure, the publishing of records of vote required an unanimous Council decision, which meant that one Member State could prevent openness in this Pillar. Moreover, explanations were published on request only, and there were no rules for the publication of statements or other items in the minutes.

The wider definition might be an acknowledgement of the fact that the legal instruments adopted under the Third Pillar can have a great impact on the interests of the citizens, whose rights and security are directly affected by such measures, and, that therefore they should be published like the "classical" legal instruments. The fact that (binding) measures taken in the Third Pillar have been placed on an equal footing with "classical" legislative measures, as far as rules on publicity are concerned, furthermore supports the institutional unity thesis as defended in the academic literature regarding the European Union.[114]

The inclusion in the Treaty of a formal obligation to publish, the record and explanations of voting, when the Council acts as a legislature, as well as the statements in the minutes, would, in theory, reveal the voting behaviour of individual States and the extent of support for a particular decision.[115] However, the duty to publish the voting records, even in the age of increased qualified majority voting, loses its importance, as in practice the taking of a formal vote is rare. The Council normally searches for consensus, even where qualified majority voting is possible.[116] This means that, in practice, it will still be difficult for the public and the national parliaments to follow and scrutinise the individual positions taken by their Member State, and to hold their ministers accountable.

Finally, like the former Rules of Procedure, the current Rules provide for openness in respect of two phases of the legislative process. According to Article 9(1), the results and explanations of votes (under

[114] See Curtin/Dekker (1999). See further §4.2.2.2.
[115] UK House of Commons Select Report (Sixth Report) of 31 July 1997, p. 39.
[116] Wallace (1997), p. 18, 53. See also Westlake (1995), p. 110-111 and 148, and Curtin (1998/2), p. 116. The latter notes that often the Presidency states informally that the necessary majority is given although no formal vote is taken.

the 1993 Rules publication of explanations of vote followed a request to this end) shall be made public, when the Council adopts a common position pursuant to the co-decision and co-operation procedure (respectively Article 251/252 EC) and when they are cast by members of the Council or their representatives on the Conciliation Committee (Article 251 EC).

5.3.4.3 The non-legislative decision-making process

In those cases where the Council is not acting in its legislative capacity, the rules on publicity are not as far reaching. Like the 1993 Rules of Procedure, the current Rules require an unanimous decision, taken on the request of one of its Members, to make public the voting results when the Council acts under the Second Pillar (Article (9)). In all other cases, a simple majority decision will be sufficient. When the result of votes is made public, the explanations of votes shall also be made public at the request of the Council members concerned, with due regard to the Rules of Procedure, legal certainty and the interest of the Council. This rule also applies in respect of common positions adopted under the Third Pillar. New is that statements entered in the minutes and items in those minutes relating to the adoption of the acts mentioned above, may also be published on the request of one of its members.

As regards the Third Pillar, the Rules provide that the records and the explanations of votes have to be made public when the Council adopts a Third Pillar convention (Article 9(2)). Moreover, statements entered in the minutes, and the items in those minutes relating to the adoption of such conventions, shall be made public by Council/Coreper decision taken at the request of one of their members. This constitutes an improvement in respect of the former Rules of Procedure.

5.4 The European Parliament

5.4.1 Public meetings

According to Article 171(1) of the European Parliament's Rules of Procedure, which have been revised to implement the Amsterdam Treaty, the Parliament shall ensure the utmost transparency of its activities in line with the provisions of Article 1 TEU. The Parliament has always been very open and transparent. Like any parliament in Western parliamentary democracies, the EP debates and votes in public (Rule 171(2)).[117] The possibility to close the debates by a two-thirds majority, as was provided for in the old Rules, has not been retained in the new ones. This possibility was, in any event, never used in the past.[118] The public may follow the debates from a gallery, but they have to remain seated and silent otherwise they may be ejected (Rule 116 (3)).[119]

Committees have been part of the Parliament's structure since the establishment of the Common Assembly of the ECSC.[120] Between 1958 and 1979, the system evolved gradually with only some occasional changes of committee names and responsibility. With the increase in the number of Members of the European Parliament after 1979 as a result of enlargements and the expansion of the European Communities fields of responsibility, new committees and subcommittees were created. Today, there are twenty committees with a number of sub-committees. Most of the committees' work consists in "the consideration and adoption of draft reports and opinions in the fulfilment of Parliament's legislative, budgetary scrutiny and agenda-setting roles."[121]

Committees are very transparent. The powers and responsibilities of standing committees are defined in an Annex to the Rules of Procedure (Rule 150(1)), whereas, in respect of temporary committees, the EP decides on their powers and terms of office when it establishes them (Rule 150(2)). This decision is appended to the minutes, which are published in O.J. C series. Decisions on the composition of committees and their sub-committees are also taken by the plenary and appended to the minutes. All committees are governed by the general published Rules of Procedure of the EP.

Like the plenary, the EP committees in principle meet and vote in public. Voting in committees is by show of hands, unless a quarter of the committee's members request a vote by roll-cast (Rule 165(2)).

The Rules of Procedure regarding public meetings in respect of committees have been modified in favour of openness several times. "Before the direct elections committees were closed to the public, but after

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[117] The EP votes on legislative or non-legislative reports in public by show of hands or electronic voting The Rules of Procedure provide for the possibility of voting by secret ballot. However, this possibility is hardly used ("unheard of in the plenary"), see Corbett (1995), p. 160.
[118] Corbett (1995), p. 152.
[119] There are no practical obstacles to attending the debates.
[120] Corbett (1995), p. 105-107.

1979 a number of committees, such as the Social Affairs and later the Environment and Economic Committees, opened their doors."[122] According to the EP's former Rules, committee meetings were not to be held in public, unless the committee decided otherwise. In January 1992, the Rules were modified to provide for neutrality on this issue. Upon being reconstituted, committees could decide whether their meetings were normally to be held in public. By March 1992, twelve of the EP's committees met normally in public, whereas five did not (Agriculture, Budgets, Budget Control, Legal and Rules). The Committee on Petitions decided on a case-to-case basis whether or not to keep its meeting in public.[123] The committees were also given the option of dividing the agenda for a particular meeting into items open to the public and items closed to the public (ex-Rule 151(2)). Committees could further exceptionally, at the request of the Commission, the Council or the High Representative, decide to hold its proceedings *in camera* when dealing with two particular fields: Common Foreign and Security Policy, and Police and Judicial co-operation in Criminal Matters (see respectively ex-Rule 91(4) and 93(4)).

In 1993, the public nature of meetings of committees and plenary sessions was stressed in the Inter-Institutional Declaration on Democracy, Transparency and Subsidiarity.[124] However, as Corbett noted, only "by late 1994 most of the committees were holding their meetings in public, with the only closed meetings committees being Legal, Budgets and Budgetary Control Committees as well as the Petition Committee depending on its agenda."[125] The Rules of Procedure of June 1999 now provide that as a rule Committees shall normally meet in public (Rule 171(3)).[126] The possibility of dividing the agenda in items open and closed to the public, and the possibility of holding committee meetings *in camera* when regarding Second and Third Pillar matters, have remained applicable (respectively Rule 171(3) and Rule 103(2)/105(2)).

The public may enter the European Parliament building and take a seat at the back of the Committee meeting rooms. Attendance at meetings may be restricted to certain people if the confidentiality procedure applies.[127] This confidentiality procedure applies automatically when information or documents are communicated to Parliament under cover of confidentiality.[128] They may be attended only by members of the committee and by officials and experts who have been designed in advance by the chairman and whose presence is strictly necessary (Annex VII, indent 3). The confidential documents submitted and discussed during these meetings are subject to a special treatment (see paragraph 5.4.3 on access to documents). As a result of the increase in the powers of the EP, and hence it becoming more

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[121] Ibid., p. 122.
[122] Ibid.
[123] Ibid., p. 111.
[124] Declaration of 25 October 1993. See Annex I, O.J. C 329/133, 17.11.93.
[125] Ibid., p. 122.
[126] See, for temporary committees of inquiry, Decision 95/167 of the EP, Council and Commission on the detailed provisions governing the exercise of the EP's right of inquiry, O.J. L 113/2, 19/05/1995. Article 2(2) provides for meetings *in camera* at request or when secret information is considered.
[127] Annex VII to the RoP 1999 laying down the procedure for the consideration of confidential documents communicated to the EP.
[128] Individual members may also request the application of the confidentiality procedure to particular documents, but it has to be accepted by a majority of two-thirds of the members present. See Annex VII, indent 2.

closely involved in sensitive issues which were once the prerogative of the Council and the Commission, the need for this kind of procedure was felt more strongly (especially in the Budgetary Committee).[129] Negotiations between the EP and the Commission on the handling of confidential documents led to an agreement being reached in 1989, which resulted in the adding of a new Annex by the EP to its Rules of Procedure laying down the rules in this respect.

Parliamentary committees have set up a number of sub-committees. As the Rules for the sub-committees are the same as for committees (Rule 156(2)), the Rules on the publicity of committee meetings also apply in a similar manner to the sub-committees.

Finally, it should be noted that there is one stage in the legislative process in which a distinct part of the EP does not deliberate in public. The Conciliation Committee, composed of EP and Council delegates, which is convened in the context of the co-decision procedure, deliberates on the possible compromises on a legislative text in privacy.

As far as public meetings is concerned, the EP constitutes a prime example of openness. As was explained in §1.1.2.1.1., publicity of committee meetings is not a common feature of the parliamentary systems of most Member States. The EP therefore belongs to the small group of parliaments with the most open system.

5.4.2 Rules on publicity of documents relating to the decision-taking phase

5.4.2.1 Plenary

All documents relating to the deliberations of the plenary sessions of the EP are subject to rules on publicity. The voting results are recorded in the minutes (Rule 133(3)),[130] whereas the explanations of vote (orally or in writing) on the final vote are included in the verbatim report of proceedings (Rule 137(1)).[131]

The Rules of Procedure require for the publication of the two documents that are drawn up in relation to the plenary session, i.e. the minutes and verbatim reports.[132] The minutes, translated into all the official

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[129] Corbett (1995), p. 136.

[130] Ibid., p. 166. However, Rule 133(3) only requires that the result of vote be recorded. Thus, how the single Members voted is not recorded (this requires a request for a roll-cast vote (Article 134(2)).

[131] Members have an individual right to make explanations of vote, Corbett (1995), p. 58 and 161.

[132] The first part of the daily minutes of each sitting records the business that took place, the names of the speakers, the procedural decisions and the overall results of voting on amendments and texts. The second part of the minutes contains the texts adopted by the EP, a list of the documents which formed the basis for the Parliament's debate and decisions (Rule 118) and the names of the members whom were present that day. See Corbett (1995), p. 166. In respect of access to the list of attendance of members, see the Ombudsman's Decision on complaint 26/13.07.1995/MAJQCS/FR/FR against the EP. As far as the texts are concerned, a new addition to Rule 148(1)

languages, are approved at the beginning of the next session (usually the next morning) and subsequently published within one month in the O.J. C series (Rule 148(4)). Verbatim reports, which are full records of the proceedings of each sitting, are also drawn up. Within a few days, a version available which contains speeches in their original language (in jargon called "Rainbow"). As translation of the "Rainbow" in all official languages is very time consuming, publication of the verbatim record in the Annex of the O.J. appears only three or four month later (Rule 149(3)).

5.4.2.2 Committees

In respect of committees' deliberations, the Rules of Procedure stipulate that the result of the vote taken on the report as a whole is stated in the report (Rule 161(2)).[133] As the report is published, so is the record of the vote (see below). There is no Rule requiring for the minutes, which are in any case rather short, to be published. As a consequence, they are only distributed within the committees and political groups (Rule 167).[134]

The Conciliation Committee deliberates and votes *in camera*. Adding to the secrecy of the Conciliation Committee is the fact that discussions are done face to face rather than on the basis of written documents.[135] Some information about the deliberative process does however come into the public domain. In accordance with Article 9(1) of its Rules of Procedure, the Council publishes the votes and the explanations of vote taken by the delegates of the Council in the Committee. In contrast, the EP does not publish or hand out any internal documents, notes, positions of institutions, compromise texts, minutes, voting records, etc. during the Conciliation phase.[136] The outcome of the Conciliation, the so-called joint text, including declarations and exchanges of letters, will be made public after it has been adopted and tabled as a session document for the Plenary for the third reading vote (on the internet at http://www.europar.eu.int under heading Conciliation Committee).

5.4.3 Rules on publicity relating to the decision-making process in general

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Rules of Procedure 1999 determines that where legislative texts adopted by Parliament contain amendments, they shall be published in a consolidated version (Rule 148(1)).

[133] Rule 133 ("The result of the vote shall be recorded") is made applicable via Rule 165(4).

[134] Westlake (1994), p. 201.

[135] Westlake (1995), p. 82.

[136] This information was given pursuant to a request for information from the author to the Committee's Secretariat.

As already mentioned most of the committees' work consists in "the consideration and adoption of draft reports and opinions in the fulfilment of Parliament's legislative, budgetary scrutiny and agenda-setting roles."[137] Reports can be divided into legislative and non-legislative reports (Rule 159/160).[138]

Rule 172 determines that "unless a committee decides otherwise, its documents shall be made public," and that their status has to be clearly indicated. Rule 172 is drafted more widely than the former Rule 152, which stipulated that "unless the committee decides otherwise, *adopted* reports and statements[139] prepared on the responsibility of the chairman shall be made public."

Up-to-date reports, which have been tabled for the plenary, are published in the EP's Sessional Documents (A-series).[140] All adopted "opinions" of opinion-giving committees are annexed to the report of the Committee responsible (Rule 162(4)), but sometimes they may be published separately. Draft reports and draft opinions at committee stage are not published. However, one can often get these documents at the entrance of the committee room (at the start of a meeting). The way in which Rule 172 is drafted seems to imply that now final draft reports, and the amendments submitted by committee members to draft resolutions, and final draft opinions also have to be made public, unless a decision to the contrary is taken. The way in which the drafts are made public might, however, consist of the simple release of these documents in the committee itself (as is often already the case). Another possibility would be to provide it following an individual request.

Committee Members may also table a motion for a resolution on a matter falling within the sphere of activities of the EU, which might be the basis for committee reports and opinions (Rule 48). These motions are published in the Sessional Documents. However, often no further action is taken upon these resolutions.

In the case of confidential proceedings (which apply when information or documents are communicated to Parliament under cover of confidentiality), access to documents is restricted to certain people and special rules apply for consideration of the documents. The documents are distributed at the beginning of the meetings, and collected again at the end, and no notes of these or photocopies may be taken. Furthermore, the minutes of the meeting may not lay down the discussion of the item under the confidential procedure, but may record only the relevant decision, if any is made. In the case of a breach of confidentiality, penalties (reprimand, temporary or permanent exclusion) may be applied.[141]

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[137] Corbett (1995), p. 122.

[138] Legislative reports in the first reading consists of amendments; amendments to the legislative text, draft resolution and explanatory statement in respect of the first reading, whereas, in the second and third reading, there is no report but a draft recommendation with amendments to the Common Position and an explanatory statement. Non-legislative reports consists of a motion for a resolution and an explanatory statement.

[139] Although Rule 172 does no longer explicitly mention the making public of statements, it might be expected that they still have to be made public as they are contained in "documents." Up to now statements have been made public via Press Releases or they have come into the public domain through distribution in the Committee.

[140] See Corbett (1995), p. 238.

[141] Ibid., p. 136.

5.5 The European Commission

5.5.1 Introduction

Accusations of lack of openness and transparency have, in the first instance, been directed against the Commission. It was sustained that the latter was an unresponsive and closed bureaucracy. The Commission, like any government, meets in private, but publishes a lot of information on its own initiative. Since 1992, the Commission has taken a number of initiatives in the field of transparency, openness and information.[142] The importance of transparency and openness was highlighted in a dramatic way in 1999 by the fraud and maladministration affair within the Commission. The Report of the Committee of Independent Experts, which was set up to examine the allegations regarding fraud, mismanagement and nepotism in the Commission, led to the resignation of the Santer Commission on 15 March 1999.[143]

This scandal underlined the importance of transparency and openness in the decision-making processes. A more open and transparent process enables the public to scrutinise and to keep its governors accountable. At the same time, it can work as a deterrent against fraud and maladministration (see Chapter 3). The need for transparency and openness, and its close relation with public scrutiny and accountability has been stressed numerous times by the Group of Independent Experts in their reports (see also Chapter 2). In their First Report they concluded that "the principle of openness, transparency and accountability are at the heart of democracy and are the very instruments allowing it to function properly. Openness and transparency imply that the decision-making process, at all levels, is as accessible and accountable as possible to the general public. It means that reasons for decisions taken, or not taken, are known and that those taking decisions assume responsibility for them and are ready to accept the personal consequences when such decisions are subsequently shown to have been wrong."[144] In its Second Report, the Committee recommended that the Commission must establish clear guidelines (to be made public)

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[142] See, for an account of the Commission's initiatives in this field and the stage of their implementation, the Commission's discussion paper on public access to documents, (SG.C.2/VJ/CD D(99) 83), 21 April 1999, p. 14-21 (distributed at the Transparency Conference held by the EP in 1999). These initiatives regard, for example, broader consultation of interested parties and greater participation in the decision-making; dialogue with the citizens; making Community legislation more accessible; public access to documents; various actions in the field of information and communication (among which improving means of dissemination of information). Some of the measures aim, in particular, at interested citizens (involved somehow in the decision-making process), whereas others are meant for the general public.

[143] First Report of the Committee of Independent Experts on allegations regarding fraud, mismanagement and nepotism in the European Commission of 15 March 1999, at http://www.europarl.eu.int/experts. The resignation of the Commission was the result of a civil servant who blew the whistle. Mr. Van Buitenen, a civil servant who worked in the EC's Internal Audit Unit, leaked his dossier, which contained examples of malpractices and fraud in the Commission, to MEPs who brought it into the open. See also the EP Resolution on the resignation of the Commission and the appointment of the new Commission, Bulletin 3-1999.

[144] See §9.3.3. See further §1.5.4.

designed to ensure maximum openness and transparency as to acts and decisions of the Commission once taken and the processes by which they were arrived at.[145]

The process of reform of the Commission, which had already been started in 1995, was made one of the chief priorities of the new Prodi Commission (see §4.3.5.). The new Commission adopted Codes of Conduct and started the reorganisation of the Commission's administrative structures.[146] The new Commission put transparency and openness high on its agenda. The day before the EP voted on the appointment of the new Commission, Prodi stressed in his speech that transparency is vital for the democratic health and accountability of the European Union, and emphasised that the Commission had to open up to public scrutiny.[147] To set an example, a Register was adopted, which lists the correspondence of the President of the Commission to which the public may request access.[148] At the end of 1999, the Commission took several other transparency measures, and presented its proposal concerning a regulation on public access to Council, EP and Commission documents.[149]

If there is a part of the Commission's decision-making process, which definitely still lacks in openness and transparency, then it is the committee-system. Some improvements have been made as a result of the BSE affair, which led to a reform of the scientific committees. Also the very opaque and closed comitology committees have been made more transparent and open by the new Comitology Decision adopted in June 1999. However, as far as the largest group of committees is concerned, i.e. the consultative and expert committees, much could still be done. Below, the rules on publicity of meetings and documents will be examined in respect of the Commission and its committees.

5.5.2 Public meetings

[145] See for remarks on openness and transparency in their Second Report of 10 September 1999, §7.2.4, §7.4.3, §7.6.3-§7.6.11 (including whistle-blowing remarks), §7.14.3, §7.16.7. The Committee accepts that the Commission needs "space to think" to formulate policy, before it enters the public domain: see in detail Chapter 7.

[146] The first two Codes regard respectively the Code of Conduct for Commissioners (SEC (1999) 1497) and the Code of Conduct for Commissioners and Departments (SEC (1999) 1481), which have both been adopted on 18 September 1999. In 2000, the Commission adopted the Code of Conduct on Good Administrative Behaviour for Staff of the Commission in their Relations with the Public. The Commission has rejected the proposal of the Ombudsman for a Code of Good Administrative Behaviour, but has adopted its own. This Code is, according to the Ombudsman, weaker as it will be annexed as a supplementary measure to the Commission's internal Rules of Procedure. Both Codes mention access to documents as a principle. See Press Release European Ombudsman, No. 1/2000. The Codes can be accessed at http://europe.eu.int/comm/codesofconduct/commissioners-en.htm. In April 2000, the Commission presented a White paper on reform with a detailed action plan (COM (2000) 200 final and final/2). This White Paper has been posted on the Commission's website at http://www.europa.int/comm.

[147] See the speech of Prodi given to the EP on 14 September 1999 before the EP voted on the assumption of the whole Commission. In the promising words of Prodi: "the Commission intends to be much more open. It is time for some glasnost here! I want to bring Europe out from behind closed doors and into the light of public scrutiny. I want the people to look over my shoulder and check that the Commission is dealing with issues that most concerns them (...)." See also the work-programme of 2000 under the heading of transparency for the plans to be implemented in 2000.

[148] See the Commission's web site at http://europe.eu.int/comm.

[149] See the General report on the EU over 1999, §984-986.

Since the foundation of the High Authority, the Rules of Procedure provide that the Commission shall meet in private and that its deliberations are covered by the principle of confidentiality (See Article 7). The reason for the application of these Rules is linked to Monnet's vision of the High Authority as a supranational policy-making body. The Treaty lays down that the members of the Commission shall be completely independent in their performance of their duties, which is underlined by the rule that the Member State should not seek to influence the members of the Commission in the performance of their task.[150] In order to prevent any interference of the Member States in the workings of the High Authority, and in particular the nationalisation of the High Authority, Monnet adopted a series of measures in the Rules of Procedure that still apply today.[151] The first principle, that of collegiality, aims at strengthening the independence of the Commission (Article 1 RoP). It means that the Commission as a whole, rather than individual Commissioners, has responsibility for Community acts. The Commission tries to reach as far as possible a consensus on issues, but voting by simple majority takes regularly place to resolve contentious issues.[152] To preserve collegiality in practice, the Rules of Procedure stipulate that the Commission meets in private, and moreover, that its discussion are covered by the principle of confidentiality.

This situation has never been challenged. Moreover, the Commission is, for the most part, not a legislature, and now performs functions more generally associated with an executive. It draws up legislative proposals and it implements secondary legislation (delegated legislation); it supervises, further, the application of Community rules and implements the Union budget.[153] Like any Executive in Western parliamentary democracies, it operates in private. Demands for opening up the Commission have, therefore, not been for public meetings, but for increased access to documents relating to the policy preparation and implementation process.

5.5.3 Rules on publicity of documents relating to the decision-making process

5.5.3.1 The decision-taking process

Besides meeting in private, the discussions of the Commission are made confidential by Article 7 of its Rules of Procedure. Unlike the Council, the Rules of Procedure of the Commission do not provide for any publicity of documents that might reveal something of its deliberations. Obviously, such rules would violate the principle of collective responsibility and would risk undermining the independence of the

[150] Donelley/Ritchie (1997), p. 5.
[151] Westlake (1998), p. 131. See also §4.3.1.
[152] Voting is confidential, but the total votes in favour, against or abstentions are recorded formally in the Commission minutes, and do, on occasions, become more widely known. Donnelly/Ritchie (1997), p. 7.
[153] Evans (1998), p. 17.

Commissioners. Documents relating to its deliberations, such as minutes or agendas have to be asked under the rules on public access to Commission documents (see Chapter 6). Out of respect of the principle of confidentiality Commissioners are not allowed to make any comments which would call into question a decision taken by the Commission. They have also to refrain from disclosing what is said at meetings of the Commission (see Code of Conduct for Commissioners).[154] Given the fact that the Commission can be compared more with an executive and administrative body, the confidentiality surrounding its deliberations is nothing abnormal.

5.5.3.2 The decision-making process in general

The Treaties contain a few provisions that require the Commission to publish certain documents. For example, Article 212 EC requires the Commission to publish an Annual Report on the activities of the Community.[155] These provisions are the only publicity duties that are laid down in the Treaties. Besides these provisions, the Commission is not under any duty to publish documents relating to the decision-making process in general. The Commission publishes, however, a lot of documents out of its own initiative as part of its wider information and communication policy.[156] Moreover, many DGs have their own documentation service and increasingly publish their own documents on the Internet.[157] The link between the publishing of documents on its own-initiative and public access to documents on request is that these documents no longer have to be requested.

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[154] See op cit. See the part on the codification of certain provisions relating to the performance of the duties of Commissioners (collective responsibility and confidentiality).

[155] This is required by Article 212 EC, Article 17 ECSC and Article 125 Euratom Treaty. Other mandatory publicity duties on the Commission are laid down in respect of the ECSC in Article 47 and 46 and in respect of Euratom in Articles 5, 11 and 40.

[156] For example, working documents which are of importance as a source of official thinking are published as COM documents. Furthermore, more SEC documents are turned in COM documents as a result of the transparency/openness policy. See §4.3.3.

[157] Deckmijn (1996).

5.5.4 Consultative, expert and comitology committees

5.5.4.1 The system of committees

Like any government, the EU relies on committees, in every phase of policy-making, as it needs expertise and knowledge. The EU makes, however, an exceptional use of committees.[158] Three main categories of committees can be distinguished.[159]

In its discussion and formulation of policy initiatives,[160] the Commission tries to increase its knowledge of the policy-subject under consideration and to find out how the Member States feel about the subject,[161] by setting up consultative committees and expert groups which "provide an excellent source of expertise and knowledge from a wide range of national and sectoral specialists upon which the Commission can draw.[162] The Commission is not required formally to consult these committees, and their opinions are not binding.[163] The decision finally taken falls under the Commission's own political responsibility.

There are about 60 consultative committees. Most of them are in the fields of agriculture and social policy. They are set up by a Commission Decision. A draft Decision, which is not published, serves immediately as the Committee's Rules of Procedure. The members of consultative committees are selected, and subsequently appointed by the Commission from a wide range of socio-economic interest groups at a European level.[164] Expert groups are composed of national officials and may also include specialists from outside national administrations . They provide the Commission with primarily technical advice on a wide range of issues, such as, public health or new standards in telecommunication.[165] Each time the Commission plans to propose legislation, it sets up an expert group.[166] They are sometimes established by Commission Decision, and at other times are created *ad hoc* by a Directorate-General or Service. For the main part, they consist of informal groups operating without any legal reference and without Rules of Procedure.

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[158] Various explanations of a historical, behavioural and functional nature have been given for the EU's heavy reliance on committees. See Van Schendelen (1998), p. 6-8. According to him, roughly two thirds of all committees (1000) existing in the EU have been created by the Commission (by Decision).

[159] Schaefer (1996), p. 7. The author follows the typology of committees used by Schaefer. He relies on the policy-cycles to categorise the committees.

[160] Van Schendelen (1998), p. 5. Expert groups may also provide for advice in the policy implementation phase. See Vos (1997), p. 213.

[161] Van der Knaap (1996), p. 85.

[162] Ibid., p. 86.

[163] The consultation of consultative/expert committee may, however, be made obligatory by the Court of First Instance (CFI) in certain circumstances. See De Búrca (1999), p. 72.

[164] See Article 4 "draft" Decision. It is possible that the committee is mixed with representatives of economic groups and experts. See, for example, Article 2 of the Commission Decision establishing a new Statute of the Advisory Committee on Foodstuff (80/1073/EEC). O.J. L 318/28, 26-11-80.

[165] Van der Knaap (1996), p. 86.

[166] Ibid.

There is a great difference between the level of institutionalisation of the two types of committees. The largest group, composed of experts, has a low level of institutionalisation although exceptions exist, i.e. "a minimal or no official budget, formal power, permanent status, secretariat or fixed location," whereas the less numerous consultative committees are much more institutionalised.[167] Besides these committees created by the Commission, the Council following a proposal of the Commission has also set up expert or consultative committees when it is of the opinion that the Commission needs specific expert advice in a particular area.[168]

At the decision-making stage, many committees and working parties exist that prepare the work of Coreper and that of the ministers. They are set up by the Council or provided for in the Treaty. The many preparatory Council committees are often excluded from the discussion about committees, this thesis does likewise.

Another important group of committees which surround the Commission are the *comitology* committees. These committees are created by Council Act to control and assist the Commission in implementing Council decisions. Given the inability of the Council and the EP as co-legislators to enact the required detailed rules or apply and/or adjust them to changing conditions, the Council delegates executive powers to the Commission. In order not to lose complete control over them, it has set up committees to advise, control and assist the Commission in the exercise of its delegated powers.[169] The different procedures for the exercise of implementing powers conferred on the Commission are laid down in Council Decision 87/373/EEC of 13 July 1987, which has recently been modified. The comitology committees are composed of representatives of the Member States. They adopt their Rules of Procedure on the basis of a standard version, which, in accordance with the 1999 Decision, has to be published. In the implementation phase also some non-comitology committees created by Council may/must also be consulted by the Commission.[170]

Two other committees, which assist the Council and the Commission in an advisory capacity, are the Economic and Social Committee and the Committee of Regions (see respectively Article 257 and 263 EC). They have to be consulted after the Commission drafted its proposal. Below, only the Commission consultative and expert committees and comitology committees will be analysed in respect of openness.

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[167] Van Schendelen (1998), p. 5.

[168] This is the case in the field of Community statistics. To date, the Council has set up 18 such committees, see Schaefer (1996), p. 7. These committees have a well-established agenda and often function for a considerable period of time. Whereas, in respect of Commission committees, the Commission has imposed upon itself the obligation to consult the relevant committee, consultation by the Commission of Council committees might be made obligatory by the Council. See Schaefer (1996), p. 9.

[169] Schaefer (1996), p. 13.

[170] For example, the Advisory Committee on Safety, Hygiene and Health Protection at Work established by Council Decision assists the Commission in preparing and implementing activities in the fields of safety, hygiene and health protection at work in all sectors of the economy: see Falke (1996), p. 162. This Committee is not categorised as a comitology, but as a consultative committee. Moreover, according to Vos (1997), expert committees also operate during the implementing phase of the decision-making process, p. 213. For example, the eight Scientific Committees which assist DG XXIV advise on the implementation of Community legislation: see Working document of the STOA panel, "Transparency and Openness in Scientific Committees: the American Experience", PE 167/327/Fin.St., Luxembourg November 1998, p. 29.

5.5.4.2 The lack of openness in the decision-making process of committees

In the last decade, EC committees, and in particular comitology committees, have been criticised on many points, among which the lack of transparency and openness.[171] The lack of transparency is manifold. First of all, the large number and variety of committees and the differences in their specific functions, institutionalisation, influence and composition have rendered the system extremely complex and opaque.[172] Moreover, only a few people, at the most, can tell how many committees exist in the European Union, in particular, the number of expert committees seems to be a mystery.[173] Who knows the rules on composition and those regarding the mode of functioning of committees? Often the Rules of Procedure do not have to be published, or they do not even exist.[174] This situation has been improved in respect of the scientific and the comitology committees, but in respect of the majority of consultative and expert committees this situation still applies. Adding to the opacity of the decision-making process in the Union, was the fact that there were too numerous comitology procedures, which increased the complexity of the decision-making system. This problem has been addressed, however, in the new Comitology Decision of 28 June 1999.

One of the most serious problems with the whole committee system is said to be the lack of openness and accountability.[175] Schaefer has identified the challenge of reform of the committee system as introducing more openness and democratic accountability without sacrificing efficiency. Committees are extremely closed bodies. They meet behind closed doors, and, in respect of most committees, no mandatory rules exist on publicity of documents relating to the decision-making process, such as agendas, reports, opinions, voting records[176] and minutes. As a result, these documents are not published. This makes that opinions are formulated and reports are adopted in complete secrecy. Only those involved (and the governments in the Council) are informed, leaving the public and often the EP, unaware of what is happening in committees. The rules on public access to documents adopted in 1993 have improved the situation, as they make it possible at least to request documents relating to the committee proceedings. Thus, lobbying is no longer the only way to get access to information or documents. However, access to comitology committees has been difficult given the Commission's narrow interpretation of its Access Decision implementing the Code of Conduct on public access to Council and Commission documents (see Chapter 6).

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[171] See Van Schendelen (1998), p. 9.

[172] De Bùrca (1999), p. 72. "Adding to the opaqueness of the system is the fact that it is possible for the same individual to be a member of more than one committee within the same subject area, and thus to be involved in a variety of ways on the same policy proposal."

[173] See also Dehousse (1995), p. 124. There is a list of committees published in the O.J. (for example, 12.2.1999, p. 492-513), but it is not sure whether the list is complete and covers all the expert groups.

[174] The first situation is applicable, for example, to comitology committees, whereas the second to many expert committees.

[175] Schaefer (1996), p. 21-23. He refers also to the Council preparatory committees (active in the decision-making phase). See also Dehousse about comitology committees (1998), p. 9 and 22.

Members of the EP (MEPs) and outside groups have criticised this oligopoly of information, and for many years they have tried to get information about what was going on in comitology committees in order to exercise scrutiny over the implementation of legislation by the Commission. The EP managed through the use of its budgetary powers, by blocking the transfer of expenditures allocated to committees, to shed some light on what was going on in committees. Some information came into the public domain through the Report on Committees, which the Commission submitted to the EP in the context of the adoption of the Annual Budget 1995.[177]

However, the growing attention to the lack of transparency and openness in respect of committees derived, in particular, from such events as the BSE and the Salmonella affairs. In his debate with the EP on the BSE, Santer promised to set rules for the openness of committees.[178] From mid-1997, the Commission took a number of initiatives to increase transparency and openness in the workings of the Commission's scientific committees. The focus on committees has also led to a debate about the legitimacy of comitology committees.

5.5.4.3 Rules on publicity of documents of committees relating to decision-making (including the decision-taking) process

5.5.4.3.1 Consultative and expert committees

Except for the provision that the list of members of the committee shall be published in the Official Journal[179], the "draft" Decision setting up a consultative committee (not published) does not contain any mandatory publicity rules. In the absence of any publicity obligations, committee agendas, opinions,[180] reports and eventual records of the discussions, are, in general, not made public. The "draft" Decision contains a provision which grants particular bodies (to be specified) the right to be informed about the results of the deliberations (opinions and/or outcome of proceedings) at the request of that body.[181] Finally, it contains a provision protecting information relating to confidential matters. According to

[176] Consultative committees do not vote (see "draft" Decision). However, exceptions to this rule seem to exist. See for example, the Waste Management Committee. Comitology committees vote rarely, see Dehousse (1998), p.4.
[177] See extensively on the "secret society", Bradley (1997), p. 241-243. Commission Report, O.J. L 34/1, Doc A7/0067/95. Some information about consultative/expert and comitology committees, like the number, their agendas and meetings can be taken from the Annual Budget, but the information is incomplete and misleading.
[178] Debate of 18 September 1997. See also Van Schendelen (1996), p. 10.
[179] See Article 7 "draft" Decision. This rule has, however, not always been respected in practice. For example, the list of members of the Waste Management Committee has usually not been published: see Van Schendelen (1998), p. 50.
[180] If an opinion is delivered in the first place. For example, the Waste Management Committee does not deliver opinions as it acts more like a forum.
[181] For example, Article 11 of the Commission Decision establishing the new Statute of the advisory committee on Foodstuffs stipulates that: "the opinion and/or records of the discussion shall be communicated at their request to the Council and to the Standing Committee on Foodstuffs."

Article 13, "without prejudice to the provisions of Article 214 of the EC Treaty, those taking part in meetings of the committee are obliged not to disclose information which has come to their knowledge through the work of the committee or its working parties, where the Commission informs them that the opinion requested or the question raised is on a matter of confidential nature." Most of the expert committees operate without any legal basis, and without Rules of Procedure. The documents relating to the deliberations of the committees are in general not made public.

The most open among the Commission committees are the scientific committees in the field of Consumer Health and Food Safety. After the BSE affair, the entire system of scientific advising was reformed and the old committees have been replaced by a Scientific Steering Committee (SSC) and eight new Scientific Committees.[182] The new system of scientific advising has been made much more transparent and open. Both Decisions setting up respectively the SSC and the new Scientific Committees, mention that the Rules of Procedure (which must be made publicly available)[183] must ensure that the committees perform their tasks in compliance with the principles of excellence, independence and transparency, while respecting legitimate requests for commercial secrecy.[184] Both Decisions, further, stipulate that besides the names of the members, which will be published in the Official Journal, the agendas, minutes and opinions have to be made public.[185] The Committee is, however, obliged not to divulge information for which there is a request for confidentiality.[186] The above-mentioned provisions greatly open up the work of the Scientific Committees.[187] It should be noted, however, that before the introduction of these principles, the Committee for Food was already very transparent.[188]

Besides the increasing openness in respect of the Scientific Committees, the Commission on 15 June 1998, announced the formation of "17 new research advisory groups(RAG) to advice on the research to be carried out through the key actions of the Fifth Framework Programme."[189] The names of the members and their elected chairperson and the recommendations of the committees have to be made public.

Except for the efforts to increase openness and transparency in respect of the Scientific Committees, and the new RAGs, no further action has been taken to increase openness in respect of the majority of consultative and expert committees. There exist no mandatory rules on publicity of documents relating to

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[182] Commission Decision No. 97/404/EC of 10 June 1997, O.J. L 169 of 27 June 1997. Commission Decision No. 97/579/EC of 23 July 1997, O.J. L237 of 28 August 1997.

[183] See respectively Article 6 and 8. The Rules of Procedure will be made available on the Internet, but not in the O.J. as they are internal documents (argumentation given by the Commission to an informal question).

[184] See Article 6(1)/(2a) Commission Decision 97/404/EC and Article 8(1) Commission Decision 97/579/97.

[185] See Article 3(4) and 7 Commission Decision 97/404/EC and Article 3(3) and 10 Commission Decision 97/579/97. They are put on the web at http://www.cc.cec:8080/en/comm/dg24/scientif.html.

[186] See Article 8 Commission Decision 97/404/EC and Article 11 Commission Decision 97/579/97. See also Gray (1998), who gives an example of the application of this provision in respect of the Scientific Committee for Food, p. 71.

[187] Currently, the list of members of each committee, their agendas, outcome of proceedings (opinions) and reports, including previous ones, have been made available on the Internet.
See at http://www.cc.cec:8080/en/comm/dg24/scientif.html.

[188] "All SCF opinions are published, and there are 33 series of reports up to 1993 containing 108 opinions." They are published in all languages. Delays in publishing due to lack of a dedicated budget, see Gray (1998), p. 75.

their decision-making process and such documents are neither provided out of the Commission/Committee's own accord. However, these documents are covered by the Commission's Decision on access to documents as the Commission considers consultative and expert committees as part of the Commission's infrastructure.[190]

5.5.4.3.2 Comitology committees

As a result of a British proposal, which was supported by several other Member States, the new Comitology Decision of 28 June 1999 includes provisions on transparency and openness.[191] The new rules provide for improved access to information for the public and, in particular, the EP.[192]

The new Decision requires that the committees adopt their Rules of Procedure on the basis of standard Rules of Procedure, which must be published in the O.J.[193] The Rules of Procedure of each separate committee are not subject to any publicity obligations. Under the new Decision, the Commission is further obliged to publish in the O.J. a list of all comitology committees, which specifies in relation to each committee the basic instruments under which the committee is established.[194] From 2000 onwards, it must also publish an Annual Report on the working of the committees (Article 7(4)).

Besides these publicity duties, which foremost increase the transparency of committees (composition and functioning), the standard Rules of Procedure stipulate that committee discussions shall be kept confidential (Article 14(2)). Before the adoption of the new Decision, the proceedings of the committees were also made confidential by the basic regulation that set them up or their Rules of Procedure. The "draft " Rules of Procedure, which were not published, contained the provision that "the workings of the committee are secret."[195] The confidentiality Rule has thus been kept. However, the Decision and

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[189] Working document of the STOA panel, op cit., p. 30. See Commission Press Release, DN IP/98/532, 15 June 1998.

[190] See Case T-188/97, *Rothmans International BV v. Commission* [1999] ECR II-2463.

[191] Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, O.J. L184/23, 17/07/1999. The Commission has also played with the idea of including provisions on openness in the Decision itself. However, this idea did not find its way into the final proposal (see the Commission discussion paper on public access to Commission documents of 21 April 1999, op cit.. It should be stressed that this documents is just one in a number of drafts regarding a new Communication on openness).

[192] The new Decision grants, furthermore, the EP the right of scrutiny in those cases where, due to the lack of agreement in the Committee, the Commission refers to the Council a proposal for implementing measures (of instruments adopted by the co-decision procedure). The Decision lays down in detail the Commission's obligation to inform the EP, as to allow the latter to exercise fully its right of scrutiny. The references of the documents which the Commission is required to send to the EP will be set out in a register (from 2000 onwards).

[193] Standard Rules of Procedure Council Decision 1999/468/EC Rules of Procedure for the committee, O.J.C 38/3, 06/02/2001.

[194] Information from the Commission. List of committees which assist the Commission in the exercise of its implementing powers, O.J. C 225/2, 08/08/2000.

[195] See also the Commission's internal guide for officials, p. 14. For example, Article 12 Rules of Procedure of the Customs Code Committee determines that "the work of the Committee shall be treated as confidential. The chairman may lay down rules for the application of this principle in specific cases, in agreement with members of the Committee."

standard Rules determine further that the rules on public access to documents applicable to the Commission shall also apply to the comitology committees.[196] Before this Decision, the Commission was of the opinion that comitology committees do not form part of the Commission's infrastructure and, therefore, documents of these committees would not fall under the Code of Conduct and its Access Decision.[197] This interpretation was rebutted by the Court in the *Rothmans* case, delivered after the adoption of the new Comitology Decision (see §6.2.3.).[198]

Although the committees' meetings are still covered by the confidentiality principle, with the result that documents such as agendas, draft measures and minutes are not published, the extent of openness in respect the decision-making process of comitology committees has nevertheless been improved.[199] As a result of the new Decision and the Court's ruling in *Rothmans*, documents of comitology committees have been brought under the Commission's general access regime.

[196] See Article 7(2) of the Decision and identical Article 14(1) of the standard Rules of Procedure. It is for the Commission to take a decision on requests for access to these documents.
[197] The Commission considers itself the author of the agendas and the draft measures, but not of the minutes of each comitology committee: see *Rothmans v. Commission*, op cit.
[198] Ibid.
[199] In the above-mentioned discussion paper of 21 April 1999, op cit., the Commission mentions that the opinion of the Committee should in principle be accessible, whereas access to the minutes would be subject to the agreement of the members of the Committee. Agendas and draft measures as they constitute Commission documents would be covered by the Code of Conduct.

5.6 Concluding observations

Since the emergence of the transparency and openness debate in the early 1990s much has been achieved. In this chapter, the changes made to the rules on publicity of legal instruments, meetings and documents have been analysed thoroughly. It follows clearly from this analysis that considerable progress has been made, and that the extent of openness in the decision-making processes has been greatly improved.

The Council has opened up to a large extent its decision-making process, in particular, the legislative process. Since 1992 the Council's Rules of Procedure provide for the keeping of public meetings. These debates must be held on the Presidency's, and if appropriate, on the Commission's work programme and on at least one important legislative proposal. The Council may decide by qualified majority on the holding of other debates which concern an important issue affecting the interests of the Union. The debates which have been kept up to now mainly concerned big general issues. The debates have been criticised as constituting the dull reading out of speeches, and also complaints have been heard about the fact that too few meetings have been held on important legislative proposals. When the Council acts as a legislature, its meetings still take place behind closed doors. The practice of public meetings seems to constitute more an example of cosmetic rather than concrete openness.

Despite the fact that the Council legislates in private, the legislative process has been opened up through increased publicity of documents relating to this process. Transparency is enhanced by the publishing of calendars of all Council meetings, and the list of items on the provisional agenda of the Council and preparatory bodies when the latter acts as a legislature. The Treaty of Amsterdam guarantees further a certain degree of openness by requiring the publication of records, explanations of vote, and statements when the Council acts as a legislator. In addition, the Rules of Procedure require for the publishing of all items in the minutes (Article 9(1)). As a result of the above-mentioned changes, the public is now much better equipped, at least in theory, to scrutinise that part of the legislative process which is in the hands of the Council of Ministers, and to keep its ministers accountable at the national level (see remarks made in 5.3.4.2.2). However, as stressed before minutes are very short. Moreover, one should not forget that normally people also have access to verbatim records of national parliaments. It should further be recalled that the legislative process is largely conducted in the preparatory bodies and not in the Council of Ministers. Therefore, access to documents related to the preparatory working groups and Coreper meetings should be more accessible if there is to be genuine legislative openness. This view has been expressed by the European Parliament, which in its Resolution of January 1999 called for practical steps to improve access to "Council documents when it is acting in its legislative capacity" (Article 207 EC). It

expressed the belief that "Council documents" should also include full texts of Council meetings, as well as documents related to preparatory Council working groups and Coreper meetings.[200]

To the extent that the legislative process is in the hands of the European Parliament, transparency and openness are guaranteed. The plenary meetings of the EP are open, and so are its committee meetings. It must be recalled that public committee meetings were not a feature of the EP from the beginning. It is only since mid-1990s that all Parliamentary committees began to meet in public. However, documents underlying the legislative process have been made available to the public from the start, and access can even be obtained to draft reports which are still under discussion in the committees.

As far as the Third Pillar is concerned, many changes have been made in the last few years in favour of openness. First of all, under the current Rules of Procedure all formal instruments and initiatives adopted under the Third Pillar, except for the common position, must now be published as a rule. Also the decision-taking process under this Pillar has been opened up considerably as a result of the widening of the definition of when the Council is acting as a legislature. Under the current Rules of Procedure, the Council is also acting as a legislator when adopting the main Third Pillar instruments. As a result, all items mentioned in Article 9(1) are also published automatically in respect of the main Third Pillar decisions. Finally, certain initiatives of the UK Presidency led to the adoption by the Council of other measures to enhance transparency and openness in this Pillar. For example, the adoption of a database concerning measures adopted in the Third Pillar and the making available of calendars of the K4 Committee and other JHA working groups. These changes seem to support the conclusion that there is a growing recognition of the importance of Third Pillar decisions. In respect of publicity of decisions and documents relating to the decision-taking process, the Third Pillar rules are increasingly on a par with those of the First Pillar.

This is clearly not the case in respect of the Second Pillar. The Rules of Procedure as regards the publicity of legal instruments and documents relating to the decision-taking process, have remained largely unchanged in respect of the Second Pillar. These Rules, which initially applied to the Second as well as to the Third Pillar, still require an unanimous Council decision to make instruments adopted under the Second Pillar public. This rule has only been eased to some extent in respect of measures implementing joint actions and common strategies, as under the current Rules of Procedure a simple majority instead of unanimity is now sufficient to make such measures public. The extent of openness of the decision-taking process has not been improved worth mentioning over the years. Publication of records of vote require an unanimous decision, whereas explanations of vote, statements and items in the minutes can be published on request. The lack of openness in this Pillar is of course not so strange given the sensitive issues which make up this Pillar. Also at national level diplomacy is the least open of government activities.

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[200] See Bulletin 1/2 1999. In this resolution, the EP also proposed various steps to extend the practice of open meetings, and it advocated greater use of the internet for legislative proposals, comitology texts and other important EU documents, in order both to inform and also, where appropriate, to consult EU citizens and organisations. It further made suggestions for the implementation of the Amsterdam provisions on openness.

The last important problem, which has been discussed in this chapter, regards the committees which assist the Commission in the preparation and implementation phase of the policy-making process. These committees, which constitute prime examples of opaqueness and secrecy, have become the focus of criticism in recent years. This has led to some improvements as regards the Scientific and Comitology Committees. The BSE-affair has led to a complete reform of the system of Scientific advice, and as a result the new Scientific Committees have been made subject to a number of transparency and openness duties. Furthermore, the new Comitology Decision includes certain transparency and openness provisions. However, the majority of consultative and expert committees are still lacking in transparency and openness. No mandatory rules on publicity of documents relating to the decision-making process exist, and neither are such documents provided on the Commission's/Committee's own accord. These documents are, however, covered by the Commission Decision on access to its documents. It follows that in respect of the committee-system in particular still much could be done to enhance transparency and openness.

The above overview of what has happened in the field of openness and transparency shows that a number of important changes have been made since these issues appeared on the Union agenda. It equally shows that the progress has not yet gone far enough, and that there are still parts of the decision-making process which suffer from a lack of openness and transparency.

6 PUBLIC ACCESS TO EUROPEAN PARLIAMENT, COUNCIL AND COMMISSION DOCUMENTS ON REQUEST

6.1 Introduction

The Code of Conduct on public access to Council and Commission documents has been in force since 1994. The Code of Conduct, which is an inter-institutional instrument between the Council and the Commission, was adopted through the Council's Rules of Procedure by simple majority vote.[1] The Council and the Commission subsequently implemented the Code through separate Decisions of 20 December 1993 and 8 February 1994 respectively.[2] Right after the adoption of the Code, the Netherlands brought a case to the European Court of Justice (ECJ), in which it challenged the legal basis of the Council Decision 93/731/EC (Article 22 Rules of Procedure, and Article 155 EC).[3] It argued that the very purpose of the rules laid down in the Decision was to create rights for citizens, and, therefore, they could not have been adopted on the basis of provisions authorising the Council to adopt measures to its internal organisation and functioning (see §4.5.2). The Netherlands lost the case, and the Court ruled that as long as the legislator has not adopted general rules, the institutions must adopt such rules by virtue of their powers of internal organisation (see §4.5.1). In the seven years of its application, only small procedural changes have been made by the institutions to their implementation Decisions, except for the recent amendment made by the Council to its Decision on Access in July 2000. This amendment restricts the scope of the Council Decision on Access as far as documents relating to the Second Pillar are concerned. It should be stressed that this change has been heavily criticised in the academic literature and by various Member States, and has led to a case being brought to the Court of Justice by the Netherlands and Sweden.[4]

In the first part of this chapter, the different aspects of the Code of Conduct and the various problems which have emerged in practice will be analysed. The rules of the European Parliament (EP) shall be treated only briefly as the main problems regarding access to documents concern the implementation and application of the Code of Conduct (§6.2). Besides the analysis of the rules on access, two related

[1] Code of Conduct concerning public access to Council and Commission documents (93/730/EC), O.J. 1993 L340/41. The Netherlands voted against the adoption of the Code of Conduct (see §4.5.2.1.).
[2] Council Decision of 20 December 1993, O.J. 1993 L340/43 (hereinafter Decision 93/731/EC). Commission Decision of 8 February 1994, O.J. 1994 L46/58 (hereinafter Decision 94/90/ECSC, EC, Euratom). The Commission declared in Article 1 of its Decision 94/90 that the Code of Conduct has been adopted, whereas the Council reproduced in its Decision 93/731, with some additions, all the provisions of the Code.
[3] Case C-58/94, *Netherlands v. Council* [1996] ECR I-2169.
[4] The case has been filed as (C-369/00). See further §6.2.2.2.2.

problems will be treated, namely, the existing relationship between general rules on access to documents and specific provisions regarding disclosure/secrecy existing in the European Community (EC) and the relation between the Community rules and national rules on access to documents (respectively §6.3. and 6.4).

In the second part of this chapter (§6.6), the role of the European Court of Justice and the Ombudsman respectively in the field of access to documents will be examined in detail. The Court has started to build up its case-law in the field of access to documents, and to date, it has delivered judgements on twelve cases.[5] Initially it has limited itself to a marginal review mainly consisting in a review of the correct procedure to be followed, whereas in later cases an initiation of a more substantive review can be observed. Besides lodging a complaint with the Court, citizens who have been refused access can also complain to the European Ombudsman. Complaints to the Ombudsman are more frequently made, given the fact that the procedure is relatively informal, less time-consuming and there are no costs involved. These elements make the route to the Ombudsman a valid alternative to judicial review. Besides his redress-related role, the Ombudsman has played an active role in opening up to scrutiny other institutions and bodies than the Council and the Commission through his two inquiries made on his own initiative, into the existence of rules on public access in respect of 19 other institutions and bodies.

[5] The following cases concerning access to documents have been decided: Case T-194/94, *Carvel & Guardian Newspapers Ltd. v. Council* [1995] ECR II-2767. Case C-58/94, *Netherlands v. Council* [1996] ECR I-2169. Case T-610/97 R, *Hanne Norup Carlsen and others v. Council*, Order of the President of the CFI of 3 March 1998. Case T-105/95, *WWF v. Commission* [1997] II-313. Case T-124/96, *Interporc Im- und Export GmbH v. Commission* (Interporc I) [1998] II-231. Case T-92/98, *Interporc Im- und Export GmbH v. Commission* (Interporc II) [1999] ECR II-3521. Case T-83/96, *Van der Wal v. Commission* (Van der Wal I) [1998] II-545. Case C-174/98 and C-189/98, *Netherlands and Van der Wal v. Commission* (Van der Wal II), judgement of the ECJ of 11 January 2000. Case T-174/95, *Svenska Journalistenförbundet v. Council* [1998] ECR II-2289. Case T-188/97, *Rothmans International BV v. Commission* [1999] ECR II-2463. Case T-14/98 *Hautala v. Council* [1999] ECR II-2489. Case T-309/97, *Bavarian Lager Company v. Commission* [1999] ECR II-3217. Case T-188/98, *Kuijer v. Council*, judgement of the CFI of 6 April 2000. Case T-20/99, *Denkavit Nederland BV v. Commission*, Judgement of 13 September 2000.

6.2 The Code of Conduct on public access to Council and Commission documents

6.2.1 General principle and beneficiaries

The Code of Conduct lays down the general principle that the public will have the widest possible access to documents held by the Council and the Commission. Any person may apply (in writing) for access, without having to state their reasons for the request.[6] Moreover, no category of applicants is eligible for special treatment under the Code (i.e. Members of the EP, journalists or governments). There is, however, no provision that stipulates that the applicant has the right to remain anonymous.[7]

An occupational breakdown of those requesting documents, in particular, from the Commission shows that the Code is used by a limited, highly specialised public, and not so much by the ordinary citizen. In 1999, out of 408 requests made to the Commission, 26.5% derived from academics, 17.6% and 18.4% respectively from lobbies and lawyers, and only 10.5% from ordinary citizens (fifth place after public authorities).[8] In the same year, the Council received 889 requests for documents, of which 24% derived from academics, 8% and 9% respectively from pressure groups and lawyers, but most applications were made by a mixed group labelled "other" (45%). This last group must also include the requests of ordinary citizens, but the exact percentages cannot be traced. In 2000, the number of applications has risen in the Council to 1294 requests. The professional origin of the applicants has remained almost the same.[9]

The above figures lead to the conclusion that the alleged lack of transparency in the European Union (EU), at least as far as the ordinary citizen is concerned would not seem to have been remedied by the introduction of such measures as access to documents rules, but in all likelihood measures such as the provision of easily understandable and accessible information on EU affairs are more significant for the citizen.

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[6] See *Interporc I*, op cit., §48 (regards Commission Decision 94/90).
[7] Österdahl (1998), p. 351.
[8] The publication of the Commission statistics has been delayed due to the considerable work surrounding the drafting of the new Regulation on public access to documents (checked on 04/07/2001).
[9] The group "other" remained the largest group (42%), followed by respectively academics (25%) and industry (10%).

6.2.2 The scope as far as the objects are concerned

6.2.2.1 General

Despite the formulation of the general principle, access can be obtained only to documents "drawn up" by the Council and the Commission. This follows from paragraph 5 of the Code, which stipulates that "where the document held by an institution was written by a natural or legal person, a Member State, another Community institution or any national or international body, the application must be sent direct to the author" (the so-called "authorship rule"). This paragraph, although not presented as such, functions in practice as an exception, as it excludes from the access policy all incoming documents.[10] The Court of First Instance (CFI) noted that the authorship rule, like any exception, must be construed and applied strictly so as not to frustrate the application of the general principle of transparency.[11] Although not having an equivalent in the law of most Member States, which grant access to documents in the possession of ("held by") the government,[12] the CFI has ruled in *Interporc II* that the authorship rule, according to the present state of Community law, is valid.[13]

Recently the Ombudsman observed in the context of a complaint regarding a refusal of access to documents, that the authorship rule was placed in the section of the Code which deals with initial applications.[14] He noted that it is, therefore, arguable that, in the case of confirmatory applications, the normal provisions of the Code apply. He explained that if the applicant has made no efforts to obtain a document from its author, then, on this interpretation, it could be appropriate for the Commission to refer to the authorship rule. However, if the applicant shows that he has been unable to obtain the document from the author, then, on this interpretation, the Commission should grant access, unless one or more exceptions in the Code apply. Although such argumentation might be legally possible, the very idea behind the adoption of the rules was precisely to exclude access to third-party documents. The new legislation puts an end to the need for such questionable constructions to obtain access to third party documents, as it grants access to documents "held by" the institutions (see Chapter 7).

Another limitation is that access is given only to documents and not information. The latter term is wider, as it also includes access to electronic information. Moreover, it might require also some activity of the

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[10] See the ruling of the CFI in Case T-188/97, *Rothmans International BV v. Commission*, op cit., §55. See also the remarks of the Ombudsman in respect of the identical Article 2(2) Council Decision 93/731. See complaint 1056/25.11.96/STATEWATCH/UK/IJH (30-06-1998).

[11] Ibid. *Rothmans v Commssion*, op cit.. The rule regarding the exceptions was laid down by the CFI in *WWF v Commission*, op cit., see §56.

[12] See for example, the Dutch and Swedish legislation on public access to documents.

[13] See *Rothmans* and *Interporc II*, op cit..

[14] See his draft Recommendation to the European Commission in complaint 713/98/IJH.

public authorities.[15] For example, they might need to gather information from various sources to satisfy the applicant's request for information. A documents is defined as "any written text, whatever its medium, which contains data drawn up by the institutions" (paragraph 2 of the Code of Conduct). This definition extends access to electronic information, but it is limited to written texts (see further Chapter 7).

Under the Code of Conduct, an application may be made for all "internal" documents. Internal documents have been defined by the Commission in its Guide for the public as documents which are not yet finalised or not intended for publication. For example, access can be obtained to preparatory documents, such as preliminary drafts, draft proposals for legislation, interim reports and explanatory documents. It should be mentioned that the Code is more liberal in respect of disclosure of internal documents than the national legislation of most Member States. Whereas it is quite usual to find some kind of restriction, in national legislation on access to documents, on the disclosure of internal documents, no such restriction is contained in the Code of Conduct. For example, even a country such as Sweden, which is considered to be very open, provides for restrictions in respect of internal documents. The Swedish law gives access to "official" documents.[16] A document is considered to be official if it is in the keeping of a public authority, and if it is deemed to have been received, prepared or drawn up by an authority. A document which is drawn up by a public authority is an "official document" only if the matter or case to which it relates has been settled or if the document does not relate to a specific matter or case, when it has been finally checked and approved by the authority, or when it has been finalised in some other manner (Article 7 Freedom of the Press Act).

The Code is much wider as it does not make the release of a document dependent upon the stage of the decision-making process. It is not necessary that the decision to which the document requested relates has been taken. Naturally, the stage of a particular decision to which the documents relate may influence the decision as to whether or not to release a document, but it is not a fixed condition for granting access. For example, the Council has relied upon the argument that the documents relate to ongoing proceedings or that the decision to which they relate has just been taken to refuse access to documents under the exception concerning "the confidentiality of its deliberations").[17] Furthermore, access can also be obtained under the Code of Conduct to unfinished documents.

Another limitation provided for under the Swedish legislation is that it excludes from the definition of *"official"* documents, preliminary outlines or drafts and memoranda that have not been filed. This does not mean that they can never be accessed, but that the moment is delayed until they have been filed, which ensures a certain maturity of the file. Documents of this nature are, however, covered by the Code of Conduct.

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[15] Curtin (2000), p. 16.
[16] Article 3 of Chapter 2: "On the public nature of official documents" (Freedom of the Press Act 1766).
[17] Council Report on the implementation of Council Decision 93/731/EC 1996-1997, p. 11. See further the complaints made to the European Ombudsman, §6.6.3.2.

The Danish legislation is rather restrictive in respect of the disclosure of internal documents. The Danish law excludes from the right of access, in principle, all "internal case material," although an exception is made in respect of "internal case material" which becomes available in its final form under certain circumstances.[18] It should, however, be noted that, under both the Swedish and Danish legislation, a documents loses its internal character if it has been submitted to another authority (see Chapter 7).[19]

6.2.2.2 Documents relating to the Second and Third Pillar

6.2.2.2.1 General

In two separate cases, *Svenska Journalistenförbundet (Tidningen)* [20] and *Hautala,* [21] the Court of First Instance has ruled that the Council Decision on Access also applies to documents which have been adopted in the framework of respectively Titles V and VI of the Treaty on the European Union. In *Journalistenförbundet*, the Court held that Decision 93/731 expressly provides that it is to apply to all Council documents, irrespective of their content. Moreover, the CFI referred to Article 41 (ex Article K.13, former Article K.8) TEU, which makes the Council's Rules of Procedure (Article 207(3) EC Treaty, ex Article 151(3)),[22] which constitutes the legal basis for Decision 93/731, applicable to measures within the scope of the Third Pillar.[23] This ruling has been commended in the literature as constituting a bold decision, in which the Court did not hesitate to enlarge the scope of the Council Decision on Access.[24] However, it should be noted that the Council has never refused access to documents on the grounds that these documents are adopted under the Third Pillar (or Second Pillar).[25] The ruling was, therefore, confirming the rightness of the Council's practice. It should, however, be stressed that the information relating to the Second and Third Pillar is generally more sensitive, and that access will therefore be refused more often. In the above-mentioned cases, the parties contested the jurisdiction of the

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[18] See Article 7 and 8 of the Danish Access to Public Administration Files Act, Act No. 572, 19 December 1985.
[19] When a document is submitted to others is not always easy to determine: see the PUBLAW Country Report on Denmark, p. 12. This Report was drawn up under the auspices of the Commission and finalised in January 1991.
[20] *Svenska Journalistenförbundet v. Council*, op cit., §81-83.
[21] *Hautala v. Council*, op cit., §41-42.
[22] Article 207(3) EC Treaty stipulates that "the Council shall adopt its rules of procedure."
[23] The same reasoning was used by the CFI in applying Council Decision 93/731/EC to documents adopted within the framework of Title V (Second Pillar). It referred to Article 28 (ex Article J.18, former Article J.11(1)) of the Treaty on EU, which constitutes the correspondence of Article 41 TEU.
[24] Dyrberg (1999), p. 161.
[25] In *Carvel & Guardian v Council*, which concerned a Council decision refusing access to Third Pillar documents, the Council did not argue that these documents fall outside the scope of the Access Decision, but that they fall under the exception of the protection of "the confidentiality of its deliberations," op cit.

CFI to review decisions regarding access to documents relating to matters covered by Titles V and VI (see §6.6.1).

6.2.2.2.2 The exclusion of classified ESDP documents from access under Council Decision 93/731/EC

On 14 August 2000 the Council adopted, by written procedure, a Decision amending its Decision 93/731/EC on public access to documents to exclude certain classified documents relating to the European Security and Defence Policy (ESDP) from its scope.[26] The amended Access Decision stipulates that "the public shall have access to Council documents, *except for documents classified as TRES 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 (...) (the passage in italics is new).

This amendment fundamentally changes the former Council Decisions on access, whereby citizens could get access to any Council document, except where an exception applied as laid down in Article 4 of Council Decision 93/731/EC. Documents, which relate to above-mentioned issues will be classified according to Council Decision of 27 July 2000 (see §6.3.4.2). Before this amendment, classification in itself did not constitute an obstacle to the release of documents under the Council's practice (see §6.3.4.2.2). The procedure would be, first, to examine whether the document in question could be released under the rules on access, and, if so, it would subsequently be declassified. The exclusion of the above-mentioned documents from access was justified in the preamble (until such time as they are declassified) by referring to "the seriousness of the consequences of disclosure of such documents, in particular, with regard to the prospective development of the new strengthened European security and defence policy, and the necessary confidence which those involved must be able to have at a crucial moment in the development of this policy." This exclusion was necessary in order for the Council to have access to Nato documents, which are subject to fairly strict security rules.

[26] This amendment to the 1993 Decision on public access to Council documents was agreed at the meeting of COREPER on 26 July and adopted by "written procedure" on 14 August 2000. See Council Decision of 31 July 2000 (10702/00 LIMITE). It has been proposed by the Secretary-General of the Council, Mr. Solana, and was adopted in Coreper, with the Netherlands, as the only Nato country, Sweden and Finland voting against. Council Decision 2000/527/EC amending Decision 93/731/EC on public access to Council documents and Council Decision 2000/23/EC on the improvement of information on the Council's legislative activities and the public register of Council documents, O.J. L 212/9, 23/08/2000.

The amended Decision makes no distinction between documents relating to operational activities and policy-making (which in principle should be public). It is also very broad, as it includes classified documents concerning "non-military management of crises," amongst which the European Police Force for Peace Operations. Moreover, Council documents 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 enable conclusions to be drawn regarding the content of classified information submitted by a third party may not be disclosed, unless written permission is obtained from that third party.[27] The effect of this rule is that non-classified EU documents in this area may not be disclosed. The decision is not taken by the Council, but by the third party. This provision was included because the exchange of information in this sensitive area will only work if the informant knows that the information submitted by him will not be disclosed (see the preamble). The list of exceptions was also changed so as to add under the collective notion of the public interest, the exception concerning the security and defence of the Union or one or more of its Member States and, military or non-military crisis management. Finally, a new sentence was added to Article 5 concerning the decision on requests for access. It determines that the Permanent Representative Committee shall ensure that the necessary measures are taken to ensure that the preparation of such decisions is entrusted to persons authorised to take cognisance of the documents concerned.

The "Solana" Decision[28] further overturns the Council's Decision of December 1999 to include references to classified documents on the public register of documents.[29] The above-mentioned classified documents will not be listed in the Council public register.[30]

The Council has expressed its intention to include this amendment also in the new legislation which should be adopted before the end of May 2001. This would clearly undermine the commitment in the Amsterdam Treaty, to grant a right of access to documents including those relating to the policy areas coming respectively under the Second and the Third Pillar (through Article 28 and 41 TEU). It would further violate the intention underlying the TEU, which enshrines the general principle that decisions must be taken in as open a manner as possible (Article 1). It can, however, be expected that any decision in this respect will face strong opposition in the EP. The latter lodged on 23 October 2000 a case with the Court arguing that the Council has breached its prerogatives by adopting decisions on a matter which is currently the subject of a legislative report going through Parliament.[31] Furthermore, the Netherlands,

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[27] To enable to contact the source of the information the time-limit to reply has been extended from one month to two month, Article 7(4).

[28] The author of the proposal of this Decision was the Secretary-General of the Council, Mr. Solana.

[29] See the Council Decision on the improvement of information on the Council's legislative activities and the public register of documents, 6 December 1999 (2000/23/EC, O.J. L9/22, 13.01.2000).

[30] See Article 2 of the Council Decision of 14 August (2000/527/EC), op cit.

[31] The EP has refused the Council's proposal to allow three members of Parliament (MEPs) access to classified documents. These members would be vetted and would be refrained from disclosing the content of the documents to other MEPs. This proposal was an attempt to head off Court action. See http://www.statewatch.org.news.

joined by Sweden, has decided to take the Council to Court as it contests the way the Decision was made (no consultation with national parliaments, EP or civil society), and that it was wrong to exclude a whole category of documents from access.[32]

6.2.3 The scope as far as the subjects are concerned: the problem of the "unity" of the institutions

The Code of Conduct applies only to the Council and the Commission. Although the Council is a "unitary" institution, there exist many different instances of decision-making. The Council is composed not only of the Council of Ministers, but also of several senior bodies, the most important ones are Coreper, the K4-Committee and the Political Committee. Besides those bodies, over 200 working parties/groups exist, which assist in the preparation of the Council's work. Although the above-mentioned bodies operate under three different Pillars, they are all part of the "unitary" Council. With regard to the Commission, this means that all Directorates-General/Departments and Task Forces up to the College are included.

However, it might not always be clear what bodies are part of the structure of the Council or the Commission, which has consequences for the application of the general rules on access to documents. For example, what about the many committees that are involved in the different phases of the EC/EU decision-making process? Are their documents Commission, Council or Committee documents? In other words, are these committees part of one of the institutions, and, if so, which one, or must they be considered as a separate body? If committees are considered to constitute a separate body, requests for access to documents of these committees have to be made to these committees directly. According to paragraph 3 of the Code of Conduct, applications drawn up by separate bodies must be sent directly to the author of the document ("authorship rule").

In cases of requests for access to documents, the Commission has made a distinction between the committees created by the Commission, and those created by the Council (which include the comitology committees). The first category of committees includes the consultative committees and expert groups, which assist the Commission in its discussion and formulation of policy initiatives. The Commission considers these committees as part of the Commission, and their documents are assimilated with those of the Commission. These documents are, thus, governed by the general policy on access to documents.

[32] See the website cited in previous foodnote. The Netherlands and Sweden took their decisions at respectively 22 and 28 September 2000. The case has been filed as (C-369/00). Finland sent an application on 3 November 2000 to intervene in support of the Netherlands.

Another important group of committees falling into the second category of committees are the comitology committees. These committees are created by the Council to control and assist the Commission in implementing Council decisions. The Commission chairs the meetings and serves as a secretariat for these committees. The Commission draws up most of the documents relating to comitology proceedings, i.e. agendas, draft implementing measures and minutes. It could, therefore, be argued that these documents fall under the general policy of access to document.

The Commission has followed another line of reasoning. In its opinion, agendas and draft measures constitute Commission documents, and are, therefore, covered by the general access regime. However, it has always refused access to the documents of comitology committees, such as minutes and Rules of Procedure, on the grounds that the Committee not the Commission is the author of these documents. Requests for access should therefore be made directly to the Committee itself on the basis of paragraph 3 of the Code of Conduct. The Commission is, thus, of the opinion that committees constitute a separate body and are not part of the Commission's infrastructure ("another Community institution").

The question as to whether comitology documents are Commission or Committee documents was the subject of the *Rothmans* case.[33] In this case, the applicant had requested access to various minutes of the Customs Code Committee under the Commission Decision on Access. The Commission refused access on the grounds that these documents are not Commission documents, and that it, therefore, is unable to send a copy on the grounds of paragraph 3 of the Code of Conduct. The applicant sustained that the minutes are drawn up by the Commission, and therefore the Commission is the materially and intellectual author of these documents. More importantly, the applicant noted that the rule on authorship is designed to protect *third party* documents. In his opinion, comitology committees belong to the Commission and do not constitute a "separate body" (third party). The Commission rebutted the arguments of the applicant, and explained that there is a difference between penmanship and intellectual authorship of documents. In the case of the minutes, it sustained that it is true that the Commission draws them up, but this technical work is not sufficient to confer authorship on it. The minutes are approved by the Committee, which is solely responsible for its deliberations. It rejected, further, the argument that the committee is merely an emanation of the Commission, which, in its opinion, misconstrues the role, functions and place of comitology committees within the Community's institutional structure. This observation would seem to be not incorrect. Comitology committees have been established to control the Commission, and therefore, it would be strange to see them as an emanation of the Commission.

Despite the long time it took to deliver a judgement, the Court was very brief in its ruling. First, it looked into the rightfulness of the argument that comitology committees are entirely distinct from and independent of the Commission, and secondly, that the documents in question are consequently not Commission documents. The Court ruled that comitology committees cannot be regarded as being

"another Community institution or body," neither do they belong to any of the other categories of third party authors within the meaning of the Code of Conduct. The Court pointed out that comitology committees assist the Commission in performing the tasks conferred on it, that the Commission provides the secretarial function for the Committee in question, which means that it draws up the minutes which the committee adopts, and that, like any other comitology committees, it does not have its own administration, budget, archives or premises and address of its own. The Court concluded that "for the purposes of the Community rules on access to documents, comitology committees come under the Commission itself. It is, therefore, the Commission which is responsible for ruling on applications for access to documents of those committees such as the minutes in question here."[34]

The Court is thereby stating explicitly that *for the purpose of the Community rules on access to documents*, comitology committees come under the Commission itself. It seems that the Court is trying to find a way to grant access to comitology documents, despite the difficulty of the relation between the Commission and the committees. It might be that the Court also felt strengthened in taking this approach, given the fact that the Commission's rules on access to documents have been made applicable to comitology committees pursuant to the new Decision on Comitology (28 June 1999). It is important that, besides the Court's judgement, the same rule has been laid down in secondary legislation. Whereas before its adoption, it would have been possible to adopt a provision excluding comitology documents from the scope of the future access regime, this has now become more complicated. As noted by Dyrberg, the Court's ruling would not have stopped such an exclusion from the Commission's access Decision, as due to the absence of a higher general principle of public access to documents in the Union, the institutions are free to limit the new right of access as they wish.[35] It should be stressed that the Comitology Decision further dictates the content of the new Regulation on access to documents. The above-mentioned judgement is further positive as the Court has prevented the introduction of such unworkable criteria as "penmanship" and "intellectual authorship."[36]

Besides the comitology committees, the Council has created other committees, for example, the committees which assist the Commission in the policy-preparation phase. But what committees does the Council consider as part of the Council for the purpose of the application of the Council Decision 93/731? And according to what criteria does it decide this? For the sake of transparency, it would be helpful if both the Council and the Commission were to draw up a list of committees, which they consider, for the purpose of the policy of access to documents, to be part of the Council or the Commission.[37]

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[33] See *Rothmans International BV v. Commission*, op cit.
[34] Ibid., §62.
[35] Ibid., p. 168.
[36] Dyrberg (1999), p. 167-168.
[37] This was already suggested by the Commission in the 1993 Communication on openness in the Community, in which it expanded upon the basic principles of access to documents, which it had set out in an earlier Communication. See Annex II attached to COM (93) 258 final, O.J. C 166/8.

Other "vertical transparency"[38] problems have emerged regarding the status of the "Presidency." According to the Council, the "Presidency" constitutes "another Community institution or body" within the meaning of Article 2(2) of the Council Decision on public access to documents (cf. §3 Code of Conduct). The Council noted that documents of the Presidency had to be requested directly from the latter. After a complaint to the Ombudsman in this respect, the Council changed its interpretation of the status of the Presidency.[39] It made a distinction between documents written by the Member State holding the Presidency in its capacity as Presidency of the Council, and those written by that Member State not relating to its role as Presidency of the Council. Only in the second case would Article 2(2) apply, and would the documents fall outside the Council Decision on Access. Similar interpretation problems have occurred in respect of documents of the Council's Secretariat, which in the Council's opinion constitutes a different institution to the Council.[40] Clearly, these episodes show how the Council has tried to resist granting access to these documents with unconvincing arguments.

The complaint led to another legal problem regarding documents of which the Council Presidency is a joint author.[41] The Council argued that Article 2(2) applies in the case of documents which are not established under the sole responsibility of the Presidency, but jointly by the Presidency and some other institution or body. The Ombudsman observed that Article 2(2) functions in practice as a *"de facto"* exception, and that, according to the case-law of the Court, exceptions have to be interpreted narrowly. To include documents of which the Council is a joint author within the scope of this Article would considerably broaden the scope of this exception, which would be contrary to the case-law of the Court. The Court made a critical remark to the Council, in which it rejected the interpretation of the Council as neither the express wording of Article 2(2) nor the case-law of the Court support the Council's position.

This narrow interpretation of the scope of the "institutions", which limits the scope of the Code in a vertical sense, strengthens the view that the institutions do not consider the issue of public access to documents as fundamental. The scope of the future right of access to documents is already very limited, as only the three main institutions will be covered, but if the scope of the new right is restricted further in this vertical sense, then the substance of the new right will indeed be rendered shallow.[42]

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[38] Curtin (1999), p. 78-79. She uses "vertical transparency" to refer to the many different instances of decision-making in the institutions.
[39] See complaint 1056/25.11.96/STATEWATCH/UK/IJH against the Council (30.06.98).
[40] Bunyan (1999), p. 36.
[41] This legal problem emerged within the procedure of the original complaint.
[42] Curtin (1998), p. 19.

6.2.4 Exceptions

The Code of Conduct contains two categories of exceptions to the general principle of the widest possible access.[43] The first category determines that the institutions "will" refuse access to any document where disclosure could undermine the protection of the "public interest" (public security, international relations, monetary stability, court proceedings, inspections and investigations), the individual as well as privacy, commercial and industrial secrecy, the Community's financial interests, and confidentiality as requested by the natural or legal persons that supplied the information or as required by the legislation of the Member States that supplied the information. The CFI has ruled that as this category is drafted in mandatory terms, the institutions *must* refuse access to documents if the relevant circumstances are shown to exist.[44] Actual harm is not required, the likelihood that disclosure will harm the public interest seems to be sufficient to refuse access to a document.[45] In *Interporc v Commission,* the CFI determined that before deciding on a request for access to documents, the institution must consider, *for each document requested,* whether in the light of the information in its possession disclosure is in fact likely to undermine one of the interests protected under the first category of exceptions" (italics added).[46] If so, the institution must refuse access to the document in question. In other words, a document-to-document approach is required, which also seems to imply a case-by-case approach.

Under the second category, the institutions *may* refuse access in order to protect "the institution's interest in the confidentiality of its proceedings." This category, drafted in discretionary terms, leaves it to the institution's discretion as to whether or not to refuse a request for access to documents relating to its proceedings (facultative exception). In the *Carvel & Guardian* case, the CFI observed that the institutions must, nevertheless, when exercising their discretion, balance the interests of the citizen in gaining access to its documents against any interest of their own in maintaining the confidentiality of their proceedings.[47] In this case, the Council refused access to several documents on the grounds that they related to its deliberations, and it had, therefore, no choice but to refuse them. This interpretation was rejected by the CFI. It seems that the balance of interest has to be performed in respect of each document.[48] It is not clear, however, whether the

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[43] See *WWF v. Commission*, op cit., §57. See *Carvel & Guardian Newspapers Ltd. v. Council* for the corresponding provisions of Decision 93/731 (Article 4), op cit., §63-65.

[44] See, in relation to the provisions of the Code of Conduct, the CFI's judgement in *WWF*, op cit., §58. See, in relation to the corresponding provisions of Decision 93/731 the CFI's ruling in *Garvel & Guardian*, op cit., §64.

[45] See *Interporc I*, op cit., §52 ("likely to undermine").

[46] Ibid.. This conclusion, according to the Court, follows from the word "could." See *Svenska Journalistenförbundet v. Council* for the same rule, but determined in respect of the Council, op cit., §112.

[47] *Carvel and the Guardian v Council*, op cit., §64-65. See, in respect of the corresponding provisions of the Code of Conduct, *WWF v. Commission*, op cit., §59.

[48] See Brunmayer's (Deputy Director General of the Secretariat General of the Council) contribution to the Conference on "Transparency and Openness" in Maastricht September 1997. He noted that "the ruling of the Court of First Instance in the *Carvel* case had an important impact on the Council's working methods, resulting in the careful 'balancing test' *as described for every document*" (italics added). See (1998), p. 73. This is also the view of

personal interest of the citizen in gaining access has to be weighed or the public interest in disclosure. The CFI's definition seems to suggest a claimant-defendant balance. In the *Carvel & Guardian* case, it ruled that the Council must "balance *the interest of citizens* in gaining access to its documents against any interest of its own in maintaining the confidentiality of its deliberations" (italics added)[49] Moreover, this interpretation seems to be the only correct one, as "the public right to know" does not (yet) exist in the European Union legal order. The balance test has, however, been difficult to perform in practice as, under the Code of Conduct, the applicant does not have to state his reasons for making the request for access. In fact, the Commission has acknowledged that this balancing test causes problems. [50]

The CFI explained that the distinction between the two categories of exceptions is related to the nature of the interest which the categories seek respectively to protect. The category of obligatory exceptions seeks to protect the interest of third parties or of the general public, whereas the category relating to the internal deliberations of the institution protects exclusively the interests of the institution.[51] It noted that exceptions within the first category may be invoked jointly with the one within the second category in order to refuse access to documents.[52] The CFI has, further, stressed that where a general principle is established and exceptions to that principle are then laid down, the exceptions should be construed and applied strictly so as not to defeat the application of the general rule.[53]

According to well-established case-law, legal acts have to be reasoned sufficiently so as to give, in particular, the parties the opportunity to defend their rights and the Court to exercise its supervisory powers.[54] The degree of specificity of the reasoning depends on the act in question (see below).[55] In *WWF v Commission*, the CFI laid down the specific requirements concerning the statement of reasons for a decision refusing access to documents under the first category of exceptions. This statement must contain, at least for each category of documents concerned, the specific reasons for which the institution considers that disclosure of the documents requested is precluded by one of the exceptions provided for in the first category of exceptions. This would permit, on the one hand, the interested parties to know the justification for the measure and to give them the possibility to check whether the institution has considered the request in the way described above, and on the other hand, to enable the Court to exercise its powers of review on the

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the Commission: see its (leaked) discussion paper of 22 January 1999 concerning the new legislation on public access to the institutions documents (SG.C.2/VI.CD/D(98)12). This document can be found on the website of Statewatch: http://www.statewatch.org/secreteurope.html.

[49] *Carvel & Guardian Newspapers Ltd. v. Council*, op cit., §65.

[50] See the Commission's discussion paper concerning the new legislation on public access to the institutions documents of 21 April 1999 (SG.C.2/VJ/CD D (99) 83), p. 10. This document can be found on the website of Statewatch, op cit..

[51] See *WWF v. Commission*, op cit., §60.

[52] Ibid., §61.

[53] Ibid., §56.

[54] See for the oldest case, Case 24/62, *Germany v Commission*, 1963 ECR.

[55] Hartley (1998), p. 124.

legality of the decisions.[56] Not much has been said about the duty to reason in respect of second category of exceptions, however, it is clear that at least from the reasoning should follow whether the balancing of interest test was actually performed (see *WWF v Commission*).

In the *Kuijer* case the Court observed that, depending on the context of the case, the test for establishing whether the requirements to state the reasons for a particular access decision has been satisfied may be more or less stringent.[57] During the confirmatory procedure the applicant, puts forward factors which are capable of casting doubt on whether the first refusal was well-founded; the Council must reply to the specific points made by an applicant during a confirmatory application. Although that particular case regarded a mandatory exception, the Court's observation seems not limited to this category but to be of a general nature. This judgement therefore makes the duty to state reasons considerably heavier than was the case before.

6.2.5 Procedural aspects of the Code of Conduct

6.2.5.1 Repeat applications and applications for very large documents

The Code of Conduct allows the institutions to find a "fair solution" in the case of "repeat applications" and/or those relating to "very large documents" (paragraph 4). This provision has been relied upon by the Council mainly in respect of the numerous applications made by two different persons (a journalist and an academic) for many documents relating to the Third Pillar.[58] During the years 1996-1997, they accounted for 58% of the documents applied for.[59]

The term "repeat applications" and "very large documents" is defined neither in the Council Decision nor in the Code, and has given rise to conflicting interpretations. A complaint concerning the Council's application of this provision was lodged in 1996 with the Ombudsman.[60] The Council had refused access to a request made by Mr. B for copies of minutes of fourteen meetings of the K4 committee, on the grounds that his request constituted a "repeat application," which applies equally to a "very large number" of documents. As a result, the Council applied a "fair solution", which consisted in the sending of five out of the fourteen documents. The confirmatory application, which was subsequently made in respect of the other nine documents, was refused by the Council on the same grounds. In its opinion to the Ombudsman, the Council explained that Mr. B uses a systematic technique to obtain access to all Council JHA

[56] *WWF v. Commission*, op cit., §64-65, and §66.
[57] Case T-188/98, *Kuijer v. Council*, judgement of the CFI of 6 April 2000, §46.
[58] Ibid., p. 17.
[59] Council Report on the implementation of Council Decision 93/731/EC, 1996-1997, p. 13.
[60] See the Decision of the European Ombudsman on complaint 1053/25.11.96/Statewatch/UK/IJH against the Council (28-07-1998).

documents. That technique consists of initially requesting the agendas of all Council bodies dealing with JHA matters, and then, subsequently requesting all documents included on those agendas. This constitutes, in its opinion, a "repeat application." According to the Council, the concept of a "repeat application" includes cases in which the same person regularly and systematically requests over a long period of time access to a large number of documents of the same type, through not necessarily the identical documents. The Council also claimed that the quantity of the documents requested is a separate criterion, which may justify the application of a fair solution, even if the request is not a repeat one. The request for documents was turned down on both grounds. According to Mr. B, a repeat application refers to a situation in which a person applies for the same document again and again. Moreover, he pointed out that the Code refers to very large documents and not a very large numbers of documents as was mentioned in the reply of the Secretary-General to his request.

In his Decision, the Ombudsman observed that, in practice, the provision operates as an exception to the general rule of the widest possible access to documents, and that, according to established case-law, where a general principle is established and exceptions to that principle are then laid down, the exceptions should be construed and applied strictly in a manner which does not defeat the application of the general rule (see above, *WWF v Commission*).

The Ombudsman rejected the Council's interpretation of "repeat application" and that of "a very large number of documents." It pointed out that "repeat applications" naturally refers to applications for the same documents.[61] Article 3(2) provides for the possibility of a fair solution to allow the Council to deal efficiently with cases in which the same person makes repeated applications for the same documents, hoping or claiming that the circumstances which motivated previous refusals may have changed. The Ombudsman observed that the Council Decision on Access does not impose any limit on the number of documents for which the citizen may apply as a right. If this were the case, there would also be a risk of infringing legal certainty, as no applicant would know beforehand how many different documents could be requested before the Council would consider the application to be a repeat application. He further rejected the Council's interpretation, which brings all applications for a "very large number" of documents within its scope, as this would lead to the same practical result as the interpretation of repeat applications by the Council. Similar arguments against such an interpretation therefore apply.

It is clear from the above that the Council tried, in the absence of another provision on which to rely, to stretch the scope of this provision in order to cope with applications which, in its own words, are manifestly excessive or involve disproportionate costs.[62] In its Report (1994-1995) regarding the implementation of the Council Decision on Access, the Council noted that "the very nature of certain applications sometimes elicits the thought that steps are being taken to test the system rather than exercise

[61] This is also the interpretation followed by the Commission.
[62] See the Council Report on the implementation of Council Decision 93/731/EC, 1996-1997, p. 13.

a legitimate option." It should be noted that the above persons claim to be monitoring the Third Pillar. Referring to the limited resources in respect of time and staff, the Council noted that it might, therefore, be worth considering whether provisions should be made for applications which are manifestly excessive, or involve disproportionate costs, to be refused, where appropriate, after examination of the reasons for the applicant's interest. In the opinion of the Ombudsman, the concern of the Council to safeguard the efficiency of its administration constitutes a legitimate concern. However, he observes that in order to protect its efficiency, the Council could rely upon its system of charging as a safeguard in dealing with requests for documents which impose a heavy administrative burden, as is done often in the Member States. The underlying problem of the Council seems not so much to be the fact that these requests upset its efficiency, that is to say its limited resources in respect of time and staff, but rather that it does not consider it legitimate for individuals to be "testing" its activities in such a way.[63]

If one considers that documents of the public authorities are, in principle public, except where the protection of certain public or private interests dictates otherwise, then the reason why someone requests certain documents, and who makes such request, is irrelevant. In the author's opinion, this seems to constitute a fundamental aspect of the principle of public access to documents. The European Ombudsman (EO) stressed that, as any person is entitled to make a request for documents without stating his reasons for making the request, access cannot legitimately be blocked by the Council simply because of a possible negative attitude towards the purpose for which a request has been made or the person who made it. Thus, testing seems permissible, but, with all other requests, if this places an excessive burden in terms of money and staff, then charging would seem to be appropriate. The idea of an access law is to provide openness, but at the same time, it should not paralyse the administration nor constitute a disproportionate burden on the tax-payers money. The difficulty is to determine how much one is prepared to pay for openness.

6.2.5.2. The internal procedure for handling requests for access to documents

The internal procedure concerning the handling of requests for access to documents is centralised in the Council and decentralised in the Commission. In the Commission, requests for access are examined by

[63] See, for example, the publication of the explanations of vote in respect of another request for access to documents of Mr. B., but identical as regards the type of application (Press Release 5326/97 (Presse 12)). "The Austrian, Belgian, French, German, Italian, Luxembourg, Portuguese and Spanish delegations supported the draft reply and the interpretation contained therein of the concept of "repeat applications" and "very large documents" (same as the Council's interpretation mentioned in the above text). "They consider that the applications by Mr B. are repeat applications, that they are contrary to the spirit of the 1993 Decision and that they abuse the good faith of the Council in its willingness to be transparent. They accordingly consider the reply to be fair within the meaning of the 1993 Decision." Sweden and the UK in their common explanation of vote (negative) rejected the interpretation of the two terms as given in the draft reply.

the appropriate Directorate-General (DG) or Service. In the event that it is going to refuse access, the DG/Service is supposed to consult beforehand the Unit in the General Secretariat (SG) which deals with transparency and public access to documents.[64] Although the DG/Service is not obliged to follow the opinion of the SG, it will pay due account to it given the fact that it is the task of the SG to review decisions on access to documents. In sensitive cases, the DG/Service also involves the SG in the event that it intends to grant access. Where an application has been rejected, the applicant is informed of the grounds for refusal, and then has one month to make a confirmatory application to have the initial decision reviewed by the Secretary-General (see Article 2(2) Commission Decision 94/90). The SG then examines, in collaboration with the Legal Service, the initial decision refusing access and writes the draft reply. Before the draft reply is sent to the applicant, it has to be approved by both the Legal Service and the Secretary-General.

In the Council, applications for access are dealt with by DG F of the Council's General Secretariat. The SG contacts the DG's concerned and the Legal Service and asks for their opinion about the application. The SG writes then a draft reply, which must be approved by the Legal Service. Where an application is rejected, the applicant can make a confirmatory application to the SG (see Article 7(1) Decision 93/731/EC). The SG also writes the draft reply to the confirmatory application, but the confirmatory application is itself decided upon by the Information Working Party (IWP). The IWP is one of the permanent groups that prepares the work of the Council. This Group is composed of the Press officers of the fifteen Member States, who are part of the Permanent Representation of their country residing in Brussels.

The Group normally meets once a month to discuss all kinds of issues relating to information policy, but it also decides on all confirmatory applications for Council documents. Before each meeting, the SG sends the delegations the confirmatory application and the SG's draft reply to it, the initial application and the SG's reply, and copies of all the documents applied for. At the meeting the release of each single document and on the SG's draft reply in total is approved by a simple majority vote. Sometimes a delegation lets its vote depend on another delegation. For example, delegation X may support delegation Y which feels very strongly about not disclosing a particular document, although delegation X does not see much harm in releasing it. Delegations sometimes ask the floor to explain why they voted against or in favour of the release of a particular document (declarations and explanations of vote can be attached to the minutes). The draft reply of the SG is changed in accordance with the outcome of the vote on each single document. In general, it is followed by the delegations.

The delegations can be categorised according to their attitudes towards openness. Member States that can be labelled as less progressive in access to document cases are, for example, Belgium, France and Spain, instead countries in favour of openness are, for example, the United Kingdom, Denmark, Sweden and the

[64] Unit SG/C/2 "Europe and the Citizen I."

Netherlands (shifts in attitude may occur).[65] This categorisation seems to reflect largely the national administrative cultures and attitudes.[66] It is important to bear in mind that each delegation acts upon the instructions of its government. If agreement is reached on the confirmatory application, the draft reply, eventually modified, is sent to Coreper II as an I-point, which means that no discussion is necessary at Coreper-level. Subsequently, it ends up as an A-point on the agenda of the next Council meeting.[67]

It is worth mentioning that access to the minutes (called summary conclusions) of the meetings of the IWP will in general be refused. The author applied for access to the minutes of the IWP covering the year 1996/1997. This application was refused almost in total on the grounds that these documents contained detailed positions of delegations, the disclosure of which could impede the efficiency of the Council's deliberations in the future. The balance of interest test subsequently conducted by the Council was in favour of keeping the Council's deliberations confidential. Given the nature of the meetings, detailed positions will almost always be expressed and written down in the minutes, with the result that the chances of gaining access to the minutes will be small.

The time-limit prescribed by the Code of Conduct to give a reply to the initial application, to make a confirmatory application, and to answer the confirmatory application is one month. The Council has amended its Decision on 6 December 1996 to allow the time-limit to be extended by one month in exceptional circumstances and provide for a report on the implementation of the Decision to be submitted every two years.[68] In case of a negative decision to a confirmatory application, the applicant may lodge a complaint, within one month, to the Ombudsman or the Court of Justice (see paragraphs 9-11 Code of Conduct). The Council and Commission Decisions on Access mean that a failure to reply within one month to an initial request constitutes a refusal, except where a confirmatory application is made. The same rule applies in case of confirmatory applications.[69] These provisions were not mentioned in the Code of Conduct. There is an incentive for the institutions not to reply in order to avoid having to state the reasons for their refusal and the possibility of making a confirmatory application, to lodge a case to the Court or complain to the Ombudsman.[70] The "fictive refusal" seems, however, a violation of the principle of the "rule of law." This principle requires that reasons are given for decisions, and a failure to reply amounts to a failure to give reasons. How can a citizen check whether the refusal was correctly

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[65] See also Bunyan (1999), p. xii.
[66] The UK is mentioned amongst the progressive countries, which can be explained by the fact that the Labour Party came into government. Under the Labour government, the UK has adopted its first FOI Act (November 2000).
[67] Half the confirmatory applications made during the period 1996-1997 were given unanimous replies by the Council, and a large number were voted down by only a few Members of the Council, see Council Report on the implementation of Council Decision 93/731/EC, 1996-1997, p. 5. The voting results usually reflect the votes taken at the preparatory level (IWP).
[68] O.J. L 325, 14 December 1996.
[69] See Article 7 (2) and (4) Council Decision 93/731/EC and Article 4 Commission Decision 94/90/ECSC,EC, Euratom.
[70] Code of Conduct, §10/11. See further Article 7 Council Decision 93/731/EC.

made, and whether it should make a confirmatory application or not? Moreover, the Secretariat General needs to know the reasons for the initial refusal in order to review the legality of that decision.

Applicants may have access to a document either by consulting it on the spot, which is the most appropriate way in the case of voluminous requests, or by having a copy sent at their own expense. The system of charging for copies is optional for the Commission, but fixed for the Council.[71]

Recently, the Court of First Instance had to decide the legal question as to whether the Council is obliged to consider the possibility of granting partial access to documents.[72] The Code and the Council Decision 93/731/EC are silent in this respect. The applicant argued that the Council infringed Article 4(1) of its Access Decision (exceptions) by refusing to grant access to the passages in the contested report, which are not covered by the exception based on the protection of the public interest. The Court concluded that Article 4(1) should be interpreted in the light of the right to information[73] and the principle of proportionality. From this it follows that the Council is obliged to examine whether partial access should be granted to the information not covered by the exception. However, the Court observed that the Council might balance the interest of public access to the passages against the burden of administrative work caused by deleting the parts covered by the exception. The Decision was subsequently annulled as it appeared that the Council had not undertaken such an examination, as it considered that the principle of access to documents only applies to documents, and not to the information contained in them.[74] The possibility for the institutions to rely on the principle of proportionality to refuse partial access seems small. The Court observed in *Kuijer*, that when the Council has to assess the risk that disclosure of documents could entail for the public interest, the removal of sensitive passages from the documents should not necessarily involve an intolerable burden of work for the institution.[75] Is that not what institutions always do, assessing whether or not disclosure might damage a protected interest? It seems, therefore, that partial access should in general to be granted.

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[71] Commission Decision of 19 September 1996 amending Decision 94/90/ECSC,EC,Euratom, O.J. L247, 28 September 1996. See Decision of the Secretary General of the Council of 27 February 1996 relating to fees in the context of public access to Council documents, O.J. C 74/3, 14 March 1996.

[72] See the Judgement of the CFI in *Hautala v. Council*, op cit.. See also the European Ombudsman's Decision concerning complaint 620/97/PD, in which the Ombudsman allowed the Commission to grant partial access. He accepted the refusal of the Commission to give access to the evaluative part of a report, as this was covered by exception.

[73] The Court looked at the basis on which Decision 93/731/EC was adopted in order to interpret Article 4. It noted that Declaration 17 and the Conclusions of the European Council in Copenhagen, which constitute the basis of the Code of Conduct, both refer to access to information. Moreover, the Court pointed to its case-law, i.e. *Svenska Journalistenförbundet*, (op cit.), in which it held that "the objective of Decision 93/731/EC is to give effect to the principle of the largest possible access for citizens to information," and to *WWF*, (op cit.), in which it ruled that exceptions should be construed and applied strictly as not to defeat the application of the general rule. See respectively §66 and 56.

[74] The Council has appealed this judgement (22 September 1999) arguing that the CFI committed a fundamental error of law in interpreting Article 4(1) in the meaning as legally requiring the Council to consider whether access should be given to parts of a document to which access is requested. See C-353/99 P.

6.2.5.3 Register

Crucial for making requests for documents is the knowledge that certain documents exist, which is made easier through a register. In fact, in several countries, for example Sweden, the establishment of a register is required by law and is seen as essential for the exercise of the right to access to documents and to enhance efficiency. At the 1996 IGC, Sweden, which modelled its proposal on its own access to documents system, proposed the inclusion of an Article in the Treaty, stipulating that the Council must decide on rules obliging the institutions to register documents, to keep public registers and to file them.[76] In practice, it has proved difficult for applicants to fulfil the requirement of the Code that applications for access must be made in a sufficiently precise manner and must contain information enabling the document(s) requested to be identified.[77]

In response to demands of the public, the Council has set up a register, which entered into force in January 1999. The register contains the titles, dates and document codes of non-classified Council documents.[78] Under a Decision taken by the Council under the Finnish Presidency in December 1999, the Council's register was meant to include the references to the document number and the subject matter of classified documents as from 1 January 2000. No reference would, however, be made to the subject matter if disclosure of this information could undermine one of the interests protected by the mandatory exceptions.[79] Up to now this initiative has not been implemented. According to the Council, this delay is the result of technical problems. Another explanation might be the fact that the Council was going to amend its Council Decision 93/731/EC in respect of classified CFSP documents (see paragraph 6.2.2.2.2).[80]

The register includes only definitive documents and does not contain working texts marked SN, DS, "non-paper", nor messages transmitted on the Courtesy (Coreu) network or by telex. Two other groups of documents which are not included in the register are documents drawn up before January 1999 and, internal documents, such as departmental memos.[81] These documents can, however, be obtained under the Council Decision on Access.

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[75] See *Kuijer v. Council*, op cit., §56.
[76] Swedish Working Paper of 20 May 1996, which was drawn up in the context of the 1996 IGC.
[77] See paragraph 1 Code of Conduct. The Council complained about the many vague requests it received in its Report on the implementation of Council Decision 93/731/EC, (1994/1995).
[78] The Council's register can be found at http://ue.eu.int/index.htm. Documents marked "restreint, confidential and secret" are excluded.
[79] Article 2 Council Decision of 6 December 1999 on the improvement of information on the Council's legislative activities and the public register of Council documents (2000/23/EC, O.J. L9/22, 13.01.2000). This Decision is the follow up to the Report on the first six months of the operation of the Council's register (not published, but accessible on request under the Code).
[80] "Solana plans for the security state agreed, an end to EU openness?" (27.7.00), at Statewatch's website, op cit.
[81] See the Commission discussion paper of 22 January 1999 on public access to documents, op cit.

The text of the documents is, in principle, not displayed, given the fact that access to the documents listed in the register is not automatic, but remains to be decided under the Council Decision 93/731/EC. However, in order to prevent bureaucratic overload, in particular, as a result of the substantial increase in the number of applications after the coming into force of the register, the Council decided that the content of documents which have been released shall be made available on the internet.[82] For the same reason, it decided to make available the agendas concerning meetings of the Council and its preparatory bodies (only senior bodies), when it is acting in its legislative capacity. The identification of documents will be facilitated by making available the provisional agendas, as these often contain references to the documents considered in respect of the legislative matter under consideration.[83] The initiative under the Finnish Presidency was more bold as the provisional agendas of all Council working parties were published on their website.

The EP, in its Resolution on the European Ombudsman's Special Report, welcomed the Council's initiative, and called on all Community institutions and bodies to establish such public registers in all languages, preferably through the internet. It further invited the Commission to include the setting-up of a register as a requirement in its new proposal under Article 255 EC Treaty.[84]

Following a complaint in this respect, the Ombudsman addressed in January 1999 a formal draft Recommendation to the Commission in which he urged the latter to set up a register.[85] The EO observed that the absence of a register severely restricts citizens' abilities to make use of the rules on access to documents. According to the Ombudsman, it is a basic principle of good administration that a public authority should maintain an adequate register of documents it holds including incoming and outgoing documents. The lack of such a register constitutes an instance of maladministration. The Commission responded that it would seriously think about setting up a register in the framework of the new Regulation on access. This register would in the first instance list only documents which are frequently requested. The Commission explained that it had not yet set up such a register given the technical problems involved.[86] The current system of registration of documents in the Commission is completely

[82] See Article 3 Council Decision on the improvement of information on the Council's legislative activities and the public register of Council documents, op cit. This should be the case as from 1 July 2000.

[83] When the register came into force, the Council issued an instruction, which stipulated that "confidential, restreint, SN and non-paper documents will not be included in the public register. For this reason, from now on these documents will not be mentioned in official Council documents (in particular, on provisional agendas and in outcomes of proceedings). Classified documents should, however, now be mentioned in the register. Statewatch has brought a complaint to the Ombudsman about this objectionable practice. See "Statewatch takes two new complaints against the Council over access to documents to the EO" (11 July 2000), at Statewatch's website, op cit.

[84] EP Resolution of 16 July 1998, O.J. 1998 C 292/170.

[85] See the Ombudsman' s Decision on complaint 633/97/PD against the Commission (EO Annual Report 1999, p. 234). The Decision includes the draft Recommendation of 29 January 1999. See further Press Release 1/1999, 04.02.1999.

[86] In an interview, a civil servant of the Commission noted that the Commission is currently preparing a register for the Secretariat General, which should be ready in September 2000 (to date, there is no sign of such a register on the website of the Commission). See Die Zeit Debatte about Freedom of Information in European Context. The debate was held between Preston M. of the Commission and Bunyan T. of Statewatch.

decentralised and depends on each DG or department separately. The EO was satisfied with this reply and closed the case. If in the future the Commission implements the idea of a register, which would only be limited to frequently requested documents, the author doubts whether this would constitute an "adequate" register of documents as demanded by the EO in his draft recommendation.

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at http://www.debatte.zeit.de/Forum37/HTML/000002.htm.

6.3 The relation between the general rules on access to documents and specific provisions regarding disclosure/secrecy

6.3.1 General

In the Community legal order, many specific provisions on disclosure or secrecy of information exist. These special rules can be divided into three categories: (a) special rules in respect of persons with a particular interest; (b) special rules on access to particular categories of documents, and; (c) special rules governing the confidentiality of certain documents.[87] These provisions are often enshrined in secondary legislation. The existence of such special provisions has given rise to problems of compatibility with the general rules on access to documents. These problems are caused because of the fact that the Code of Conduct has not regulated, in a satisfactory way, the relationship between the general and the specific rules. The key question is whether the special rules override the general rules. Under the current system this seems not to be the case.

6.3.2 Special rules for persons with a particular interest

6.3.2.1 " Access to the file"

The Commission noted that many requests for access made under the Code of Conduct that cause problems, relate to state aid or competition cases, procedures for recruitment competitions and invitations to tender.[88] The problems are caused because of the fact that in these fields special rules apply for persons with a particular interest.

An example relating to the special rules on competition nicely illustrates some of the compatibility problems that have emerged. In competition cases, the parties involved have specific rights in respect of access to the file as part of their rights of defence, whereas these do not extend to third parties. The preamble of the Code of Conduct mentions that "the said principles are without prejudice to the relevant

[87] See the Commission discussion paper on public access to documents of 22 April 1999 for various categories of special provisions (including examples), op cit.

[88] See, for example, rules on state aid and competition (see Annual Competition Report and the case-law); rules on the Staff Regulations of officials and other servants of the EC, for example, recruitment competitions; ACPC rules on invitations to tender; Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. See the Commission discussion paper of 22 April 1999, op cit.

provisions on access to the files directly concerning persons with a specific interest in them." As will be shown below, this provision does not prevent, however, the emergence of compatibility problems.

The Commission in 1997 adopted a Communication on the internal rules of procedure for processing requests for access to the file in cases pursuant Article 81/82 (ex Articles 85/86) EC Treaty, Article 65 and 66 ECSC Treaty and Council Regulation N4064/89 (mergers).[89] It stipulates that enterprises which are subject to the investigation must have access to all documents making up the file, except for the following categories of documents: business secrets of other businesses, other confidential information and internal Commission documents (drafts, opinions, memos). As regards internal Commission documents, the Communication stipulates that this category of documents is, as a matter of principle, inaccessible to the parties, as the Commission departments must be able to express themselves freely within the institutions concerning ongoing cases. Third parties have no access rights at all in respect of information contained in the files. The purpose of the Communication is to give enhanced access to the file only to the parties involved, but not to third parties.

Internal Commission documents are, however, covered by the Code of Conduct, which does not exempt from its scope the category of "internal Commission documents relating to investigations in competition cases." In respect of the parties, the Communication (codifying partly the case-law of the Court) seems to override the rules of the Code of Conduct, as the Code determines that the rules on access are "without prejudice to the relevant provisions of access to the files directly concerning persons with a special interest in them." However, third parties, including disguised parties, which use a strawman, may request access to these documents under the Code of Conduct. The documents in question may only be refused if an exception applies. Obviously there is a risk that third parties may obtain greater access to internal Commission documents via this route, than the parties involved under the Communication. This is obviously an illogical situation. The legal argument that the Commission's Access Decision does not apply, because special rules exist in this field of law which set aside the general rules, cannot be upheld (i.e. *lex specialis derogat legi generali*). The problem with this legal argument is that the Communication containing special rules on access does not amount to legislation.

Similar problems, as outlined above, emerge in state-aid and infringement cases. The parties concerned, to whom the special rules of access to the file apply, risk having lesser access to the documents than the general public (including the disguised parties) under the Code of Conduct. This problem no longer exists in respect of Commission documents relating to investigations into possible infringements of Community law, as the CFI has ruled in *WWF*, that these documents must be refused under the exception of the public interest "investigations."[90] The Commission might try to draw an analogy with the *WWF* case, in state-aid

[89] Van Miert Communication (97/C23/03). The Communication aims at ensuring compatibility between current administrative practice regarding access to the file and the case-law of the Courts.
[90] *WWF v. Commission*, op cit.. This case will be discussed in detail in §6.6.2.2.1.

and competition cases in order to refuse Code requests for Commission documents relating to the investigations into the infringement of these rules.[91]

6.3.2.2. The Data Protection Directive

The Data Protection Directive lays down rules regarding the protection of individuals with regard to the processing of personal data and on the free movement of such data.[92] Recently a conflict has arisen between the narrow interpretation of the Commission of the Data Protection Act, which prevents it from releasing certain information, and the principle of openness as laid down in Article 1 TEU. The Ombudsman relied upon the new Treaty provision to settle the case. The Ombudsman drafted a Recommendation to the Commission in which he recommends that the latter provides the names of those persons who have made submissions to the Commission in the light of an Article 226 (ex Article 169) EC Treaty procedure, and of the representatives of a trade organisation who attended a meeting in respect of the same procedure. The Commission argues that the Directive prevents it from releasing this information without first obtaining their consent. The Commission in an attempt to reach a friendly solution asked for the consent of those people, but managed only in 14 out of the 45 cases to obtain it. The Ombudsman issued a draft Recommendation arguing that the Commission had misunderstood its obligations under the Data Protection Act, and has infringed the principle of openness.

6.3.3 Specific rules applicable to certain categories of documents

6.3.3.1 General

Under this category come, for example, the special rules on statistics, information relating to the budget, and rules on opening historical archives to the public.[93] Since 1999, the Community has adhered to the UN Convention on the Environment, which contains rules on public access to environmental information. The adherence to this Convention has given rise to compatibility problems between the special rules on

[91] In respect of competition cases it might also try to rely upon Article 20 Regulation 17 (professional secrecy).
[92] Directive 95/46/EC of the EP and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the freedom of such data, O.J. 1995 L 281/31.
[93] See for the rules on opening historical archives to the public (Council Regulation of 1 February 1983 and Commission Decision of 8 February 1983- O.J. L 43, 15 February 1983) and for the rules on statistics (Council Regulation of 11 June 1990- O.J. L 151, 15 June 1990). See the Commission discussion paper of 22 April 1999, op cit.

access laid down in the Convention and the Code of Conduct. Below, this problem will be discussed very briefly, followed by a discussion of the rules on Archives.

6.3.3.2 The UN/ECE Convention on Environment [94]

The UN/ECE Convention on the Environment lays down rules on public access to environmental information, participation and access to justice in the field of environment. The rules on public access to environmental information are drafted wider than those of the Code of Conduct. For example, the Convention grants access to information, whereas the Code only to documents. Another difference is that the Convention provides in respect of certain exceptions for a public interest test, whereas such a test is absent in the Code of Conduct. As the Commission (SG) wanted to keep one general system of access to Council and Commission documents in the Community legal order, the Community could not adhere to the Convention in so far as it grants wider access to environmental information than the Code of Conduct. Allowing the existence of a separate system for access to environmental information alongside the general system would endanger the unity of the access system. Moreover, this would entail the risk that other DGs would also argue that they need special rules on access in their policy fields, with negative effects from a transparency point of view. In the end, the Community has acceded to the Convention under the reservation that the rules on access to environmental information are applied as far as they do not prejudice the Code of Conduct.

6.3.3.3 Archives rules

The rules concerning the opening to the public of the historical archives of the institutions of the EC and the EAEC, on the one hand, and the ECSC, on the other, have been laid down in Council Regulation 354/83/EEC, Euratom and Commission Decision 359/83/ECSC respectively.[95] In general, the historical archives are open to the public after the expiry of a period of 30 years starting from the date of the creation of the document or record. The historical archives contain not only the documents drawn up by the institutions, but also those which it has received. It, therefore gives, wider access than that given to

[94] UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). This Convention was adopted 25 June 1998, and will enter into force when sixteen countries will have ratified or approved the Convention. See at: http://www.unece.org/europe/pp. On 04/07/2001 there were registered 40 signatories and 13 parties.

[95] The Council Regulation also applies to the Court of Auditors and the ECOSOC. The Commission Decision also applies to the Consultative Committee and the Court of Auditors. The content of both measures is identical (except

current documents under the Access Decisions. The public shall, however, have no access to documents and records that have been graded by the institutions as confidential or higher, unless they have been declassified according to established rules.[96] In case they have been drawn up by the Member States, the institutions shall abide by the classification established by the originator. It should be noted further that the Regulation prevents the release to the public of classified documents of the institutions through national archives on terms less strict than those laid down in the Regulation (see beneath paragraph 6.3.4.2.2.).[97]

6.3.4 Other provisions governing the confidentiality of certain documents

6.3.4.1 Provisions on secrecy in secondary law

In many Member States, special laws exist to protect certain categories of information/documents from disclosure by the public authorities. These special laws usually set aside the general rules on public access to documents. The need for special rules is felt necessary, as public authorities collect enormous amounts of information in the context of the daily running of the administration. As most national laws provide for access to documents "held by" the public authorities, these special provisions protect, in particular, information which it received from outside. A good example is the UK, which has included in more than 250 Acts, regarding different policy fields, special secrecy clauses in respect of (confidential) information which has been collected or received from external sources by the public authorities.[98]

The EC Treaty does not contain any provisions on secrecy of particular documents. The only general provision relating to secrecy is Article 287 (ex Article 214) EC Treaty, which lays down the general duty of professional secrecy.[99] Instead, secondary Community legislation contains often provisions on secrecy of information/documents.

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for the exclusion from access of some particular categories of EAEC documents). For simplicity shall be referred to the provisions of the Council Regulation.

[96] Besides this category of documents, Article 3 of the Regulation excludes from access some particular categories of EAEC documents. Moreover, Article 4 lays down special requirements for the release of documents or records which are covered by the obligation of professional secrecy or business secret. Commission Decision of 30 November 1990 (amending Decision 89/196 EEC, Euratom, ECSC) lays down detailed rules for the declassification of documents covered by professional or business secrecy, O.J. L 340/24, 6 December 1990.

[97] See Article 6 of both the Council Regulation and the Commission Decision.

[98] See the White Paper "Open Government," Cm 2290, July 1993.

[99] See, for the duty of professional secrecy under the ECSC and Euratom Treaty, Articles 47 and 194 respectively. The Euratom Treaty also makes particular information confidential or notes that confidential information may not be disclosed. However, this information is not drawn up by Commission (see Articles 13, 15-16).

For example, various regulations adopted in different policy fields allow the Commission to conduct investigations and inspections/searches, with the aim of detecting possible infringements of Community law. Information acquired by the Commission or communicated to it under these regulations, is covered by the principle of professional secrecy, and as a result may not be disclosed to the general public. This principle applies, for example, in the field of fraud, competition and customs.[100] These special rules do not seem to conflict with the general rules of the Code of Conduct. Whereas the latter gives access to documents drawn up by the two institutions, the special rules seem to protect documents and information which are received by those institutions. This information is excluded from the scope of the Code of Conduct.

Many regulations and directives also exist which provide for co-operation in different policy fields, between the Member States themselves, or the Member States and the Commission, which require the exchange of information or which lead to the gathering of information in another way (checks etc.). This information is often protected through both national and Community law. For example, Regulation 2847/93 provides that "the data communicated or acquired by virtue of this Regulation shall benefit from the same protection accorded to similar data by national legislation of the Member States receiving them and by corresponding provisions applicable to Community institutions."[101] Österdahl has commented on this situation and pointed to the possibility that the rules on secrecy will be interpreted differently in Sweden than other Member States, due to the difference in national laws on openness and legal cultures of transparency.[102] Problems with the Community might arise if a document of the Community is released under national law, when the latter wanted to keep it secret.

[100] See, for example, Article 8 of the Council Regulation 2185/96 on anti-fraud (O.J. L 292, 15 Nov. 1996); Article 45 of Council Regulation 515/97 on enquiries to customs and agriculture matters (O.J. L 82, 22 March 1997); Article 5 of Council Regulation 1026/1999 of 10 May 1999 determining the powers and obligations of agents authorised by the Commission to carry out controls and inspections of the Communities' own resources (O.J. L 126, 20/05/1999, p. 1); Article 8 Regulation EC 1073/1999 of the EP and the Council of 25 May 1999 concerning investigations conducted by European Anti-Fraud Office (O.J. L136/1, 31/05/1999); Council Regulation 17/62, in special edition of the O.J.

[101] Another example is Council Regulation 1486/81 of 19/05/1981, which stipulates that "any information communicated in whatever form pursuant to this Regulation shall be of confidential nature. It shall be governed by the obligation of professional secrecy and shall enjoy the same protection as offered to alike information under both national law of the Member States, which received it, and the corresponding provisions applying to Community authorities." Other examples are given by Österdahl (1998), p. 353.

[102] Ibid., p. 353-356.

6.3.4.2 Classified documents

6.3.4.2.1 The rules on internal classification

The current system of classification in the Community is fragmented. All institutions and bodies apply their own classification systems and there is thus no single harmonised system. In 1992, the Commission proposed a Regulation on the security measures applicable to classified information produced or transmitted in connection with EEC or Euratom activities, but the proposal was withdrawn by the Commission after it was heavily criticised by the EP.[103]

The rules on classification of information have been laid down by Commission Decision C (94) 3282 and Council Decision 24/95.[104] The former rules were replaced by the above Decisions as a result, in particular, of the entry into force of the Maastricht Treaty which introduced new areas of competences, especially in the field of Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA). This development required the adoption of appropriate measures to protect the information exchanged or processed in these areas. In the light of the impetus given by the European Council in December 1999 to developing the EU's means for military and non-military crisis management in the framework of a reinforced European security and defence policy (see §6.2.2.2.2), the Council amended its Decision 24/95 in order to add the grade TRÉS SECRET/TOP SECRET to its classification of documents and to reinforce internal arrangements.[105]

Information is classified in order to restrict its circulation in case its unauthorised disclosure could be detrimental to the essential interests of the EU, a Member State or/and another organisation. The Commission as well as the Council classification system is based on the criteria of security. This amounts to a complete change of the classification system of the Council, which formerly was based on the criteria of distribution. The Council uses four classification categories: TRÉS SECRET/TOP SECRET, SECRET, CONFIDENTIAL and RESTREINT. The first new security grade protects information the unauthorised disclosure of which could cause extremely serious prejudice to the essential interests of the Union or to one or more of its Member States. This classification will be used, in particular, in the field of ESDP. The

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[103] Bunyan (1999), p. 3-4.

[104] The Commission Decision C(94) 3282 of 21 November 1994 on the security measures applicable to classified information has not been published, instead Council Decision 24/95 of 30 January 1995 on measures for the protection of classified information applicable to the General Secretariat of the Council has been published in the Council Guide, Delegate's Handbook III. Both the Council and Commission have also adopted rules on security screening of persons authorised to have access to classified information, respectively Council Decision 98/319/EC, O.J. 1998 L140/12, and Commission Decision 99/218/EC, O.J. 1999 L80/22.

[105] See further Decision of the SG 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 SG of the Council. This Decision replaces Council Decision 24/95. O.J. C 239/1, 23/08/2000.

middle two protect information the unauthorised disclosure of which could respectively seriously harm or harm the essential interests of the EU (...). The last category is much vaguer and wider, as it protects information the unauthorised disclosure of which would be "inappropriate or premature." Most of the documents have the reference LIMITÉ, which is not a security classification. This category of documents is only circulated to the authorised addressee.[106] The Commission uses the security grading: TOP SECRECT, SECRET, and CONFIDENTIAL, which protect respectively information the unauthorised disclosure of which would be exceptionally detrimental, seriously detrimental, or simply detrimental to the essential interests of the EU or one of its Member States or another organisation.

The Commission's Classification Decision does not contain any provision which requires for periodical review of classified documents with the view of declassification. The Decision mentions only that documents which have a temporary classification shall be declassified automatically on the expiry date or otherwise specified, and that information originating from outside shall be declassified only by the originating organisation. It might be that each Department or Unit has its own procedure for declassification, but there seems to be no obligation to do so, nor a particular uniform procedure to follow. Documents may also be declassified after a request for such documents has been made, however, this will be incidental. Instead, in respect of the Council, the rule is that after five years information for which the period of classification has not been laid down shall be examined on whether it should remain classified or be declassified. Classified documents may only be downgraded or declassified with the written authorisation of the authority from which the document originated. However, this authority must, if possible, indicate on the classified document the date of lapse or time after which the information contained therein may have its classification grading downgraded or declassified. Moreover, it is the task of the Classified Information Office to question periodically the need to maintain the classification of information.[107]

6.3.4.2.2 Access to classified documents

The preamble of the Code of Conduct stipulates that "these principles (read: the rules on public access to documents) will have to be implemented in full compliance with the provisions concerning classified information."[108] This provision has been explained in the literature to mean that documents bearing such

[106] A part of the former "restreint" category has been renamed as "limité."
[107] See Article 8 of the Commission Decision of 21 November 1994 on the security measures applicable to classified information. See Article 2(3), Article 4, 9(1) and Article 10(2) of the Council Decision of 27 July 2000 on measures for the protection of classified information applicable to the Secretariat General of the Council.
[108] See also the Preamble and Article 8 of Council Decision 93/731/EC. The latter Article stipulates that "whereas this Decision must apply with due regard for provisions governing the protection of classified information."

security classification do not fall under the general rules on access.[109] However, both Commission and Council Decisions on measures to protect classified information contain provisions to the extent that the rules on classification do not prejudice the general rules on public access to documents adopted by them.[110] This seems to imply that documents with a security classification also fall under the access rules, and that access to a document should not be refused simply because of the mere fact that it is classified. In fact, classified documents have been released under the Code of Conduct by the institutions.[111]

The procedure would be, first, to examine whether the document in question can be released under the rules on access on the basis of its content, and if so, it will subsequently be declassified. In respect of classified ESDP documents, this is no longer the practice, as their classification leads to their automatic exclusion (see §6.2.2.2.2). There are, however, difficulties in making requests for classified documents. In respect of the Commission, it will be hard to know that such documents exist, as the Commission has no register of the documents it holds. However, even if the Commission had such a register, it would not necessarily include classified documents. In fact, considering its remarks given to the Ombudsman about the content of a future register, there seems little chance that it will include such documents. The Council should have changed its register, in accordance with its Decision of December 1999, so as to include, from 1 January 2000, references to classified documents (except for SECRET and CONFIDENTIAL ESDP documents), but, to date, this Decision has not been implemented (see paragraph 6.2.5.3). This measure, besides improving the possibilities to make requests for such documents, would also have remedied the negative aspects of the Council's new procedure for the adoption of documents classified as SECRET or CONFIDENTIAL.[112] These documents are no longer mentioned on the list of normal A-points, but on a separate classified list called *A-bis*. Neither do the telexes, which list the approved A-points, mention classified documents anymore. A separate list of SECRET and CONFIDENTIAL A-points approved by the Council are distributed to the Permanent Representatives. It is not at all sure that a request for the *A-bis* list and the separate list of SECRET and CONFIDENTIAL A-points will be released under the Council Decision on Access.

In respect of disclosure by the Council or Commission of classified Member States' documents, there is no problem as paragraph 5 of the Code of Conduct excludes requests for access to documents produced by third parties. Classified documents of national or international authorities received by the Council retain their original security grading (see Article 3(2)). The same rule applies in respect of classified documents received by the Commission from the institutions, Member States or another organisation, but the Commission may also assign an equivalent grading (see Article 6(1)). In case Council or Commission

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[109] Curtin (2000), p. 23.

[110] Corrigendum to document C(94) 3282 of 29 November 1994 concerning the relation between the rules on classification and those on public access to documents. See Council Decision 24/95 of 30 January 1995, Delegate's Handbook III, op cit., p. 23.

[111] See the Council Report on the implementation of the Council Decision on public access to documents, (1994-1995), p. 8.

documents contain confidential information from the Member States, they will probably rely on the mandatory exception of confidentiality as requested by the natural or legal persons or as required by the legislation of the Member State that supplied the information. Partial access can then be given to that part of any document which is not covered by the exception.

[112] Öberg (1998), p. 15.

6.4 The relation to national rules on access to government documents

Are Member States bound by the Community rules on access to documents or may they decide requests for access to EU documents upon the basis of their own rules on access?[113] To date, Member States have taken different approaches in this respect, some Member States abiding by the rules of the Community institutions, others deciding requests for access under their own general rules on access.[114]

It should be observed that most national access laws do not differentiate between documents drawn up by the authorities themselves or received by them, so that both categories of documents are subject to the same national access regime. These rules differ, however, as to whether the author has be consulted before third party documents are disclosed, or whether the classification of documents fixed by the third party has to be followed.[115]

In the Netherlands, persons requesting access to EU documents under the Dutch legislation on public access to documents are sent back to the European institutions. The problem concerning the treatment of requests for access to EU documents made under the Dutch law, was the subject of litigation in Dutch courts. In 1992, a Dutch Member of the EP requested access to various minutes of the ECOFIN Council under the Dutch Act concerning access to documents.[116] His request was refused primarily on the basis of the secrecy clause contained in Article 18 of the Council's Rules of Procedure, which was given precedence over the Dutch law on access to documents. Secondly, the refusal was based on the exception regarding the protection of international relations with foreign states or international organisations. In its judgement, the Council of State upheld the refusal on the grounds of the primacy of Community Law. In its opinion, Community law has precedence over national law irrespective of the direct effect of the rules concerned. In the literature, the correctness of the Court's radical interpretation of the primacy of EC law has been contested,[117] and it has been argued that the Court was obliged to request a preliminary ruling under Article 234 EC Treaty (ex Article 177). In fact, it is worrying that the Dutch Court set aside so easily the Dutch legislation on access to documents, which notably has a constitutional basis.[118] As a result of the judgement, the Netherlands sends the person who made the request for access to EU documents back to the European institutions. It has also been observed that it is more difficult to get

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[113] Clearly they are bound by secrecy commitments agreed by them in secondary Community legislation. See §6.3.4.1.

[114] The information results from an interview with the Commission.

[115] See for the different rules applying in this respect in the Member States, the comparative research conducted by the Commission in view of the drafting of the new proposal for a Regulation on public access to documents of the institutions, p. 6. At the Commission's website http://europe.eu.int/comm.

[116] See *Metten v. Minister of Finance*, Judgement of Afdeling Bestuursrechtspraak, Raad van State, 7 July 1995, N. R01.93.0067.

[117] See, for example, Besselink (1996), p. 167.

[118] Article 110 of the Dutch Constitution stipulates that in the exercise of their duties government bodies shall observe the right of public access to information in accordance with rules to be established by act of Parliament.

access to EU-related documents under the Dutch access rules, raising the danger of the creation of diplomatic conflicts. Moreover, evaluative and preparatory policy documents concerning the Dutch role in the formulation of EU policy, are often refused on the ground that they contain "personal policy opinions of officials," which constitutes an exemption under the Dutch law on public access to documents.[119]

Denmark seems not to send the person back, but it does not give access to documents if they are confidential following the rules of the European institutions.

In Sweden, the public authorities have operated their own rules on access to documents in cases of requests for EU documents. In 1995, the Swedish weekly newspaper *Journalistenförbundet* requested access to twenty EU documents about Europol in Stockholm and in Brussels.[120] The Swedish authorities provided eighteen of the documents under the Swedish legislation on access to documents, whereas the Council allowed access to four under the Council Decision 93/731/EC. In September 1995, *Journalistenförbundet* filed an application to the CFI seeking annulment of the Council's decision refusing access to the above-mentioned documents. The CFI had, however, not to address the issue as to whether Sweden was allowed to release EU documents under its own legislation. The Council denied that Sweden could apply its own access rules, as not Sweden but the Council was the owner of the documents.[121] Like Sweden, Ireland, France, the UK, and Portugal treat requests under their own general rules. It should, however, be noted that usually they use the exceptions, such as the protection of information concerning international relations to refuse them. This exception is suitable to refuse access to documents of other Member States and of the EU. In this way, violations of the duty of loyalty, which exists between the Member States and the EU, can be prevented (Article 10, ex Article 5 ECT). Finland considers that, on the one hand, documents may contain information which falls under one of the material secrecy clauses in its own Act, and, on the other hand, its disclosure might hamper the abilities of the Finnish State to act within the Community (in this assessment, one has thus to take into consideration the rules on access to documents, which are in force at the Community level).

Whereas, in respect of EU documents which are still circulating in the administrations of the Member States, the latter determines how to treat requests for access to such documents (classified and non classified), in respect of *classified* documents of the institutions, which have been transferred to national archives, the Communities Archive legislation seems to apply. Article 6 of Council Regulation 354/83 EC/Euratom and Commission Decision 359/83 CECA respectively on public access to the archives forbids the Member States to release to the public classified documents of the relevant institutions, which have not been declassified, through national archives on terms less strict than those laid down in the

[119] Article in the NRC (Dutch newspaper) of 04/08/2000, "EU mag openbaarheid niet naar believen beknotten."
[120] *Svenska Journalistenförbundet v. Council*, op cit..
[121] See Curtin (2000), p. 26.

above-mentioned Community Archives legislation (see paragraph 6.3.3.3). This provision also applies to those documents which reproduce entirely or partially the content of such documents.

The question which arises from the above discussion is whether it is possible that rights which citizens possess under national access to documents laws can be taken away or affected by rules developed in the context of the EU. Curtin denies this and bases her argument on the principle of subsidiarity and citizenship, which she interprets in the light of Article 1 TEU.[122] She argues that "the principle of subsidiarity read together with the fact that citizenship is explicitly designed to be of a supplemental nature only to national citizenship and not to detract or reduce in any way national citizenship suggests that the acquired rights of a citizen with regard to access to government information under national law cannot be taken away or affected by rules developed in the context of the EU." This would be the only fair reading considering the aim of Article 1 TEU that the decision-making process should be conducted as open as possible. The rights of the citizens under their national law amount to an established minimum level of openness to which the development of EU rules and principle will have a supplemental function. This reasoning means that, since the entry into force of the Amsterdam Treaty (which incorporated Article 1 TEU), decisions, such as that taken in the *Metten* case, are no longer possible. She calls this a kind of reverse principle of supremacy in the interests of the citizens.[123] Whether this argument is legally strong enough to prevent the limiting of more generous rights possessed by citizens under national access systems can be questioned. Looking to the future, it must be stressed that the gains will indeed be less, if the new Community legislation on access, required to remedy a major deficit in the Union, would emasculate more generous rights of access which citizens possess under national access laws. This is not a theoretical observation, but a real possibility (see further §7.3.7).

[122] Ibid., p. 15.
[123] Ibid., p. 26.

6.5 The European Parliament rules on public access to documents

In response to the Ombudsman's formal Recommendation (see §6.6.3.3.), in which he called on fourteen bodies and institutions to adopt rules on public access to documents, the European Parliament adopted rules on access to its documents in July 1997. The way in which the rules were adopted has been criticised in the EP itself.[124] They were adopted by the Bureau, but are referred to as EP rules, in spite of the fact that they have not been discussed in any Parliamentary committee or in the plenary session. The rules are very similar to those adopted by the Council and the Commission, and, therefore, only a few remarks will be made here. The procedure for handling requests for access to documents is decentralised. It is for the relevant body or service to examine each applicant and to give advice about what decision should be taken. But it is the Secretary General who replies on behalf of the European Parliament to applications for access. Decisions on applications for review are taken by the Bureau, with the possibility of delegation to the Secretary General on a proposal of the latter. The period for replying to the initial request, to make a confirmatory application and for replying to the confirmatory application, is 45 days. Finally, the exceptions are the same as those laid down in the Code of Conduct, except for the omission of the exceptions concerning the protection of international relations and monetary stability. The new rules have hardly been used, which is not so surprising as all political documents are generally already in the public domain, usually even at an early stage in their examination.[125] The rules are necessary in respect of access to administrative documents and other internal documents such as, Legal Service notes and so on.

[124] See EP Report on openness within the EU, Committee on Institutional Affairs, Rapporteur M. Lööw, PE 228.441, p. 13 (note 1).
[125] Ibid., p. 13. See §5.4.2/5.4.3.

6.6 Review by the European Courts and the Ombudsman in the field of access to documents

6.6.1 Are there limits to the Courts' and Ombudsman's powers to review decisions on access to documents?

As the powers of the European Ombudsman and the Court of First Instance to review decisions regarding access to Second and Third Pillar documents have been contested on similar grounds, this issue will be treated first in one single section. The issue of the Ombudsman's competences was for the first time raised by the Council in the context of the six complaints to the EO made by Mr. Bunyan on behalf of NGO "Statewatch,"[126] The complaints concerned the Council's replies to requests for access to documents relating to activities under the Third Pillar. The Ombudsman agreed with the Council that he does not have the competence to deal with complaints about measures adopted under the Third Pillar. However, he contested that the subject-matter of the complaints were of such nature. He observed that requests for documents are made and dealt with under the Decision 93/731/EC, which has been adopted on the basis of Article 207 (ex Article 151) EC Treaty (Rules of Procedure). He further pointed to the *Guardian* case in which the CFI interpreted and applied the Council Decision on Access, and which involved access to Third Pillar documents.[127] Given the limitation on the jurisdiction of the CFI imposed by Article 46 (ex Article L) of the Treaty on European Union, the CFI would have had no jurisdiction to deal with this aspect of the *Guardian* case if access to Third Pillar documents was itself a Third Pillar matter. He concluded that the correct interpretation and application of the Council Decision on Access is, therefore, a matter of Community law and not a Third Pillar matter, even if the documents in question concern actions under the Third Pillar. In *Journalistenförbundet* and in *Hautala*, the CFI rejected, on similar grounds, the Council's objections to the jurisdiction of the CFI in respect of access to documents concerning actions under respectively the Third and Second Pillar.[128] In *Journalistenförbundet*, it observed that Decision 93/731, in Article 1(2) and 2(2), expressly provides that it is to apply to all Council documents. Decision 93/731 therefore applies irrespective of the contents of the documents requested. It added that the fact that it does not have jurisdiction to review the legality of measures adopted under Title VI does not curtail its jurisdiction in the matter of public access to those measures. In the CFI's opinion, the assessment of the legality of the contested decision is based upon its jurisdiction to review the legality of decisions of the Council taken under Decision 93/731 (based on Article 207(3) EC Treaty, ex Article 151(3)), on the basis

[126] See the European Ombudsman Annual Report 1997, p. 20-21.
[127] Case *Carvel & Guardian Newspapers Ltd. v. Council*, op cit.
[128] *Svenska Journalistenförbundet v. Council*, op cit., §81-84. See *Hautala v. Council*, op cit., §41-42.

of Article 230 (ex Article 173) of the EC Treaty, and does not in any way bear upon the intergovernmental co-operation in the spheres of JHA as such. In *Hautala*, the CFI applied the same reasoning but then in respect of documents relating to the Second Pillar. This Decision is important even after the Amsterdam modifications, which widened the Court's powers of review. The Court is now given jurisdiction over much of the Third Pillar, but it still has no powers in respect of the Second Pillar.

6.6.2 Judicial review by the European Court

6.6.2.1 General

To date, the CFI has decided more than a dozen access to documents cases. Most of these concerned decisions refusing access to documents under the exception of the public interest. After having determined the legality of the rules on public access to documents in the *Netherlands* case, the CFI laid down in a number of cases the procedural requirements to be applied by the institutions when handling requests for documents: it introduced the balancing of interest test in respect of the confidentiality exception (*Guardian case*); it determined how requests for access should be handled in respect of the application of the first category of mandatory exceptions (*Interporc I, Journalistenförbundet*); it specified the duty to state reasons in respect of this category (*WWF*); and it ruled that the possibility of granting partial access to a document must be considered (*Hautala/Kuijer*). Moreover, it established its jurisdiction to review the legality of decisions refusing access to documents irrespective of their content (*Hautala, Journalistenförbundet*). It further interpreted the scope of the Decision 93/731 and the Code as far as the objects (*Journalistenförbundet, Hautala*) and subjects (*Rothmans*) are concerned. Moreover, it started to interpret the different exceptions according to the principle of facilitating the widest possible access. Below, the cases shall be analysed insofar that the Court has interpreted a particular exception. In the conclusion, the way in which the CFI has exercised its judicial review will be examined and commented upon. The CFI's review has concentrated on procedural aspects, rather then examining in detail the substantive considerations which led the institutions to refuse access.

6.6.2.2 The interpretation of exceptions

6.6.2.2.1 The scope of the exception of the public interest

The CFI, in an application for interim relief, has given a very extensive interpretation of the exception of the public interest.[129] The *Carlsen* case concerned a Decision of the Council refusing to release documents of

[129] See *Hanne Norup Carlsen and Others v Council*, Order of the President of the CFI in the proceedings for interim relief in Case T-610/97 R, judgement of 3 March 1998.

the Legal Service of the Council and the Commission.[130] The Council refused to release the opinions of the Legal Service on the grounds that this could harm the public interest in the maintenance of "legal certainty" and "the stability of Community law," as well as the public interest in "the Council's being able to obtain independent legal advice." The applicants argued that the Council had breached its Access Decision, as the exception of the public interest does not list the interests to be invoked by the Council for refusing access to the documents. In the Council's opinion, this exception should be interpreted extensively as also including other interests which are not mentioned explicitly.[131] In this respect, the CFI observed that:

> La formulation de la position fait apparaître que, si, d'une part, elle indique au premier tiret, entre parenthèses, cinq catégories d'intérêt à ayant droit a une protection absolue, d'autre part, elle se réfère, au début de ce même tiret, à la notion générale d'intérêt public. Or il ressort de la teneur de la disposition que c'est la protection de l'intérêt public en générale qui peut justifier le refus d'accès aux documents et que, partant, il ne serait pas fondé de limiter, contre la lettre de cette disposition, la portée de la notion d'intérêt public en la réduisant aux cinq hypothèses figurant entre parenthèses" (para. 48).
>
> "En effet, celles-ci se caratérisent, tout d'abord, par la référence expresse à l'exigence générale de protéger l'intérêt public et font mention, successivement et entre parenthèses, de certains case d'application spécifiques, en leur reconnaissant, de facon claire et non équivoque, une importance mineure (para. 49).

The CFI rejected the argument of the parties that the exceptions should be interpreted narrowly. According to the CFI, this jurisprudence cannot effect the above-mentioned provisions, which should be interpreted literally. In the view of the Court, the list of interests mentioned between brackets are simply examples of specific public interests that are definitely entitled to protection. Access to documents may, however, also be refused under the general notion of the public interest. The result of this interpretation is that the possible grounds for refusing access to documents have been extended greatly. The interpretation of the exception of the public interest given by the Council and the CFI differs from that of the Commission. The Commission has, to date, always interpreted the list of interests mentioned in the exception of the public interest as exhaustive. In other words, these explicitly-specified interests define the exception of the public interest.

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[130] It should be noted that the Council was not allowed to decide upon the disclosure of the opinions of the Commission's Legal Service. It should have sent the applicant, in accordance with paragraph 3 of the Code of Conduct, to the Commission.

[131] See *Carlsen*, op cit., §28.

Having decided the scope of the public interest exception, the CFI gave another very wide interpretation of the public interest exception, and it considered that access to legal opinions must always be refused on the grounds of the protection of the public interest. The Council admitted in this case that it refuses according to *long-standing practice*, access to the opinions of the Council's Legal Service on legal questions, irrespective of the specific content of the opinions and of the stage the matter has reached.[132] In other words, the Council does not decide on requests for access to legal opinions on a document-by-document basis, as required by the CFI in its judgement in the *Interporc I* case (delivered one month before the *Carlsen* judgment).[133] Nonetheless, the President in his Order did not sanction the Council for this approach, and considered the automatic exclusion legitimate. This ruling contradicts the decision of the CFI held in an earlier judgement. In the Presidency's opinion, the disclosure of documents containing opinions of the Legal Service on legal questions could, at first sight at least, create uncertainty with regard to the legality of Community measures and might have adverse consequences on the functioning of Community institutions. The stability of the Community legal order and the proper functioning of the institutions, which are matters of the public interest, would suffer as a result.[134] The Presidency added that given the particular nature of legal opinions, these documents seem, in principle, not to lose their confidential character as time passes by (paragraph 50). In other words, legal opinions are not accessible to the citizens. One can question whether the disclosure of legal opinions would always harm the public interest. It can be doubted whether a legal opinion more then 15-20-years old would have such destabilising effect on the Community legal order. Obviously, legal opinions may have this effect; for example, a legal opinion which removes the legal basis upon which a Community measure is based could destabilise the legal order, as it might give rise to cases of annulment of the measure before the ECJ. However, it can be argued that it was not necessary for the CFI to exclude legal opinions as a category from access, considering the fact that legal opinions do not have legal force and that legal opinions are not always correct. Release would thus *not per se* inflict harm on the Community legal order.[135]

The Commission has taken to date a more favourable approach towards the legal opinions of its Legal Service. Applications for legal opinions are not automatically refused, but are examined on a case-by-case having regard to the particular content of the legal opinions (document-by-document approach). The relevant exception in this case is, according to the Commission, the exception of the confidentiality of its deliberations (which requires a balancing of interest test). It is not clear whether this attitude is the consequence of the Commission's narrow interpretation of the public interest exception, which prevents it from relying on this

[132] See the Council Report on the implementation of Council Decision 93/731/EC (1996-1997), p. 10. See also the Council Report over the years 1994-1995, p. 6-7. In the latter Report the Council proposed to supplement Article 4(1) Council Decision 93/731 by adding the words "legal certainty," as is the case in Article 5(1)(2) of the Council's Rules of Procedure. The Council would thus create an explicit ground of refusal for legal opinions. In this respect the Council also relied upon the opinion of the AG Jacobs in *Netherlands v. Council*, op cit.

[133] Case *Interporc I*, op cit.. See further §6.2.4.

[134] See *Carlsen*, op cit., §46.

[135] See Dyrberg (1999), p. 166.

exception as to exclude legal opinions, or whether it flows from a truly different vision in this respect. The Commission might change its practice and rely on this judgement to refuse access to opinions of its Legal Service under the public interest exception in the future. Regrettably, the main case has been withdrawn and a new case needs to be brought in order to get a definite ruling by the CFI as to whether legal opinions would always harm the public interest and, therefore, should never be disclosed.

6.6.2.2.2 The public interest exception of court proceedings

The cases *Interporc* [136] and *Van der Wal* [137], which have both been appealed by the applicants, regard documents relating in some way to Court proceedings. The first case regarded the situation in which the Commission was a party in court proceedings. The purpose of the exception of the public interest in this case is to protect the interests of the parties in a "fair hearing." The second case regarded the situation in which the Commission collaborated under a "Notice of Collaboration" with a national court. The public interest exception may be relied upon to protect the "procedural autonomy" of the national courts. However, the Court ruled that only a narrowly-defined category of documents may be refused under this exception for that purpose.

In *Interporc I*, the Commission refused access to all documents requested by the applicant on the grounds that these documents relate to a decision, which has become the subject-matter of a Court proceeding. In its defence, the Commission sustained that it is in its power to refuse to give the public, including the other party in a case, documents relating to pending court proceedings under the special exception of "court proceedings." It stated that its rights of defence, and, therefore, the public interest, would be seriously compromised if it had to release these documents. In the opinion of the Commission, the release of such documents could always harm the public interest. At the hearing, the Commission said that a request for such documents will, therefore, be *quasi automatically* refused. The CFI annulled the Commission's decision on the grounds of failure to give reasons.[138] The case was appealed, and the CFI had in the end to decide whether documents, which have not been drafted for the purpose of court proceedings, but which have become part of a subsequent court proceeding, are entitled to protection under the public interest exception (*Interporc II*).[139] Taking into consideration the objective of the Code of Conduct and the requirement of interpreting the exceptions strictly, the CFI ruled that "court proceedings" means that the protection of the public interest precludes the disclosure of the content of documents drawn up by the Commission solely for the purpose of specific court proceedings. It explained that the latter phrase refers to the pleadings or other documents

[136] *Interporc I*, op cit.
[137] *Van der Wal v. Commission I*, op cit.
[138] The Commission issued on 23 April 1998 a new Decision, which was identical as regards the content, but better reasoned.

lodged, internal documents concerning the investigations of the case before the Court and correspondence concerning the case between the DG's concerned and the Legal Service or lawyers' office. It explained that the drawing of the scope of this exception tries to ensure the protection of the work done within the Commission and confidentiality and the safeguarding of professional privilege for lawyers (note the difference with legal advice as such, see *Carlsen*). The CFI determined that the exception does not protect documents from disclosure which were drawn up in connection with a purely administrative matter, such as was the situation in this case. The CFI subsequently annulled the decision.

Van der Wal, instead, regarded documents which have been drawn up for the purpose of a special court case.[140] The CFI observed, referring to Article 6 ECHR, that the exception of "court proceedings" is designed to ensure respect for the fundamental right of every person to a fair hearing by an independent tribunal. This exception is not restricted solely to the protection of the interests of the parties in the context of specific court proceedings, as was the case in *Interporc*, but encompasses also the procedural autonomy of national and Community courts. This means that both national and Community Courts must be free to apply their own rules of procedure concerning the powers of the judge, the conduct of the proceedings in general and the confidentiality to the file in particular.[141] In this case, the documents, which had been refused by the Commission, regarded documents sent by it to the national court in response to a request from that court under the co-operation notice existing between the Commission and national courts.[142] In respect of the question whether the Commission could rely on this exception to refuse those documents, it ruled in the affirmative. It made a distinction between documents drawn up by the Commission for the sole purpose of a particular court case, such as the above documents, and other documents which exist independently of such proceedings.[143] The application of the exception can, in the CFI's opinion, only be justified in respect of the first category, as the decision whether or not to grant access is a matter for the appropriate national court alone.[144]

This wide interpretation of the exception of "court proceedings" was rejected by the Court of Justice in its judgement in appeal.[145] The Court, although it agreed that the right to a fair hearing includes the right of procedural autonomy, rejected the CFI's opinion that the court hearing a dispute is necessarily the only

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[139] *Interporc II*, op cit.
[140] *Van der Wal v. Commission I*, op cit.. It constitutes the third case decided against the Commission, and the first which passed the reasoning test. The two earlier cases decided against the Commission are *WWF* (see below) and *Interporc I*.
[141] *Interporc II*, op cit., §48/49.
[142] Notice 93/C 39/05 adopted by the Commission on co-operation between national courts and the Commission in applying Articles 81/82 (ex Articles 85/86) EC Treaty. On the basis of this Code, national courts may consult the Commission on points of law and its customary practices. See, for an annotation of this case, Schermers/Swaak (1999), p. 553.
[143] *Van der Wal*, op cit., §50.
[144] Dyrberg (1999) criticises the fact that the CFI based its judgement on fundamental rights (right to a fair hearing), p. 165.
[145] Case C-174/98 and C-189/98, *Netherlands and Van der Wal v. Commission* (Van der Wal II), judgement of the ECJ of 11 January 2000.

body empowered to grant access to the documents in the proceedings in question. It disagreed further with the latter, as it considered that not all documents supplied by the Commission to national courts, although drafted with a view of particular court proceedings, come under the exception of the public interest. It noted that often the documents which the Commission supplies concern documents which it already possessed or which merely refer to earlier documents, or in which the Commission expresses merely an opinion of a general nature. In relation to these documents, the Commission must assess in each individual case whether they fall within the exceptions listed in the Code of Conduct adopted by Decision 94/90. However, documents supplied by the Commission, which contain legal or economic analysis, drafted on the basis of data relating to the case pending before the national court, may be exempted under the public interest exception if national law precludes such disclosure. The Commission must ensure that their disclosure is not contrary to national law, and, in case of doubt, must consult the national court and refuse access only if that court objects to disclosure. In other words, the applicant may request access under Community law, which should however be interpreted according to national law, or under the national Court rules.

The judgement of the CFI, criticised already in the literature as being fundamentally flawed, has been corrected by the Court in favour of openness.[146] It is, in fact, hard to see how documents supplied by the Commission under the notice, which do not amount to advice drafted on the basis of aspects of the case provided by the national court, can damage the procedural autonomy of the court and in the end the right to a fair trial. It regards general information, which instead might help to prevent cases from being brought to Court, as they give insight in how the Commission acts in Articles 81/82 (ex Articles 85/86 EC Treaty) EC Treaty situations.

6.6.2.2.3 The public interest exception of international relations and public security

The public interest exception, in particular that of international relations or public security, has also been relied upon by the institutions to refuse access to documents drawn up within the framework of the CFSP and JHA. Up to now, the CFI has decided two cases concerning Third Pillar documents, i.e. *Journalistenförbundet* [147] and *Kuijer* [148], and one concerning the second Pillar, *Hautala*.[149] The *Journalistenförbundet* case concerned a Decision of the Council refusing access to a large number of documents relating to Europol on the grounds that disclosure could undermine the public security and the confidentiality of the Council's proceedings. The applicant had, however, already obtained most of these

[146] Curtin (2000), p. 34.
[147] *Svenska Journalistenförbundet v. Council*, op cit.
[148] *Kuijer v. Council*, op cit.
[149] *Hautala v. Council*, op cit.

documents under the Swedish legislation on access to documents. The case has already been discussed in the context of the relation between national rules on access and Community rules (see paragraph 6.4). In this case, the CFI observed that the concept of public security does not have a single and specific meaning, and covers both the internal and external security of a Member State as well as the interruption of supplies of essential commodities and it could equally well encompass situations in which public access to a particular documents could obstruct the attempts of authorities to prevent criminal activities (as was argued by the applicant).[150] The CFI, on the basis of a Council note summarising the content of each refused document, made a distinction between those relating to the negotiations on the adoption of the Europol Convention (which covered most refused documents) and those concerned with operational matters of Europol itself. Next, it ruled that in the absence of any explanation on the part of the Council as to why the disclosure of these documents would in fact be liable to prejudice particular aspects of the public security, it was not possible for the applicant to know the reasons for the adoption of the measures and therefore to defend its interests. The CFI seems to say that documents relating to policy-making should, in principle, be public, whereas those relating to particular operational matters do not.[151]

In *Kuijer*, analysed above in another context, the Council refused access to documents relating to activities of CIREA under the public interest exception of international relations.[152] In both *Kuijer* and *Journalistenförbundet*, the CFI was not required to judge the Decisions refusing access on their merits, because of the insufficiency of the reasoning. The public interest exception of international relations was also the subject of the *Hautala* case. This case concerned the refusal of the Council to grant access to a Report on conventional arms export, as disclosure could undermine international relations. The CFI, in this case, left a wide discretion to the Council to determine whether or not harm will be caused by disclosure of the Report. The wide discretion is related to the political responsibilities conferred on it by Title V of the TEU (see § 6.6.2.2.5).

6.6.2.2.4 The public interest exception of investigations

The *WWF* case, which was the first access case decided against the Commission, concerned the specific exception of the public interest "investigations."[153] The CFI ruled that documents must be refused under the heading of the protection of the public interest "investigations," if they relate to investigations which might lead to the opening-up of an infringement proceeding even if a period of time has elapsed since the closure of the investigation. This refusal is justified given the confidentiality that Member States are entitled to expect of

[150] See §121 of the judgement in this case, op cit.
[151] Bunyan (1999), p. 39-40.
[152] CIREA (Centre for Information and Discussion and Exchange on Asylum) is a Council working group established under the Third Pillar.

the Commission in such circumstances.[154] It seems that the CFI is of the opinion that these documents may never be disclosed. [155] The *WWF* case was, however, lost by the Commission on the grounds of insufficient reasoning.[156] It should be noted that this particular judgement regarded the phase in which the Commission tries informally to solve the problem, i.e. before it opens a formal Article 226 (ex Article 269) EC Treaty procedure. In *Bavarian Lager Company*, the Court, relying on the *WWF* judgement, concluded that a draft reasoned opinion (not signed by the Commissioner), may not be released as it is covered by the exception of the public interest (investigations).[157] The procedure under Article 226 (ex Article 169) EC Treaty was still at the stage of investigations and inspection and thus protected by the public interest exception. It stressed that the Commission had wrongly interpreted the *WWF* case, as this case does not allow for the refusal of all documents relating to infringement procedures, but only those relating to the investigations which might lead to the opening of an infringement procedure.[158] The CFI, thus, did not rule whether the reasoned opinion may be exempted under the exception of the public interest. However, the fact that it corrected the wrongly-assigned status of the document in question -from reasoned opinion to draft reasoned opinion- and emphasised the correct interpretation of the *WWF* case, seems to point in the direction that, according to the CFI, the reasoned opinion cannot be refused on the grounds of the exception of the public interest. This seems correct as, with the issuing of the reasoned opinion, the investigative stage ends, since the Commission has reached the conclusion that the Member State infringed the Treaty. The problem is that according to the Manual (internal procedural rules), the Commission should not disclose the reasoned opinion to a third party.[159]

6.6.2.2.5 Evaluation of the exercise of the CFI's judicial review

The case-law of the CFI relating to access to documents is steadily growing, and allows the making of some general observations about the way the Court has exercised its powers of review. In the cases decided up to date, the CFI has not examined in any detail the substantive considerations which led the institutions to refuse access. Neither has it examined the documents *in camera*, although it seems as

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[153] De Leeuw (1997), p. 339.
[154] *WWF v. Commission*, op cit., §63.
[155] The case dealt with investigations into possible infringements of Community law, but it might be possible for the Commission to rely upon the Court's ruling to exclude documents relating to investigations into breaches of the Community competition or state aid rules. It could equally be argued in those cases that the parties or the Member States concerned are entitled to expect confidentiality of the Commission (see §6.3.2.1).
[156] The Commission issued a new Decision on 6 August 1997, which was identical as regards the content, but reasoned better.
[157] Case T-309/97, *Bavarian Lager Company v. Commission*, judgement of the CFI of 14 October 1999.
[158] Ibid., §41.
[159] This constitutes another example of the problem regarding specific rules *versus* general rules on access as discussed in §6.3.

though it would be prepared to do so if necessary (see *Kuijer*).[160] Most of the decisions have been annulled on procedural grounds, in particular that of insufficient reasoning (see, for example, the *Guardian, Interporc I* and *Journalistenförbundet* cases). It should, however, be noted that the line between, on the one hand, a "procedural," and, on the other, a more substantive review is sometimes a thin one; an annulment by the CFI on the grounds of insufficient reasoning is but a small step away from saying "I do not like your decision."

It should further be noticed that this kind of review is also a result of the type of cases that have been brought before the CFI. A number of cases concerned denied requests for access to different documents, which, however, belonged to one and the same category. In these cases, the institutions seem to give a general reason for refusing access to all the documents requested because they belong to a particular category which, if disclosed, could undermine the public interest. This approach has been admitted by the Council in respect of legal opinions (*Carlsen*) and by the Commission in respect of the documents relating to court proceedings (*Interporc I*). In other words, the institutions did not refuse access to the documents in question after having examined each document as to whether or not its specific release would harm a protected interest. This is in violation of the approach described by the CFI, namely a document-by-document and case-by-case approach. The CFI would seem to be the only authority allowed to do this. The CFI has interpreted the public interest exception rather widely, and has twice excluded large categories of documents from access. According to the CFI, certain categories of documents, by their very nature, may always harm the public interest if they are disclosed (see *WWF, Carlsen* and *Van der Wal I*). The CFI's broad interpretation has been sanctioned by the Court of Justice in the *Van der Wal II* case. By allowing the institutions to exclude fairly automatically documents falling under the public interest exception, the CFI did not have to review the substantive choices made by the institutions. However, in the *Hautala* case, the CFI did, for the first time, have to evaluate the rightfulness of the Council's assessment of the facts.

In *Hautala*, the CFI had to examine whether disclosure of a report on conventional arms export could undermine the public interest as sustained by the Council. The CFI noted that:

> The Council's discretion is concerned with the political responsibilities conferred on it by TV of the TEU. It is on that basis that the Council must determine the possible consequences which disclosure of the contested report may have for the international relations of the EU. In those circumstances, *review by the CFI must be limited to verifying whether the procedural rules have been complied with, the contested decision is properly reasoned, and the facts have been accurately stated, and*

[160] In *Kuijer*, the CFI noted that, as it had sufficient information to uphold the applicant's claims and to annul the contested Decision, it did not consider it necessary to ask the Council to release it the documents in question, op cit., §62.

whether there has been a manifest error of assessment of the facts or a misuse of powers (italics added).[161]

Next, the CFI examined the reasoning and observations made by the Council in its defence, and concluded that there was no reason to fault the Council's assessment.[162] In respect of the Second Pillar, the CFI has thus made explicit that it will conduct a marginal substantive review.[163] This review is thus not limited to procedural aspects only, but contains, albeit superficially, a substantive review. If the CFI comes to the conclusion that the assessment is at fault, it can either replace it with its own assessment and provide access to the document, or just annul the decision.[164] It is not so surprising that the CFI limits itself in respect of the Second Pillar to a marginal review, as it regards a sensitive policy field with enormous political responsibilities, which decisions are moreover subject to the intergovernmental method. Furthermore, it should be recalled that, in respect of Second Pillar matters, the Court as yet has no jurisdiction.

Not much can be said about the Court's review of the facultative exception regarding the confidentiality of the institution's deliberations. This exception seems to leave the institutions a broad margin of discretion as to whether access should be granted or refused. Up to now, the CFI's review has been limited to assessing whether the balancing-test had been performed, which had to follow from the reasoning. In several cases, it was unable to conclude this from the reasoning, and annulled the decision on the grounds of insufficient reasoning. Thus far, the CFI never had to decide upon an allegation that the outcome of the balancing-test was wrong, which would have forced it to determine the extent of discretion left to the institutions and what kind of review (substantive/marginal) it would carry out.

6.6.2.2.6 In camera examination

To date, the CFI has never examined the content of the documents itself, although it has made clear in *Kuijer* that it would be prepared to do so when necessary. The CFI has recently added a new provision to its Rules of Procedure which allow it to examine documents *in camera*. It should be observed that the Court of Justice in its case-law has already provided for exceptions to the principle that the main parties

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[161] Ibid., §71-72.
[162] Ibid., §74.
[163] See, for a definition of marginal review, Schermers/Waelbroeck (1992), §310. They speak of marginal review when the Court only reviews whether the executive operates outside reasonable margins.
[164] In a working document to the 1996 IGC, Sweden argued that the Court should have the power to replace the assessment made by the institutions and decide that the applicant should have access to the document in question. See Swedish Working Document to the 1996 IGC of 20 May 1996.

have access to the entire case-file.[165] However, the CFI thought it necessary to codify this case-law to prevent difficulties, which in particular may arise in cases concerning access to the file and public access to documents. It explained that, in cases where it needs to examine the claims of a party as to the confidential nature of a document, it is faced with a conflict between the need to investigate the case fully, the need to ensure a fair hearing, and the need to protect private or public interests which might be jeopardised by disclosure of certain information. The new provision enables the CFI to acquaint itself with the content of such a document in order to assess whether it is of a confidential nature, as claimed by the party, but without disclosing it to the parties. The rules of procedure of the Court of Justice do not enshrine a similar provision. This is also less necessary given the fact that it is the CFI which in the first instance decides on access-to-document and competition cases (which require deep factual analyses). In case the Court needs to examine a document *in camera*, it can continue to rely upon its case-law.

6.6.3 Review by the European Ombudsman

6.6.3.1 General

Since the European Ombudsman took office in 1995, he has decided about 20 complaints concerning public access to documents, and in most cases he was able to provide the complainant with redress. At the end of 1996, the EO received many complaints (from one single person) about the way in which the Council interprets and implements its rules on public access to documents. A number of times the EO rejected the narrow interpretation of the Council regarding certain aspects of its access rules, and replaced it with a more liberal one. Some complaints led to changes in the Council's practice in this field. The Ombudsman did, however, not always find a co-operative attitude during his investigations. In particular, he was hindered in his work by the obstructive attitude of the Commission in providing access to the file in question. Following complaints from the Ombudsman about his limited powers of investigations, including those in respect of access to files, the EO's Statute is currently under revision as far as his powers of investigation are concerned. The Ombudsman's role in the field of access to documents, has not remained that of a passive receiver of complaints. He has conducted two successful inquiries on his own initiative, into the existence of rules on public access to documents in respect of nineteen other institutions and bodies. In this section, these issues will be treated in detail.

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[165] See the Court Order of 21 September 1999 in Case C-204/07 *Portugal v Commission*, and 4 February 1981 in Case 155/79 *AM & S v Commission* [1982] ECR 1575, at p. 1616. The Court would examine the alleged confidential documents in private, but produce a description of its content for use by the parties. See note of the CFI regarding its amendments to its Rules of Procedure. See the website of the Court at http://curia.eu.int.

6.6.3.2 The Ombudsman's review of complaints concerning public access to documents or openness in general

In the event that a request for access to documents is refused, the rules on public access to documents refer explicitly to the possibility to make a complaint to the Ombudsman.[166] After a complaint has been made, the Ombudsman examines whether the institution has properly applied its rules on access, and whether it has acted within the limits of its legal authority in exercising any discretionary powers. In cases where the rules have been wrongly applied, the Ombudsman may call on the institution to reconsider the matter and to apply the rules correctly. [167] In this redress-related role, the Ombudsman operates as a more informal, faster and less-expensive alternative to judicial review. The Ombudsman must, however, remain inside the limits drawn by the Court which is the highest authority on the interpretation of Community law.

Since the adoption of the Code of Conduct in 1994, the Ombudsman has decided upon three complaints regarding public access to documents in 1996, four in 1997, six in 1998 and six in 1999.[168] In total, eight cases were decided against the Council, nine against the Commission, one against the EP and one against the Commission and the EP jointly. Sometimes the mere fact that a complaint was made to the Ombudsman was enough for an institution to alter its practice. A number of times the EO managed to reach a friendly solution, even with the institution keeping to its opinion regarding the rightfulness of its refusal.[169] In other cases, however, a critical remark or even a formal recommendation of the Ombudsman was needed in order to provide redress.[170]

The complaints decided by the Ombudsman raise interesting problems of interpretation and application of the rules of access to documents. In particular, the cases brought by "Statewatch" against the Council revealed the conservative approach of the Council in interpreting and applying its own rules. This approach has often been "sanctioned" by the Ombudsman, who replaced narrow interpretations with more liberal ones. For example, the Ombudsman has rejected the wide interpretation given by the Council as to

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[166] The Code of Conduct mentions explicitly the Ombudsman as a mean of redress. See also the rules on access of the other institutions and bodies.

[167] See the Annual Report for 1998, p. 30. The European Ombudsman has actually inspected the documents in question. See, for example, complaints 1045/21.11.96/BH/IRL/JMA or 1087/10.12.96/STATEWATCH/UK/IJH.

[168] In 1996, the lack of refusal for information and transparency constituted the second main type of maladministration alleged (30 complaints, 13%), whereas this constituted the main type of maladministration alleged in 1997 (60 complaints, 25%), 1998 (69 complaints, 30%), 1999 (66 complaints and 23%). Complaints about decisions on public access to documents constitute only a small part of it.

[169] See complaint 1045/21.11.96/BH/IRL/JMA. The Commission confirmed its opinion about the nature of the documents (non-Commission document), but agreed to reach an *ad hoc* solution with the European Ombudsman.

[170] The statistics over 1995-1999, show in respect of the Council and the Commission respectively, no-maladministration (1-3), case-settled (2-1), closed with a critical remark (4-3), one friendly solution in respect of the Commission, draft recommendation (1-1) (excluding the draft recommendations following the own-initiative inquiries of the EO). In respect of a complaint regarding both the EP and the Commission jointly, no-maladministration was found, whereas the only complaint regarding the EP was settled.

what constitutes "another institution or body" under the Code. In his opinion, the Council wrongly held that the "Presidency of the Council" constitutes "another institution or body," and that documents of which it is a co-author do not fall under the rules of access as they are not Council documents.[171] The Ombudsman also rejected the very wide interpretation of the Council as to what constitutes a "repeat application" (see §6.2.5.1).[172]

The Ombudsman had further to intervene with critical remarks to force the Council to reason better, and to perform the balancing of interest test genuinely. In different complaints, the Council had refused access to documents under Article 4(2) on the grounds that they "contain national positions," "have been recently adopted" or relate to "ongoing discussions."[173] One complaint showed that the Council refused under Article 4(2) access to all documents which contain national positions.[174] In respect of "ongoing discussions" reason, the EO observed that, in public access regimes, it is commonly a consideration which carries considerable weight. However, the Ombudsman observed that whilst the Council may take the above-mentioned elements into consideration when balancing the interests, they do not constitute *per se* sufficient grounds to refuse access.

The EO has also received complaints about the lack of openness in respect of the Third Pillar. A complaint was made to the Ombudsman about the fact that the Council destroyed agendas of meetings held under the JHA Council after one year.[175] After an inquiry of the Ombudsman into the matter, the Council responded to the complaint by altering its practices so that draft agendas of JHA meetings are now systematically kept by the General Secretariat departments concerned and made publicly available.[176] Another complaint regarded the fact that the Council does not maintain and make available to the public an up to-date list of measures which it adopts in the field of JHA.[177] After a failed attempt to reach a friendly solution, the Ombudsman issued a formal draft Recommendation to the extent that the Council should make available to the public on request the list of all measures approved in the field of JHA. The Council accepted the EO's Recommendation, and soon after its adoption, the Council established a database containing lists of measures adopted by the Council in JHA.[178]

Most of the complaints made against the Commission concern its lack of transparency and supply of information. As far as complaints on access to Commission documents are concerned, few raised interesting questions of interpretation. Those which did regarded questions which were the subject of a

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[171] See complaint 1056/25.11.96/STATEWATCH/UK/IJH.
[172] See complaint 1053/25.11.96/STATEWATCH/UK/IJH.
[173] See complaint 643/97/PD (ongoing discussions), 1057/25.11.96/STATEWATCH/UK/IJH (national positions), and 1087/10.12.96/STATEWATCH/UK/IJH (recently adopted and national positions).
[174] See complaint 1057/25.11.96/STATEWATCH/UK/IJH.
[175] See complaint 1054/25.11.96/STATEWATCH/UK/IJH.
[176] See the Conference on Transparency and Access to Documents held in the EP on 26 March 1999, speech given by the European Ombudsman.
[177] See complaint 1055/25.11.96/STATEWATCH/UK/IJH.
[178] See the website of the Council at http://ue.eu.int.

pending Court proceeding or had already been decided by the Court, which meant that the EO in the first case had to end his inquiries, whereas in the second he only had to apply the judgement.[179] Two other complaints, which do not regard mere application must be mentioned. In the first, case the EO managed, as part of a friendly solution, to get the Commission to grant partial access to a document (decided before the *Hautala* case). In regard of the second complaint, the Ombudsman issued a draft Recommendation to the Commission that the latter has to adopt a register of the documents it keeps. The latter Recommendation has not been very successful (see §6.2.5.3). In respect of the Commission, a new conflict has recently emerged between it and the Ombudsman. This case does not regard the rules on public access to documents, but the release of information by the Commission in accordance with the Data Protection Directive. The novelty of the whole case lies in the Ombudsman's reliance upon the principle of openness as laid down in Article 1 TEU, as one of the main arguments to demand the release of the information. The case shows also the very wide interpretation of the Data Protection Directive by the Commission.[180]

6.6.3.3 The European Ombudsman's own-initiative inquiry into public access to documents of other Community institutions and bodies

In 1996, the EO conducted an inquiry on his own initiative, into the issue of public access to documents held by fifteen Community institutions and bodies, among which the EP, the European Court of Justice and the agencies.[181] This inquiry was felt particularly necessarily given the various complaints the Ombudsman had received about the un-satisfactory way in which requests for access were handled by Community institutions and bodies. In his Decision, the EO observed first of all that rules on public access could promote transparency and good administrative behaviour, thereby enhancing the relations between citizens and the Community institutions and bodies. It helps both citizens to know their rights, and officials to deal accurately and promptly with requests for documents.[182]

Recalling the judgement of the Court in the *Netherlands* case, the Ombudsman concluded that it appears that, in relation to requests for access to documents, Community bodies and institutions have a legal obligation to take appropriate measures to act in conformity with the interests of good administration.

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[179] See complaint 506/97/JMA regarding court proceedings and complaint 633/97/PD concerning comitology documents.

[180] The case has been dealt with in §6.3.2.2..

[181] See the EO's Decision and Recommendation in the own-initiative inquiry into public access to documents held by Community institutions, initiated in June 1996 (616/PUBAC/F/IJH). This Decision is included in the EO Annual Report 1996, p. 80. See note below, which lists the institutions and bodies which were subject to the inquiry with the references as to where the rules have been published.

[182] See EO Decision for the three ways in which rules promote transparency and good administration, ibid., p. 81.

Referring further to the Union's commitment to transparency,[183] and the existence of a single institutional framework for the Union,[184] he concluded that the adoption of rules on public access to documents constitutes an appropriate measure in relation to the processing of requests for access to documents. On the basis of this analysis, the Ombudsman concluded that failure to adopt and make easily available to the public rules governing public access to documents constitutes an instance of maladministration, and, therefore, he recommended in his Decision of 20 December 1996 that those institutions and bodies covered by the inquiry should adopt and make easily available rules concerning public access to all documents not already covered by existing legal provisions allowing access or requiring confidentiality.[185]

All the above-mentioned institutions and bodies, to which the draft Recommendations were addressed, have now adopted rules governing public access to their documents,[186] except for the ECJ which points to its difficulty in establishing a clear separation between documents which relate to its judicial role and those which do not.[187]

Given the present state of Community law, the Ombudsman limited his inquiry (and draft Recommendations) into the existence and public availability of the rules. Consequently, in his Special Report[188] he did not examine whether the rules adopted are sufficient "to ensure the degree of transparency that European citizens increasingly expect of the Union."[189] In general, many Community institutions and bodies have based their rules on public access to documents on those of the Council and the Commission.[190] The EO noted that compared to the provisions governing some national administrations, the rules on public access to documents held by the Community institutions and bodies, are generally quite limited, especially in that the rules adopted give no right of access to documents held

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[183] This commitment appears from Declaration 17 and numerous subsequent acts.

[184] Article 3 TEU (ex Article C) provides that "the Union is served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives (...)."

[185] The draft Recommendation was not addressed to the Office of Harmonisation in the Internal Market as it appeared during the enquiry that this body had already adopted rules on public access to its documents.

[186] The European Parliament, O.J. 1997 L 263/27; The Court of Auditors, O.J. 1998 C 295/1; The European Investment Bank, O.J. 1997 C 243/13; The Economic and Social Committee, O.J. 1997 L 339/18; The Committee of the Regions O.J. 1997 L 351/70: The European Monetary Institute, O.J. 1998 L 90/43; The European Training Foundation O.J. 1997 C 369/10; The European Centre for the Development of Vocational Training (Cedefop); The European Foundation for the Improvement of Living and Working Conditions, O.J. 1999 L 296/25; The European Environment Agency, O.J. 1997 C282/5; The Translation Centre for Bodies of the European Union, O.J. 1998 C46/5; The European Monitoring Centre for Drugs and Drug Addiction; The European Agency for the Evaluation of Medicinal Products (http://www. eudra.org/gendocs/PDFs/GENERAL/001297en.pdf).

[187] See the EO' s own-initiative inquiry into public access to documents (616/PUBAC/F/IJH), p. 5.

[188] Special Report of the Ombudsman to the EP following his own-initiative inquiry into public access to documents (616/PUBAC/F/IJH). This Report sets outs which rules on access have been adopted and how they were published.

[189] See for some comments in respect of the content of the rules, the Report of the EP Committee on Petitions concerning the Special Report by the EO following his own-initiative inquiry into public access to documents, EP 226.263/fin (2 July 1998), p. 12-13. See also the opinion of the EP Committee on Institutional Affairs in respect on the Special Report, same documents, p. 29-30.

[190] Special Report of the Ombudsman to the EP following his own-initiative inquiry into public access to documents (616/PUBAC/F/IJH). Under the heading C3 "the substance of the rules."

by one body, but originating in another. Nor do the rules require the establishment of registers of documents. These observations seem to amount, nevertheless, to a criticism of the content of the Code of Conduct.

More importantly, the Ombudsman noted that consistency (Article 3, ex Article C TEU) and equal treatment of citizens require that when the new Regulation governing public access to EP, Council and Commission documents becomes part of Community law, the general principles and limits which it lays down should be applied throughout the Community administration.[191] In its own-initiative inquiry the Ombudsman has already relied on the single institutional framework-consistency argument to support his conclusion that the institutions must adopt rules on access throughout the whole community.[192] He uses now the same argument to argue for similar (not identical) contents. If, in the future, the institutions and bodies do not incorporate into their rules on public access to documents, the principles and limits as laid down in the new Regulation, the Ombudsman might conclude on the basis of Article 3 TEU that this amounts to an instance of maladministration. It must be stressed that Article 255 EC leaves it open for other institutions and bodies to adopt rules, and to determine their content. In the absence of any Treaty obligation for these other institutions/bodies to adopt rules, the Ombudsman has tried to read, in a creative way, such a legal duty into Article 3 TEU.

The inquiry conducted by the Ombudsman has speeded up the process of the adoption of rules on public access by other institutions and bodies than the Council and the Commission. The Ombudsman has undoubtedly contributed to the enhancement of openness in the European Union's administration. In April 1999, the Ombudsman launched another own-initiative inquiry into public access to documents held by four EU bodies, which were not yet operational at the time of the earlier inquiry. He asked the European Central Bank (ECB), the European Agency for Safety and Health at Work, the Community Plant Variety Office (PVO) and Europol to inform him of whether they have followed the example set by other EU institutions and have adopted rules on public access to their documents, and if so, whether these rules are publicly available. At the moment of the EO's request, the first two had already adopted and published such rules, whereas the PVO was in the process of adoption.[193] Europol informed the EO that it would consider adopting rules on public access to documents before the end of the year.[194] As, at the end of 1999, Europol still did not have a definite timetable for the adoption of such rules, the EO issued a

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[191] Ibid., p. 7.

[192] See the Ombudsman's own initiative inquiry into public access to documents under the heading "decision of the Ombudsman", (616/PUBAC/F/IJH).

[193] See the Annual Report of the European Ombudsman over 1999, p. 245-259. See ECB Decision 1998/12, published on 28 April 1999 O.J. L110/30; see EASHAW (http://agency.osha.eu.int/publications/other/infofreedom); CVPO (http://www.cpvo.fr).

[194] See EO's introductory remarks concerning the first mandate to the EP Committee on Petitions, 28 September 1999, Brussels.

draft Recommendation in which he recommended that the former adopt rules within three months.[195] After having extended the deadline again, Europol announced on the 6th of July 2000 that it would apply as an interim measure the same rules on public access to the documents it holds as those applied by the Council of Ministers. As soon as the new Regulation on public access to EP, Council and Commission documents has been adopted the Management Board will re-examine the rules on access applying to Europol in the light of this Regulation.[196]

The Ombudsman deliberately did not assess the substance of the adopted rules. He explained this by referring to the present state of Community law. In fact, in the absence of a general principle of public access to documents or general legislation in this respect, the content of the appropriate measures seems something for each institution and body to determine. Moreover, one should not loose sight of the fact that the Ombudsman's decisions (including recommendations) lack binding force, and that he has no powers of enforcement. He needs to be careful in his approach in order to achieve changes in the administration's way of working and thinking. The most that he can do is to issue formal non-binding recommendations, and send a Special Report to the EP; the latter can take the matter further if it so wishes.[197] In fact, one of the subjects identified by the EO in his Report which he would like to see further investigated regards the substance of the adopted rules.[198] Except for some brief remarks, the EP Report on the Special Report of the European Ombudsman, does not address this point.[199] Neither does the Resolution following this Report.[200] In this Report, the Committee on Petitions pointed also to another issue: the existence of fifteen or more specific Codes of Conduct on public access to documents in the Union. This situation is obviously not satisfactory from a transparency point of view, conceived in the sense of clarity and understandibility. The Committee stressed that for real institutional transparency and accessibility for the public, it would be better to have a common set of general rules on public access to documents for all institutions and bodies in the European Union.[201]

6.6.3.4 The Ombudsman's powers of inquiry as far as they regard access to files

[195] See the EO's draft Recommendation to Europol in the context of his own-initiative inquiry OI/1799/IJH in public access to documents of 13 December 1999.
[196] See the response to the European Ombudsman's Recommendations made in the latter's own-initiative inquiry OI/1799/IJH. See EO Press release 14/2000 of 19 July 2000. The EO closed the case on 12 July as his recommendation had been accepted.
[197] The Ombudsman pointed in his Special Report to the EP following the own-initiative inquiry into public access to documents (616/PUBAC/F/IJH), to four different subjects which he would like to see further investigated or pursued by the EP.
[198] Ibid.. Under the heading of "the substance of the rules."
[199] Report of the EP Committee on Petitions concerning the Special Report by the EO following his own-initiative inquiry into public access to documents, op cit., p. 12-13. See also the opinion of the Legal Affairs and Citizens' Rights Committee, same document, p. 29-30.
[200] EP Resolution of 16 July 1998, O.J. C292, 21-09-1998, p. 170.

The Ombudsman's powers of inquiry are laid down in Article 3(2) of the Ombudsman's Statute and comprise inspection of files and the hearing of witnesses.[202] As far as access to files is concerned, Article 3(2) stipulates that Community institutions and bodies must supply the Ombudsman with any information he has requested of them and give him access to the files concerned. Before they hand out documents originating from a Member State, the latter's permission is required in respect of documents classified as secret, whereas in respect of other documents the Member State needs to be informed. In addition, Member States' authorities shall be obliged to provide the Ombudsman with any information that may help to clarify instances of maladministration by Community institutions or bodies. They may, however, refuse information that is covered by laws or regulations on secrecy, or by provisions preventing it from being communicated. On the basis of Article 287 (ex Article 214) EC Treaty, the Ombudsman and his staff may not divulge any confidential information obtained during the course of the inquiries. The right to inspect includes the possibility to read the documents, to make notes and to take photocopies.[203] If the assistance requested is not provided, the Ombudsman shall inform the EP which shall take "appropriate representations" (Article 3(4)).

Under Article 3(2), the Community institutions and bodies are allowed to refuse to give the Ombudsman access to files on "duly substantiated grounds of secrecy." In his Annual Report 1998, the EO expressed his disagreement with the restrictions to his powers of investigation, i.e. access to the file and hearing of officials. He rejected the limits as unnecessary and inappropriate, and as far as access to the file is concerned, he called for a Treaty provision granting him full access to all documents relevant for assessing a situation.[204] During 1999, the Ombudsman experienced further problems in this front in his relations with the Commission (although not with the Council or Parliament).[205] The EO complained about the Commission's reluctance to provide, as a matter of routine, all the documents and information needed during the investigations. Documents were usually obtained after lengthy argument. Moreover, it happened that they were only released after the EO pointed to the possibility of drawing up a report concerning refusal to the EP.[206] To speed up eventual amendments, the EO drafted a proposal of revision

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[201] Report of the EP Committee on Petitions concerning the Special Report by the Ombudsman to the EP following his own-initiative inquiry into public access to documents, op cit., p. 11-12. See similar the opinion of the Legal Affairs and Citizens' Rights Committee, same document, p. 21.

[202] See 94/262/ECSC/EC/Euratom: Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties, O.J. L 113/15, 04/05/1994.

[203] See EO Annual Report 1999 for his instructions to his staff concerning inspection of documents, p. 24.

[204] See the EO Annual Report 1998, p. 12.

[205] In the five years the EO has been active, he has inspected the files during investigations in complaints in about 20 cases.

[206] See the Ombudsman' s speech kept for the Committee on Petitions concerning his first mandate, 28 September 1999, Brussels. See further the note of the EO prepared for Almeida Garrett of the EP Committee of Constitutional Affairs, 24 May 2000 (on the Ombudsman' s website under "speeches" at http://www.euro-ombudsman.eu.int). Since the Annual Report 1998 problems have arisen in four cases. In three cases (closed) the Commission allowed the EO finally access to the file, but after considerable delay. In the fourth case, the Commission refused to let the

of Article 3(2), which he sent to the EP President in December 1999.[207] The EO proposed to remove the existing limitation on his powers to inspect the file in question, and to allow him to inspect and take copies of any document or the contents of any data medium. These restrictions, according to the Ombudsman, prevent him from carrying out his duties properly and jeopardise citizen's confidence in his work. He observed that his proposal corresponds to the normal principle applying in respect of national Ombudsmen and similar bodies.[208] The EO, moreover, pointed to OLAF which has the right of immediate and unannounced access to any information and the right to copy any documents held by the institutions.[209] The EO' s suggested amendments have been approved by the Council according to Article 195(4) (ex Article 138e) EC Treaty, and the whole procedure will probably be finished next year.

6.6.3.5 Access to documents held by the Ombudsman

Complaints to the Ombudsman are dealt with in a public way unless the complainant requests confidentiality. As noted by the Ombudsman in his Annual Report for 1995, "it is important that the Ombudsman should act in as open and transparent a way as possible, both so that European citizens can follow and understand his work and to set a good example to others." In principle, all documents relating to a complaint are public, unless the complaint has been classified as confidential. In the latter case, the complaints and documents annexed thereto by the citizen and the reports and draft recommendations shall be treated as confidential.[210] Other documents - those which do not concern a complaint- held by the Ombudsman are public, unless the latter considers that confidentiality is required by Community law, the Statute of the Ombudsman, or in order to protect his interest in the confidentiality of his proceedings or the running of his office. Requests for documents have to be made in writing and have to be sufficiently clear. The decision on a request should be taken within 15 days and charges may be asked for the supply of copies.

EO inspect documents of a company on the grounds that they are covered by commercial secrecy. It proposed that the EO should sign an undertaking to indemnify the Commission in respect of any damage caused to a third party by release of information contained in the document.

[207] In its Resolution on the Annual Report of the activities of the EO, the EP urged the Committee on Institutional Affairs to consider amending Article 3(2) of the EO' s Statute. See O.J. 1999 C 219/456. See also the Report of the Committee on Petitions on the Annual Report on the activities of the Ombudsman in 1998, PE 229.669/fin (18 March 1999).

[208] See the Annual Report over 1998 for the complete proposal of the Ombudsman, p. 23. See further the EO' s note for the Constitutional Affairs Committee, op cit.. The latter Committee had asked the EO to conduct some comparative research in respect of the right to inspect the file during inquiries by national Ombudsmen.

[209] See the note of the EO for the Constitutional Affairs Committee, op cit..

[210] See Article 13 of the Decision of the European Ombudsman adopting implementing provisions, 16 October 1997 (came into effect 1 January 1998).

6.7 Concluding observations

In this chapter, the implementation and application of the Code of Conduct have been researched in detail. It was shows that the Code suffers from a number of shortcomings. Moreover, its application in practice has not always been without conflict. Despite these problems, it must be stressed that the Code seems to work well in practice. Most documents which have been requested have been released without problems; indeed, the institutions may even have been rather liberal in their release. In 1999, 82.8% of the Commission documents requested were released after the completion of the whole procedure, against 85.6% and 83.9% respectively in 1999 and 2000 in respect of the Council. The statistics of the Council show that the total amount of applications made is increasing each year. In 1999 it received 889 applications for a total of 6,747 documents, against 338 for a total of 3,984 documents in the year before.[211] Since the coming into force of the register, there has been another explosion in applications: 684 applications for 4,051 documents in the first six months of 2000. At the end of the year, the number of applications had doubled, to 1,294 for a total number of 7,032 documents. Besides the coming into force of the register, the possibility of making requests for documents by e-mail might have had a positive impact on the number of requests made. The Council is considering measures to deal with the enormous increase in applications in order to avoid bureaucratic overload. For example, it is now making documents, which after a request have been released, directly available in the register. In contrast with the Council, the applications for Commission documents continues to decline, and amounted to only 408 for 587 documents in 1999. What the reasons are for this decline in the number of applications is not explained. Looking at the type of documents requested, a decrease can be noticed in the percentages of documents requested relating to Industry: 13.5% in 1998 to 3.4% in 1999. On the other hand, the group "other departments" grew from 17.3% in 1998 to 30.9% in 1999.[212]

There has been an enormous decline in the applications for Council documents concerning the Third Pillar. In 1998, 77% of the applications concerned the subject area of JHA, whereas in 1999 and 2000 these figures were only 37% and 29% respectively. The reason for this might be manifold. It might be the result of a decline in demands coming from Civil Rights organisations, or/and of the positive effect resulting from the measures taken by the Council in 1998 to increase openness and transparency in the Third Pillar and/or of several Ombudsman cases. In contrast, there was an increase in demands falling under the heading "other" (2% in 1998, 17% in 1999, and 13% in 2000). In the last two years, documents

[211] The statistics do not state whether the number of applications regards only receivable documents or also non-receivable documents.

[212] Under this heading are mentioned the Secretariat-General, European Anti-Fraud Office, DG Justice and Home Affairs, IGC Task Force, Legal Service, Cabinets etc..

regarding the Third Pillar and the group "others" were the documents which have been requested the most. At third place are documents relating to the internal market (10% in 2000 against 5% in 1999).[213]

The most cited motive for refusing access changed from that of "the protection of the deliberations of the Council" (51% in 1998 and 30% in 1999) to that of the public interest exception (12% in 1998 and 47% in 1999). The figures for 2000 come close to those of 1999 with 33.1% and 40.7% respectively. This shift has probably to do with the decline in applications to Third Pillar documents, which often have been refused under the exception of the protection of the Council's deliberations.[214] The Commission's breakdown shows that 30.9% of the applications made in 1999 concerned the subjects covered under the heading "diverse" (19.9% regarded the SG); 10% concerned both the Internal Market and Customs. The exception on which the Commission has relied the most is that of the public interest (50.6% against 52.9% in 1998), the confidentiality of its deliberations (13% against 5.9% in 1998) and a combination of exceptions (15.6% against 19.6% in 1998).

Despite this high percentages of documents which have been released, the research identified the existence of two (main) problems in respect of the Code of Conduct: the first regards the exclusion of access to documents drawn up by third parties, whereas the second concerns the rather widely drawn exceptions and, in particular, the one concerning the protection of the interest in the confidentiality of the institution's deliberations. An additional problem regards the possible non-limitative character of the public interest exception (see §6.6.2.2.1) Nevertheless, the Code is in respect of certain aspects more progressive than certain national laws on access to documents. Under the Code access can be obtained, for example, to all internal documents, including documents which are not final or relate to a decision-making process which has not ended. Access can further be obtained to documents drawn up under the Second and Third Pillar. Moreover, classification in itself does not seem to constitute an obstacle for the release of documents. The wide scope, as far as the documents are concerned, has recently been limited considerably by the Council's Decision of 14 August 2000, which amends the Council Decision 93/731/EC as to exclude from its scope the complete category of classified ESDP documents. This constitutes a considerable step backwards in respect of the practice which existed up to now. Moreover, the Council has intentions to introduce this exclusion also in the new Regulation on public access to documents (see next chapter).

The application of the Code in practice has led to various cases and complaints being brought respectively to the Court and to the Ombudsman. These cases and complaints reveal the sometimes narrow, i.e. non-fundamental, approach taken by the institutions towards openness and access to documents. The institutions have interpreted rather widely the exceptions and other aspects of the Code of Conduct and

[213] In 1999, at a shared third place, were documents relating to the environment and external relations (both with 9%).

[214] Council Report concerning the implementation of the Council Decision on Access over 1996-1997, p. 11. This exception has been used less frequently in respect of documents where the Council acted as a legislator.

their Access Decisions. For example, this approach is illustrated by the problems which emerged in respect of "the unity" of the institutions, and, for example, by the Council's interpretation of "repeat" applications and "joint Presidency documents." The wide interpretation of the latter two terms was rejected by the Ombudsman. He neither accepted the Council's reasoning that because documents contain "detailed national positions" or "relate to ongoing discussions," these cannot be disclosed under Article 4(2) Council Decision 93/731. The cases which were brought to the Court reveal that the Commission and the Council sometimes have excluded whole categories of documents from access under the public interest exception. The CFI did not sanction this approach, but instead agreed that the public interest exception requires the exclusion of certain categories of documents from access. In one case, *Van der Wal II*, the Court narrowed the wide interpretation given by the Court of First Instance.

The analysis of the cases and complaints give the impression that the Ombudsman is more inclined towards openness than the Court. The former has rejected a number of times the narrow approach taken by the institutions, whereas the CFI has allowed the institutions to exclude wide categories of documents under the public interest exception. As regards the way in which they have exercised review, it is interesting to note that the Ombudsman has never replaced the judgement of the institutions regarding the possible harm inflicted by disclosure with that of his own. He has, however, in some cases examined the documents in question himself. As far as the Court's review is concerned, in the cases decided up to now it did not examine in detail the considerations which led the institutions to refuse access, except for the *Hautala* case. Neither has it examined the documents *in camera*, although it seems prepared to do so if necessary (see for example, *Kuijer*). Most of the cases have been annulled on procedural grounds, in particular that of insufficient reasoning. It should be observed that the CFI has, however, laid down important procedural requirements as regards the way in which the institutions have to decide requests for access.

7 THE IMPLEMENTATION OF ART. 255 EC: THE COMMISSION'S PROPOSAL FOR A REGULATION ON ACCESS TO DOCUMENTS

7.1 Introduction

In the two preceding chapters, the current rules on public access to European Parliament, Council and Commission documents, and their application in practice, have been analysed. This included an examination of the review exercised by the Court and the Ombudsman in access to document cases. From this examination, it became apparent that as the institutions have got used to the application of the Code of Conduct, they seem to have become more liberal in their release of documents than at the beginning. In the first years of the existence of the Code of Conduct, the Court laid down the correct procedure to be followed and started to interpret the exceptions. The Ombudsman, at his turn, played an important role in correcting negative embedded institutional practices in the field of access to documents and openness in general.

The issue of openness and, in particular, access to documents, was one of the main institutional issues on the agenda of the IGC in 1996. The negotiations led to the inclusion of the general principle of openness in Article 1 of the TEU, and to the insertion of the right of public access to EP, Council, and Commission documents in Article 255 EC Treaty. The latter article stipulates that the general principles and limits to the right of access must be laid down in secondary legislation, which should be adopted through the co-decision procedure within two years after the coming into force of the Amsterdam Treaty. The Regulation, was adopted, with some delay, on 30 May 2001 after a difficult and partly secret decision-making process.[1] As was explained in Chapter 1, by the time the empirical research for this study was closed the drafting process was still going on. This chapter does not cover the new Regulation, however the initial stage of the legislative process is fully documented. First, an analysis of the IGC negotiations in respect of the inclusion of the right of access to documents in the Treaty shall be conducted. Next, follows a thorough examination of the Commission's proposal itself, and of its drafting phase. Some specific remarks in respect of the recently adopted Regulation shall be made in the Conclusion of this thesis.

[1] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, O.J. L 145/43, 31.05.2001. This Regulation shall be applicable from 3 December 2001 (Article 19).

7.2 The 1996 Intergovernmental Conference

7.2.1 The adoption of Article 255 EC Treaty

During the 1996 IGC, proposals on public access to documents were put forward by the Netherlands, Sweden, Denmark and Finland separately, and by Italy and Austria jointly.[2] All proposals favoured the insertion of the principle of public access to documents in the EC/EU Treaty in a way which ensured that the general rule was the right of access to documents, with the exceptions to this right being defined by the Council in secondary legislation. According to those Member States, this principle would not be guaranteed sufficiently if it were enshrined only in secondary legislation or political undertaking. It was felt that there was a need for a legal basis in the Treaty so that citizens and national parliaments could be assured of more direct access to such documents. [3] Although sharing the need for a legal basis in the Treaty itself, and defining the conditions and limits in secondary legislation, the proposals differed on essential points. Some other Member States were satisfied with the *status quo*, and wanted to maintain and develop this principle through a Code of Conduct.

During the Irish Presidency it became clear that most Member States were in favour of including the principle of public access to documents in the Treaty itself. During subsequent negotiations, the main points of discussion among the Member States appeared as follows:[4]

a) The placement of the article: should it be placed in, for example, the part enshrining the general principles,[5] or in that dealing with citizenship,[6] or in the chapter concerning provisions common to several institutions?[7]

b) The scope of the general principle: should access be granted to documents "held by" or "drawn up" by the institutions, and should documents under all three Pillars and within all the institutions and bodies of the Community be covered?

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[2] Dutch proposal of 15 April 1996 (SN 607/96); Swedish proposal of 3 September 1996 (CONF/3899/96); Danish proposal of 16 September 1996 (CONF/3905/96); Finnish draft proposal of 20 May 1996 and 6 April 1997 (CONF/3865/97). Finland issued also a non-paper in September 1996 and a Statement in October 1996. Italy and Austria issued a proposal on 3 October 1996 in the context of citizenship (CONF/3941/96).

[3] Report of the Reflection Group, June and December 1995, SN 520/95 (Reflection Group Report II). Part Two: an annotated agenda, E-II (A More Transparent Union).

[4] Öberg (1998), p. 11.

[5] Denmark proposed inserting the principle of public access to documents in a new Article 5a EC Treaty.

[6] This was proposed by the Netherlands (new Article 8e/8f TEU), and Italy and Austria jointly (new Article 8c TEU).

[7] This was suggested by the United Kingdom Presidency in its proposal for a draft Treaty (new Article 192a EC Treaty). See similarly the proposals of Sweden and Finland, op. cit..

c) The level at which the conditions and limits to the principle of access to documents should be enacted: do they need to be enumerated in the Treaty itself,[8] in secondary legislation,[9] in an inter-institutional agreement[10] or under the rules of procedure of each institution?[11]

Once it was agreed that the conditions and limits to the principle of access had to be laid down in secondary legislation, the question emerged:[12]

d) Whether the conditions and limits should be adopted by qualified majority or by unanimity in the Council, and whether it should be adopted by co-decision or after simple consultation of the European Parliament?

The Treaty was amended and a new article was added to the chapter of the Treaty regarding "provisions common to several institutions," which grants any citizen of the Union (...) a right of access to documents of the EP, the Council and the Commission (Article 255 EC Treaty). It should be observed that Article 255 EC contains several limitations, which obviously effect the scope of the future legislation (see below).

Article 255 EC reads:

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to EP, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.
2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.
3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.

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[8] This was suggested by Sweden in its Working Document of 20 May 1996, but later dropped in its proposal of September 1996, op cit..

[9] Those Member States requesting transparency supported a system with three levels: the general principle had to be enshrined in the Treaty, the principles and limits had to be fixed by the Council in a Regulation according to the co-decision procedure, whereas the laying down of specific rules would be left to each institution. This system would guarantee the application of general uniform rules.

[10] Luxembourg seemed to favour this. Also the Commission could accept this solution.

[11] This was proposed by the United Kingdom (UK) Presidency, see its proposal for a draft Amsterdam Treaty (Dublin II). It was also supported by the Commission.

[12] This was agreed during the Dutch Presidency.

Any confusion that might have existed in the past as to whether documents relating to policy areas coming under the Second and Third Pillar are covered by the Code of Conduct has been removed under the new system. Through Article 28 and Article 41 TEU respectively, the provision on public access to documents has been made applicable to the policy areas coming under the Second and the Third Pillar. Furthermore, Declaration 41 stipulates that when the EP, the Council and the Commission act in pursuance of the Treaty establishing the ECSC Treaty and Euratom Treaty, they should draw guidance from the provisions relating transparency, access to documents and the fight against fraud in force within the framework of the Treaty establishing the European Community.

The inclusion in the new Treaty of a provision granting citizens a right of access to documents was essential, at least for those who consider the issue of public access to documents as fundamental given its relation with democracy, and not as a matter that can be left for internal-rule making by the institutions (see §4.5.3.2).

7.3 The Commission's proposal for a Regulation under Article 255 EC Treaty

7.3.1 Introduction

The Commission's Press Release, which was submitted after the adoption of the proposal by the College of Commissioners, states that "the proposal presents a significant advance on the existing Codes operating in the different institutions."[13] Examining the proposed legislation in detail seems to lead to a less optimistic conclusion, for example, in respect of a number of important aspects the proposal constitutes a step backwards in respect of the current system. The proposal has been heavily criticised by all kinds of people and groups, amongst which national experts, academics, NGOs, Members of the EP (MEPs), journalists and the Ombudsman.[14] In particular, the exclusion of internal documents of the institutions from the definition of documents, the many and broadly drafted exceptions, and the obligation that Member States must not hamper the application of the Regulation have given rise to fierce criticism.

A preliminary criticism regards the isolated way in which the proposal was drafted. Given the subject-matter, and its importance, one would have expected the Commission to consult broadly with different segments of civil society during the preparatory stage of the drafting process. This was the practice followed recently in the UK. Before the UK Freedom of Information Bill was presented to the House of Commons, two rounds of public consultation took place, one before and one after the draft Bill was issued. Moreover, greater efforts in the field of transparency and openness could, in particular, have been expected from this new Commission, considering the resignation of the former after the discovery of fraudulent practices. It should, however, be noted that the Commission had planned a two-stage process, by issuing first a Communication allowing for consultation and debate, and only then a formal legislative proposal. The Commission abandoned, however, the first stage in view of the loss of time due to the resignation of the Santer Commission and the deadlines set out in the Treaty, and went straight to the presentation of the draft legislation.[15]

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[13] Commission Press Release, IP/00/75, 26 January 2000.

[14] For example, amongst the national experts can be mentioned the Standing Committee of Experts on International Immigration, Refugee and Criminal Law (Meijers Committee), which drew up an alternative proposal: Amongst the Journalists, the European Federation of Journalists (IFJ): The House of Lords also issued a Report on the Commission's proposal: Amongst NGOs, the Civil Liberties organisation, *Statewatch*. The documents issued by the above-mentioned bodies can be found on the special website of *Statewatch*: http://www.statewatch.org/secreteurope.html. This website deals exclusively with issues concerning openness and secrecy in the European Union. Other NGOs which criticised the Commission's proposal are: the Euro Citizen Action Service (ECAS) at http://www.ecas.org, and the European Environmental Bureau (EEB) at http://www.eeb.org/publication/access_to_documents_.htm. See also the websites of various EP political groups (D'66, Greens). The Ombudsman's suggestions in respect of the proposal can be found at http://www.statewatch.org/Sodermanrepen.htm.

[15] See ECAS, op cit., p. 2.

The proposal was drawn up almost completely without external interference, except for a Conference organised in April 1999 by some political groups, the European Federation of Journalists and Statewatch, which was attended by civil society, academics and journalists. In this context, the Commission released a discussion paper, which should have become a Communication, but which was abandoned in June for the reasons explained above. During the drafting process, however, an earlier version of the ex-discussion paper and various drafts of the proposal were leaked and placed on the Internet.[16] None of above-mentioned preparatory documents has officially been published. At the end of December, some governments made it know that the draft Regulation was unacceptable, and certain governments said so publicly (Sweden).[17] The Commissioners were put under pressure by their home Member States, especially by Sweden, Finland, Denmark and the Netherlands, and this led to two significant changes.[18] The proposal, after having been discussed by the Chefs du Cabinet on 21st of January 2000, was adopted by the full Commission on the 26th of the same month.[19]

The proposal was based upon an assessment of best practice in all EU Member States, in particular that of the Nordic countries, as well as on the Commission's experience of its own Decision on access to documents.[20] The Commission drafted the proposal in consultation with the other institutions. In December 1997, an informal working party consisting of officials from the three institutions was set up under the leadership of the Secretariat-General of the Commission, to prepare the ground and outline of the possible directions for the draft Regulation. The next stage in the adoption of the proposal was its scrutiny by the EP and the Council. The EP did not entirely compensate for the failure of the Commission to consult widely, as it too failed to organise a public hearing before finalising its own position on the draft proposal. It did, however, hold a working seminar on 18 September 2000 concerning access to EU documents and the proposal for a new Code.[21]

Below the different aspects of the proposal will be analysed with reference to the current rules and case-law, critics and national law.

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[16] The first draft of the discussion paper on public access to documents was leaked and is dated 22 January 1999 (SG.C.2/VI.CD/D(98)12). The second was presented by the Commission at the EP Conference and is dated 21 April 1999 (SG.C.2/VJ/CD D(99) 83). These two documents can be found on the website mentioned below. The third version was released under the access to document rules (May version). In respect of the proposals, two versions were leaked, dated respectively 22 October and 29 November 1999, and were subsequently published on the Internet at http://www.statewatch.org/secreteurope.html. A third version seems to have been leaked to Statewatch (dated 21 January 2000).

[17] See "Full analysis and critique of the Commission's Regulation on public access to documents," Statewatch Bulletin Volume 10, No. 1, see its website, op cit..

[18] Sweden has given its opinion in respect of the proposal: see "Swedish standpoint regarding an EU issue," EUJu2000/823, dated 14 March 2000.

[19] The proposal was officially published on 21st of February 2000, COM(2000) 30 final/2. The official version differs from that of January only in some details (often linguistic). The official version is used here, which will be referred to as "the Commission proposal." The proposal can be found on the Statewatch website, op cit..

[20] See the Commission's Press Release, op cit.

[21] See EP website at http://www.europarl.eu.int. See also for essays which were submitted: http://statewatch.org/secreteurope.htm ("Essays for Open Europe"). The EP adopted in October 2000 its Report on the proposal for a Regulation of the European Parliament and of the Council regarding public access to documents of the EP, Council and the Commission, A5-0318/2000, Rapporteur: M. Cashman, of 26 October 2000. The Explanatory Statement was adopted at 3 November 2000.

7.3.2. The Preamble: the general framework and objective

The Preamble consists in 13 paragraphs which set out globally the main principles and limits of the new Regulation. The purpose of the Regulation is to widen access to documents as far as possible, in line with the principle of openness (recital 4). The Preamble further states that the principle of 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 *vis-à-vis* the citizen in a democratic system." Instead of specifying its own objective, the Preamble refers to the objectives of the wider principle of openness.

It follows from the Preamble that the Regulation applies to all documents held by the institutions, and that it covers documents of the ECSC and Euratom as well as documents relating to the Second and Third Pillar. At first sight the scope appears very broad as the right extends to all documents drawn up or received by the institutions. In subsequent recitals this scope is, however, narrowed down considerably in respect of documents drawn up by the institutions. Besides the general statement that a system of exceptions to protect certain public and individual interests shall be introduced, it is stated that the institutions should be entitled to protect their internal documents. The principles of the Regulation are, further, without prejudice to the specific rules applicable to access to documents. Finally, recital 12 makes an unusual reference to the duty of loyalty, and states that "the Regulation does not aim at amending existing national legislation on access to documents, but that it is nevertheless clear that, by virtue of the principle of loyalty which governs the relations between the Community institutions and the Member States, the latter should take care not to hamper the proper application of this Regulation." This recital has the effect of restricting any wider right of access to EU documents, which a citizen might currently enjoy by virtue of national law.

7.3.3 General principle and beneficiaries

In accordance with Article 255 EC Treaty, any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has the right to the widest possible access to the documents of the three institutions, subject to the exceptions laid down in the Regulation (Article 1). However, the principle that all documents are accessible, except for those falling under specified exceptions is not followed completely ("publicity-except" principle). Other provisions exist which further limit access to certain documents. In respect of the beneficiaries, Article 255 EC is narrower than the current system of access to documents, which grants the right to "the public."[22] This limitation has

[22] The argument has been put forward in civil society that the right should also be granted to the future Member States and to legal persons whose business is affected by EU decisions. See, for example, EEB comments on the

important consequences, in particular, in respect of the Council. The latter' s statistics show that 10.5% of the requests made in 1999 came from countries outside the European Union.[23] Under the present system, the applicant does not have to state his reasons for making the request (Article 1).

7.3.4 The scope as far as the objects are concerned

7.3.4.1 The inclusion of documents drawn up by third parties

One of the most controversial issues that had to be decided regards the scope of the new legislation as far as the documents covered are concerned. Article 255 EC does not stipulate whether access is only granted to documents which have been "drawn up" by the three institutions or also to those which have been received from third parties. Disagreement in respect of the scope seemed already to exist during the 1996 IGC negotiations. In an earlier proposal on Article 255 EC, the Dutch Presidency used a restrictive wording, as access was only granted to document "originating from" the institutions. This version was, however, not adopted in the final text, but instead the current ambiguous formula was chosen. This uncertainty as regards the scope of the legislation might also explain the French insistence on including Declaration N° 35 in the Treaty. This Declaration stipulates that "the Conference agreed that the principles and conditions referred to in Article 255 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." If the phrase "EP, Council and Commission documents," which was finally included, is interpreted as implicitly referring to incoming documents held by the institutions, then release of these documents would be protected by the Declaration. This Declaration has also been used to support the broader interpretation of Article 255 EC Treaty. It has been argued that the underlying premises must be that incoming documents are covered under the right of access, otherwise the wording of the Declaration would make no sense whatsoever.[24]

The question of the scope of the documents covered appears to be of a political rather than a legal nature. From the wording of Article 255 EC, no legal obligation can be deduced that access should be granted to

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European Commission's proposal for a Regulation regarding public access to documents of the EP, the Council and the Commission, 17 March 2000 at its website, op cit..

[23] This figure is even higher over the first six months of 2000, namely 16%. The figure is, however, distorted to a certain extent as it includes, besides requests from European countries outside EU and those outside Europe, also those whose origin could not be identified. The Commission' s statistics over 1999 show that around 1.7 % of the requests came from Europe but outside the EU, and 2.0 % from outside Europe. There were no requests whose origin could not be identified. The result of the limitation will probably be less significant in respect of the Commission than the Council.

[24] Curtin (1998/2), p. 114.

documents originated from third parties, but neither it is prohibited.[25] A legal obligation to extend the right might, however, be defended on the basis of Article 1 EC Treaty which lays down the general principle of openness.

Up to the last moment of the drafting process, the issue remained controversial. In the various discussion papers, the Commission expressed itself in favour of granting access to documents originating with a third party, although it pointed to the practical difficulties associated with the handling of non-Commission documents and to the duty not to disclose those documents which the Member States would themselves not release.[26] This liberal view was reflected in the first draft proposal in October. However, by the time of the second draft in November, the right of access had been limited to documents drawn up by the institutions only. Behind this radical change seems to be the Legal Service, although the reasons for its opposition to a broad right of access are unknown. After criticism made in respect of the November draft proposal, the Commission changed its proposal so as to provide for a right of access to documents "held by", i.e. documents drawn up by the institutions or received from third parties and in their possession.[27] This version was adopted on the 26th of January 2000 by the full Commission (Article 2(1)).[28] Article 2(1) limits access to third party documents to those sent to the institutions after the date on which the Regulation becomes applicable. The reason given for this is that it will give the institutions time to inform the citizens properly of this broader right, although a more plausible explanation would seem to be that the Commission in particular would encounter practical difficulties in providing access to documents issued before the Regulation comes into force.

Although no reference is made regarding the relation between the new legislation and Declaration 35, the Declaration should have been incorporated somehow into the principles and conditions of the new legislation. No explicit provision/exception exists in this respect, and the only relevant provision seems to be the exception of Article 4 (d) concerning documents supplied in confidence (§7.3.6.). If a Member State supplies a document and makes, at the same time, a Declaration 35 request, the receiving institution will probably consider this as a request for confidentiality, and will, before releasing the documents, ask the Member State' s permission to do so.

The broader access right is obviously a major step forwards in respect of the current situation. However, the wide scope is in danger of being reduced considerably if one looks at the exceptions (§7.3.6.).

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[25] This is also the opinion of the Commission: see the January discussion paper on public access to documents, op cit.

[26] For example, it pointed to the possible difficulties in identifying and locating documents, as a result of the absence of a centralised registration of incoming documents. It also referred to the heavy burden on the administration, if the consent of the author of the document should be requested. See the April discussion paper on public access to documents, op cit..

[27] Third party has been defined as "any natural or legal person, or any entity outside the institution, including the Member States, other Community and non-Community institutions and bodies and non-member countries" (see Article 3(f)).

[28] The issue seemed to have been settled definitely before the meeting of the Chefs du Cabinet on the 21st of January 2000. See the Communication from Mr. Kinnock on reforming the Commission, point 3 (18 January 2000).

7.3.4.2 No access to documents already published

Article 2(2) determines that access is not given to documents already published or accessible to the public by other means. This requires, however, that the institution indicates where the documents has been published and how it is available, or indicates the other means. What falls under "other means" is not clear. Could it be that if the document can be obtained from an authority of a Member State, the applicant will be refused access to it?[29] "Other means" would seem also to cover the Internet. As, even now, it cannot be supposed that all citizens have access to internet, the institutions should be obliged to provide the document if the applicant makes clear that he has no access to internet. The same should be required of the institutions in regard of any "other means," which is not accessible/available to the applicant.

7.3.4.3 The relation with specific rules

Article 2(2) stipulates that the Regulation shall not apply where specific rules on access to documents exist. This means, according to the explanatory memorandum, that the Regulation does not apply where specific rules exist for certain person who have a particular interest in information or where there are rules governing the confidentiality of certain documents. It is emphasised that these rules should, however, be revised as soon as possible in the light of the general principle of transparency. This provision has clearly been enacted to deal with the problems of compatibility, which have arisen under the current rules (see §6.3.2).

As far as the special access rules for persons with a special interest are concerned, there is some confusion about the effect of this provision. Does it mean that where special rules exist the general rules no longer apply in respect of those persons with a special interest (to whom special rules apply), or in respect of anybody?

For example, in competition cases special rules exist for the party to have access to files. This provision seems to have the effect that the party can only request access to such files under the special rules, but no longer under the Regulation. This interpretation of the provision is, however, only workable, if third parties cannot request access to files under the general rules. Otherwise the party could just send a strawperson to make the request for access under the general rules. It seems that the extent of this provision regarding special *versus* general rules is that, where special rules exist, one can no longer ask for access under the general rules. This would remove the possibility that third parties might obtain wider access under the general rule than the party under the special rule, which would defeat the rationale behind the special rules, which aim at providing parties with more favourable access. Given the confusion, any amendment should make clear explicitly the extent of this provision.

There is another problem regarding the fact that the provision allows special "rules" to set aside the treaty right: the legal status of the rules is not specified, but it can be questioned whether special rules of a lower status can set aside the general rules on access which are laid down in a Regulation, itself based on the Treaty. For example, in competition cases, the special rules are laid down in a Communication which has been adopted on the basis of the Commission's Rules of Procedure. Is it legally possible for those Rules to set aside the general rules on access? Usually, in other access regimes, a hierarchy of norms exists and only special rules of the same hierarchy as the general rules can set aside the latter.

A last remark concerns the UN/ECE Convention on the environment (see §6.3.3.2.). It would seem that the UN/ECE Convention (Aarhus Convention) which contains special rules for access to environmental information sets aside the Regulation.[30] This cannot have been the intention of the Commission, and amounts to an unforeseen side-effect. It might also be that, given the fact that the Convention contains rules about access to information and not documents, it would not override the Regulation. Again, clarity is needed in this regard.

It seems necessary that in an Annex to the Regulation, all special laws existing in the Union which override the general access rules should be specified, as well as all other rules which contain secrecy/disclosure provisions.

7.3.4.4 The definition of documents

7.3.4.4.1 General

In accordance with Article 255 EC, the proposal provides for access to "documents" and not the wider term "information" (see §6.2.2.1.). The wide definition of documents reduces however the difference in scope between the two terms. Article 3 defines documents as "any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audio-visual recording)." Access is, nevertheless, limited to *administrative* documents, i.e. documents concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility. What the effect of this limitation is, is not clear, as it would seem hard to imagine what documents the institutions hold that are not somehow related to the institution's sphere of responsibility.

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[29] See EEB comments in respect of the proposal at its website, op cit., p. 4.

[30] UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters at http://www.unece.org/europe/pp.

7.3.4.4.2 Internal documents

The article excludes further from the definition of documents, "texts for internal use such as discussion documents, opinions of departments, and informal messages." In other words, this category of documents is never accessible, not even after the decision to which they relate has been taken. The Commission justifies this exclusion by referring to the Committee of Independent Experts, which stressed that "like all political institutions, the Commission needs space to think to formulate policy before it enters the public domain, on the grounds that policy made in the glare of publicity, and therefore on the hoof, is often poor policy."[31] The Preamble (and explanatory memorandum) explains that the need for "space to think" requires the exclusion of documents which express individual opinions or reflect free and frank discussions or the provision of advice as part of internal consultations and deliberations, as well as informal messages such as e-mails.

The exclusion of the above-mentioned category of documents from access constitutes an enormous step backward from the current rules, where all internal documents are in principle accessible, unless covered by an exception. It should be stressed that the Commission has observed that above-mentioned documents are documents which are not usually released at present.[32] In respect of the scope of the exception, it noted that its effect in practice has to be awaited, but that it would seem to exclude those documents which are currently refused under the exception of the confidentiality of the institution's deliberations.[33]

The exclusion has been criticised for being extremely vague and broad, leaving an enormous discretion in the hands of the institutions in this respect. What is covered exactly by the term "text for internal use"? When does a document loose its internal character? Does it cover correspondence between departments? Do preliminary drafts or drafts fall under the exclusion? The Commission's discussion papers of January and April, which according to this provision would themselves probably not be released as they would come under "discussion documents," are much clearer in this respect. The latter distinguished between three categories of documents: those relating to the institution's internal organisation and administration (Manuals of procedures etc..); preparatory documents forming part of the legislative process, which could be divided into those relating to Commission policy decisions and initiatives (preliminary drafts, draft proposals for legislation or decisions, interim reports), and explanatory documents and other factual information relating to the Commission's policy initiatives and decisions (statistics, background notes, studies etc..). The third category of documents regarded working documents in the form of contributions to internal proceedings (*internal documents*: summary reports of meetings, briefing notes, departmental

[31] See the second Report of the Committee of Independent Experts on allegations regarding fraud, mismanagement and nepotism in the European Commission of 10 September 1999, §7.6.6, at http://www.europarl.eu.int/experts. See similar the Report on Openness within the European Union, Committee on Institutional Affairs, Rapporteur Lööw, PE 228.441/fin., 8 December 1998, p. 15.

[32] See Die Zeit Debatte, Freedom of Information in a European Context- http://www.debatte.zeit.de/Forum37/HTML/000002.htm. Interview between Preston M. (Commission) and Bunyan T., p. 5.

opinions, mission reports, notes containing officials' personal thoughts or opinions). Whereas the first two categories would be accessible, this latter category would be excluded. The November draft proposal made a further distinction between working documents/papers drawn up exclusively for internal utilisation, which are not covered, and other working papers which are accessible, but only after their adoption. This further distinction was not taken into the final draft proposal.

As far as the "opinion of departments" is concerned, it not clear why the public is not allowed to know which department advanced what arguments in the process of decision-making. This is information which is important for the citizen to know, and as long as individual opinions of officials are not released, it is hard to see why this would be problematic? The explanatory memorandum tries further to exclude from access e-mail messages on the grounds that they are informal messages and an equivalent to telephone calls. Obviously this is an erroneous understanding of the character of e-mail, which, properly viewed, amounts to a document (excluding obviously private e-mails). In sum, the extent of this widely-drafted exclusion is uncertain, and it would be possible to include under this exclusion all kind of documents, which are important for the public to access in order to be able to understand the decision-making process and to scrutinise or control the institutions.

A final remark about the placement of this provision in the definitional section. Normally, provisions limiting the right of access to internal documents appear in the provisions on exceptions and not in the definitional section.[34] The current position has another negative consequence. If "text for internal use" are not considered to be "documents", then they do not have to be listed in the register of *documents*, which should be set up under Article 9 (see §7.3.8).[35]

Is there a need for a "space to think"? It has been argued that the government needs a certain space to think in private in order to protect the quality of its work, the free and frank communication between officials (ministers and civil servants) and to avoid influence at too early a stage.[36] The "space to think" as referred to in the Report of the Experts, seems to refer to the danger that publicity at an early stage would lead to rushed policy-making, which would result in poor policy. It has been argued that the administration needs this space to develop its position and to prepare in peace the documents before they are discussed in public. In response, opponents reason that the assumption that institutions must be able to think in private is inconsistent with their character as public authorities, and that each and every action of a public authority is, or should be, taken on behalf of the public interest and should be open to public control and scrutiny.[37]

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[33] Ibid., p. 14.
[34] See for example, the Commission's comparative research into the rules on public access to document rules of the Member States, p. 5, at http://eu.europe.int/comm.
[35] See EEB comments on the proposal, op cit., p. 6. The EEB seems of the opinion that the placement in the definitional section was motivated by the fact that in this way internal documents would not have to be enshrined in the register.
[36] See Berge (2000), p. 35.
[37] See EEB comments, op cit.

Allowing public insight into the working of government at an early stage has, however, many positive effects. It may lead to more informed debate and better understanding of complex issues, reassure the public that issues have been thoroughly debated and show weaknesses in official thinking. Early participation can further improve the quality of the rules finally adopted, as the administration can take into account all the different views. In fact, the various leaks of the current proposal seems to have led to important changes (improvements) at the last moment. Further, the leaks, i.e. publicity at an early stage, did not rush the Commission to adopt the final version of the proposal as the Experts warned.

What is really needed under the heading of a "space to think"? The answer is subjective and seems culturally related. Most Freedom of Information (FOI) legislation contains, provisions which aim at creating a certain margin for government to conduct its business in private. For example, in the Netherlands, all documents drafted for the purpose of internal discussion are public, except for individual policy opinions, information which will only be made public in a form that does not reveal the identity of the official.[38] The Dutch answer to the above-mentioned question is thus "not much." The UK's answer is the opposite, as it exempts from access the whole class of information relating to the formulation of government policy.[39] The legislation of Nordic countries also contains provisions in this respect (see §6.2.2.1).

The EP Committee on Institutional Affairs has observed in general that most internal notes should remain confidential, except for such documents as formally adopted minutes, certain working documents and certain other and widely distributed preparatory material which should generally be made available.[40] The need for a "space to think" is, however, much more difficult to defend in respect of the legislative process, which should be conducted as much as possible in public (see Article 207 EC). On the other hand, it should, be stressed that the legislative process in the European Union takes place through painstaking negotiations, which require a certain amount of confidentiality (see §5.3.3). This should, obviously be taken into account when excluding certain internal documents. Moreover, the difference in structure between the Council and the Commission means that exclusion of internal documents might have more far-reaching consequences in respect of the former rather than the latter institution. This difference was one of the reasons for the Meijers Committee (Expert Committee) not to include an exception to protect certain internal documents from disclosure.[41] They admit that it is not unreasonable for each institution to feel it must have a certain margin in the interests of efficient decision-making, but that interest can never as a matter of course prevail over the citizens primordial interest in obtaining access to documents. In this decision, they have taken into consideration the particularities of the Union's decision-making process, and the fact that many decisions/practices take place in working parties and subsidiary organs. Therefore,

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[38] Article 11 of the Dutch law on public access to documents. Wet van 9 november 1978 (Stb. 1978, 581), replaced by Wet openbaarheid van bestuur (Stb. 1991, 703). Entry into force 1 May 1992 (Stb. 1992, 185).
[39] Clause 33 and 43 of the FOI Bill at the moment it went from the Commons to the Lords (HL Bill 55).
[40] Report on Openness, Committee on Institutional Affairs, Rapporteur Lööw, op cit., p. 15.
[41] See the alternative proposal of the Standing Committee of Experts on International Immigration, Refugee and Criminal Law (Meijers Committee), Utrecht, July 2000. This proposal can be found at the website of Statewatch, op cit.

it would not be acceptable to limit, for example, the citizens' access to those document written for external use (or distributed outside) or after the decision-making process has been finalised.[42]

According to the author a certain "space to think" is indeed not unreasonable, but it should be protected by a clearly and limited drafted exception. Documents for internal use should be defined more precisely, and they should not be excluded permanently from access. The author does not agree that the release of these documents should be postponed until after the subject matter to which they relate has been decided, as to do so would hinder the possibility to participate in the decision-making process (see §7.3.7.3 about an "embargo" system). These documents should be protected from disclosure only as long as they have not reached a certain level of maturity. It is not necessary to release every draft of a document.[43] The problem is how to determine the level of maturity before which access should be prevented. A solution might be to exclude such documents as long as they have not been filed (the Swedish solution). Finally, it is important not to disclose the identifiable individual policy opinions of an official.

7.3.4.5 Classified documents

The Commission's proposal does not contain any provision regarding access to classified documents (internal classifications or classified information received from a third party). In other words, classification as such would not seem to constitute an obstacle to disclosure. It should be noted that the Council is planning to propose the inclusion of its recent amendment to its Decision 93/731/EC on public access to documents, which excludes certain classified ESDP documents from its scope (the so-called "Solana Decision"). This will probably face opposition from the Parliament. The latter has lodged a case with the Court of Justice for breach of its prerogatives by adopting decisions on a matter which is currently the subject of a legislative report going through Parliament. The Netherlands and Sweden have also decided to challenge the Council in Court over its Decision amending Decision 93/731/EC (see §6.2.2.2.2).

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[42] Ibid.

[43] The danger of releasing internal documents at too early a stage (early concepts) is that people in fact use them to show how the administration changed its mind by comparing them to more mature versions of the same document. However, often very early versions of a document consist only in reflections of one official (or group) and are written for the purpose of discussion. This is often forgotten by those who comment on these documents.

7.3.5 The scope as far as the subjects are concerned

7.3.5.1 Horizontal

The right of public access to documents is only granted in respect of the three main institutions. As a consequence, the two other institutions mentioned in Article 7 EC, the Court of Justice and the Court of Auditors, and the two quasi-institutions mentioned in the Treaty, the ECS and the Committee of Regions are not covered by it. It seems that the Court of Justice and Auditors have been excluded from the scope of the Treaty provision as it was deemed inappropriate to apply such provisions to courts of law. Moreover, many other bodies and organs existing in the Union decision-making process are not covered.[44] This of course constitutes an important weakness given the fact that several such bodies are in a particular position to influence the institutions in a way that affects the rights of the private parties. So far, nineteen other institutions and bodies have adopted voluntary codes on public access to documents, in most cases in response to the Ombudsman's Recommendations issued in this respect following his two own-initiative inquiries into the existence and public availability of rules on public access to documents. The Ombudsman ruled that those bodies and institutions have a legal obligation to adopt rules on access to documents, and failure to adopt such rules would constitute an instance of maladministration (see §6.6.3.3).

The undesirable situation from the viewpoint of transparency of the existence of multitude different Codes on public access to documents in the Union has already been pointed out. Moreover, in the light of the general principle of openness as laid down in Article 1 TEU, there seems no justification for the fact that three institutions should be bound by more detailed rules in the future than all the other institutions and bodies, each of which fulfil key functions in the Union.[45]

This situation may however be prevented. The European Ombudsman emphasised that consistency and equal treatment of citizens requires that, when the new Regulation governing public access to EP, Council and Commission documents becomes part of Community law, the general principles and limits which it lays down should be applied throughout the Community administration (see §6.6.3.3). The Meijers Committee adopts similar reasoning in this respect.[46] It notes that the Council, under Article 308 EC Treaty, can ensure that in the future the general principles and limits governing citizens' right of access to documents, as provided for in the new Regulation, must extend to all other institutions and bodies of the EU. It sees this as an important general principle, which it deduces from the principle of equality as well as from the principle of openness as laid down in Article 1 of the TEU. It notes that since the signing of

[44] In recent years numerous functional bodies and agencies and many hybrid new organisations have been created. See Curtin (1999), p. 77.
[45] See the alternative proposal of the Meijers Committee, op cit., No. 5.
[46] Ibid.

the Treaty of Amsterdam this principle of openness applies in a general and horizontal fashion across the spectrum of European Union activity to all institutions and organs and other bodies. Thus, it is only the special implementation of that general horizontal principle with a legal basis in the EC Treaty (Article 255), which as a matter of course does not apply to the other institutions and bodies other than the three explicitly mentioned. Therefore it emphasised the Council's possibility to act on the legal basis of Article 308 EC Treaty.

7.3.5.2 Vertical

In the past, controversies emerged about which bodies are part of the Council and the Commission for the purpose of the rules on public access to documents. These controversies led to complaints to the Ombudsman and a case being brought to the European Court of Justice (see *Rothmans v Commission*).[47] Future disputes in this respect should be prevented, as the proposal defines in detail what bodies form part of the EP, the Council and the Commission. The committees, which are set up by the Treaty or by the legislator to assist the Council, are expressly mentioned as constituting part of the Council, whereas the committees set up by the Commission as well as those set up to assist it in the exercise of its executive powers (the famous "comitology committees"), are considered part of the Commission for the purposes of the Regulation. The inclusion of the comitology committees amounts to an incorporation of the case-law of the Court of Justice and the Comitology Decision (see §6.2.3). An undertaking, which had been promised long ago, but was never satisfactory discharged by the Council nor the Commission, is the obligation laid down in Article 3(f) to draw up a list of committees in the context of the separate implementation by the institutions of the Regulation.

7.3.6 Exceptions

7.3.6.1 General

Access to documents drawn up by the institutions or received from a third party will not be granted if the document is covered by one of the exceptions laid down in Article 4. However, the explanatory memorandum notes that where there is some doubt as to whether a document received from a third party is covered by an exception, the institution will consult the author of the document first, although it reserves the right, if no reply is forthcoming, to take the final decision on whether to allow access to document or not. In other words, if the reply is forthcoming the institution seems to consider itself

compelled to follow that opinion rather than take the final decision on disclosure itself. This is obviously an objectionable situation, as it should be the institution, in principle, which takes the final decision on access to documents.

Under the proposal, only mandatory exceptions exist. The original mandatory exceptions have remained obligatory in character, but the simple harm test has been replaced by a substantial test. Article 4 stipulates that the institutions *shall* refuse access to documents where disclosure *could significantly undermine* (a) the protection of the public interest, (b) the privacy and the individual, (c) commercial and industrial secrecy or the economic interests of natural/legal persons, (d) or confidentiality as requested by third parties or as required by national law. Under each general interest ((a) to (c)), a list of specific exceptions are mentioned. The lists are not exhaustive and regard only examples of specific interests which need in particular protection. The combination of a mandatory exception with the word "could", which stands for "potential" harm and not "actual" harm, provides for extensive protection. It has to be seen whether the addition of "significant" will make a refusal more difficult in practice. The facultative exception of the confidentiality of the institutions' proceedings has been deleted, but seems, however, to appear slightly modified as a mandatory public interest exception, i.e. the effective functioning of the institutions.

7.3.6.2 The public interest exceptions

The first negative aspect is that the catalogue of exceptions mentioned under the collective notion of the public interest is not exhaustive.[48] The exceptions mentioned are only examples of those interests which in particular need to be protected. Clearly the Commission has relied upon the Order of the Court of First Instance (CFI) in the *Carlsen* case.[49] As mentioned before, it should be stressed that it regards an interim ruling, which is moreover dubious. The list of public interest exceptions contains, besides those mentioned in the Code of Conduct, several new ones. New is the explicit mentioning of *defence* (added to *international relations*), as well as *relations between and/or with the Member States or Community or non-Community institutions*. This latter exception is very broad, and seems able to cover any communication between institutions and others (except for non-Member States, which relations, however, might be protected under the exception of international relations). Whereas the Code of Conduct only protects the Community's financial interests, which seems not an unusual exception, the proposal protects

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[47] Case T-188/97, *Rothmans International BV v. Commission* [1999] ECR II-2463.

[48] The exceptions mentioned under the public interest are: public security; defence and international relations; relations between and/or with the Member States or Community or non-Community institutions; financial and economic interests; monetary stability; the stability of the Community's legal order; court proceedings, inspections, investigations and audits; infringement proceedings, including the preparatory stages thereof; the effective functioning of the institutions.

[49] Case T-610/97 R, *Hanne Norup Carlsen and others v. Council*, Order of the President of the CFI of 3 March 1998.

in general *financial or economic interests*. It does, however, not specify whose financial or economic interests are protected. This exception needs to be drafted more precisely, and its necessity should be explained satisfactorily. Some of the new exceptions amount to the codification of the case-law. For example, *the stability of the Community's legal order* was the exception on which the Council relied in the *Carlsen* case to refuse access to the opinions of the Legal Service. The remarks, which have been made above in respect of the *Carlsen* case, apply again (see §6.6.2.2.1). If the intent of this provision is to exclude entirely legal opinions, then this can be done much better by a specific exclusion to this end or by bringing these opinions under the internal document exemption (see §7.3.4.4.2). This is not an unusual exception. For example, the UK Freedom of Information Bill contains an exemption regarding legal professional privilege, which is, however, subject to the public interest test (clause 40). In the Netherlands, judicial opinions regarding policies are in principle accessible, but will often contain information which is covered by an exception, such as personal policy opinions, confidential business information or information concerning privacy. The current exception is not limited to legal opinions and protects all documents which could undermine the stability of the Community's legal order. What kind of documents come within this provision is not clear.

The proposal, further, incorporates the judgement of the CFI in the *WWF* case, but goes beyond that ruling considerably.[50] To recall, the CFI in this case ruled that documents relating to investigations, which might lead to the opening up of an infringement procedure, may not be disclosed as they fall under the exception of the public interest of investigations. The current exception does not only cover the preparatory stages of the infringement proceedings, but the whole proceedings. This seems contrary to the CFI's opinion, as the latter stressed in the *Bavarian* case expressly that not all documents relating to infringement proceedings are covered by the exception.[51] It was very keen to establish the exact status of the document in question, preparatory or not preparatory, since in *WWF* it had determined that only the first category of documents is protected under the exception. The phase following the establishment of the existence of an infringement, i.e. from the moment of the delivery of the reasoned opinion (including the reasoned opinion), does not seem to require protection.

7.3.6.3 The specific public interest exception of the effective functioning of the institutions

The last and most controversial public interest exception is the one concerning *the effective functioning of the institutions*. This is the transformed version of the current discretionary exception of the confidentiality of the institutions' proceedings. This change in phrasing seems, however, to result in a widening of the exception. It is moreover negative that there is no longer any balancing of interests. If disclosure of a document could significantly undermine the effective functioning of the institution, access

[50] Case T-105/95, *WWF v. Commission* [1997] II-313.
[51] Case T-309/97, *Bavarian Lager Company v. Commission* [1999] ECR II-3217.

must be refused. Whether the transformation will lead to more openness given the introduction of the more severe harm test has to be seen in practice. It is not known whether the CFI will leave the institutions a broad margin of appreciation in conducting the harm test. The case-law seems, however, to suggest it will (see, for example, *Hautala*).[52] In respect of the application of the public interest exception of international relations, the CFI in *Hautala* left a broad degree of discretion to the Council and it observed that, in the subject area of Common Foreign and Security Policy (CFSP), it would only conduct a marginal judicial review.[53] It remains to be seen whether the CFI, in respect of other subject areas, will engage in a more substantive review than in the CFSP area. If so, then the effect of moving this exception might be positive, given the fact that under the confidentiality exception the institutions seem to have a wide discretion (see §6.6.2.2.5).

As the Commission proposal already exempts from access all internal documents, the need for this exception can be questioned. No explanation has been given as to why this exception is regarded as necessary, and in fact there is wide-spread support for its deletion.[54] Given this lack of explanation, one cannot help reading the exception in the light of the remarks made in the Commission's discussion paper of January in respect of the current confidentiality exception. In this paper, the Commission proposed to include an *embargo* system in the new proposal. This system should be created "to delay access to certain documents to avoid any interference in the decision-making process and to prevent premature publication of a document from giving rise to "misunderstandings" or jeopardising the interests of the institution (e.g. granting access to preparatory documents only after the formal adoption of a decision by the Commission, or, where appropriate, the EP or Council)." This is, for example, the case in Sweden (see Chapter 6.2.2.1). This system tries to protect the "space to think," as discussed before in respect of internal documents.

This exception allows the institutions in practice, and in particular the Commission, to exclude all preparatory documents which would enable the public and civil society to influence and to participate in the decision-making process before decisions have been taken. Influence from outside should as much as possible be prevented as it is seen as negative interference in the work of *public* institutions. Documents which might give rise to misunderstanding should not be kept secret, but accompanied with a short explanation, otherwise, democracy would be reduced to *ex-post* accountability. This embargo system was not adopted in the final proposal, which is positive. Nevertheless, it is still possible to apply it under the new exception of the effective functioning of the institutions. This is not something new as the Council already refused access to documents under the current confidentiality exception, on the grounds that they regard decisions which are still under consideration or have only been recently adopted (see the Ombudsman's complaints in §6.6.3.2).

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[52] Case T-14/98 *Hautala v. Council* [1999] ECR II-2489.
[53] Ibid.
[54] See for example, ECAS, op cit., p. 5. According to the Ombudsman, it seems unnecessary and could be deleted. See Söderman J., "Mr. Söderman responds to Mr Prodi' s letter to the President of the EP," 14 March 2000, at http://www.statewatch.org/Sodermanrepen.htm (includes the European Ombudsman's suggested amendments to the Commission proposal regarding Article 255 EC Treaty), p. 4.

7.3.6.4 Privacy and the individual

The second protected interest regards *the privacy and the individual*, which amounts to a commonly justified exception found in all national legislation.[55] The protection of the privacy seems, in particular, important as co-operation in the fields of security and justice depend on information networks and databases containing sensitive information. Moreover, it has been argued that new measures are needed. For example, it is positive that the Amsterdam Treaty incorporated Schengen, but the latter's intergovernmental system has a very weak authority to protect privacy and other civil liberties.[56] The protection of the individual's right to inspect his own files is equally important, as in this way the citizen can check, for example, the accuracy of the information kept. This right is sufficiently protected under the Commission proposal (under the provision concerning specific laws).

7.3.6.5 Commercial and industrial secrecy or economic interests

Commercial and industrial secrecy or economic interests of a specific natural or legal person are also protected. One of the exceptions under this general interest is extremely broadly formulated, and protects industrial, financial, banking and commercial information, including information relating to business relations and contracts.[57] The information does not even have to be confidential (as requested or prescribed by law, or because, when it was communicated, an expectation existed that the information would not be disclosed).[58] It has been suggested that the exception should go no further than necessary to protect legitimate trade secrets, the confidentiality of which has been expressly requested, and the disclosure of which would harm a commercial or industrial interest by helping a competitor.[59] In particular, with regard to this exception, it has been argued that the public interests in, for example, environment, health and safety, as well as human rights should take precedence over commercial considerations.[60]

7.3.6.6 The exception of documents submitted in confidence

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[55] The exceptions mentioned under this general notion are: personnel files, information given in confidence with a view to recruitment, personal details.
[56] See ECAS' comments on the proposal, op cit., p. 3.
[57] Under the general heading are further mentioned the exceptions of: business and commercial secrets; intellectual and industrial property; information on costs and tenders.
[58] See EEB comments, op cit., p. 10.
[59] Ibid.. See also the extensive comments in respect of this exception made by ECAS, op cit., p. 7.
[60] Ibid., p. 4 and EEB comments, op cit., p. 9-10. Both base their comments on the Aarhus Convention on environmental information (see §6.3.3.2.).

The broader right of access is obviously a major step forwards in respect of the current situatior However, the wide scope risks being considerably reduced if one looks at the exception stated in Articl 4(d). This article stipulates that documents shall be refused where disclosure could significantl undermine the protection of the confidentiality requested by the third party who supplied the document or the information, or as required by the legislation of the Member State. The third party, including th Member States, does not have to give any reason as to why the documents should be confidential. Thi exception raises the danger that in practice many third party documents will be excluded from access which means that the broader right to access becomes meaningless. The Ombudsman's suggestion to limi the right to submit documents in confidence to cases which fall under grounds set out in law, would limi the possibility to submit all documents to the institutions in secret.

7.3.6.7 Concluding observations in respect of the exceptions

The only positive point of the newly-drafted exceptions is the fact that the mandatory exceptions have been subjected to a substantial instead of a simple harm test. However, one can immediately object and argue that it would have been more appropriate to make certain exceptions discretionary (facultative), and to allow for a "public interest test." This public interest test would mean that access could only be refused if the public interest in disclosure did not outweigh the harm caused to a particular interest protected by an exception. This test could still be imposed by the CFI, as it did with the balancing of interest test in respect of the facultative exception under the Code of Conduct (see *Guardian* case).[61] The inclusion of a public interest test might not be suitable in all fields; for example, one can object to such a test in the case of public security or defence. Some NGOs have argued for the inclusion of a specific public interest test in respect of the exception of commercial secrecy or international relations.[62] Another general defect of almost all exceptions is the fact that they are drafted too broadly and vaguely. Highly objectionable is the fact that the lists of exceptions mentioned under the three general interests (Article 4 (a) to (c)) are not exhaustive. Especially in respect of the public interest exception, this is absolutely unacceptable, as an enormous amount of information could be exempted under the general heading. The determination of the exceptions should not be left to the public authorities, but should be laid down precisely beforehand in the law. The list of specific public interest exceptions is extremely broad and should be narrowed down. For example, the exception of the effective functioning of the institutions amounts to a "catch-all" exception, which can be relied upon by the institutions to exclude almost everything they want. This exception should be deleted.[63] But in addition the exceptions mentioned under the general interests of commercial, industrial and economic interests and the exception of documents supplied in confidence by third parties are too widely drafted, with all the accompanying negative consequences.

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[61] Case T-194/94, *Carvel & Guardian Newspapers Ltd. v. Council* [1995] ECR II-2767.
[62] See in respect of international relations, ECAS, op cit., p. 4-5.

Whereas the Commission's proposal follows the traditional line of exceptions as found in the Member States, a completely different approach is taken by the Meijers Committee.[64] This Committee has tried to take into account the reality of decision-making within the Union as well as its interaction with the national legal systems. As a result of this complex relationship with those systems, the meaning and scope of such concepts as *public interest*, *international relations* or *security* will be very differently as worked out and applied within the Union than within the Nation-state than within the Union. The Committee proposed the inclusion of three exceptions, two of which aim at protecting private interests.

7.3.7 The relation with the Member States' legislation on access to documents

The provision concerning the relation between national access legislation and the future Regulation has been softened after, as it seems, a last-minute meeting between the Swedish Foreign Affairs Minister and Commissioner Kinnock.[65] The November version of the proposal obliged the Member States to apply the principles and the limitations set out by the present Regulation when they receive requests for access to EU documents. It was, in particular, this aspect which led to criticism by civil society. This obligation was dropped in the final proposal as adopted on the 26th of January 2000. The new wording of the article still implies, however, that the Member States should not release EU documents, which the latter would not disclose itself under the Regulation. According to recital 12 Preamble:

> Although neither the object nor the effect of this Regulation is to amend existing national legislation on access to documents, it is nevertheless clear that, by virtue of the principle of loyalty which governs the relations between the Community institutions and the Member States, Member States should take care not to hamper the proper application of this Regulation.

This provisions would end the current situation in which the most progressive Member State determines the level of openness of EU documents, which might have caused some irritation between the Member States. To recall, it has already led to irritation between the Council and Sweden in the *Journalistenförbundet* case (see §6.4).[66]

The above-mentioned proposal tries to limit the wider access that citizens might have to EU documents under their national legislation on access. This interpretation appears, however, to be in violation with several Treaty provisions. According to the Meijers Committee, this interpretation contravenes one of the objectives of the Union as enshrined in Article 2 TEU. Article 2(3) stipulates as an objective of the Union

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[63] See also the Ombudsman's suggested amendments to the Commission proposal, op cit., p. 4.
[64] Meijers Committee, op cit., No. 6.
[65] Swedish Press at http://svdsvenskan.se/red/v4/25utrikes.html, 25 January 2000.

to "strengthen the rights and interests of the nationals of its member states through the introduction of a citizenship of the Union." From this recital it can be deduced that the Regulation cannot have the effect of restricting the present right of openness (or access to documents) which a citizen of a Member State currently enjoys by virtue of his or her national law, as this would contravene the above-mentioned objective of the Union. In practice, this means that the national law of citizens takes precedence over the provisions of the Regulation in the event that the former is more favourable. This approach is reinforced by the application of the principle of subsidiarity (Article 5 EC Treaty). The alternative Regulation as proposed by this Committee provides thus in the Preamble that "whereas any restriction on the openness which a citizen of a Member State may invoke under his domestic law is contrary to that objective of the Union" (read further Article 2(2)). A slightly different reasoning is followed by Curtin, which, nevertheless, leads to the same conclusion (see §6.4).[67]

Apart from the interesting legal argument above, the raison d'être of which I agree with, it is not sure as to whether this reasoning can prevent the limitation of more generous rights which citizens possess under their national access laws. As a result of the principle of supremacy and direct effect of Community law, the provisions of the Regulation can set aside conflicting national law. An action for annulment of the Regulation because it violates Article 2 TEU would not seem possible, as the European Court of Justice (ECJ) has no jurisdiction to rule over the principles as laid down in Article 2 TEU. If the Regulation can be annulled for violation of the subsidiarity principle, would seem difficult given the very general nature of this principle. This seems to lead to the conclusion that, in particular, the EP must guard against the inclusion of such provisions as already proposed by the Commission.

7.3.8 Procedural aspects

The provisions regarding the administrative procedures for handling requests and remedies are similar to those in force under the present system, which, as explained in the memorandum, operate satisfactorily. A number of adjustments have, however, been made. First of all, the institutions may exceptionally extend the time-limits for replies to initial and confirmatory applications by one month. The term "exceptionally" is not defined, and seems in practice to stand for vacational seasons or requests concerning a large number of documents.[68] The time-limit of one month is longer than in most national legislation (for example, in the Netherlands). However, as it might be expected that requests for third party documents, in particular those of Member States, will be more frequently made under the Community rules than under

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

[67] She argues that on the basis of the principle of subsidiarity and citizenship, which she interprets in the light of Article 1 TEU, the rights acquired by citizens under national access law cannot be taken away by EU rules (including the future Regulation). This should be the legal situation since the coming into force of the Amsterdam Treaty. See Curtin (2000), p. 15 and 26.

[68] See Statewatch' s suggested amendments to the Commission proposal, p. 4.
See at http://www.statewatch.org/holamend.html.

national law, the longer time-limit might be justified. In respect of third party documents consultation might have to take place more frequently, which means extra time before the decision on access can be taken.

A positive aspect of the proposal is that the current rule, that a failure to reply to a confirmatory application equals a refusal, has been changed into the opposite, namely a failure to reply equals a positive response. This constitutes a better protection of citizen's rights, but a failure to reply remains bad administration.[69]

The proposal has kept the provision concerning the necessity to consult the applicant with a view to finding a fair solution in cases concerning repeat applications and/or applications relating to very large documents.[70] However, "repeat" is replaced by "repetitive," which according to some frequent applicants would be an attempt to overturn the Ombudsman's rulings in two cases concerning refusals on this ground.[71] To recall, the Ombudsman ruled that repeat applications are not, as the Council argued, numerous applications for different documents belonging to a particular policy field, but numerous applications for the same document. Whether this change is merely of a linguistic or of a more substantive character should be made explicit in the explanatory memorandum. Criticism has also been made in respect of the part regarding "very large" documents. It has been argued that this provision suggests that the citizen is a burden on the institutions by seeking such a large document. However, it has rightly been pointed out that the size is in the control of the institutions, and not the citizens, and, therefore, it is the responsibility of the former to make large documents accessible (for example, electronically).[72]

The proposal further stipulates that costs may be charged to the applicant, but no further details are provided. In the opinion of the author, it should at least be stated that costs should not exceed a *reasonable* amount.

In accordance with the judgement given by the Court of First Instance in the *Hautala* case, the proposal introduces the requirement of providing partial access in case certain passages are covered by one of the exceptions to the right of access. In this case, an edited version of the requested document shall be provided (Article 7(2)). The possibility which the CFI left to the institutions to refuse granting partial access if this would cause an intolerable burden of work (*Hautala*), which in the opinion of the CFI would in general not seem to be the case (*Kuijer*), does not appear in the proposal. This is positive, as it should not be the citizen who bears the consequences for the fact that the institutions fail to draft their future documents in such a way that they cannot comply with their obligations to provide partial access.[73]

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[69] In the November draft version of the proposal, the failure equalled a negative response.
[70] The January version of the proposal (26.01.2000) required the finding of an *amicable* and fair solution.
[71] See Statewatch's suggested amendments, op cit., and Mr. Peers comments in the EFIL discussion group, at http://www.onelist.com/community/EFIL.
[72] See EEB, op cit., p. 11.
[73] See also Meijers Committee, op cit., No. 6.

Documents which are obtained by the applicant may not be reproduced for commercial purposes or exploited for any other economic purposes without the prior authorisation of the right-holder. This provision is broader than the current provision as enshrined in the Code of Conduct. For example, does it cover the situation of a journalist who is using the document in connection with an article for which he is paid? Has the documents been "exploited for economic purposes?"[74] As far as the burden of asking authorisation is concerned, the user must ask the author's or right-holder's permission, as the responsibility for the use made of a document lies with the former. The institutions should obviously assist in providing the details of the author/right-holder.

Finally, Article 9 requires the institutions to provide access to a register of documents. No requirements are, however, laid down as to the time within which it should be set up, what it should contain and how it should be made publicly-accessible. These elements should be determined in the Regulation itself or in secondary legislation adopted under the co-decision procedure, but should not be left to the discretion of each institution.[75] The register must contain all documents, and it must be prevented that certain types of documents, such as classified or internal documents, are excluded from the register. The institutions might argue that, for example, internal documents shall not be enshrined as they are not part of the definition of "documents" as provided for in the final Regulation (see §7.3.4.4.2).

Article 10 determines that each institution shall implement this Regulation via its Rules of Procedure. It should be stressed that the implementation should regard only practicalities, which the institutions may treat differently given their differences in characteristics, and not general principles and limits which should be treated in the Regulation itself. The European Courts should be able to control whether the implementation complies with the general principles as laid down in the Regulation.[76] Article 10 determines that these provisions should take effect three months after the adoption of the Regulation.

7.3.9 Regulation *versus* Decision

Article 255 EC does not determine the legal instrument in which the general principles and limits to the right of access should be laid down. The appropriateness of a Regulation has been questioned in academic circles and civil society. It has been argued that a Decision would have been more appropriate, given the fact that the legislation is addressed to three institutions.[77] The Meijers Committee has expressed itself in favour of a Regulation, as this would entail a clear break with the past Decisions on access and has very clearly defined legal effects. Provisions of Regulations are directly-applicable with regard to the

[74] See for this example the EEB comments on the proposal, op cit., p. 13. See also Statewatch' s suggested amendments, op cit., p. 5.
[75] See Article 6 of the alternative Regulation proposed by the Meijers Committee, op cit.. This article provides that within one year after the entry into force of this Regulation, the three institutions shall determine under the co-decision procedure how the register is to be organised and made publicly available.
[76] Ibid., No. 7.

institutions in question, but also in the Member States, in the sense of conferring directly-applicable norms on citizens. The fact that a Regulation is also directly applicable in the Member States, has according to some commentators the effect of overriding Member States' national policies and practices of freedom of information in respect of EU documents.[78] In other words, it is not true that the Commission has dropped making measures binding on Member States. The choice of a Regulation seems, however, not to have been made for this reason.[79] Furthermore, if the rules had been laid down in a Decision, then national policies on access to documents could have equally been affected as Decisions can also have direct effect.

7.3.10 The staff rules and whistleblowers

All officials working in the Community institutions are subject to the duty of professional secrecy, as laid down in Article 287 EC Treaty (see respectively Article 47 ECSC and 194 Euratom). A similar duty is included in the staff rules of Community officials (Article 17), violation of which will lead to disciplinary sanctions (Article 86). But what if officials release documents to reveal any misconduct? There is no reference to the protection of whistleblowers in the Commission's proposal. The topic is handled, however, in the context of the reform of the Commission. The Commission in its White Paper "Reforming the Commission" proposes the inclusion of a whistleblower provision in the staff rules, which must ensure, *inter alia*, the protection for the whistleblower who acts in good faith and in the public interest, without acting for personal gain, and according to departmental procedures.[80] Inspiration for the future rules on whistleblowers seems to have been drawn from the UK Public Interest Disclosure Act, which protects the "watchdog whistleblower."[81]

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[77] See Statewatch' s suggested amendments, op cit., p. 1.
[78] Ibid..
[79] This is also the opinion of Peers as expressed in the EFIL discussion group, op cit..
[80] See the White Paper "Reforming the Commission," Part II (Action Plan), COM (2000) 200 final. Action 59/60.
[81] UK Public Interest Disclosure Act 1998, Chapter 23. In the UK, a distinction is made between two types of whistleblowers: the "watchdog" and the "protest" whistleblower. The latter has been defined by Mr Kinnock as being generally self-indulgent, sometimes wicked and often anonymous, whereas the former is generally unselfish, serious and not hidden and weakened by anonymity. It is, according to Mr. Kinnock, the watchdog whistleblower who deserves encouragement and protection. See speech given by Commissioner Kinnock, The Hague, 19 November 1999. See also the Swedish legislation for a very wide freedom of officials to supply information (included secret) to the mass media and the protection of the sources (informants identity) of journalists, see Österdahl (1998), p 341.

7.4 Concluding observations

Despite the recognition in the Preamble of the importance of openness for participation, accountability and legitimacy, the overall impression of the proposal is that it still does not consider the citizen's right of access as primordial. The principle that all documents are public, and that access may only be refused to protect certain specific public or private interests which are explicitly provided for in law and narrowly defined, does not seem to underlie this proposal.

First of all, not all documents, which are not covered by an exception are public, as documents which are already published or accessible to the public by other means are also excluded from the scope of the proposal, as well as "text for internal use." Moreover, access is only to "administrative" documents. Whether the presumption of openness really exists depends on the content of the exceptions. If these are drafted so broadly as to exclude most of the interesting information then clearly the balance is shifting to the side of secrecy. As regards the Union, it can be concluded that there are too many exceptions, which are drafted too broadly and vaguely. The situation that the lists of specific exceptions mentioned under the three general interests (Article 4 (a) to (c)) are not exhaustive, is unacceptable, especially in respect of the public interest exception, as most information can be excluded under the general notion of the public interest. The determination of exceptions should not be left to the public authorities, but they should be laid down in law beforehand, precisely and in an exhaustive manner. The actual list of public interest exceptions is extremely broad and should be narrowed down. In particular, the catch-all provision of the effective functioning of the institutions should be deleted. This specific public interest exception in combination with the exclusion of "texts for internal use," might in practice lead to the exclusion of many documents which are important for early participation and for keeping those in power accountable. In particular, insiders and well-established lobbies, who already have earlier access than outsiders on an informal basis, will be privileged.[82] As said above, the exceptions mentioned under the general heading of commercial, industrial secrecy and economic interests, and the one regarding the confidentiality as requested by third parties are much too broad. The widening of the scope to documents received from third parties, has been circumscribed considerably as a result of the latter exception. In this respect the remark made in the explanatory memorandum, that where the institution has doubt as to whether or not an exception applies in respect of third party documents, it will consult the author of the document first should also be noticed. In case a reply is forthcoming, the institution seems to consider itself compelled to follow that opinion rather than take the final decision on disclosure itself. Finally, all exceptions are of a mandatory character, and there are no exceptions which allow for the disclosure in the public interest. In fact, it should be seriously considered whether a public interest test, as provided for example in the UK and the Dutch access systems, should be included in the EU system. Further consideration should also be given to make some of them discretionary (facultative). The current combination of mandatory and

absolute exceptions (no balancing of interests) provides for optimal protection of the interests listed. Instead, facultative and relative exceptions would favour more openness.

Leaving the main problem of the exceptions, there are a number of other problems with the proposal. Under the proposed legislation, a failure to reply in case of initial requests is still treated as a negative reply. This rule has been changed under the proposal into the opposite, but only in respect of confirmatory applications. Having regard of the negative consequences of this rule (see §6.2.5.2), it is important that the EP and the Council change it, and at least provide that in respect of initial request, a failure should be treated as a positive reply. Although, the author still considers that replies must always be given and should be reasoned. Another administrative point concerns the fact that the proposal does not contain any duty to send requests which are made to the wrong institution or body to the right one. This duty exists, for example, in the Netherlands, and seems particular needed in the EU given its difficult organisational structure. The proposal furthermore does not contain a provision requiring institutions to supply the document in the form requested, if it is able to do so. It only stipulates that the institutions must supply the documents in the language preferred by the applicant (if it exists in that language). Such a provision is however required, in particular, as in this electronic age it might be expected that more people prefer to have documents in electronic form. Electronic supply could be cheaper, faster and more useful for the applicant as the latter can edit the document.[83]

Another important problem is Recital 12 which treats the relationship between the national laws on access to documents and the rules applying in the Union. It is not permissible that the rules existing at the Union level can limit the rules on access to documents applying in the Member States. Therefore, this recital should be rephrased and this situation needs to be stated explicitly. The negative side of this would obviously be that the most progressive system determines the extent of openness, which is in fact also currently the case. This issue is not easy to solve, and the only solution would be to harmonise the national systems in respect of access to EU documents.

Finally, there are some general problems with the way in which the proposal has been drafted. It has been drafted on the basis of an assessment of best practice in all EU Member States, in particular, that of the Nordic countries, as well as on the Commission's experience of its own Decision on access to documents. The Union is, however, not a nation-state, and, therefore, the system of access should not be a sum of the best practice, but be tailored to its own specific features (see §4.2).[84] The proposal applies, in the first place, to three institutions, which differ in function and in structure. The Council's structure is very particular and does not assimilate that of a traditional legislator. It is composed of the executives of the 15 Member States. The method of working is also very different. It works through negotiations, and most part of the legislative output is not decided by the Council itself but at lower levels. The Commission is unlike national administrations foremost a policy-maker and not an executive. Furthermore, the special

[82] See ECAS, op cit., p. 1 (conclusions).
[83] See EEB, op cit., p. 13.
[84] Curtin (2000), p. 39-41.

relationship between the Union and its Members should be taken into account.[85] The above remarks have in particular to be considered when drafting the exceptions. This has been done by the Meijers Committee in its alternative proposal. Instead of proposing exceptions along the traditional line of the Member States, it took a completely different approach taking into account the above-mentioned considerations. This does not mean that looking at the exceptions of different national access systems is not valuable, but only to a certain extent.

[85] Ibid. See Meijers Committee, op cit., No. 6.

8 CONCLUSION

8.1 The implementation of the fundamental principle of open government in the European Union

The purpose of this study has been to provide an answer to the following research questions:

How has the principle of open government been approached, implemented and applied in the European Union? To what extent might this principle play a more fundamental role in the future?

It follows from the analysis of the topic of open government in the European Union as conducted in this study, that the principle of open government is gradually evolving into a fundamental principle. This conclusion is based upon a number of developments which have taken place in the Union since the issue of openness was placed on the political agenda in 1992.

It has been amply demonstrated in this research that openness in the decision-making process constitutes an essential aspect of any democracy, however conceptualised. Openness enables the public to scrutinise actions of the government and to keep those in power accountable. It further allows them to participate in the decision-making process (see Chapter 2). It has been asserted in the legal literature that the principle of open government and the right of public access to government documents, constitutes a fundamental human right on the grounds that it is necessary for the functioning of democracy and/or constitutes a precondition for the exercise of certain fundamental rights. Despite these convincing philosophical arguments, this status has in general not been recognised in positive law in Europe. However, legal developments inside and outside the EU show that there is a broader affirmation of the right of access to documents, and it seems that this right is slowly evolving into a fundamental human right (Chapter 3).

Despite the view that open government is essential for the functioning of democracy, the initial approach taken by the institutions towards the issue of openness does not seem to underlie this vision. The motive underlying the introduction of measures to enhance openness in the decision-making process was foremost to increase public confidence in the administration and to create support for the Union. These measures had to remedy the social legitimacy crisis, which existence was revealed during the ratification of the Maastricht Treaty. Openness was viewed as an aspect of good administration, and, in conformity with that view, it was seen by the institutions and organs as a matter which could be left for internal regulation . Prior to the coming into force of the Amsterdam Treaty, all measures to open up the decision-making process were introduced by voluntary changes made by the institutions to their own internal rules.

As far as access to documents is concerned, the European Court of Justice supported the approach taken by the institutions in this respect. In *Netherlands v Council* it ruled that "so long as the Community legislator has not adopted general rules on the right of access held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their powers of internal organisation, which authorises them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration."[1] Despite the pleas that the right of access to documents constitutes a fundamental principle because of its close link with democracy, the ECJ has not, as yet, recognised the existence of a general principle of public access to documents in the Community's legal order. Instead, it acknowledged the existence of a "limited" right of access to documents, which is subject to the conditions laid down in the institutions' internal rules. The non-fundamental approach taken towards the issue of openness is, furthermore, demonstrated by the restrictive way in which the institutions at times have interpreted and applied their Decisions on access to documents.

Open government in the Union has mainly been implemented through internal rules regarding the publicity of documents and access to documents on request. Except for the opening up of some Council meetings in cases in which important issues affecting the interests of the Union or new legislative proposals are discussed, this method of opening up the decision-making process has not been used. When the transparency and openness debate started, public dissatisfaction was foremost directed against the Commission, which was seen as an unaccountable and closed bureaucracy. But soon other problems were identified, amongst which, the lack of openness in the legislative process. Not only does the Council meet in private when it acts as a, legislature, but no documents relating to this process were initially published. Some improvement in this situation was made by the Council through amendments to its Rules of Procedure in 1993. Since then results and explanations of vote have been published systematically in Press Releases. The legislative process was further opened up by the adoption of a Code of Conduct concerning public access to statements in the minutes and to the minutes when the latter acts as a legislature (October 1995). The above-mentioned degree of openness was constitutionalized by the Amsterdam Treaty, which requires that, where the Council acts in its legislative capacity, enhanced access must be given to those documents, and that at least the results of votes and the explanations of vote, as well as statements in the minutes, must be published (Article 207(3)). No serious efforts have been made, however, to open up the meetings of the Council when the latter is acting in its legislative capacity. There are in fact many problems in opening up the legislative meetings, in particular, the risk of blocking the process and pushing deliberations into the corridor must not be underestimated. Neither is the suggestion to open up the first and final stage of the legislative process and leave the negotiation phase closed problem-free, as it presumes that a distinction can be drawn between the Council acting in its negotiation mode (in private) and acting in its legislative mode (in public). This does not seem to be the case in practice. Moreover, if meetings were to be opened up, this would of course not lead to total

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

legislative openness, as most of the legislative work is prepared in Coreper, and other senior level committees and working parties which continue to work in private.

Another problem which was identified regards the lack of transparency and openness in the Third Pillar. Transparency and openness in this Pillar is very important, because it concerns in particular measures, in areas such as asylum and immigration, judicial control and police co-operation, which in most cases have an impact on the interests of individuals whose rights and security are directly affected by Union policies. The fact that a part of the Third Pillar has been transferred to the EC Treaty does not change this. Instead, by establishing new objectives for EU JHA and by providing for a set of more refined and adequate legal instruments, the new Treaty greatly increases the Union's potential to adopt comprehensive measures in the areas of JHA which are likely to have a much greater impact than before on EU citizens and third country nationals living in or entering the territory of a Member State.[2] In other words, the need for openness has even become more pressing. In recent years, openness has been improved considerably, especially, as far as rules on publicity of instruments/documents are concerned. Since the coming into force of the Amsterdam Treaty, instruments and proposals adopted under this Pillar must, in principle, be published automatically. Furthermore, according to the 1999 Rules of Procedure, the Council acts now also as a legislator when adopting the main Third Pillar decisions, and as a result all items mentioned in Article 9 have also to be published in respect of those Third Pillar decisions. Transparency and openness were further improved by the initiative of the UK Presidency, which provided for the publication of calendars of the meetings of K4 and preparatory groups and by keeping one open debate of the JHA Council per Presidency. In particular, the numerous complaints about denial of access to Third Pillar documents made by the civil rights organisation *Statewatch* to the Ombudsman, led to changes in favour of openness. As a result of these complaints, the Council has, for example, set up a database listing all instruments adopted by the Council under this Pillar since 1993, and it makes now further available its agendas. It follows from the statistics of the Council that access to Third Pillar documents (on request) remains, however, more problematic than those related to the First Pillar. In this sensitive Pillar, access to documents is, most of the time, refused in order to protect the public interest and the confidentiality of the Council's deliberations.

Whereas some improvements have been made in respect of the Third Pillar, the confidential nature of the decision-making process under the CFSP Pillar remains untouched. The Council's Rules of Procedure require still an unanimous decision for publishing legal instruments adopted under this Pillar, and for records of vote relating to the adoption of such instruments. The only measure which has been taken in respect of openness is the introduction of a database listing all instruments adopted under this Pillar. In August 2000, the Council further restricted access to documents under this Pillar by excluding from its Decision on Access classified European Defence and Security Policy documents (the so-called Solana Decision).

[2] See Monar.

Partly as a result of the BSE affair, attention was also drawn to the existing lack of openness and transparency in the committees which assist the Commission in the policy preparation and implementation process. These committees are the prime example of opaqueness and secrecy, and have become the focus of criticism in the past years. The lack of openness and accountability has been said to constitute the most serious problem existing in respect of the committee-system. Except for the opening up of the Scientific Committees, the majority of consultative and expert committees remain closed and opaque. No rules exist for the publicity of documents relating to their decision-making process, and such documents are neither provided on the committee's or Commission's own initiative. These documents are, however, covered by the Commission's Decision on public access to its documents. As far as comitology committees are concerned, some transparency was introduced by the new Comitology Decision. However, no mandatory rules on the publicity of documents were included. The only important provision on openness enshrined in this Decision is the one that the rules on public access to documents which are applicable to the Commission will also apply to the comitology committees. It appears from this study that, in particular, in respect of committees much can still be done to enhance transparency and openness.

The most important measure which has been taken to open up the decision-making process in the Union has of course been the introduction in 1993 of the Code of Conduct concerning public access to Council and Commission documents. This inter-institutional instrument has been adopted through the Rules of Procedure of the Council (simple majority), and has subsequently been implemented through separate Council and Commission Decisions. There exist, in particular, two problems in respect of the Code: firstly, no access is given to third party documents, but only to documents drawn up by the institutions, and secondly, the exceptions are too widely drafted, especially the one concerning the protection of the institution's deliberations. Other problems which have emerged in practice regard the insufficient regulated relationship between the Community rules on access and specific provisions on openness and secrecy as laid down in secondary legislation, and between the Community rules on access and those of the Member States. From the outset, the institutions have at times taken a conservative approach towards the issue of access to documents, as is shown by the cases and complaints brought to the CFI and the Ombudsman respectively. For example, the Ombudsman has rejected several times the restrictive interpretations of the Council in respect of certain aspects of the Code (for example, in respect of the notions "repeat applications" and "Presidency documents"). The case-law shows further that the Council and the Commission have interpreted the exceptions rather broadly, and have at times excluded whole categories of documents from access under the exception of the "public interest." This approach was nevertheless not sanctioned by the CFI. To date, the CFI had to decide a dozen access-to-document cases. In its early cases, the CFI laid down important procedural requirements concerning the way in which the institutions have to decide upon requests for access. The CFI's review has remained rather marginal, and the Court has rarely examined in detail the considerations which led the institutions to refuse access. Most of the cases have been annulled upon procedural grounds, in particular, that of insufficient reasoning.

Despite the above-mentioned problems, the Access Decisions seem to work quite satisfactorily. The statistics of both institutions show a high percentages of disclosure. Furthermore, the Council is experiencing an explosion of applications since the coming into force of its Register in 2000. The statistics show further that the Access Decisions are not so much used by ordinary citizens, as by a highly specialised public, such as academics, lawyers and pressure groups. Journalists, which can be seen as an intermediary between the citizen and the public authorities, make very little use of the Access Decisions. These figures lead to the conclusion that the alleged lack of transparency and openness is not remedied, as far as the ordinary citizen is concerned, by the introduction of such measures as access to documents rules, but probably more by the provision of easily understandable and accessible information on EU affairs. The Access Decisions are thus of value for those who have a specific interest in the decision-making process (interest groups, civil society).

The first steps towards a more fundamental approach to the issue of openness was taken at the 1996 IGC. This time the issue of transparency and openness constituted an important issue on the institutional agenda. The negotiations led to the inclusion of the principle of openness in Article 1 of the TEU. The principle seems to be essentially declaratory in nature, however, this does not mean that it has no legal value whatsoever. It is possible for the Court to interpret acts/instruments of the institutions and bodies of the Union in the light of this general principle. For the first time, citizens were granted a Treaty right of access to EP, Council and Commission documents (Article 255 EC). The principles and limits to this right must be determined by the co-decision procedure within two years after the entry into force of the Treaty of Amsterdam. The future recognition by the Court of a general principle of access to documents in the Union has not lost in importance now the Treaty enshrines this right. First of all, it will entail a substantive standard of transparency against which the new Regulation on access to EP, Council and Commission documents, and the individual decisions on requests for access made under this Regulation can be measured. Secondly, the Treaty right exists only in respect of the three main institutions, leaving the other institutions and bodies outside its scope. As a result, there will be no uniform horizontal system of access to documents in the Union. Although the other institutions and bodies are not covered by the Treaty Article, this does not mean that they are under no duty whatsoever to adopt rules on access to documents. The Ombudsman has issued Recommendations to 19 institutions and bodies requiring them to adopt rules on access to documents, failure of which would amount to maladministration. However, it is not excluded that the Court will recognise in the future a fundamental right of access to documents. Already, before the implementation of Article 255 EC, some changes in the attitude of the Court can be witnessed. A gradual evolution of the general right of access to information into a fundamental right seems to be taking place. In one of its recent cases, the CFI refers to the right to information in a manner which seems to indicate that it considered it in fundamental terms, and linked it moreover to its democratic roots.[3] The Court might further be encouraged to adopt such a right by several developments which are taking place in and outside the Union (see Chapter 3). A strong legal basis exists for the

[3] Curtin (2000), p. 13.

recognition of this fundamental principle. First of all, almost all Member States of the EU have adopted rules on public access to documents. Furthermore, at the level of international law, there is now ample recognition of the fact that openness, and access to documents constitutes an essential element of democracy, whereas at Community level this right has recently been enshrined in the newly adopted European Union Charter of Fundamental Rights. The pressure for the recognition of this fundamental principle comes however from inside, as the Union is founded itself upon democracy and the rule of law as stated explicitly in Article 6(1) TEU.

8.2 Towards a more fundamental role in the future?

The function of transparency and openness which has received most emphasis in the Union is that it allows for public scrutiny and democratic accountability/control. The importance of this function was again highlighted with the BSE affair and, in an extreme way, with the latest scandals of corruption and maladministration in the Commission. Democratic accountability and control are central features of parliamentary democracy as existing in the Member States. It is, in particular, this model which is the most widely used by politicians and institutions in the Union. However, democracy is not only about accountability and control; it is also about participation. In recent years, the debate on democratising the Union has become much richer with the advancement of alternative (not necessarily exclusive) models of democracy to the traditional parliamentary democracy of the nation-state. In particular, more deliberative and participatory theories have been defended as attractive models in theory and practice (see extensively §4.4.2.3.2). These theories make participation by citizens in the public debate (deliberations) or in decision-making the central element of democracy. They emphasise the need for input from the bottom. The ability to participate in the social dialogue or in decision-making depends to a large extent on the accessibility of timely (before a decision is taken) and accurate information, and of access to the social dialogue and to the decision-making process. It is, in particular, in these "thicker" theories that open government in the Union can come to play a fundamental role.[4]

Do the rules on openness, as existing currently in the Union, support the development of a more deliberative and/or participatory type of democracy in the future? The answer to this question seems to be negative. It appears from this study that the existing obligations of the Council to supply information/documents allow mainly for ex-post accountability. First of all, the purpose of the duty to publish records of vote and explanations of vote, as well as statements in the minutes and the items in those minutes related to the adoption of legislative is mainly to allow for ex-post accountability. Furthermore, no other rules exist, as is generally the case in national law, requiring the publication of verbatim records of the Council and its preparatory bodies and of documents underlying the legislative process (draft decisions, background studies/information). Access to the latter type of documents could lead to a more informed debate before decisions are taken, if released at an early stage (for example, the Council released early in the drafting process its draft Common Position regarding the new Regulation on access to documents). The Council is not required to legislate in public, not even in respect of the first and final reading of a legislative proposal. Although, public meetings are closely linked to an accountability model, at the same time they can inform the public debate. In respect of the Commission no duty exists which requires it to publish preparatory documents underlying its proposals. All documents (Green and White Papers, COM documents and proposals) which the Commission decides to make public, are made public out of its own initiative. Instead, the Rules of Procedure of the European Parliament require for the

publication of all (preparatory) documents relating to the decision-making process. These Rules further provide for the keeping of public plenary and committee meetings. Thus, that part of the legislative process which is in the hands of the EP is completely open.

The analysis of the system of public access to documents, and, in particular, the way in which it has been applied in practice leads to the same conclusion. This system allows primary for ex-post accountability.[5] It must be stressed that the Code of Conduct is in theory favourable to participation. It does not contain any provisions which exclude beforehand from access certain kinds of preparatory documents, i.e. drafts, background notes, studies and reports, which are essential in order to follow the decision-making process. Nor does the Code set conditions on the release of documents, such as the rule that documents must be finalised or that the decision to which the documents requested relate must have been taken, as is the case in some Member States. However, in practice there have been instances in which the Council has refused access to documents under the exception concerning "the protection of the confidentiality of its deliberations," because they related to ongoing discussions or because they had only been recently adopted.[6]

The new Regulation on public access to EP, Council and Commission documents, which has recently been adopted (31 May 2001), constitutes in this respect a step backwards.[7] Article 4(3) contains an exception regarding internal documents which relate to ongoing deliberations and to deliberations which have ended and led to a decision. The fact that it regards an "exception" constitutes an improvement in respect of the Commission's proposal, which excluded from the definition of documents; "text for internal use", such as discussion documents, opinions of departments and informal messages. These documents could thus never be obtained. Moreover, the exception of "the effective functioning of the institutions," which appeared in this proposal, was drafted very widely. This exception would have allowed the institutions to exclude in practice all preparatory documents which could enable the public and civil society to influence the decision-making process before decisions are taken. Nevertheless, the new exception provided for in the Regulation might undo the advantages, as it premises is *secrecy* and not disclosure. Article 4(3) stipulates that "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" (emphasis added). The fact that internal documents is not defined means that many documents which can be of interest for participation might come under it. This is affirmed by the Council's final draft Common Position of 20

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[4] Curtin (1998/2), p. 110.
[5] See for a similar conclusion Curtin (1998), p. 250-258.
[6] In order to protect delegations' positions, the Council did often not provide access to preparatory documents in the Third Pillar if the decision had not yet been adopted. Instead it noted that there is often a large majority to release these Third Pillar documents once the decision has been adopted. See the Council's Report concerning the implementation of the Council Decision on Access over 1996-1997, op cit., p. 11.
[7] Regulation (EC) No 1949/2001 of the EP and of the Council of 30 May 2001 regarding public access to EP, Council and Commission documents, O.J. L 145/43, 31.05.2001. The Regulation will apply from 3 December 2001.

December 2000, which mentioned under "internal documents," i.e. discussion documents, unfinished documents, draft documents and documents whose content reflects personal opinions.[8] It must be noted that the exception is drafted widely as it is not limited to internal documents drawn up by the institutions, but extends also to documents received by an institution which relates to the decision-making process. Article 4(3) stipulates further that "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 interest in disclosure" (emphasis added). Thus, the public can even be denied knowledge of the reasons underlying the decisions taken. The new exception not only risk impeding informed participation, but also ex-post accountability can be prevented. In respect of the "current" situation, the new Regulation clearly constitutes a step backwards with regard to access to documents which are essential for participation, although of course all depends on its application in practice. Considering, however, the procedure by which the Regulation has been adopted, with its many secret meetings and working documents, it seems that not much can be expected in this respect.[9]

But even if the rules on passive supply of documents (i.e. on request) did allow for wide access to (preparatory) documents relating to ongoing discussions, this would still not be enough for a more deliberative and participatory democracy to emerge. Requests for such documents take time and requests can be refused. Moreover, it is not practicable if all those who want to influence the process would have to make individual requests for the relevant documents. Curtin has argued for the introduction of an active information obligation in the Treaty, i.e. the institutions should be placed under an obligation to actively make extensive information available to the public on the decision-making process in all its manifestations.[10] Moreover, the obligation on institutions to make information available on request entails at the same time, in her view, an obligation to make known the information they have in their possession. The key to do this is provided by the electronic media. She calls for the exploration of ways of moving towards a situation where it will increasingly be considered as an obligation on the part of the executive, legislative and judicial authorities within the EU to place on the Internet extensive information about their tasks, their organisational structure, their activities, the agendas for their meetings as well as information on the most important documents under discussion in that context.[11] Today, the Internet is used more

[8] See Final Draft Common Position of the Council of 20 December 2000, 14938/00 (22 December 2000).
[9] The Regulation had to be adopted by the co-decision procedure, but, in the end, this procedure was only partly followed. The Council, the European Commission and the European Parliament kept a series of "trilogue" meetings to try and resolve the substantial differences between their drafts of the new code of access to EU documents. In the end a "compromise text" was agreed, which was adopted with a large majority in favour at the plenary session of the EP as a first reading text on 3 May 2001 (400 votes in favour, 85 against and 12 abstentions). Next, agreement was reached in the Council on 14 May 2001. See for fully-documented account of the adoption process, http://www.statewatch.org. See further the EP's Report on the proposal for a Regulation of the European Parliament and of the Council regarding public access to documents of the EP, Council and the Commission, A5-0318/2000, Rapporteur: M. Cashman, of 26 October 2000. The Explanatory Statement was adopted at 3 November 2000. See the Final Draft Common Position of the Council of 20 December 2000, 14938/00 (22 December 2000).
[10] Curtin (1998), p. 259.
[11] Ibid., p. 259-260..

frequently by institutions; they place documents on the Internet, which have already been published through other channels for reasons of speed and because the Internet is easier accessible.

Weiler, and others, have an even more radical proposal: they want to place the entire decision-making procedure (named *Lexcalibur)* on the Internet.[12] The project also includes the possibility of interested parties actually giving input into the specific decisional process (next step). This project they see as one of the main means of empowering the citizens and combating the feeling of alienation. The proposal would enhance the possibility of all actors, in particular, the media, pressure groups, NGOs, but also ordinary citizens to play a more informed, critical and involved role in the public sphere. Like Curtin, they consider a greatly improved system of information only as a first step of a larger project: "it would serve as a basis for a system that allows widespread participation in a policy-making process so that European democracy becomes an altogether more deliberative process through the posting of comments and opening of a dialogue between the Community institutions and interested private actors."[13]

An improved information system is thus only the first step in achieving a more deliberative and participatory democracy. The next step is to create spaces for deliberation and opportunities to participate in the decision-making process. Participation by citizens and groups in the decision-making process in the Union has taken place mainly through informal, indirect and non-binding mechanisms. Some effort to allow broader opportunities to participate in the policy-making process have been made by the Commission through the adoption of two Communications in 1992, one on transparency in general and one regarding an open and structured dialogue between the Commission and special interest groups.[14] Participation remains, however, assured through administrative accommodation, with all its negative aspects.[15] The consultative exercise remains completely in the hands of the Commission, who will decide alone on what proposals consultation will take place. The existing mechanisms for participation in respect of the decision-making in the EP, the Council/Coreper remain mostly informal and indirect.[16] In respect of the EP, participation has taken place through the mechanism of public hearings on policy related topics or polity building (ICG) with the civil society. A formal, but indirect mechanism of participation regards the citizen's right of petition to the EP.

In the academic literature, mechanisms have been advanced within the current top-down institutional structure, which allow for greater input from the bottom. In particular, support has been given to subjecting participation by all kind of groups (commercial and non commercial) in the policy process to rules and procedures. As has been explained above, participation in respect of the Commission's activities is currently through administrative accommodation. Several scholars argue for the introduction of a formal framework for participation along the lines of the United States Administrative procedural Act

[12] Weiler (1997), p. 153.
[13] Ibid., p. 154.
[14] See §4.3.3. Communication on increased transparency in the work of the Commission (SEC (92) 2274 final). Communication on an open and structured dialogue between the Commission and special interest groups, (SEC (92) 2272 final).
[15] Craig (1998), p. 56.

("notice and comment procedure"). The advantages of this approach would be that groups are granted participation rights and will have access to justice to challenge the resulting norms. It has been argued that participation through a notice and comment procedure would improve public accountability and fairness in Community rule-making.[17] Another way to formalise participation is the creation of new institutional fora such as, an associative parliament or a civil society forum.[18]

It should be observed that both options are in line with a more deliberative way of arriving at decisions. However, the model of deliberative democracy demands more from "the informed and enlightened citizenry and its role "bottom up" in the formal political process" than the above-mentioned options.[19] This model requires the creation of spaces for deliberation (in particular, the civil society plays a central role), and for institutional mechanisms which provide for feedback to the formal institutions (who are the decision-makers). In the context of creating a European public space, Curtin points to the need to reinforce the legal status of civil society, and eventually constitutionalize this role in the Union. She, furthermore, comes up with different ways to institutionalise a more participatory civil society in the Union. For example, she plays with the idea of a "constituent assembly" composed of representatives of civil society in the Union, which could be given a formal role in the process of Treaty revision. She sees also possibilities for direct democracy in the Union system, such as the holding of referenda at constitutional moments or the keeping of a European referendum on the basis of a popular initiative, with the objective of cancelling an existing legislative instrument. Another idea which has been advanced by some authors is a citizen-legislative initiative.[20]

Some of the above-mentioned ideas regarding increased participation by citizens and civil society are now discussed in the context of the Commission's White Paper on European Governance entitled "Enhancing Democracy in the European Union."[21] In February 2000 the Prodi Commission identified as one of its four strategic objectives for this term of office "promoting new forms of governance."[22] The White Paper (WP) will lay out a set of recommendations on how to enhance democracy in Europe and increase the legitimacy of the institutions.[23] One of the twelve groups that work on the White Paper

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[16] Curtin (1998), p. 264-268.

[17] See, in particular, Bignami (1999), p. 38. She provides for a detailed proposal for a "notice and comment" procedure in the Community. See further Craig/de Búrca (1998), p. 44, Dehousse (1998). The Commission has introduced a "notice and comment" procedure, but only limited use has been made so far. See Commission Report for the Reflection Group (IGC 1996), op cit., p. 39. See also Craig (1998), p. 53-54.

[18] Curtin (1998), p. 268.

[19] Ibid., p. 275 at seq.

[20] See Weiler (1997), p. 152. He proposes a legislative ballot initiative which coincides with elections to the EP. Citizen will vote on legislative initiatives when the EP elections take place. See also Curtin, (1998), p. 279.

[21] See for all the documentation regarding the drafting of the White Paper at http://www.europa.eu.int/comm/governance/index_en.htm. The White Paper will probably be finished in September 2001.

[22] See the speech given by Prodi on 15th February 2000 when he started his term of office at the Commission. "Governance" is defined in the Work programme as rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards accountability, clarity, transparency, coherence, efficiency and effectiveness, see, p. 4.

[23] As stated in the Work programme, "if it is accepted that democracy in Europe is based on two twin pillars- the accountability of executives to European and national legislative bodies and the effective involvement of citizens in

focuses on the broadening and enriching the public debate on European matters. The Group (I.a.) is working on providing citizens with *means* to actively participate in a public dialogue on European issues, communicate their views, and evaluate the actions taken by European institutions. It is about the building of an *European public sphere*. It will pay special attention to how the public debate can be revived through the new information and communication technologies. The Working Group will examine aspects, such as how the Commission's information policy can be improved, how the media and European Parliament can play more important role in promoting public debates on European questions, and how interaction with and between citizens can be developed in the information society. Another Group (II.a.) looks into the role played by organisations from civil society. It is important to note that the Group stresses that the aim is for participatory democracy to be reconciled as much as possible with representative democracy in order to increase the acceptability and effectiveness of European decisions. The group will work on ways to formalise clear and equitable participatory rights to the European decision-making process for civil society as well as regional and local actors. It will provide answers to what are the most efficient and legitimate ways for the Commission to be aware of the views of the widest array of actors before it finalises its decisions? Who should she inform, consult, involve, when and how? How can the process be transparent as well as equitable? The group will also look at the role which such bodies as ECOSOC and the Committee of Regions can play for the participation of civil society. The Group stresses that good consultation must be based on relevant information available to all parties concerned, and that new communication and information technology must not lead to short-circuiting the representatives concerned and curtailing the reflection stage.

There are two other recent examples in the Union of a more deliberative way for arriving at (Constitutional) decisions. The first example, is the relatively deliberative and open nature of the (ad-hoc) process by which the EU Charter of Fundamental Rights was drafted.[24] The Convention, the body drafting the Charter, was composed of institutional representatives of the national and European level. Civil society was thus not included in the composition of this body, nor was it formally involved in the drafting process. The Convention, therefore, did not constitute a democratic deliberative forum as envisaged by deliberative theories of democracy.[25] Nevertheless, the process of drafting was done in a transparent and open way, as hearings of the body were public and documents submitted at hearings were made public. At these hearings, a large number of submissions and representations were made by civil society. In general, some degree of engagement or deliberation with civil society has taken place.[26] There was further a website on the Europa Server during the drafting process, which was useful for those who wanted to follow the process from outside. This process contrasts sharply with the secretive and state-dominated way in which the IGC is conducted. That the traditional IGC process is already influenced by

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devising and implementing decisions that affect them, then it is clear that the reform of European modes of governance is all about improving democracy in Europe." See SEC(2000) 1547/7 final, 11 October 2000, p. 4.

[24] See for a critical analysis of the drafting of the European Union Charter of Fundamental Rights, De Búrca (2001). p. 126.

[25] See De Búrca (2001), p. 131.

[26] Ibid., p. 133.

this more deliberative vision is evidenced by the fact that a general debate was launched at Nice on "the future of the European Union" in anticipation of the Treaty revisions process of 2004.[27] This debate should reach out further than before to all sections of society, and it should highlight the basic challenges which the Union is facing in the coming decades and stimulate suggestions for how to respond rationally to these challenges in terms of policy provisions, institutions and organisation of work.[28] In order to create a citizens-forum, i.e. a location at which all contributions to the debate can be assembled and made available, a "Future of Europe" website has been established.[29] In addition, numerous initiatives have been taken in the Member States and candidate Member States to stimulate the national debate and actively to engage citizens in this debate. After this open reflection stage, a structured reflection stage will start, after that follows the actual IGC. It has been said that this process should be conducted in the greatest possible openness and transparency. There seems to be support to envisage an open preparatory forum, similar but not necessarily corresponding, to that of the Convention that prepared the European Union Charter of Fundamental Rights. The majority who has made statements in this respect, seems to agree that it should be based on the participation of representatives of national governments, national parliaments, the EP and the Commission. Only a few think it is necessary to consider the participation of NGOs in some form. The final decision on the initiatives in respect of the continuation of the process will probably be taken at the European Council in Laeken in December 2001.

In the absence of an explicit choice about which democratic model should apply to the Union, the latter has up to now evolved without a clear vision- although most changes made so far go in the direction of a representative parliamentary democracy. Recent developments show, however, the penetration of a more deliberative and participatory vision of democracy in the context of the Union. The Commission's work conducted in the context of the White Paper partly underlies a deliberative and participatory perspective. It is interesting to see how the Commission now seems to (re)evaluate its information and communication policy from a more deliberative democracy point of view, whereas in the past this vision was lacking. The Commission is also working on ways to formalise the participatory rights for civil society, which fits well the deliberative/participatory model of democracy. Furthermore, the process which led to the drafting of the European Union Charter of Fundamental Rights and the launching of "the debate on the future of the EU", show that efforts are being made to involve the citizens and civil society more closely in the debate and the decision-making process concerning constitutional issues. The answer to the research question will therefore not come as a surprise. The above events suggest that the principle of open government will come to play a more fundamental role in the future, namely in providing the means to make the Union a more deliberative and participatory democracy.

[27] See Declaration No. 23 to the Final Act of the Treaty of Nice.
[28] See the "Report on the Debate on the Future of the European Union" of the Presidency to the European Council (Press Release 08-06-2001), at: http://ue.eu.int/Newsroom.
[29] See http://europa.eu.int/futurum.

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